Court File No. CV-18-600624-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC.

Applicant

- and -

URBANCORP RENEWABLE POWER INC.

Respondent

Application Under Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

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BOOK OF AUTHORITIES
(Motion for Sale Approval Returnable December 11, 2020)

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TAB 1

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

Skyepharma PLC v. Hyal Pharmaceutical Corp.

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

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Farley J.

Heard: October 20, 1999
Judgment: October 24, 1999
Docket: 99-CL-3479

Counsel: *Steven Golick* and *Robin Schwill*, for Receivers of Hyal Pharmaceutical Corp., Pricewaterhouse Coopers Incorporation.
Berl Nadler and *James Doris*, for Skyepharma PLC.
S.L. Secord, for Cangene Corporation.
Robert J. Chadwick, for Bioglan Pharma PLC.

***Farley J.*:**

Endorsement

1 PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to understand that Ground, J. did not have available to him the Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context — as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

2 Ground J. ordered that the Confidential Supplement to the Receiver's Third Report be distributed forthwith to the service list. It appears this treatment was also accorded the Confidential Supplement to the Fourth Report. These Confidential Supplements contained specific details of the bids, discussions and the analysis of same by the Receiver and were intended to be sealed pending the completion of the sale process at which time such material would be unsealed. If the bid, auction or other sale process were to be reopened, then while from one aspect the potential bidders would all be on an equal footing, knowing what everyone's then present position was as of the Receiver's motion before Ground J., but from a practical point of view, one or more of the bidders would be put at a disadvantage since the Receiver was presenting what had been advanced as "the best offer" (at least to just before the subject motion) whereas now the others would know what they had as a realistic target. The best offer would have to be improved from a procedural point of view. Conceivably, Skye has shot its bolt completely; Bioglan on the other hand, in effect, declined to put its "best intermediate offer" forward, anticipating that it would be favoured with

an opportunity to negotiate further with the Receiver and it now appears that it is willing to up the ante. The Receiver's views of the present offers is now known which would hinder its negotiating ability for a future deal in this case. Unfortunately, this engenders the situation of an unruly courthouse auction with some parties having advantages and others disadvantages in varying degrees, something which is the very opposite of what was advocated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as desirable.

3 Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back-doored in some way. See *Royal Bank v. Soundair* at pp 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.). The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated: see *Royal Bank v. Soundair* of pp.5 and 11. Specifically the court's duty is to consider as per *Royal Bank v. Soundair* at p.6:

> (a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;
>
> (b) the interests of all parties;
>
> (c) the efficacy and integrity of the process by which the receiver obtained offers; and
>
> (d) whether the working out of the process was unfair.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Royal Bank v. Soundair* at p.7. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Royal Bank v. Soundair* at pp. 9-10.

5 In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopordize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

> The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it.

See also *Royal Bank v. Soundair* at p. 8. Obviously if there are conditions in offers, they must be analyzed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

6 Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Royal Bank v. Soundair* at p. 12 and *Re Central Capital Corp.* (1996), 38 C.B.R. (3d) 1 (Ont. C.A.) at pp.31-41 (per Weiler, J.A.) and pp. 50-53 (Laskin, J.A.).

7 Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Royal Bank v. Soundair* at p. 14 and *Crown Trust Co. v. Rosenberg* at p. 109.

8 Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.

9 It appears to me that on first blush the Receiver here conducted itself appropriately in all regards as to the foregoing concerns. However, before confirming that interim conclusion, I will take into account the objections of Bioglan and Cangene as they have shoehorned into this approval motion. I note that Skye and Cangene are substantial creditors of Hyal and this indebtedness preceded the receivership; Bioglan has acquired by assignment since the receivership a relatively modest debt of approximately $40,000.

10 On September 28, 1999, I granted an order with respect to the sale process from thereon in. In para. 3 of the order there is reference to October 8, 1999 but it appears to me that this is obviously an error and should be the same October 6, 1999 as in para. 2 as in my endorsement I felt "the deadline should not be 5:00 p.m. Friday, October 8/99 but rather 5:00 p.m. Wednesday, October 6/99." Bioglan had not been as forthcoming as Skye and Cangene and it was the Receiver's considered opinion (which I felt was well grounded and therefore accepted) that the Receiver should negotiate with the Exclusive Parties as identified to the court in the Confidential Supplement to the Third Report (with Skye and Cangene as named in the Confidential Supplement). These negotiations were to be with a view to attempting to finalizing with one of these two parties an agreement which the Receiver could recommend to the court. While perhaps inelegantly phrased, the deadline of 5:00 p.m. on October 6, 1999 was as to the offerers putting forward their best and irrevocable offer as to one or more of the combinations and permutations available. Both Cangene and Skye submitted their offers (Cangene one deal and Skye three independent alternatives — all four of which were detailed and complex) immediately before the 5:00 p.m. October 6, 1999 time. It would not seem to me that either of them was under a misimpression as to what was to be accomplished by that time. It would be unreasonable from every business angle to expect that the Receiver would have to rather instantly choose in minutes and therefore without the benefit of reflection as to which of the proposals would be the best choice for acceptance subject to court approval; the Receiver was merely stating the obvious in para. 10 of its Confidential Supplement to the Fourth Report. Para. 31 should not be interpreted as completely boxing in the Receiver; the Receiver could reject all three Skye offers if it felt that appropriate. The Receiver must have a reasonable period to do its analysis and it did (with the intervening Thanksgiving weekend) by October 13, 1999. In my view, it is reasonable and obvious in the context of the receivership and the various proceedings before this court that the finalizing of the agreement by 5:00 p.m. October 6, 1999 did not mean that the Receiver had to select its choice and execute (in the sense of "sign") the agreement by that deadline. Rather the reasonable interpretation of that deadline is as set out above. Bioglan, not being one of the selected and authorized Exclusive Parties did not, of course, present any offer. It had not got over the September 21, 1999 hurdle as a result of the Receiver's reasonable analysis of its proposal before that date. The September 28, 1999 order, authorized and directed the Receiver to go with the two parties which looked as if they were the best bets as candidates to come up with the most favourable deal. As for the question of "realizing the superior value inherent in the respective Exclusive Parties' offers", when viewed in context brings into play the aforesaid concerns about creditors having priority over shareholders and that in a liquidation the creditors must be paid in full before any return to the shareholders can be considered. It was possible that the exclusive parties or one of them may have made an offer which would have discharged all debts and in an "attached" share deal offered something to the shareholders, especially in light of the significant tax losses in Hyal. That did not happen. No one could force the Exclusive Parties to make such a favourable offer if they chose not to. The Receiver operated properly in selecting the Skye C Plan as the most appropriate one in light of the short fall in the total

debts. I note that a share deal over and above the Skye C Plan has not been ruled out for future negotiations as such would not be in conflict with that recommended deal and if structured appropriately. Bioglan in my view has in essence voluntarily exited the race and notwithstanding that it could have made a further (and better) offer even in light of the September 28, 1999 order, it chose not to attempt to re-enter the race.

11 I would also note that in the fact situation of this case where Skye is such a substantial creditor of Hyal that the $1 million letter of credit it proposes as a full indemnity as to any applicable clawback appears reasonable in the circumstances as what we are truly looking at is this indemnity to protect the minority creditors. Thus Skye's substantial creditor position in essence supplements the letter of credit amount (or substitutes for a part of the full portion).

12 It is obvious that it would only have been appropriate for the Receiver to have gone back to the well (and canvassed Bioglan) if none of the offers from the Exclusive Parties had been acceptable. However the Skye Plan C one was acceptable and has been recommended by the Receiver for approval by this court.

13 As for Cangene, it has submitted that the Receiver has misunderstood one of its conditions. I note that the Receiver noted that it felt that Cangene may have made an error in too hastily composing its offer. However, the Cangene offer had other unacceptable conditions which would prevent it on the Receiver's analysis from being the Receiver's first choice.

14 Then Cangene submitted that the Receiver erred in not revealing the Nadler letter which threatened a claim for damages in certain circumstances. Clearly it would have been preferable for the Receiver to have made complete disclosure of such a significant contingent liability. However, it seems to me that Cangene can scarcely claim that it was disadvantaged since it was previously directly informed by Mr. Nadler as counsel for Skye of their counterclaim. There being no material prejudice to Cangene, I do not see that this results in the Receiver having blotted its copybook so badly as to taint the process so that it is irretrievably flawed.

15 I therefore see no impediment, and every reason, to approve the Skye Plan C deal and I understand that, notwithstanding the (interim) negative news from the United States FDA process, Skye is prepared to close forthwith. The Receiver's recommendation as to the Skye Plan C is accepted and I approve that transaction.

16 It does not appear that the other aspects of the motion were intended to be dealt with on the Wednesday, October 20, 1999 hearing date. They should be rescheduled at a convenient date.

17 Order to issue accordingly.

Motion granted.

2000 CarswellOnt 466
Ontario Court of Appeal

Skyepharma PLC v. Hyal Pharmaceutical Corp.

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

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Carthy, Goudge, O'Connor JJ.A.

Heard: December 21, 1999
Judgment: February 18, 2000
Docket: CA M25061, C33086

Proceedings: affirmed *Skyepharma PLC v. Hyal Pharmaceutical Corp.* ((1999)), 1999 CarswellOnt 3641, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 ((Ont. S.C.J. [Commercial List]))

Counsel: *James W.E. Doris*, for Skyepharma PLC.
Alan H. Mark, for Appellant/Respondent on the motion, Bioglan Pharma PLC.
Joseph M. Steiner and *Steven G. Golick*, for Price Waterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corp.

The judgment of the court was delivered by *O'Connor J.A.*:

1 This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to Skyepharma PLC. Bioglan Pharma PLC, a disappointed would be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

2 The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

3 Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding $100,000) and to hold the proceeds of any sales pending further order of the court.

4 On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

5 The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realisation was likely to result from negotiations with Skyepharma and Cangene.

6 In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were increasing in the amount of approximately $70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

7 On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable to the receiver and that realised the superior value inherent in the offers made by Skyepharma and Cangene. [1] The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

8 On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hyal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hyal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realisation for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and timeframes contained in other offers. The receiver said that these risks were not immaterial.

9 At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hyal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

10 It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hyal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

> Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hyal in the amount of $40,000.

11 The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hyal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

12 The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

13 This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

14 Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised judicial sale or, alternatively, that the receiver be required to reopen the bidding

relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

15 In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy."

Analysis

16 The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

17 Section 6(1)(b) of the *Courts of Justice Act* provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.).

18 The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale approval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

19 First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan maintains, was finally disposed of by the order approving the sale to Skyepharma.

20 A similar issue was considered by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (Ont. H.C.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the *Rules of Civil Procedure*. The relevant portion of that rule, at the time, read as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;
>
> ... the person may move for leave to intervene as an added party. [2]

21 Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

22 I adopt both his reasoning and his conclusion. At p. 118, he said:

> The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.

> Nor, in my view, can Larco resort successfully to cl. (*b*) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

23 The British Columbia Supreme Court reached a similar conclusion in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.). In that case the receiver in a debenture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the Court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon ...". Berger J. dismissed this motion. At p. 30, he said:

> The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in *Gurtner v. Circuit* [cite omitted] goes so far. No order made in this action will result in any legal liability being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra*.

26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

28 In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg*. Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did

not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

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

31 In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (N.S. C.A.). In that case, the receiver invited tenders to purchase lands of the debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervener. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision reopening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

33 As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court. First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to October 29 1999."

34 Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

35 I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

36 Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

> ... No party shall be entitled to retract, withdraw, vary or countermand its offer prior to acceptance or rejection thereof by the vendor (receiver). [My emphasis.]

37 The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of clause 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that Bioglan had assumed when it made its offer.

38 Accordingly I would not give effect to this argument.

39 Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharma agreement.

40 I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

41 Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

42 The motions judge approved the sale based on the recommendation of the receiver that it was in the best interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

43 In the result, I would allow the motion and quash the appeal with costs to the moving party.

Motion granted.

Footnotes

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

2 The rule as presently worded is not.

TAB 2

2010 ONSC 2870
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

2010 CarswellOnt 3509, 2010 ONSC 2870, 189 A.C.W.S. (3d) 598, 68 C.B.R. (5th) 233

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)

Pepall J.

Judgment: May 21, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Betsy Putnam for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
David Byers, Maria Konyukhova for Monitor, FTI Consulting Canada Inc.
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders Syndicate
M.P. Gottlieb, J.A. Swartz for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
Robert Chadwick, Logan Willis for 7535538 Canada Inc.
Deborah McPhail for 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 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 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 *Canadian Airlines Corp., Re*[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. 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.

Application granted.

Footnotes

1 [1991] O.J. No. 1137 (Ont. C.A.).

2 2000 ABQB 442 (Alta. Q.B.), leave to appeal refused 2000 ABCA 238 (Alta. C.A. [In Chambers]), affirmed 2001 ABCA 9 (Alta. C.A.), leave to appeal to S.C.C. refused July 12, 2001 [2001 CarswellAlta 888 (S.C.C.)].

TAB 3

2012 ONSC 4247
Ontario Superior Court of Justice [Commercial List]

Terrace Bay Pulp Inc., Re

2012 CarswellOnt 9470, 2012 ONSC 4247, [2012] O.J. No. 3628, 218 A.C.W.S. (3d) 488, 92 C.B.R. (5th) 40

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

In the Matter of a Plan of Compromise or Arrangement of Terrace Bay Pulp Inc. (Applicant)

Morawetz J.

Heard: July 16, 2012
Judgment: July 19, 2012
Docket: CV-12-9566-00CL

Counsel: Pamela Huff, Marc Flynn, Kristina Desimini for Applicant, Terrace Bay Pulp Inc.
Alec Zimmerman, James Szumski for Birchwood Trading, Inc.
M. Starnino for United Steelworkers
Alan Merksey for Tangshan Sanyu Group Xingda Chemical Fiberco Limited
Alex Ilchenko for Monitor, Ernst & Young Inc
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 Township of Terrace Bay
Peter Forestell, Q.C. for Aditya Birla Group and AV Terrace Bay Inc.

***Morawetz J.*:**

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 (Ont. 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 v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. 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 Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], 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 (Ont. Co. Ct.) [*Lama*] and *724597 Ontario Inc. v. Merol Power Corp.*, [2005] O.J. No. 4832 (Ont. 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.

Motion granted.

TAB 4

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

Nortel Networks Corp., Re

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

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

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

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

Morawetz J.

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

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

***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 (S.C.C.). ("ATB Financial").

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

> (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
>
> (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
>
> (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

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

> 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. *Residential Warranty Co. of Canada Inc., Re* (2006), 21 C.B.R. (5th) 57 (Alta. Q.B.) at para. 78.

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

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

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

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*,

Consumers Packaging Inc., Re [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for 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 Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) at para. 16.

Disposition

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

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

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

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

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

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

Motion granted.

TAB 5

At para. 31

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

Grant Forest Products Inc., Re

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

C. Campbell J.

Heard: February 1, 8, 2010
Judgment: March 30, 2010
Docket: CV-09-8247-00CL

Counsel: Sean Dunphy, Kathy Mah for Monitor
Daniel Dowdall, Jane O'Dietrich for Applicants, Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP
Kevin McElcheran for Toronto-Dominion Bank, Agent for First Lien Lenders
Fred Myers, Joe Pasquariello for Bank of New York Mellon, Agent for SLL
Sheryl Seigel for Georgia-Pacific LLC
Richard Swan for Peter Grant Sr.
Aubrey Kauffman for Independent Directors of Grant Forest Products Inc.

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

Reasons for Decision

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

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

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

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

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

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

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

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

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

First Lien Creditor Agreement

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

Second Lien Creditor Agreement

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

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

Inter-Creditor Agreement

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

The Marketing Process

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

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

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

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

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

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

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

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

> 56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
>
> a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;
>
> b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase 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 *Tiger Brand Knitting Co., Re*, [2005] O.J. No. 1259 (Ont. S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

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

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently.
>
> 2. It should consider the interests of all parties.
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained.
>
> 4. It should consider whether there has been unfairness in the working out of the process.

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

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

Motion to Add Applicants

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

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

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

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

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

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

40 The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

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

Position of SLL

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

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

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

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

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

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

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

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

Inter-Creditor Agreement

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

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

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

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

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

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

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

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

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

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

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

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

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

Comity and U.S. Chapter 15

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

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

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

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

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

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

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

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

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

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

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

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

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

76 Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments, Re* [, Doc. 09-16709 (U.S. Bankr. S.D. N.Y. January 5, 2010)] [12] both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts." [13]

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

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

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
> > The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, *Inc. v. Miler Features Syndicate*, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, *Inc. v. American Sensors Elecs*., Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *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., 47*l* 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;

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

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

Appendix A

Applicable Provisions of the Inter-Creditor Agreement

Section 3.1

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

Section 5.1 (a)

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

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

Section 5.1 (c)

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

Order accordingly.

Footnotes

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

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

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

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

5 Ibid.

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

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

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.

9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.

10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.

11 *Re. Pope and Talbot, Inc. et al*., Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.

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

13 *Metcalfe* at 18

14 (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Commercial List]) (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar*, 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

15 See footnote 12, *supra*.

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

TAB 6

1989 CarswellAlta 347
Alberta Court of Appeal

Integrated Building Corp. v. Bank of Nova Scotia

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

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

Laycraft C.J.A., McClung and Hetherington JJ.A.

Judgment: May 12, 1989
Docket: Edmonton No. 8903-0252-AC

Counsel: *R.G. McLennan*, for appellants.
R.W. Block, for respondent.
W.E. Wilson, Q.C., for receiver.
J.N. Agrios, Q.C., and *R. Reeson*, for third party.

Laycraft C.J.A. **(for the court) (Memorandum of judgment delivered from the bench):**

1 We are all of the view that the reasons for judgment of the learned chambers judge properly assessed the considerations determining when a court will interfere to reject a proposed action by its court-appointed receiver. In this case the chambers judge reviewed the effort made by the receiver to excite interest in the sale of the lands. She quoted the Ontario decision of *Crown Trust Co. v. Rosenberg* [summarized at 67 C.B.R. (N.S.) 320 (H.C.)], which states the test in these terms:

> The court must consider the efficacy and the integrity of the process by which offers are obtained. The court ought not to enter into the marketplace. The court ought not to sit as on appeal from the decision of the receiver reviewing in minute detail every element of the process by which its decision is reached.

2 She then went on to say, applying these principles to the case here:

> There is, of course, a good deal of law restating these basic general principles and I think it comes down to this, that I must ask whether a party in the position of Clarkson Gordon has been fair and reasonable in all that they have done in this process which has a practical business aspect to it, but also a judicial judiciary aspect to it.
>
> Counsel for Genesis has candidly admitted that Genesis was not misled. It is relevant to me that a director of Genesis is a defendant in this action. It is important to me that parties involved in Genesis are related to, or connected to, or are the defendants in the primary action, the Bank of Nova Scotia action, because it indicates that Genesis Corp. was knowledgeable about what was happening with regard to Integrated Building Corp., the Oluks, the Bank of Nova Scotia and this receivership being managed by Clarkson Gordon.

3 The learned chambers judge then found that the receiver had taken reasonable steps. We note that the proposed sale presented for approval was an improvement on the best proposal received after the public exposure of the property. We do not agree with the proposition that, when a receiver has received a better offer from a person who did not respond to the public invitation for proposals, the receiver is then bound to reinstitute the tender process.

4 The chambers judge found that the receiver's actions were reasonable and we are not persuaded that she made any error in fact or in law in exercising her discretion to make that decision.

5 Accordingly, the appeal is dismissed.

Appeal dismissed.

TAB 7

At paras. 2-3, 22-23

2002 CarswellOnt 650
Ontario Superior Court of Justice [Commercial List]

Battery Plus Inc., Re

2002 CarswellOnt 650, 112 A.C.W.S. (3d) 208

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Section 47.1, as Amended

In the Matter of Battery Plus Inc. and 1271273 Ontario Inc.

Spence J.

Heard: February 7-14, 2002
Judgment: February 26, 2002
Docket: 01-CL-4319

Counsel: *Harvey Chaiton*, *George Benchetrit*, for Interim Receiver, Deloitte & Touche Inc.
Melvyn Solmon, *Stuart Chelin*, for Battery Plus Inc., 1271273 Onatrio Inc.
Aubrey Kauffman, for Laurentian Bank of Canada
Alan Mark, for Cadillac Fairview Corporation
Susan Allison, for Pensionfund Realty Limited, Acktion Capital Corporation, Bramalea City Centre Equities Inc. OPB Realty Inc., Kingsway Gardens Holdings Inc., Scarborough Town Centre Holdings Inc., Yorkdale Shopping Centre Holdings Inc., Ivanhoe Cambridge 1 Inc., Morguard Investments Limited, 20 Vic Management Inc.
David Foulds, for Sharpe Electronics of Canada Ltd.
Gavin Tighe, *Bryan Skolnik*, for Dominick Bellisario

***Spence J.*:**

1 Deloitte & Touche Inc., the Interim Receiver, requests approval of the sale of the assets of Battery Plus Inc. ("BPI") and 1271273 Ontario Inc. ("127") (the "Companies"), except the Argentia property, pursuant to the Purchase Agreement dated January 21, 2000 between the Interim Receiver and LEAP Energy and Power Corporation ("Leap") and an order authorizing the Interim Receiver to assign into bankruptcy 1473722 Ontario Limited ("147") to facilitate the completion of the Purchase Agreement.

Motion for Approval of Sale

2 The approach to be followed by the Court in determining whether a receiver has acted properly in concluding an agreement for the sale of property and therefore whether to approve that sale is set out in paragraph 16 of the reasons of the Court of appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), where the Court, per Galligan J.A. adopts the following statement of the duties the court must perform in making its decision.

3 The Court is required to consider (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained and (iv) whether there has been unfairness in the working out of the process.

Opposition by the Companies and Bellisario

4 The companies oppose the approval of the sale. They invoke what they say are three duties of a receiver which are relevant in the present case:

(i) the duty of the receiver to make full disclosure to the court: *Bennett on Receiverships*, 2 nd ed. p.180

(ii) the duty of a receiver and manager to preserve the goodwill of the business: *Newdigate Colliery Ltd., Re*, [1912] 1 Ch. 468 (Eng. Ch. Div.) (at p.472 and 475, in the report excerpts provided by the Companies), and

(iii) the duty to be disinterested and impartial so as to deal fairly and even-handedly with the interests of all parties: *Federal Trust Co. v. Frisina* (1976), 20 O.R. (2d) 32 (Ont. H.C.), at 35

5 The Companies raise issues of fact with respect to the following matters:

(i) the involvement of Radio Shack in the sale process;

(ii) the information as to whether the Interim Receiver used qualified people in the sale process and had all relevant information;

(iii) the information provided by the Interim Receiver as to the advertising process and the time limits for expressions of interest;

(iv) the information provided by the Interim Receiver as to whether sufficient efforts have been made to obtain the best price, in the absence of a valuation;

(v) the disparity in the prices offered by the different bidders and whether they were given different information;

(vi) the assessment made by the Interim Receiver of the Indeka offer net of the Argentia property.

The points identified in items (v) and (vi) do not raise issues that require comment.

6 The Companies also dispute the actions of the Interim Receiver in deciding to close 22 stores at the outset, based on their lack of profitability, and purchasing only a limited quantity of inventory, despite the sales potential said to be afforded by the prospective Christmas season.

7 Mr. Bellisario, an unsuccessful bidder and creditor, raises other issues, as follows:

(i) the failure of the Interim Receiver to pursue the opportunity indicated by Mister Keys' expression of interest through the offers it made for BPI assets;

(ii) the failure of the Interim Receiver to advise Mister Keys that Leap would be accepted as the offeror, which would have allowed Mister Keys to bargain with Leap in the way it is said that Radio Shack must have done and must be assumed to still be doing, even though Radio Shack is not before the Court and may make a deal with Leap that will not be put to the Court for approval and may allow Leap to receive from Radio Shack value that would otherwise have been available to the creditors and other interested parties;

(iii) the Leap deal is conditional on one group of leases being assignable and on price adjustments in respect of leases in a second group that turn out to be non-assignable, so the Leap deal may not proceed even if approved, and its value if it does proceed is subject to the above contingencies;

(iv) the Interim Receiver used an inventory amount of $3.5 million which Mister Keyes relied on in setting its trigger number of $2.5 million and of the Interim Receiver considered that these numbers could lead to a reduction in net price by $980,000 as indicated, that matter should have been raised with Mister Keyes;

(v) the suggestion that the Mister Keyes' offer is effectively subject to the repayment of the loan from Mr. Bellisario, when all that is called for is "satisfactory resolution" in respect of this matter;

(vi) the diminution in the value of the Leap agreement that may be occurring because Leap is not paying operating costs, contrary to its agreement;

(vii) the apparently preferential treatment given to Leap in the form of an option on the Argentia property;

(viii) the possibility of receiving further bids before February 28, 2002, under Court supervision, instead of leaving the matter in the hands of Leap, with the deficiencies referred to above.

8 The Companies say that the Interim Receiver has a duty to take into account the interests of all parties and that the Court is also required to do so and this involves recognizing that Mr. Badr is a guarantor of the Companies, and is an unsecured creditor of the Companies for at least $1 million and is director with the duties of that office and has spent 10 years developing the business of the Companies. Mr. Badr arranged a financing proposal with Mr. Taddeo to assist the Companies for the Christmas season but received no response from the Interim Receiver about it.

9 The Companies take issue with the efficacy and integrity of the sale process. They say their requests for information have been refused, including their requests as to dealings between Laurentian Bank and the Interim Receiver. The Companies question what information was given to the different bidders. The Companies question the dealings with InterTAN including its conduct of due diligence at present with a view to taking an assignment from Leap, which requires the consent of the Interim Receiver.

10 The Companies say that, contrary to the Purchase Agreement between Leap and the Interim Receiver, Leap is not managing the business of the Companies and there must be an agreement between Leap and the Interim Receiver which has not been disclosed, contrary to what has been told to the Court. The Companies question whether Leap is meeting responsibilities it has under the Purchase Agreement for certain losses and expenses incurred from and after January 21, 2002.

11 The Companies submit that the report of the Interim Receiver to the Court is unreliable because it contains a meritless allegation of theft which the Companies say was made by the Interim Receiver without first making proper enquiry to the Companies.

12 The Companies say that the Interim Receiver failed to disclose that it knew about the transfer of leases to 147, at the end of September, without notice to the landlords. Later, in November, the Interim Receiver consented to the Laurentian Bank registering under the P.P.S.A. against 147 without seeking directions from the Court, which the Companies say showed partiality on the part of the Interim Receiver towards the Laurentian Bank without regard for the interests of other stakeholders.

13 The Companies also complain that the Interim Receiver made an unfounded allegation that certain cheques were never deposited into the Battery Plus account at the Laurentian Bank as they should have been.

14 The Companies say that, although the Interim Receiver said on November 19, 2001 it would give Mr. Badr access to his personal information on the computer hard drive, it failed to do so until after Mr. Badr had to resort to Court for an order for access, and the information was then made available in a form that was not usable.

15 The Companies complain that the process followed by the Interim Receiver in its possession and control of computer information does not reflect paragraph 7 of the Interim Receivership Order. Paragraphs 3(a) and 5 of the Order seem to meet this point.

16 The Companies say that the Interim Receiver has not fairly characterized the undertaking given with respect to communications with prospective purchasers and has misstated that copies of letters were not sent to the Interim Receiver's lawyers.

17 The Companies say that these deficiencies support its claim that the sale process should be redone properly, including marketing in the United States, or at least that there should be a judicial sale. The Company submits no decision should be made to allow the presently proposed sale without allowing examination of Mr. Baigle and Mr. Allen in order to ensure the Court has full disclosure of the relevant information.

18 The Companies submit that the Interim Receiver mismanaged the business by purchasing insufficient inventory to preserve the goodwill, having regard to the credit resources in place, and without seeking Court approval for its course of action. The Company says that the Interim Receiver closed stores that were forecast to be profitable and failed to deliver promised inventory.

Approach to be followed

19 In order to give proper consideration to the issues of principle and fact that are raised by the contending positions it is necessary to determine at the outset the relevant context within which these issues are to be addressed. The context here is a proposed sale by a court-appointed receiver of a business under its direction for the benefit of the interested parties. It is not disputed that the circumstances of the Companies are such that a sale of the business is the appropriate way to address the interests of the parties. The alternatives to the sale now proposed are said to include the holding of a new sale conducted differently from the present one, or a judicial sale, but there is no proposal that would obviate the need for a sale of some kind. Accordingly, it is appropriate to address the sale now proposed in terms of the tests set out in the *Soundair* decisions, as stated above.

Sufficient Effort to Get the Best Price

20 The sale process that the Interim Receiver followed is set out in its factum at paragraphs 14 to 23 and paragraphs 27 to 32. The process involved preparation of a Confidential Information Memorandum ("CIM"), preparation of and communication with a list of 80 prospective purchasers, 53 of whom received the CIM, newspaper advertisements, the receipt of 16 expressions of interest for some or all of the assets, determination of the five parties that had submitted the highest offers and met all of the minimum criteria imposed by the Interim Receiver, facilitation of due diligence via data rooms and briefing sessions, the submission of one or more letters of intent ("LOI") by each of the five parties, analysis by the Interim Receiver of the LOI's and discussions and negotiations with each of the parties, identification by the Interim Receiver of the Leap offer as the best offer and further due diligence and negotiation with Leap, and execution of the proposed Purchase Agreement with Leap and a related entity, Winner International LLC, on January 21, 2002.

21 In conducting the sale as described and referred to above the Interim Receiver followed a customary approach for the sale of a business. The proposed sale has the support of the Laurentian Bank of Canada, the largest secured creditor of Battery Plus, with a debt owing to it of $6.6 million and Sharpe Electronics which is owed $500,000. RoyNat Ltd., which is owed $300,000, is not opposed. The sale is opposed by Mr. Bellisario, a secured creditor who is owed about $1 million and is also the principal in Mister Keys, one of the unsuccessful bidders. The sale is also opposed by the Companies and by their principal Mr. Badr. The sale is supported by Cadillac Fairview which is the landlord under about 20 lessees and is not opposed by the landlords under another 20 leases. A group of unsecured creditors takes no position.

22 It is relevant at this stage to refer to the general observations Galligan J.A. made in *Soundair* (above) immediately before he adopted and set out the enumeration of the Court's duties which is referred to above:

> The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.
>
> The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think,

therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

23 Also relevant are Galligan J.A.'s comments at paragraph 21 of the *Soundair* decision, as follows:

> When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell give to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p.112 [O.R.]:
>
> > Its decision was made as a matter of business judgment *on the elements then available to it*. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
> >
> > If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the preception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

24 The purchase price offered by Leap is $5 million maximum, an amount that may be adjusted downward in certain contingencies. This amount is considerably less than the amount owed to the Laurentian Bank of Canada.

25 The price is subject to a reduction of up to $262,500 on account of non-assignable leases. The next highest offer is that of Mister Keys. The maximum price payable under that offer is $4.75 million. The third and most recent Mister Keys offer is conditional on satisfactory resolution of the security and repayment of the loan of Mr. Bellisario for $1 million. While it is conceivable this condition could be satisfied by some arrangement or concession less than either a recognition of the priority of the security held by Mr. Bellisario or the repayment of his loan, this would be up to Mr. Bellisario and there is no way to determine from the terms of the condition whether any particular amount or concession would be acceptable to him. The provision leaves the matter up to Mister Keys. The Mister Keys offer also requires all remaining leases or allows termination.

26 Mister Keys submits that its interest was evident from its willingness to submit three offers and the Interim Receiver should have come back to it to invite further offers and to disclose that Leap was in the lead, rather than assessing Leap as the highest bidder and commencing exclusive negotiations with it. But whether Mister Keys would have been willing to make an offer better than that of Leap is just a matter of sheer conjecture. Certainly, the fact that it made three offers with the terms and conditions they contained suggests the contrary.

27 The Interim Receiver could properly conclude that the Leap offer provided the prospect of a better deal. It also had a condition as to leases but the Interim Receiver could properly form the view that, after considering the two offers with their differing conditions as to leases, the Leap offer was the better one to pursue; its condition as to leases is potentially less onerous than the Mister Keys condition and if the Leap offer condition as to leases could be met, it provided the prospect of a better price than the Mister Keys offer could be considered to provide.

28 A further relevant factor in comparing the offers is that the Mister Keys offer also has a provision for reduction in respect of an inventory shortfall. The Interim Receiver considered this provision would result in a reduction in the price by a further $950,000. Mister Keys submitted that its use of a $2,500,000 minimum value for inventory was based on the CIM statement that the inventory level was $3.5 million and if the Interim Receiver was subsequently adjusting that number downward, what it should have done was to so advise Mister Keys so that the parties could have negotiated about the matter. The $3.5 million amount appears as an unaudited figure for September 30, 2001. There is nothing in the terms of the Mister Keys offer to suggest

that its minimum was premised on an assumption based on the amount in the CIM and that, if inventory had fallen considerably lower since then, Mister Keys would be prepared to negotiate about reducing its minimum accordingly. It would be at least as reasonable, if not more so, to assume that Mister Keys regarded $2,500,000 of inventory as a necessary component of its maximum purchase price.

29 Article 7 of the Leap Purchase Agreement provides that it is the general intention of the parties that, subject to court approval, Leap is to manage the operations of the business in the period from January 21, 2002 or a later agreed date up to closing. This arrangement has not been activated. Under the arrangement Leap would have paid the cost and expenses of the operations during the period and would have borne any losses during such period. The Interim Receiver submits that this arrangement was, in effect, additional to the basic value of the Leap offer that was the relevant amount to be compared with the other offers, because none of the other offers provided for such a management arrangement. Mr. Davis' affidavit says that Mister Keys offered to help manage the business free of charge in order to maximize value but such an offer does not go as far as the one that was contemplated in the Leap Purchase Agreement. There is nothing on which an assessment could be made that the Mister Keys offer of management assistance should have been considered material to the comparison of the value of the offers.

30 Mister Keys says that the Leap offer is ultimately dependent on the landlords because of the requirements for a minimum number of 40 leases. All the offers, in one way or another, are conditional on leases being assigned. Mister Keys submits that the Leap offer should not be decided until the landlords decide but no reason is apparent why the matter would be better dealt with that way than instead proceeding with the assessment that is now under way.

31 Mister Keys submits that the report of the Interim Receiver discloses that preferential treatment is being given to Leap in respect of the Argentia property, but section G of the report, which deals with the Argentia property, does not suggest that any preference has been given. It simply reports about the status of sale prospects.

32 The Companies submit that the sale process was flawed in two respects that relate in part to lack of full disclosure. The Companies say they were denied disclosure which they requested about the expertise of the representatives of the Interim Receiver who administered the sale process. The Company say no valuation of the business was obtained and the sale was not advertised in the United States and there is no explanation from the Interim Receiver as to why not.

33 The Companies say that, as well, the Interim Receiver has mismanaged the business during the sale process by not purchasing adequate inventory and by prematurely closing unprofitable stores. This latter claim does not clearly amount to or support a claim that the sale process itself has been flawed or improvident, so it is dealt with below in respect of the other tests applicable for purposes of the requested approval.

34 No doubt the sale process, like any sales process, could have been conducted on a larger scale, with the retaining of expert consultants and valuators and an advertising program deployed internationally and a time schedule allowing ample time for exhaustive consideration at each stage. But in the present case, the Interim Receiver considered, based on the financial condition of the business, that it should move promptly to conduct a sale on an expeditious basis, and it did so. The process was certainly not precipitous. Mister Keys was allowed to come in with three successive offers. There is nothing before the court to suggest that if the Interim Receiver had conducted a different kind of sale process it would have had a prospect of obtaining a significantly better offer. The major creditor, the Laurentian Bank, does not think so. The Companies ask the court to second guess the Interim Receiver's decisions about the sale process but they offer no basis for the court to engage in such a venture.

The other requirements for court approval

35 The three other matters which the *Soundair* decision says require consideration for court approval to be granted are: the interests of the parties; the efficacy and integrity of the process; and the fairness of the process. These considerations overlap to some extent and so do the factual issues raised in this case, so the following part of these reasons mainly considers the requirements together in the context of the matters that are the subject of complaint.

Interests of the Parties

36 The interests that are involved here are those of secured and unsecured creditors and the shareholder Mr. Badr who is also a guarantor.

37 There is a priorities dispute between certain of the secured creditors and Mr. Bellisario. The order sought by the Interim Receiver will not prejudice the legal positions of the creditors in regard to the priorities dispute. If the leases in 147 are included in a sale the cash proceeds referrable to them will be available to meet the claims of those interested in 147 in accordance with their respective interests and priorities. Mr. Bellisario may have a tactical interest in deferring any sale of the leases but it does not seem that his legal interests would be prejudiced by a sale of the leases as part of the sale of the overall business, since it is not apparent how the leases can have any material value otherwise.

38 Mr. Badr and the Companies propose to bring other proceedings against the Interim Receiver, as mentioned above. The interests of the parties in this regard are addressed below.

Inadequate Purchases of Inventory

39 The Companies say that the Interim Receiver failed to purchase adequate inventory to support the operation of the business and failed to use credit facilities available for this purpose. The Interim Receiver disputes these allegations. Whether the level of inventory was inadequate is disputed. The question of inventory levels is addressed in the first report of the Interim Receiver in the first paragraph on page 4 of the report but no inference can be drawn from that paragraph or from the other material referred to. A proposal was provided for financing from V. Taddeo but it was made to the Laurentian Bank and was not acceptable to the bank. It would have involved the removal of the Interim Receiver and the resumption of management by Mr. Badr. There is a dispute as to what the situation and prospects were with Panasonic and Sony.

40 The issue whether the Interim Receiver failed to purchase adequate inventory is part of the other proceedings the Companies seek to bring against the Interim Receiver, to remove the Interim Receiver and for leave to sue the Interim Receiver. For purposes of the present matter, it cannot be concluded on the material before the court at present that the Interim Receiver failed to purchase adequate inventory.

Premature Store Closings

41 The Interim Receiver decided to close 22 stores promptly, on the basis that the stores were unprofitable and by closing them a core of profitable stores could be created for a sale of the business. The Companies object, based on the affidavit of Mr. Mastantuono, that the commercially responsible course would have been to keep the stores open during the more active Christmas season to get the advantage of the seasonal sales and then to see if the prospective purchasers wanted the stores. This question is obviously one of business strategy and raises a number of other questions to which it offers no answers, such as: what direct and indirect cost consequences would have resulted from the proposed course of action; and, if the stores were basically unprofitable why would the purchasers want them?

42 The matter of how to deal with the unprofitable stores had been a subject of discussions with the Companies from July on, and by October the Companies had put forward a proposal to enhance profitability by closing all unprofitable stores, which were said to be ten in number. If it made sense to the Companies in October to close the unprofitable stores and if by mid-November the number of unprofitable stores was identified by the Interim Receiver at 22, then it is hard to see how the decision to close them can have been unsound.

The Radio Shack Factor

43 The Companies and Mr. Bellisario raise issues about the dealing that it has been learned are underway between Leap and Radio Shack and/or its owner InterTAN for the transfer to Radio Shack of Leap's interest in the purchase of the business. Radio Shack is doing due diligence on the business, facilitated by the Interim Receiver.

44 The Interim Receiver has a binding agreement of purchase and sale with Leap. No basis has been established for an inference that Leap is proposing not to perform its obligations under the agreement. The agreement has not been terminated. The bidding has not been reopened. The Interim Receiver has an agreement, and it is with Leap.

45 Under the terms of the agreement, it cannot be assigned by Leap to another party without the consent of the Interim Receiver. Counsel for the Interim Receiver advised the court that, if an assignment from Leap to Radio Shack is proposed, the Interim Receiver will seek the approval of the court for its consent to the assignment. That effectively disposes of any concern in regard to the Radio Shack matter.

Unreliability of Reports

46 The Companies submit that the Interim Receiver's reports are unreliable in a number of important respects, such that the court ought not to base an approval decision upon them.

47 It is said that the reports make a meritless allegation of theft in respect of batteries that were removed from inventory the night before the Interim Receiver assumed its responsibilities. There is a dispute about the relevant facts. On the material available at present, it cannot be concluded that the way in which the Interim Receiver reported on the matter and dealt with it raises a question about the reliability of its reports for purposes of the present proceeding.

48 The Companies raise an issue about the Interim Receiver's statement on page 15 of its second report as to how and when the facts relating to the assignment of leases to 147 mainly came to its attention, but no material issue of concern is established in this regard.

49 The Companies say that the Interim Receiver acted with partiality in favour of the bank and other secured creditors when it permitted them to register under the PPSA against 147. Assuming the Bellisario security was already registered, the other subsequent registrations would not, without more, have a prejudicial effect against his security but only against subsequent security holders and no case is advance in that regard. This matter can be left for further consideration in the other proceedings to the extent appropriate.

50 The Companies say the Interim Receiver incorrectly alleged that certain cheques were not properly deposited. It is said that the record shows that a cheque for $73,000 on account of G.S.T. refund was in fact picked up for deposit. It is not shown that the report of the Interim Receiver in this regard is materially unreliable.

51 The Companies raise similar issues concerning franchisees' monies, Mr. Badr's access to his hard drive and other matters which counsel for the Companies characterized as minor, as to communications about the proceedings in the Court of Appeal and copying of documents to the counsel for the Interim Receiver. There is nothing material here.

52 For the reasons given above, the objections raised to the sale process and to the purchase price and the Purchase Agreement fail. On the material, the Interim Receiver has satisfied the test in *Soundair* and the proposed sale in accordance with the Purchase Agreement is approved.

Motions for Authority to Assign 147 into Bankruptcy

53 The Factum of the Interim Receiver provides its submissions on this request at paragraphs 33 to 39 and paragraphs 45 to 48.

54 The Interim Receiver relies, on its argument for the relief it seeks, on its contention that Battery Plus assigned the leases to 147 without notice to or consent from the landlords affected and therefore breached those leases on at least a number of them, ie. all but four. Nothing in the materials or submissions contradicts the claim that these leases have been put in breach by the assignments and it follows that they have thereby been placed in jeopardy. It is said that Bellisario had a commercially based interest in receiving security on those leases but this hardly justifies Battery Plus placing them in jeopardy to the detriment of the creditors of Battery Plus. It is proper for the Court to take into account this context in considering the Interim Receiver's request to be empowered to file an assignment in bankruptcy on behalf of 147.

55 If 147 is placed in bankruptcy the trustee in bankruptcy would be in a position to seek an order for the assignment of the leases for the benefit of all of the creditors of 147 whatever may be their respective claims and priorities. If such an order were obtained by the trustee it would facilitate the transaction now under consideration. If that transaction is approved then it would also serve the proper interests of the interested parties to have the leases now in 147 dealt with in that manner.

56 Bellisario objects that the authority that the Interim Receiver has by the existing court order is only to make an assignment in bankruptcy on behalf of the Companies, which does not extend to 147. The Interim Receiver submits that 1271273 Ontario ("127") is subject to the court order and, because 127 is the sole shareholder of 147, the Interim Receiver, in the exercise of its powers, may authorize a declaration under the *Business Corporations Act* of Ontario ("OBCA") to exercise the powers of the Board of Directors of 147 including the power to authorize it to make an assignment in bankruptcy. Bellisario objects that for the Interim Receiver to be allowed to proceed in this way would fail to respect the pledge of shares of 147 and the option on shares of 147 which he holds as security in respect of his loan to Battery Plus, but it is not apparent that the terms of those security instruments preclude 127, and therefore the Interim Receiver, from exercising shareholders rights in respect of 147 unless and until proper action is taken by Mr. Bellisario to exercise his security rights in respect of 147.

57 The Companies submit that, even if the Interim Receiver could, in the effective capacity of the directing authority of 147, make an assignment of 147 into bankruptcy, it could properly do so only if 147 is insolvent and there is no evidence that that is so.

58 It is not disputed that under the terms of the Pledge Agreement relating to the shares of 147, 127 as Pledgor is in default. Accordingly s.3.3 of the Pledge Agreement is applicable. That section by its terms entitles the Pledgor (sic) to deliver to the trustee holding the shares a default certificate directing the trustee to deliver the shares to the lender, Mr. Bellisario. There is no evidence that 127 as Pledgor has delivered such a default certificate. S.3.1 of the Pledge Agreement provides that until the security interest becomes enforceable, the shares are to be voted by proxies for 127. No provision addresses how the shares are to be voted after the securities become enforceable but before a certificate is given under s.3.3. Until that certificate is given, the shares cannot be released to the lender, so the only reasonable inference is that, until then, 127 can direct the voting of the shares. S.108(3) and (5) of the OBCA give adequate authority to 127 as the sole shareholder of 147 to exercise the duties of the Board of Directors of 147 if 127 is so authorized by a unanimous shareholders agreement, which it would be entirely within the power of 127 to authorize. Since 127 is under the direction of the Interim Receiver, it should be regarded as having the necessary authority, in place of 147, to authorize the assignment into bankruptcy of 147, subject to what is said below.

59 With respect to the above analysis, Bellisario submits that s.3.3 of the Pledge Agreement is to be construed as permitting the Lender, ie. himself, rather than the Pledgor, to deliver the Default Certificate, on the basis that the word "Pledgor" is obviously an error in the context of the section, and the context requires that the word "Lender" be read in its place. It is apparent that without some change the clause as worded makes no real commercial sense and substituting the word "Lender" would give the provision commercial sense. That does not necessarily mean that it is to be inferred that that is what the parties had in mind and had agreed to. Even if it is, there is still the question whether a Default Certificate has been delivered to the Trustee under s.3.3. No reference has been made to any document purporting to be a Default Certificate delivered under that section. Reference was made to the letter of November 2, 2001 from Gardiners Roberts LLP to Laurentian Bank (Tab 134 to the Affidavit of Michael Nero, January 31, 2000, Exhibit "A", Vol. IV) which states that demand letters and notices of intention under s.244 were issued on October 18, 2001 to the Companies and 147 relating to their obligations under the Bellisario loan to Battery Plus. Copies of the October 18, 2001 letters and notices have been provided by counsel to Mr. Bellisario.

60 Bellisario submits that the October 18, 2001 letters and notices constitute the Certificate of Default required by s.3.3 of the Pledge Agreement.

61 The November 2, 2001 letter from Gardiner Roberts was sent by them in their capacity as counsel to Bellisario and does not purport to relate to that firm's role as the trustee under the Pledge Agreement. The same is true of the October 18, 2001 letters and notices. So it cannot be said that there has been a delivery to Gardiner Robert LLP in its capacity as the trustee under the Pledge Agreement as required by s.3.3.

62 None of the three demand letters constitutes a statement to the effect required under s.3.3 of the Pledge Agreement. A notice under s.244 of the *Bank And Insolvency Act* is intended to give Notice of an intention to enforce security and not to constitute the act of enforcement contemplated by s.3.3(c) of the Pledge Agreement. S.244(2) provides that the act of enforcement is to be effected only after ten days. So a notice of intention under s.244 does not constitute a Certificate of Default under s.3.3 of the Pledge Agreement. Nothing in the terms of the October 18, 2001 notices alters this analysis.

63 It was suggested that the letters and notices of October 18, 2001 ought to be considered to be sufficient for purposes of s.3.3 of the Pledge Agreement, presumably on the basis that the proper inference to be taken from them is that the Lender was thereby effectively giving to the trustee the notification and the authorization and direction required by paragraphs (a), (b) and (c) of s.3.3 of the Pledge Agreement. However, all that can be concluded is that by giving the letters and notices of October 18, 2001, Bellisario was putting himself in a position where he would be able to trigger s.3.3, but not that he had actually triggered it. There is nothing in the material that would justify disregarding the express requirements set out in s.3.3.

64 The Interim Receiver contends that 147 is an insolvent person within the definition of that term in s.2 of the *Bankruptcy And Insolvency Act*, with particular reference to paragraph (c) of the definition. Paragraph (c) includes in the definition of an "insolvent person", a person "the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."

65 According to the reporting letter dated July 27,2001 from Keyser Mason Ball LLP to Battery Plus, 147 was, at that time "a newly incorporated company, the sole business of which is to act as assignee in respect of the assignment of the Leases", ie. the group of leases of Battery Plus assigned to 147 in connection with the Bellisario loan to Battery Plus. No evidence has been led to suggest that 147 has any other assets. Leave has been requested by the Companies to obtain evidence on the matter. The Notice of Motion by the Interim Receiver made it clear that it would be seeking authority for an assignment in bankruptcy in respect of 147 so the matter of the insolvency of 147 has effectively been in issue from the outset, so there is no basis established for the request for leave at this stage of the proceedings. There is no valuation of the assets of 147 before the Court. The leases held by 147 constitute only a part of the leases of the overall business. All but four of the leases held by 147 are in jeopardy because of their having been assigned without consent. In the circumstances the assets of 147 must be worth substantially less than the value of the total assets of the overall business.

66 147 gave to the Laurentian Bank an undertaking, dated June 5, 2001, in consideration of the continuation of specific credit facilities, to deliver to the Bank a guarantee of the credit facilities and a general security agreement on all of its assets. These instruments have not yet been delivered. Laurentian Bank submitted that, by reason of the definition of "Lien" in the Priority Agreement among certain of the parties, dated June 5, 2001, and the definition in that agreement of "Bank Security" and s.2.3(a) of that Agreement, the Bank has a claim against 147. The Bank advised that it intends to assert that claim at the appropriate time as a claim having priority over Bellisario with respect to 147. That priority question is not before the Court in the present hearing. What is relevant for now is the submission that the Bank, by reason of the undertaking given by 147, holds an obligation of 147 in respect of the Battery Plus debt owing to the Bank, for purposes of the "insolvent person" definition in the *Bank And Insolvency Act*. This contention is sound. Moreover, since the undertaking of 147 was to give a guarantee in respect of the debt that is due to the Bank from Battery Plus, the obligation of 147 is one that is due or accruing due, as required by the definition. On this basis, the value of the property of 147 must be significantly less than its obligations.

67 For the above reasons, 147 is an insolvent person and the Interim Receiver is in a proper position to act on behalf of 127 to cause 147 to file an assignment in bankruptcy.

Prejudice to Mr. Badr if 147 is assigned into bankruptcy

68 For Mr. Badr it is said that, if 147 is allowed to be assigned into bankruptcy and the leases it holds are therefore allowed to be assigned, this would prejudice Mr. Badr's right, as guarantor, to redeem Mr. Bellisario's loan and recover the leases. It is not shown how or why whatever right of redemption Mr. Badr has in this regard is entitled to priority over the rights of the Interim Receiver in respect of the assets of 127, including the shares of 147.

69 It is also said for Mr. Badr that if an order is to be made to approve the proposed sale, any sale should be subject to any exercise by Mr. Badr of any right of redemption he is determined to have, within 10 days of that determination being made in the priorities application now under way.

70 The Bank submits that there is no reason offered by the known facts to take seriously the prospect that Mr. Badr would pay $1 million to redeem a group of leases most of which are in default and that there is no evidence of any clear intent on the part of Mr. Badr to do so. The most that could be concluded is that Mr. Badr would like to be in a legal position to redeem the loan if he wished to do so.

71 Mr. Chaiton for the Interim Receiver produced on the afternoon of February 14, the last day of the hearing, a document which he said had just come to his office the previous night together with a corporate profile report obtained only minutes earlier in the afternoon of February 14. The document purports to be an assignment dated February 13, 2002, (the previous day) by 147 to 2008612 Ontario Limited of the leases that had previously been assigned by Battery Plus to 147, for a consideration of $2.00. The document appears to have been executed by Mr. Badr on behalf of 147. Counsel for Mr. Badr had no submissions to make about the document other than that information should be obtained about the purported assignee.

72 The document is a suspicious and troubling document. Without some explanation, it appears to be an effort to avoid or obstruct the effect of the order that the Interim Receiver is now before the Court seeking to obtain with respect to 147. An effort of such a kind is obviously offensive to the process of the Court and is not to be countenanced or permitted. For this reason an order is to go that no action shall be taken by any person to give effect to the document and the document shall be stayed from having any effect in respect of the matters now before the Court in the present motion without further order of the Court sought and obtained prior to the closing of any sale that may be approved and effected pursuant to this motion.

73 In all the circumstances, there is no basis for imposing the condition sought by Mr. Badr with respect of the exercise of the right of redemption.

Conclusion

74 For the reasons given above, orders are to go as requested by the Interim Receiver to approve the sale and to authorize the Interim Receiver to assign 147 into bankruptcy.

75 Certain of the matters raised in this motion relate to the motion now pending as to priorities and the proposed litigation between the Companies and Mr. Badr and the Interim Receiver. The material filed in respect of those proceedings was allowed to be referred to in this motion. For the record, it is noted that not all preliminary steps have been completed in the other proceedings.

76 Counsel may make submissions about costs.

Application granted.

TAB 8

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

***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.

TAB 9

At paras. 69-72

2010 QCCS 1742
Quebec Superior Court

AbitibiBowater, Re

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

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

Clément Gascon, J.C.S.

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

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

***Clément Gascon, J.C.S*:**

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

Introduction

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

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

The Motion at Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Analysis and Discussion

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

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

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

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

31 The Court's brief reasons follow.

The Sale Approval

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> (a) the purchase price was fair and reasonable and subjected to a thorough canvassing of the market;
>
> (b) the offer included a sharing formula, based on future gross sale proceeds from the sale of the paper machines located at the Closed Mills, that provided for potential sharing of the proceeds from the sale of any paper machines;
>
> (c) AIM confirmed that no further due diligence was required;
>
> (d) AIM had provided sufficient evidence of its ability to assume the environmental liabilities associated with the Closed Mills; and
>
> (e) AIM did not have any financing conditions in its offer and had provided satisfactory evidence of its financial ability to close the sale.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Standing Issue

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

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

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

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

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

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

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

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

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

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

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

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

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

For these Reasons, The Court:

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

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

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

any other CCAA order; and (ii) all charges, security interests or charges evidenced by registration, publication or filing pursuant to the *Civil Code of Québec*, the Ontario *Personal Property Security Act*, the New Brunswick *Personal Property Security Act* or any other applicable legislation providing for a security interest in personal or movable property, excluding however, the permitted encumbrances, easements and restrictive covenants listed on *Schedule "E"* hereto (the "*Permitted First Closing Assets Encumbrances*") and, for greater certainty, *ORDERS* that all of the First Closing Assets Encumbrances affecting or relating to the First Closing Assets be expunged and discharged as against the First Closing Assets, in each case effective as of the applicable time and date set out in the Purchase Agreement;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

14 **ORDERS** that for the purposes of determining the nature and priority of the Fort William Assets Encumbrances, the Net Proceeds from the sale of the Fort William Assets shall stand in the place and stead of the Fort William Assets, and that upon payment of the Second Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all Fort William Assets Encumbrances except those listed in Schedule G hereto shall attach to the Net Proceeds with the same priority as they

had with respect to the Fort William Assets immediately prior to the sale, as if the Fort William Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

15 **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

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

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

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

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

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

19 **WITHOUT COSTS**.

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*

2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*

3. *3224112 NOVA SCOTIA LIMITED*

4. *MARKETING DONOHUE INC.*

5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*

6. *3834328 CANADA INC.*

7. *6169678 CANADA INC.*

8. *4042140 CANADA INC.*

9. *DONOHUE RECYCLING INC.*

10. *1508756 ONTARIO INC.*

11. *3217925 NOVA SCOTIA COMPANY*

12. *LA TUQUE FOREST PRODUCTS INC.*

13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*

14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*

16. *THE JONQUIERE PULP COMPANY*

17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*

18. *SCRAMBLE MINING LTD.*

19. *9150-3383 QUÉBEC INC.*

20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*

2. *BOWATER CANADA FINANCE CORPORATION*

3. *BOWATER CANADIAN LIMITED*

4. *3231378 NOVA SCOTIA COMPANY*

5. *ABITIBIBOWATER CANADA INC.*

6. *BOWATER CANADA TREASURY CORPORATION*

7. *BOWATER CANADIAN FOREST PRODUCTS INC.*

8. *BOWATER SHELBURNE CORPORATION*

9. *BOWATER LAHAVE CORPORATION*

10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*

11. *BOWATER TREATED WOOD INC.*

12. *CANEXEL HARDBOARD INC.*

13. *9068-9050 QUÉBEC INC.*

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

15. *BOWATER BELLEDUNE SAWMILL INC.*

16. *BOWATER MARITIMES INC.*

17. *BOWATER MITIS INC.*

18. *BOWATER GUÉRETTE INC.*

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING 1 CORP.*

3. *BOWATER VENTURES INC.*

4. *BOWATER INCORPORATED*

5. *BOWATER NUWAY INC.*

6. *BOWATER NUWAY MID-STATES INC.*

7. *CATAWBA PROPERTY HOLDINGS LLC*

8. *BOWATER FINANCE COMPANY INC.*

9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*

10. *BOWATER AMERICA INC.*

11. *LAKE SUPERIOR FOREST PRODUCTS INC.*

12. *BOWATER NEWSPRINT SOUTH LLC*

13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*

14. *BOWATER FINANCE II, LLC*

15. *BOWATER ALABAMA LLC*

16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Schedule "D" — First Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

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

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

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

CERTIFICATE OF THE MONITOR

Recitals:

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

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

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

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

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

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

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

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

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

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

Name: _____

Title: _____

Schedule "E" — Permitted First Closing Assets Encumbrances

1. Beaupré Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Dalhousie Mill

None

3. Donnacona Mill

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

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

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

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

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

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

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

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

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

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

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

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

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

Schedule "F" — Second Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

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

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

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

CERTIFICATE OF THE MONITOR

Recitals:

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

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

WHEREAS on •, 2010, the Court issued an Order (the "*Closed Mills Vesting Order*") thereby, *inter alia*, authorizing and approving the execution by Abitibi-Consolidated Company of Canada ("*ACCC*"), Bowater Maritimes Inc. ("*BMI*") and Bowater Canadian Forest Products Inc. ("*BCFPI*" and together with ACCC and BMI, the "*Vendors*") of an agreement entitled *Purchase*

and Sale Agreement (the "*Purchase Agreement*") by and between ACCC, BMI and BCFPI, as Vendors, American Iron & Metal LP (the "*Purchaser*") through its general partner American Iron & Metal GP Inc., as Purchaser, American Iron & Metal Company Inc., as Guarantor, and to which ACI intervened, copy of which was filed and into all the transactions contemplated therein (the "*Sale Transactions*") with such alterations, changes, amendments, deletions or additions thereto, as may be agreed to with the consent of the Monitor.

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

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

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

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

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

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

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

Name: _____

Title: _____

Schedule "G" — Permitted Fort William Assets Encumbrances

Section 1 Permitted Fort William Land Titles Assets Encumbrances

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

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

Section 2 Permitted Fort William Registry Assets Encumbrances

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

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

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

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

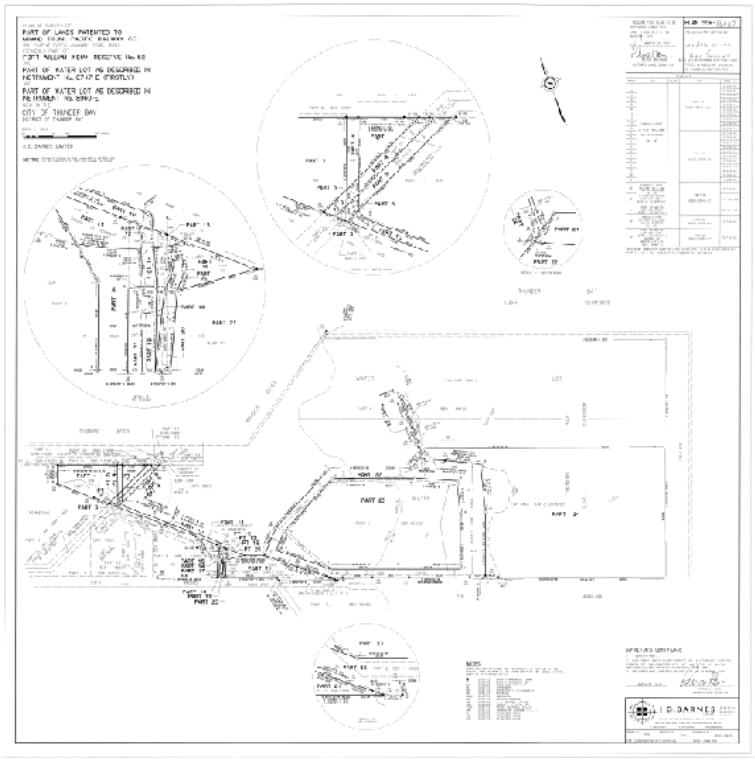
7. Agreement registered as Instrument #403730 on July 14, 1999

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

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

Motion granted.

Annex A



Graphic 1

Schedule "H" — Dalhousie Assets

Municipal address:

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

Legal description (Property Identifier No.):

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

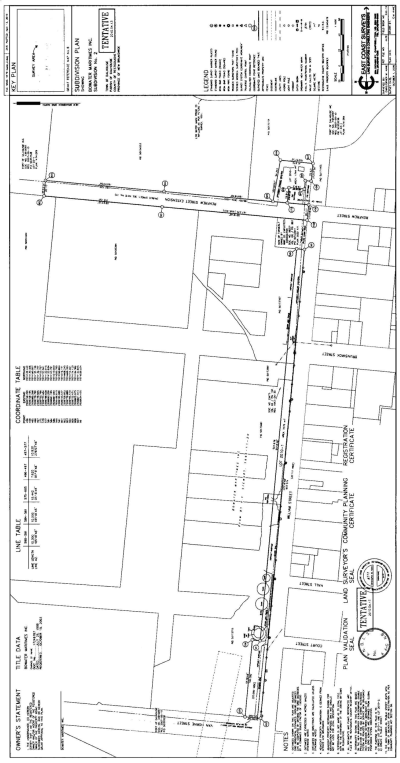
Save and Except for

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

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

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

Annex A — Dalhousie Plan



Graphic 2

Schedule "I" — Fort William Assets

Municipal address:

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

Legal description:

Section 1 Fort William Land Titles Assets

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

Section 2 Fort William Registry Assets

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

Footnotes

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

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

3 Exhibits VB-1 and I-5.

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

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

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

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

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

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

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

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

12 See Exhibit I-7.

13 See Exhibit I-2.

14 See Exhibit I-6.

15 See Exhibit I-9.

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

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

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

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

20 Exhibits AIM-1 and AIM-2.

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

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

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

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

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

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

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

28 *Ibid*.

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

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

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

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

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

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

TAB 10

At paras. 38-39

2009 CarswellOnt 4838
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4838, [2009] O.J. No. 4487, 56 C.B.R. (5th) 224

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (Applicants)

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

Morawetz J.

Heard: July 28, 2009
Judgment: July 28, 2009
Docket: Toronto 09-CL-7950

Counsel: Mr. D. Tay, Ms J. Stam for Nortel Networks Corporation et al.
Mr. J.A. Carfagnini, Mr. C.G. Armstrong for Monitor, Ernst and Young Incorporated
Mr. Arthur O. Jacques for Felske, Sylvain
S.R. Orzy for Noteholders
Ms S. Grundy, Mr. J. Galway for Telefonaktiebolaget LM Ericsson
Ms L. Williams, Ms K. Mahar for Flextronics
Mr. M. Zigler for Former Employees
Mr. L. Barnes for Board of the Directors of Nortel Networks Corporation, Nortel Networks Limited
Mr. A. MacFarlane for Official Committee of Unsecured Creditors
Ms T. Lie for Superintendent of Financial Services of Ontario
Mr. B. Wadsworth for CAW Canada
Mr. S. Bomhof for Nokia Siemens
Mr. R.B. Schwill for Nortel Networks UK Limited

***Morawetz J.*:**

1 Nortel Networks Corporation ("NNC), Nortel Networks Limited (NNL), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation, (collectively the "Applicants"), bring this motion for an Order approving and authorizing the execution of the Asset Sale Agreement dated as of July 24, 2009, ("the Sale Agreement"), among Telefonaktiebolaget LM Ericsson (PUBL) (the "Purchaser"), as buyer, and NNL, NNC, Nortel Networks, Inc.) ("NNI) or ("Ericsson"), and certain of their affiliates as vendors, (collectively, the "Sellers"), in the form attached and as an Appendix to the Seventeenth Report of Ernst and Young Inc. in its capacity as Monitor in the CCAA proceedings.

2 The Applicants also request, among other things, a Vesting Order, an Order approving and authorizing the execution and compliance with the Intellectual Property Licence Agreement substantially in the form attached to the confidential appendix to the Seventeenth Report and the Trademark Licence Agreements substantially in the form attached to the appendix and an Order declaring that the Ancillary Agreements, (as defined in the Sale Agreement), including the IP Licences, shall be binding on the Applicants that are party thereto, and shall not be repudiated disclaimed or otherwise compromised in these proceedings, and that the intellectual property subject to the IP Licences shall not be sold, transferred, conveyed or assigned by any of the

Applicants unless the buyer or assignee of such intellectual property assumes all of the obligations of NNL under the IP Licences and executes an assumption agreement in favour of the Purchaser in a form satisfactory to the Purchaser.

3 Finally, the Applicants seek an order sealing the Confidential Appendixes to the Seventeenth Report pending further order of this court.

4 This joint hearing is being conducted by way of video conference. His Honor Judge Gross is presiding over the hearing in the U.S. Court. This joint hearing is being conducted in accordance with the provisions of the Cross-Border Protocol, which has previously been approved by both the U.S. Court and this court.

5 The Applicants have filed two affidavits in support of the motion. The first is that of Mr. George Riedel, sworn July 25, 2009. Mr. Riedel is the Chief Strategy Officer of NNC and NNL. Mr. Riedel also swore an affidavit on June 23, 2009 in support of the motion to approve the Bidding Procedures. The second affidavit is that of Mr. Michael Kotrly which relates to an issue involving Flextronics which was resolved prior to this hearing.

6 The Monitor has also filed its Seventeenth Report with respect to this motion. The Monitor recommends that the requested relief be granted.

7 The Applicants' position is also enthusiastically supported by the Unsecured Creditors' Committee in the Chapter 11 proceedings and the Noteholders.

8 No party is opposed to the requested relief.

9 On June 29, 2009 this court granted an Order approving the Bidding Procedures for a sale process for certain of Nortel's Code Division Multiple Access ("CMDA") business, and Long Term Evolution ("LTE") Access. The procedures were attached to the Order.

10 The Court also approved the Stalking Horse Agreement dated as of June 19, 2009 among Nokia Siemens Networks B.V. ("Nokia Siemens") and the Sellers (also referred to as the "Nokia Agreement") and accepted agreement for the purposes of conducting the Stalking Horse bidding process in accordance with the Bidding Procedures, including the Break-Up-Fee and Expense Reimbursement as both terms are defined in the Stalking Horse Agreement.

11 The order of this court was granted immediately after His Honor, Judge Gross, of the United States Bankruptcy Court for the District of Delaware, approved the Bidding Procedures in the Chapter 11 proceedings.

12 The Bidding Procedures contemplated a bid deadline of 4 p.m. on July 21, 2009. This gave interested parties 22 days to conduct due diligence and submit a bid.

13 By the Bid Deadline, three bids were acknowledged as "Qualified Bids" as contemplated by the Bidding Procedures. Qualified Bids were received from MPAM Wireless Inc., otherwise known as Matlin Patterson and Ericsson.

14 The Monitor also reports that on July 15, 2009 one additional party submitted a non-binding letter of intent and requested that it be deemed a Qualified Bidder. The Monitor further reports that upon receiving this request, the Applicants' provided such party with a form of Non-Disclosure Agreement substantially in the form as that previously executed by Nokia Siemens. This party declined to execute the Non Disclosure Agreement and was not deemed a Qualified Bidder. The Monitor further reports that it, the UCC and the Bondholder Group were all consulted in connection with the request of such party to be considered a Qualified Bidder.

15 The Monitor also reports that it is of the view that any party that wanted to bid for the business and complied with the Bidding Procedures was permitted to do so.

16 In the period up to July 21, 2009, the Monitor reports that it was kept apprised of all activity conducted between Nortel and the potential buyers. In addition, the Monitor participated in conference calls and meetings with the potential buyers, both with

Nortel and independently. The Monitor further reports that it conducted its own independent review and analysis of materials submitted by the potential buyers.

17 On July 22, 2009, in accordance with the Bidding Procedures, copies of both the MPAM bid and the Ericsson bid were provided to Nokia Siemens, MPAM and Ericsson were both notified that three Qualified Bids had been received.

18 After consultation with the Monitor and representatives of the UCC and the Bondholder Group, the Sellers determined that the highest offer amongst the three bids was submitted by Ericsson and accordingly on July 22, 2009, the three Qualified Bidders were informed that the Ericsson bid had been selected as the starting bid pursuant to the Bidding Procedures. Copies of the Ericsson bid were distributed to Nokia Siemens and MPAM.

19 The Monitor reports that the auction was held in New York on July 24, 2009.

20 Pursuant to the Bidding Procedures the auction went through several rounds of bidding. The Sellers finally determined that the Ericsson bid submitted in the sixth round should be declared the Successful Bid and that the Nokia Siemens bid submitted in the fifth round should be an Alternate Bid. The Monitor reports that these determinations were made in accordance with consultations with the Monitor and representatives of UCC and the Bondholder group held during the seventh round adjournment.

21 The Monitor reports that the terms and conditions of the Successful Bid are substantially the same as the Nokia Agreement described in the Fourteenth Report with the significant differences being as follows:

> 1) The purchase price has been increased from U.S. $650 million to U.S. $1.13 billion plus the obligation of the Purchaser to pay, perform and discharge the assumed liabilities. The Purchaser made a good faith deposit of U.S. $36.5 million.
>
> 2) The Termination Date has been extended to September 30, 2009 or in the event that closing has not occurred solely because regulatory approvals have not yet been obtained, October 31, 2009 as opposed to August 31 and September 30, respectively, for the Nokia Agreement.
>
> 3) The provisions in the Nokia Agreement with respect to the Break-Up Fee and Expense Reimbursement have been deleted.

22 Further, I note that the Nokia Agreement provided for a commitment to take at least 2,500 Nortel employees worldwide. Under the Sale Agreement, the Purchaser has also committed to make employment offers to at least 2,500 Nortel employees worldwide.

23 The Nokia Agreement provided for a payment of a Break-Up Fee of $19.5 million and the Expense Reimbursement to a maximum of $3 million, upon termination of the Nokia Agreement. The Monitor reports that if both this court and the U.S. Court approve the Successful Bid, the Applicants are of the view that the Break-Up Fee and the Expense Reimbursement will be payable and in accordance with the order of June 29, 2009, the company intends to make such a payment. The Monitor reports that it is currently contemplated that 50% of the amount will be funded by NNL and 50% by NNI.

24 The assets to be transferred by the Applicants and the U.S. Debtors pursuant to the successful bid are to be transferred free and clear of all liens of any kind. The Monitor is of the understanding that no leased assets are being conveyed as part of this transaction.

25 The Monitor also reports that at the request of the Purchaser, the proposed Approval and Vesting Orders specifically approves Intellectual Property Licence Agreement and Trademark Licence Agreement, collectively, (the "IP Licences"), entered into between NNL and the Purchaser in connection with the Successful Bid.

26 The Monitor also reports that subject to court approval, closing is anticipated to occur in September 2009.

27 The Bidding Procedures provide that the Seller may seek approval of the next highest or otherwise best offer as the Alternate Bid. If the closing of the transaction contemplated fails to occur the Sellers would then be authorized, but not directed, to proceed to effect a Sale Pursuant to the terms of the Alternate Bid without further court approval. The Sellers, in consultation with the Monitor, the UCC and the Bondholders, determined that the bids submitted by Nokia Siemens in the fifth round with a purchase price of $1,032,500,000 is the next highest and best offer and has been deemed to be the Alternative Bid. Accordingly, the company is seeking court approval of the alternative bid pursuant to the Bidding Procedures.

28 The Monitor reports that, as noted in its Fourteenth Report, the CMDA division and the LTE business are not operated through a dedicated legal entity or stand alone division. The Applicants have an interest in intellectual property of the CMDA business and the LTE business which is subject to various inter-company licensing agreements with other Nortel legal entities around the world, in some cases on an exclusive basis and in other cases, on a non-exclusive basis. The Monitor is of the view that the task of allocating sale proceeds stemming from the Successful Bid amongst the various Nortel entities and the various jurisdictions is complex. Further, as set out in the Fifteenth Report, the Applicants, the U.S. Debtors, and certain of the Europe, Middle East, Asia entities, ("EMEA") through their U.K. Administrators entered into the Interim Funding and Settlement Agreement, the IFSA, which was approved by this court on June 29, 2009. Pursuant to the IFSA, each of the Applicants, U.S. Debtors and EMEA Debtors agreed that the execution of definitive documentation with a purchaser of any material Nortel assets was not conditional upon reaching an agreement regarding the allocation of sale proceeds or binding procedures for the allocation of the sale proceeds. The Monitor reports that the parties agreed to negotiate in good faith and attempt to reach an agreement on a protocol for resolving disputes concerning the allocation of sale proceeds but, as of the current date, no agreement has been reached regarding the allocation of any sales proceeds. Accordingly, the Selling Debtors have determined that the proceeds are to be deposited in an escrow account. The issue of allocation of sale proceeds will be addressed at a later date.

29 The Monitor expects that the Company will return to court prior to the closing of the transaction to seek approval of the escrow agreement and a protocol for resolving disputes regarding the allocation of sale proceeds.

30 In his affidavit, Mr. Riedel concludes that the sale process was conducted by Nortel with consultation from its financial advisor, the Monitor and several of its significant stakeholders in accordance with the Bidding Procedures and that the auction resulted in a significantly increased purchase price on terms that are the same or better than those contained in the Stalking Horse Agreement. He is of the view that the proposed transaction, as set out in the Sale Agreement, is the best offer available for the assets and that the Alternate Bid represents the second best offer available for the Assets.

31 The Monitor concludes that the company's efforts to market the CMDA Business and the LTE Business were comprehensive and conducted in accordance with the Bidding Procedures and is further of the view that the Section 363 type auction process provided a mechanism to fully determine the market value of these assets. The Monitor is satisfied that the purchased priced constitutes fair consideration for such assets and, as a result, the Monitor is of the view that the Successful Bid represents the best transaction for the sale of these assets and the Monitor therefore recommends that the court approve the Applicants' motion.

32 A number of objections have been considered by the U.S. Court and they have been either resolved or overruled. I am satisfied that no useful purpose would be served by adding additional comment on this issue.

33 Turning now to whether it is appropriate to approve the transaction, I refer back to my Endorsement on the Bidding Procedures motion. At that time, I indicated that counsel to the Applicants had emphasized that Nortel would aim to satisfy the elements established by the court for approval as set out in the decision of *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), which, in turn, accepts certain standards as set out by this court in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.).

34 Although the *Soundair* and *Crown Trust* tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a CCAA proceeding. For authority see *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.) .

35 The duties of the court in reviewing a proposed sale of assets are as follows:

> 1) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;
>
> 2) It should consider the interests of all parties;
>
> 3) It should consider the efficacy and integrity of the process by which offers have been obtained; and
>
> 4) It should consider whether there has been unfairness in the working out of the process.

36 I am satisfied that the unchallenged record clearly establishes that the sale process has been conducted in accordance with the Bidding Procedures and with the principles set out in both *Soundair*, and *Crown Trust*. All parties are of the view that the purchase price represents fair consideration for the assets included in the Sale Agreement. I accept these submissions. The consideration provided by Ericsson pursuant to the Sale Agreement, in my view, constitutes reasonably equivalent value and fair consideration for the assets.

37 In my view, it is appropriate to approve the Sale Agreement as between the Sellers and Purchaser. I am also satisfied that it is appropriate to grant the relief relating to the Vesting Order, the IP Licences, the Ancillary Agreement and the Alternate Bid, all of which are approved.

38 The Applicants also requested an order sealing the Confidential Appendixes to the Seventeenth Report pending further order. In considering this request I referred to the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a sealing order. The Supreme Court of Canada held that such orders should only be granted when:

> 1) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;
>
> 2) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

39 I have reviewed the Confidential Appendixes to the Seventeenth Report. I am satisfied that the Appendixes contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that the request for a sealing order is appropriate and it is so granted.

40 Other than with respect to the payment and reimbursement of amounts in respect of the Bid Protections nothing in this endorsement or the formal order is meant to modify or vary any of the Selling Debtors' (as such term is defined in the ISFA) rights and obligations under the ISFA. It is further acknowledged that Nortel has advised that the Interim Sales Protocol shall be subject to approval by the court.

41 An order shall issue in the form presented, as amended, to give effect to the foregoing reasons.

Motion granted.

TAB 11

At para. 14

2009 CarswellOnt 9415
Ontario Superior Court of Justice [Commercial List]

SkyPower Corp., Re

2009 CarswellOnt 9415

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

In the Matter of a Plan of Compromise or Arrangement of SkyPower Corp.

Morawetz J.

Judgment: October 27, 2009
Docket: 09-8321-00CL

Counsel: Robert Chadwick, Fred Myers, Cathy Costa, for Applicant
G. Smith & C. Costa, for Applicant
M. McNaughton, for KPMG Inc.
R. Askew, for Cad-Fairview
J. Bunting, for Nordback
J. MacDonald, for HSH Nordback Syndicate
K. Mak, for Lehman Bros.
S. Laubman, for Sean Edison
M. Weinczoh, for Golden Assoc.
R. Stabile, for CIM Group
K. McEachern, for West L.B.

***Morawetz J.*:**

1 Counsel to the Applicant advised that two orders were being sought namely the stay extension to November 30/09 and the approveal of the sale of the Applicants Solar business to 1495359 Alberta ULC (the "Purchaser"), an affiliate of CIM Group, the Applicant's DIP lender. The motions were not opposed.

2 The portion of the motion relating to an authorization to draw an increased amount under the DIP facility did not proceed.

Stay Extension

3 A sales process was authorized on Aug 25/09. The sales process is progressing.

4 The third report of the Monitor provides a summary of the process to date. The Monitor has been actively involved in the process, in part due to the fact that the proposed transaction on the solar business is between the Applicant and an affiliate of the DIP lender.

5 I am satisfied having reviewed the record and having heard submission that the applicant continues to work in good faith and with due diligence such that the xtension to November 30, 2009 is awarded. The projected cash flow did contemplate on increase DIP facility.

6 The Court was advised that the Applicant has decided that the Development Expense of $3.318 million scheduled for the week of Nov 29/09 will not be incurred. In the event the situation changes, counsel advised that a further court application

will he made. Based in this representation I am satisfied that there should be sufficient availability in the DIP Facility to permit operations to continue during the extension period.

7 Accordingly an order shall issue in the form presented extends the stay to November 30, 2009.

Approval of Sale to Purchase

8 The details of the proposed transaction relating to the Solar Business are set out in the Adler affidavit and the Third Report of the Monitor.

9 In addition, the Applicant filed separately a copy of the Sale purchase Agreement which disclosed the purchase price. The Monitor also filed a 2 page summary of the various offer received for the sales Business. This summary also contained comments of the Monitor which composed the various offers and the reasons why the Monitor recommended approval of the transactions with the purchaser. Having reviewed the complete record and having heard submissions and upon being advised that the secured creditors support the proposed transaction.

10 I am satisfied that the transaction provides for a reasonable outcome for affected stakeholders in the circumstances. I am also satisfied that the parties have conducted the sales process in accordance with guidelines set forth in *Royal Bucks v. Soundarin*. I specifically note that, with one exception, all competing offers to that of the purchaser, were significantly lower. With respect to the one offer that was not substantially lower, I accept the Monitor's recommendation and that of the Applicant that the offer of the purchaser is preferable and should be accepted.

11 The proposed schedules to the agreement have been amended in non-material areas. These proposed changes are acceptable.

12 I am also satisfied that proposed amendments to the draft order relating to landlord issues and secured creditors issues are acceptable.

13 The proposed transaction with the purchaser for the Sales Business is approved. It goes without further comment that nothing in this endorsement is intended to impact on any parties rights with respect to any sale approval motion relating to other assets of the Applicant.

14 The Applicant has also requested that Sale Agreement be sealed on the basis that it contains sensitive price information, the disclosure of which could be harmful to the stakeholders. Likewise, the Monitor has requested that the 2 page summary of offers also be sealed for the same reason. I am satisfied that the disclosure of this informations could be harmful to the stakeholders. Having considered the "sealing tests" as set out ion the *Sierra Club of Canada v. Canada (Minister of Finance)* [2002 CarswellNat 822 (S.C.C.)] decision of the S.C.C., I am satisfied that these two documents should be sealed pending further order.

15 An order giving effect to the foregoing is to be issued in the form presented.

TAB 12

At para. 20 and 29

2018 ONSC 3678
Ontario Superior Court of Justice [Commercial List]

Dundee Oil and Gas Limited (Re)

2018 CarswellOnt 9960, 2018 ONSC 3678, 293 A.C.W.S. (3d) 475, 61 C.B.R. (6th) 68

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DUNDEE OIL & GAS LIMITED

S.F. Dunphy J.

Heard: June 11, 2018
Judgment: June 13, 2018
Docket: Toronto CV-18-591908-00CL

Counsel: E. Patrick Shea, B. Arnold, for Applicants
Grant Moffat, Rachel Bengino, for Monitor FTI Consulting Canada Inc.
J. Wallace, for purchaser Lagasco Inc.
S. Kromkamp, B. McPherson, for HMQ in right of Ontario
Aubrey E. Kauffman, for National Bank of Canada
M.P. Gottlieb, for Canadian Overseas Petroleum Limited

***S.F. Dunphy J.*:**

1 Dundee Oil and Gas Limited brought an application, supported by the Monitor, seeking approval of a sale of substantially all of its assets before me on May 23, 2018. I approved the proposed sale subject to requiring further evidence regarding the requested assignment of executory contracts under s. 11.3 of the *Companies' Creditors Arrangement Act* on June 11, 2018.

2 The matter came back before me on June 11, 2018 where, based upon the new evidence filed, I approved the transaction including the assignment of the executory contracts with reasons to follow. These are those reasons.

Background facts

3 Dundee entered into an Asset Purchase Agreement subject to court approval dated April 4, 2018. The sale was the result of a long process that began in August 2017 when Dundee was operating under the protection of the proposal provisions of the *Bankruptcy and Insolvency Act*. Those proceedings were continued under the CCAA on February 13, 2018.

4 Dundee's assets consist primarily of a large number of petroleum and natural gas leases as well as associated equipment, gathering pipelines, etc. Many of the assets are in fact leased or are otherwise the subject of contractual arrangements between Dundee and the owner of the affected land. Accordingly, a significant aspect of the proposed sale transaction was a requirement that an assignment of the underlying contracts be accomplished by an order pursuant to s. 11.3 of the CCAA.

5 On May 23, 2018 I indicated to the parties that I was satisfied with the necessity and advisability of ordering the requested relief and the process leading up to it save and except one aspect. In approving an assignment using the authority vested in me by s. 11.3 of the CCAA, I am required to inquire into a number of matters about which I found the record before me that day to be deficient. One landowner, Mr. Whittle, had made a formal objection and availed himself of the opportunity to express his concerns by telephone. He raised a number of objections to what he perceived to be concerns regarding the operational stability of the purchaser and their ability to see to eventual remediation obligations.

6 During the course of the hearing, the Applicant indicated that the purchaser was prepared to proceed without an order compelling the assignment of agreements between Dundee and Mr. Whittle. The Applicant's position was that the form of agreements used in the case of Mr. Whittle's contracts at least required no consent for a valid assignment. The Purchaser was prepared to run the risk of that assessment proving accurate in Mr. Whittle's case.

7 In the result, I adjourned the hearing until June 11, 2018 in order to grant the applicant additional time to address the concerns raised by me regarding s. 11.3 of the CCAA. I indicated that there were no other issues.

8 The specific concerns raised by me were these:

a. The operation of a natural resource extraction business such as an oil and gas business is one that entails a degree of environmental risk that, in the event of insolvency of the lessee/contract holder may visit the remediation or well-capping costs upon the landowner, a factor that makes the capacity and ability of the proposed assignee to manage those responsibilities a matter of concern when assessing the suitability of the proposed assignee; and

b. The affidavit material at the motion provided no solid evidence of the expected financial stability or durability of the purchaser post-closing, a rather critical factor to assess in considering the suitability of a proposed assignee.

9 Three things happened during the intervening delay, two planned one unexpected.

10 Firstly, the Monitor arranged to notify the landowners of the delay. No further objections were received from that front. Mr. Whittle maintained his objection despite the Applicant's concession that it was not seeking to compel assignment of his agreements.

11 Secondly, the Applicant filed a Supplementary Affidavit of Jane Lowrie, President and Chief Executive Officer of Lagasco Inc, the purchaser sworn June 5, 2018. This affidavit provided further details regarding the financial status of the purchaser.

12 Lastly, one of the "runner-up" bidders (Canadian Overseas Petroleum Limited) sent a letter to the Monitor on June 7, 2018 which letter COPL decided to send directly to the court on June 8, 2018 when the Monitor did not agree to bring the letter to my attention directly.

13 This intervention generated a flurry of reaction or overreaction, depending upon your point of view. It was, in the final analysis, a tempest in a teacup.

14 The Applicant and National Bank (who strongly supports the sale and, despite the sale, will end up with a significant shortfall on its secured claim) were understandably taken aback by a last-second threat to a transaction they have worked very hard to bring to the threshold of completion and that, from their perspective at least, is clearly the best option available. They asked me not to consider the submissions of a mere "bitter bidder".

15 They needn't have had so little faith in the editorial judgment of the court. COPL had experienced counsel who was well aware of the stiff currents flowing against any attempt of an unsuccessful bidder to gain standing to upset a transaction. There was no request for standing. The principal message of the communication was an opportunistic one perhaps, but not unfair. In light of the issues raised on May 23, 2018, COPL wanted to remind the Monitor and eventually the court that it remains ready willing and able to move forward with a transaction should Lagasco drop the ball. Of course, COPL did not resist ensuring that a few helpful bits of analysis/argument that might serve to persuade the court to think about moving in that direction also managed to find their way into the communication. It was not an attempt to introduce fresh evidence through the back door.

16 As I remarked during the hearing, I did not fall off the turnip truck yesterday. The motivation behind the communication was not cloaked nor was its simple object.

17 A few take-away admonitions from this:

a. Communications directly with the judge are to be discouraged generally;

b. Where necessary, such communications should be copied to the service list generally absent some very compelling reason not to do so; but

18 I would have preferred that this course of conduct had been followed here. The Monitor was copied and the integrity of the process was in no way compromised.

19 The substantive question before me was whether I ought to approve the provisions of the requested approval and vesting order that would compel the assignment of certain executory contracts under s. 11.3 of the CCAA.

20 Section 11.3 of the CCAA authorizes the court to assign "the rights and obligations of the company" to an agreement to any person specified in the court order that is willing to accept the assignment. Post-filing contracts, eligible financial contracts and collective agreements may not be assigned in this fashion.

21 There was no issue in this case with the technical aspects of the case. Proper notice was given. No prohibited categories of contracts were proposed to be assigned. The terms of the proposed assignment were designed to ensure the payment of cure costs would be made. A procedure for resolving any disputes about cure costs was designed to avoid compromising the rights of affected parties.

22 The issue to be decided was whether this was an appropriate case for me to exercise my jurisdiction to make the order under s. 11.3. Section 11.3 does not provide an exhaustive code of the factors for me to consider. Rather, s. 11.3(3) lists three factors that, among others, I am to consider:

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

23 In the present case, the Monitor has approved the proposed assignments and has made detailed and thoughtful submissions to me outlining the basis of that approval. The concerns expressed by me on May 23, 2018 did not fall on deaf ears.

24 The purchaser Lagasco is largely a shell company for the time being. It will own the business being purchased. The evidence before me indicates that substantially all of the purchase price is to be debt financed — partly through financing secured by the equipment to be purchased and party through a credit facility. On day one there will be little to no equity in the purchaser and the significant leverage will have to be serviced entirely from cash flow.

25 Taken in isolation, this factor raised grave concerns in my mind as to whether the assignee would be able to perform the obligations or whether, in light of the potential fragility of the assignee, it would be appropriate to compel the contract counterparties to accept the assignee.

26 I still have those concerns. I think it helpful that I should elaborate somewhat on what the concerns are and how I have resolved them. The Monitor's dispassionate and frank analysis of the issues has been very helpful in this process.

27 Section 11.3 of the CCAA is an extraordinary power. It permits the court to require counterparties to an executory contract to accept future performance from somebody they never agreed to deal with. But for s. 11.3 of the CCAA, a counterparty in the unfortunate position of having a bankrupt or insolvent counterpart might at least console themselves with the thought of soon recovering their freedom to deal with the subject-matter of the contract. Unlike creditors, the counterparty subjected to a non-consensual assignment will be required to deal with the credit-risk of an assignee post-insolvency and potentially for a long time. Creditors, on the other hand, will generally be in a position to take their lumps and turn the page.

28 Of course, insolvency is not always a catastrophe for such counterparties. Sometimes it is a godsend. Assets locked into long-term contracts at advantageous prices may be freed up to allow the counterparty to re-price to current market. In such cases, the creditors are at risk of seeing the debtor lose critical assets while the counterparty receives an unexpected windfall. The business and value of the debtor's assets may evaporate in the process — be it from one large contract lost or many smaller ones.

29 Bankruptcy and insolvency always involves a balancing of a number of such competing interests. Creditors, contract counterparties - all of these have rights arising under agreements with the debtor that are either actually compromised or at risk of being compromised by insolvency. The CCAA and BIA regimes are predicated on facilitating a pragmatic approach to minimize the damage arising from insolvency more than they are concerned to advance the interests of one stakeholder over another.

30 It seems to me that a fundamental condition precedent to requiring a contract counterpart to be locked into an involuntary assignment post-insolvency is that the court sanctioning the assignment is able to conclude that the assignee will, in the words of s. 11.3(3)(b) of the CCAA, "be able to perform the obligations". This does not imply iron-clad guarantees. It does not give license to the counterparty to demand the receipt of financial covenants or assurances that it did not previously enjoy under the contract it originally negotiated with the debtor.

31 A proposed purchaser starting life with close to 100% leverage gives this judge a considerable degree of heartburn when it comes to answering the question of whether the assignee is a person who will be able to perform the obligations. That concern is amplified when one adds the prospect of landowners being made liable for environmental remediation caused by lessees and others on their land.

32 So, if that is my concern, by what process have I allayed it?

33 Firstly, the financial information before me is that cash flow from these operations has been quite solid. Dundee's insolvency has not been a result of operating losses.

34 Secondly, while any projection of future business results will always be subject to a number of contingencies and imponderables outside of the control of the parties, the forecast reserves prepared by Deloitte in this case have been prepared under NI 51.01 which means at the very least that they have been prepared to reviewable standards of reasonableness. The forecasts, such as they are, justify the inference that there is a *reasonable basis* to conclude that the cash flow from the acquired assets will sustain operations and the acquisition debt. It will be a while before an equity cushion will be built though.

35 Thirdly, the purchaser has a plan to reduce G&A and operating costs to provide a further margin of safety and a level of institutional experience to make such a plan credible.

36 Fourthly, the environmental risk is mitigated somewhat by the fact that Ontario's regulatory model operates on a "pay as you play" basis requiring the building of reserves to handle capping costs as wells move past their expected lives. Dundee has had no trouble in the past funding capping expenses from operations and these expenses are accounted for in the cash flow forecasts used.

37 Finally, the MNR has agreed to a voluntary assignment of its leases (off-shore) while no on-shore landowners have seen fit to object to the proposed assignments despite quite adequate notice being given.

38 I must also be mindful that contract counterparties are not expected to *improve* their situation by reason of an assignment. A counterpart to an executory contract that is subject to involuntary assignment under s. 11.3 of the CCAA has managed to find itself contractually bound to an insolvent debtor notwithstanding whatever contractual safeguards were negotiated to avoid that outcome. The debtor is now insolvent. The desire to ensure the assignee is a reasonably fit and proper one should not morph into an exercise in patching up contracts previously negotiated by requiring financial covenants and safeguards never before required.

39 In all the circumstances, I was led to the conclusion that it would be appropriate to assign Dundee's rights and obligations to the purchaser and that the purchaser is someone who will be able to perform the obligations assigned. I have carefully reviewed

the proposed order and am satisfied that the method of ascertaining cure costs and, if needs be, resolving disputes arising about the quantum satisfies the requirements of s. 11.3(4) and s. 11.3(3)(c). There is a fair process to resolve disputes about quantum should they arise.

40 In the result, I approved the transaction and the form of Approval and Vesting Order presented to me subject to minor amendments made at the hearing.

Application granted.

TAB 13

At para. 46

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 16

Date: 20200526
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN

GOVERNMENT OF YUKON
as represented by the Minister of the Department of Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Madam Justice S.M. Duncan

Appearances:

John T. Porter and Laurie A. Henderson	Counsel for the Petitioner
No one appearing	Yukon Zinc Corporation
No one appearing	Jinduicheng Canada Resources Corporation Limited
H. Lance Williams	Counsel for Welichem Research General Partnership
John Sandrelli and Cindy Cheuk	Counsel for PricewaterhouseCoopers Inc.

REASONS FOR JUDGMENT
(Application by Welichem Opposing Partial Disclaimer)

INTRODUCTION

[1] Welichem Research General Partnership, (“Welichem”), is a secured creditor of the debtor company, Yukon Zinc Corporation (“YZC”). PricewaterhouseCoopers Inc.

(the "Receiver") was appointed by Court Order dated September 13, 2019, as the Receiver of YZC. Welichem brings an application for the following relief:

1) the Receiver's notice of partial disclaimer of the Master Lease is a nullity and of no force and effect;
2) the Receiver has affirmed the Master Lease and is bound by the entirety of its terms; and
3) the Receiver must pay to Welichem all amounts owing under the Master Lease from the date of the Receiver's appointment and ongoing.

BACKGROUND

[2] The background set out in *Yukon (Government of) v. Yukon Zinc Corporation*, 2020 YKSC 15, applies here, in addition to the following facts.

[3] On March 1, 2018, YZC sold 572 items, comprising most of the equipment, tools, vehicles and infrastructure at the Wolverine Mine (the "Mine") to Maynbridge Capital Inc. ("Maynbridge") for $5,060,000 (plus tax). Maynbridge and YZC entered into a Master Lease agreement also on March 1, 2018, for the lease of all 572 items.

[4] The term of the Maynbridge lease was six months, with a total rental payment of $331,603.30 (plus applicable taxes) to be prepaid on the commencement date. Interest was 13%. The lease contained a purchase option of $5,060,000 on or before September 2, 2018. It was secured by a general security agreement dated March 1, 2018, over all of YZC's present and after-acquired property, including the Master Lease items.

[5] On May 31, 2018, YZC and Welichem entered into an initial loan agreement in the amount of $1,000,000 as principal.

[6] On July 23, 2018, Welichem advanced a second $1,000,000 loan to YZC. YZC granted a General Security Agreement in favour of Welichem, dated July 23, 2018.

[7] On August 30, 2018, YZC and Welichem entered into a third loan agreement of $6,550,000 as principal. YZC granted a new General Security Agreement in favour of Welichem dated August 30, 2018.

[8] On September 3, 2018, YZC used the monies from the third loan to purchase from Maynbridge the 572 Master Lease items for the sum of $6,550,000, by exercising the purchase option under the lease agreement with Maynbridge.

[9] YZC sold these items to Welichem that same day, September 3, 2018, for $5,060,000. This reduced YZC's loan debt to Welichem to $3,490,000.

[10] Also on September 3, 2018, YZC and Welichem entered into a lease agreement (the "Master Lease"). Welichem leased to YZC all of the items purchased from Maynbridge and sold to Welichem. These are the same 572 Master Lease items that had been sold to Maynbridge and leased back to YZC, set out in Schedule A of the Master Lease (the "Master Lease Items"). The Master Lease and General Security Agreement with Welichem were in exactly the same form as those between YZC and Maynbridge.

[11] The terms of the Master Lease with Welichem include the following:

i) Rent of $338,430.82 plus taxes for each three-month period. Payment each month of $110,000.

ii) Interest at 25% per annum, increasing to 50% on default.

iii) Option to purchase the Master Lease Items for $5,060,000 plus taxes.

iv) YZC to grant security against all of its present and after-acquired property.

v) YZC to keep the items in good repair, condition and mechanical working order.

vi) YZC to deliver the Master Lease Items at its expense to a location specified by Welichem at the end of the term of the Master Lease, whether by expiry or termination.

vii) YZC required to insure the Master Lease Items against theft, loss or destruction.

[12] Welichem's interests as a secured creditor and as a lessor were registered and perfected under the Yukon *Personal Property Security Act*, R.S.Y. 2002, c. 169, and the British Columbia *Personal Property Security Act*, R.S.B.C. 1996, c. 359, on September 26, 2018.

[13] Welichem became the first-ranking secured creditor of the assets of YZC. They also held a first-ranking charge with the leasehold interest, as a result of subordination agreements with other parties with registered personal property security interests against YZC: namely, Jinduicheng Canada Resources Corporation Limited ("JDC Canada"), Jinduicheng Molybdenum Group Co. Ltd., Aihua Dang, Jingyou Lu, and Yu Luo.

[14] A reserve for the full three-month payment (until December 2018) was retained by Welichem from the purchase price. After December 2018, YZC made no further payments. Nor did it make repayments on the outstanding amount of the loan of $3,490,000. By December 1, 2018, Welichem began charging 50% interest, and at the date of the receivership, it claimed the outstanding amount under the loan agreement was $6,820,000.

[15] Since September 2019, the Receiver has been responsible for ensuring the care and maintenance at the Mine is carried out, and the site is stabilized. The Receiver is also developing a sale and investment solicitation plan ("SISP").

[16] When the Receiver initially entered the Mine it found the following:

i) The site crew consisted of two two-person teams for a two-week shift, the minimum number allowed for safety reasons. One shift did not have an individual with supervisor certification;

ii) The employees had been ready to leave the Mine site because they were not being paid their wages and they had safety concerns;

iii) The majority of the heavy equipment at the Mine was in need of repairs and subject to 10 outstanding work orders from YWCHSB;

iv) The Mine was in a state of permanent closure under the Water Licence; and a state of temporary closure under the Mining Licence; and

v) No lease payments had been made by YZC to Welichem since December 2018 and there was no insurance on any of the Master Lease Items.

[17] The Receiver has identified 79 of the 572 Master Lease Items that it views as essential for the continuing and necessary care and maintenance and environmental remediation of the Mine (the "Essential Items"). These items include trucks - pick-ups, dump trucks, water trucks, vacuum trucks - trailers for staff accommodations, water treatment plant, fuel tanks, glycol storage tanks, generators, graders, excavators, skid steers, quad, water compressor, incinerator, compactor, frost fighter, scissor lift, pumps and a transformer.

[18] The Receiver reported that without the Essential Items, it has no means to control water on site, no ability to generate electricity for Mine facilities, no equipment to maintain the road or airstrip, no vehicles and no living accommodations for staff to carry out care and maintenance.

[19] As of December 31, 2019, the Receiver incurred over $200,000 to repair Essential Items to a workable operating standard.

[20] After several months of unsuccessful negotiations with Welichem, the Receiver issued a notice of partial disclaimer to Welichem on November 8, 2019. It provided that the Receiver intended to disclaim or resiliate (defined below) the Master Lease but was preserving the Receiver's right to use the Essential Items, for a monthly payment of $13,500 as compensation for their use. The Receiver issued this notice after considering a number of factors, including the proportion of Essential Items in relation to all of the Master Lease Items; the feasibility of renting or purchasing alternate equipment; the amount spent by the Receiver on repairs to the Essential Items; and the projected wear and tear for use of the items during receivership.

ISSUES

[21] The issues in this application are:

i) whether the Receiver has the authority to use the Essential Items to carry out its duties (i.e. partially disclaim the Master Lease);

ii) if so, whether that authority was exercised properly in accordance with the Receiver's duties; and

iii) whether the use of these items constitutes an affirmation of the Master Lease, requiring the Receiver to make full payments to Welichem from the date of its appointment and ongoing.

POSITIONS OF THE PARTIES

[22] Welichem's grounds of objection are: first, at law the Receiver has a binary choice - affirm the entire contract or disclaim the entire contract. Second, the partial disclaimer was an attempt to alter unilaterally the material terms of the lease. This was beyond the Receiver's authority and beyond the terms of the Court Order appointing them as Receiver. The Court has no authority or jurisdiction to impose an agreement with new terms on the parties. Third, s. 243(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*"), does not include the ability to disregard property and civil rights, in this case Welichem's ownership of the Master Lease Items. This is reinforced by s. 72(1) of the *BIA*, which says the provisions of the *BIA* shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with the *BIA*. Finally, the Court's inherent jurisdiction does not allow it to alter the lease agreement. Alternatively, if inherent jurisdiction does apply, the Court should not exercise that inherent jurisdiction, given its limits, including jurisprudence that says it should be used sparingly and in exceptional circumstances. This is not one of those circumstances because alteration of the lease terms as set out in the partial disclaimer would prejudice Welichem.

[23] The Receiver agrees that generally a contract is disclaimed in its entirety. However, there is no legal authority prohibiting a partial disclaimer. The Receivership

Order contains several provisions authorizing its actions. The powers provided by s. 243 of the *BIA*, or s. 26 of the *Judicature Act*, R.S.Y. 2002, c.128, are broad enough to include this action in these circumstances, and the Court has discretion provided by s. 243 of the *BIA* and its judicial interpretation. Alternatively, the Receiver relies on Bennett's text on Receivership in which he writes "in the proper case, the receiver may move before the court for an order to breach **or vary** an onerous contract including a lease of premises for equipment" [emphasis added] (Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto, Canada: Carswell, 2011) at p. 436 ("*Bennett on Receiverships*"). The Receiver's duties include acting honestly, fairly, in good faith, with transparency and in a commercially reasonable manner, all of which were fulfilled here. More specifically, the Receiver has a duty to protect all stakeholders, including Welichem, in the context of an urgent situation. The Receiver carefully considered its options, exercised its duties appropriately in the circumstances and did not act arbitrarily in issuing the notice of partial disclaimer.

BRIEF CONCLUSION

[24] The Court has the authority to authorize the Receiver to use the Essential Items it identified as necessary in order to continue the care and maintenance and environmental remediation, pursuant to the statutory discretion in s. 243(1)(c) of the BIA or in s. 26 of the Judicature Act. The Receiver has not affirmed the contract by its actions and is not required to pay the monthly lease amounts to Welichem, with the exception of the $13,500 per month for the use of the Essential Items.

ANALYSIS

The context

[25] "The nature of insolvency is highly dynamic and the complexity of a firm's financial distress means that legal rules are not fashioned to meet every contingency." (Janis P. Sarra, *Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters* (2007), 3 ANNREVINSOLV at 9 (WL) ("*Examination of Statutory Interpretation*")).

[26] The actions of the Receiver must be assessed in the context of this case. That context is the Receiver's appointment in September 2019 at a time when the Mine had not been operating for over four years; the Mine had flooded in 2017 and its condition was continuing to deteriorate; the regulator, Government of Yukon ("Yukon") as represented by the Department of Energy, Mines and Resources, had entered the property to manage environmental and safety issues in October 2018; and the Receiver's mandate was to stabilize the Mine and manage a process to transition the site to a responsible owner, if possible.

[27] The context also includes the involvement of Welichem for the first time in May 2018, when the Mine was in the deteriorated state described above. In addition, YZC had been successfully prosecuted twice for breaching its licence conditions; and it owed $25,000,000 in security to Yukon as of May 2018.

Definition of Disclaim, Resiliate and General Principles Applicable to Receivers Disclaiming Contracts or Leases

[28] To disclaim means to renounce or repudiate a legal claim or right. This means that the non-repudiating party is no longer obligated to perform the contract. To resile

means to draw-back from an agreement or contract (Bryan A. Garner ed. in chief, *Black's Law Dictionary*, (St. Paul, MN: Thomson Reuters, 2009) sub verbo "resile").

[29] In the insolvency context, the receiver's ability to disclaim or affirm contracts of the debtor is permitted by the operation of s. 243(1) of the *BIA*, the order appointing a receiver, and the common law. Where a receiver affirms a contract, it will be subject to its terms and liable for its performance (*Bennett on Receiverships*, at pp. 435-436). Where a receiver disclaims a contract, it will not be personally liable for its performance.

[30] The common law has confirmed a receiver's authority to disclaim a contract and sets out the principles that apply to a receiver in making its decision to do so. The decision of a receiver about the future of the contracts of the debtor is made after they analyze the specific fact situation before them, guided by their general duties set out in the *BIA*, applicable principles at common law and the terms of the order appointing them.

[31] The general duties of a receiver include acting fairly, honestly and in good faith and dealing with the property of the debtor in a commercially reasonable manner. A receiver acts in a fiduciary capacity with respect to all parties, including the debtor, and to all classes of creditors: *Toronto-Dominion Bank v. Crosswinds Golf & Country Club Ltd.*, [2002] O.J. No. 1398 (O.N.S.C.), at para. 15; *Philips Manufacturing Ltd., Re*, [1992] B.C.W.L.D. 1683 (B.C.C.A.), at para. 17, quoted in *Forjay Management Ltd. v. 0981478 B.C. Ltd.*, 2018 BCSC 527, at para. 21. It is trite law that a court-appointed receiver is an officer of the court and is not beholden to the secured creditor who caused its appointment (*Forjay*, at para. 21). It has a duty to the court to act in accordance with the

terms of the order and the law (*Bayhold Financial Corp. v. Clarkson Co.*, [1991] N.S.J. No. 488 (N.S.S.C.), at para. 30).

[32] The British Columbia Court of Appeal, in the case of *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, provided a thorough review of the common law in both England and Canada as well as the statutory authorities giving power to trustees to disclaim contracts. The Court concluded at para. 31:

> In view of the position in the English authorities pre-dating the English Act of 1869, there is a common-law power in trustees to disclaim executory contracts. This power has been relied on for many years by trustees, and in the absence of a clear statutory provision overriding the common law, in my view trustees should have this power to assist them fulfill the duties of their office.

[33] Similar conclusions and guidance were provided by the Nova Scotia Supreme Court Appeal Division in *Bayhold Financial Corp. v. Clarkson Co*., [1991] N.S.J. No. 488, at para. 53, quoting *Receiverships* by Frank Bennett (*Toronto: Carswell, 1985)*:

> ... In a court-appointed receivership, the receiver is not bound by existing contracts made by the debtor. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[34] In *bcIMC Construction Fund Corporation v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, the Court noted that if the contracts were not disclaimed, the party seeking to uphold the contract would receive a significant preference not available to other creditors (para. 96). The receiver must consider whether failure to disclaim might result in an unjustified preference in favour of one stakeholder (*Forjay*, para. 41).

[35] The British Columbia Supreme Court in *Pope & Talbot Ltd*., Re, 2009 BCSC 17, at para. 17, described the process undertaken by a receiver in deciding what to do about the debtor's contracts:

> Typically, after a receiver is appointed, it will assess the various contracts under which goods or services are being supplied to the debtor and make a decision as to the ones it wishes to continue. Its decision is usually prompted by post-appointment deliveries of goods or services under various contracts. The decision to be made at that point by the receiver is whether it wishes to affirm the particular contract and continue receiving the supply or, alternatively whether it wishes to disclaim the contract, halt the supply and leave the contracting party with a claim provable in the insolvency proceeding.

[36] It is acknowledged by the parties and I accept that a partial disclaimer or variance of a contract by a receiver is at the very least unusual. Welichem argues there is no legal authority allowing it and that if it were permitted, receivers would be trying to do it all the time.

[37] The first question is whether there is authority from the Receiver's Order, the statute and the law sufficient to support the Receiver's actions in this case.

i) Does the Receiver Have Authority to Use the Essential Items

a) Receiver's Order

[38] The Receiver derives its power and authority from the Court Order made under the *BIA* appointing it as Receiver, dated September 13, 2019. The Order includes at para. 3 that the Receiver is:

> … empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
>
> …

> (c) to manage, operate and carry on the business of the Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtor,
>
> …
>
> (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtor;
>
> …
>
> (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if considered necessary or appropriate by the Receiver, in the name of the Debtor;
>
> …
>
> (s) to the extent authorized and approved by Yukon, to carry out care and maintenance activities with respect to the Mine and to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations; and
>
> (t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

[39] Welichem argues that the wording in s. 3(c) of the Order supports its view that the Receiver has only a binary choice available to it. A partial disclaimer or variance would require the wording "cease to perform all or part of the contract", similar to the phrase "cease to carry on all or part of the business."

[40] This argument ignores ss. (s) and (t) of the Order, giving the Receiver general authority to take steps reasonably incidental to its powers and statutory obligations. It also ignores ss. (i) and (p) which set out the Receiver's powers to undertake

environmental and workers' health and safety assessments, and obtain any regulatory approvals or permits it considers appropriate or necessary. These sections are relevant to ensuring proper care and maintenance and environmental remediation are continued in the context of an unstable mine site.

[41] Section 3(c) which includes the Receiver's power to cease to carry on all or part of the business is also relevant to the use of Essential Items. The business of the company is the operation of a mine. The Receiver is not carrying on that business; it is carrying on care and maintenance and remediation in order to preserve the assets and allow the Mine to become operational in future. Most of the equipment and infrastructure covered by the Master Lease is for the purpose of carrying out the operation of mining. The Receiver has specifically identified the specific equipment and infrastructure it needs in order to carry on the work it is required to do - i.e. care and maintenance and environmental remediation. This is consistent with their powers as set out in s. 3(c).

[42] The Receiver's general powers under the Order include protecting and preserving the Property, defined in the Order as the assets, undertakings and property, including all proceeds, of the Debtor. The Receiver's responsibilities for the Property must be understood in the context of the definition of property set out in s. 2 of the *BIA*, which includes "**obligations arising out of or incidental to property"**. In this case the obligations arising out of or incidental to the Property necessarily include carrying out the care and maintenance and environmental remediation at the Mine. The Essential Items are necessary to carry out that work.

b) Statute

[43] The determination of the Receiver's authority to use the Essential Items and the Court's authority to permit it or not requires an interpretation of s. 243(1) of the *BIA* and s. 26 of the *Judicature Act*.

[44] The Receivership Order addresses what powers the Court has granted, based on the powers the Court may grant under the statute. These statutory powers found primarily in s. 243(1) of the *BIA* are:

> ... a Court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:
>
> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) **take any other action that the court considers advisable.** [emphasis added]

[45] Section 26(1) of the *Judicature Act* provides:

> 26(1) A *mandamus* or an injunction may be granted or a **receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made**, and that order may be made either unconditionally or **on any terms and conditions the Court thinks just.** [emphasis added]

[46] The modern rule of statutory interpretation is: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd

ed. 1983), at p. 87). It is a useful tool for construing legislation that grants broad powers to courts in general terms. By insisting on a purposive analysis, it helps to establish the scope of powers and discretion conferred by statutes on public officials, and on the court.

[47] The Ontario Court of Appeal in the decision of *Third Eye Capital Corporation v. Resources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508 ("*Third Eye*"), reviewed the history of s. 243(1) of the *BIA*, and in particular the scope of s. 243(1)(c). The Court noted Parliament imported the same broad general wording from s. 47(2)(c) of the *BIA* which was enacted in 1992 – that is, "take such other action that the court considers advisable." The broad powers provided to the interim receivers by courts pursuant to s. 47(2) of the *BIA* had been endorsed by judicial interpretation of the section. Justice Farley in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.*, [1994] O.J. No. 953 (O.N.C.J.) ("*Curragh*"), found that s. 47(2) of the *BIA* permitted the Ontario court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. His reasoning was as follows at para. 22:

> ... It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what **"justice dictates" but also what "practicality demands."** It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability. ...[emphasis added]

[48] The Court of Appeal in *Third Eye* went on to interpret Justice Farley's comment as follows at para. 53:

> Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[49] The Jackson and Sarra hierarchy referred to by the Court of Appeal is from the paper *Examination of Statutory Interpretation* referenced at para. 25. The authors' thesis was that courts should first engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation to reveal that authority. Before accessing other judicial tools, courts should exercise their authority under the statute. Statutory interpretation may reveal a discretion, and the courts may determine its extent; or statutory interpretation may reveal a gap. If there is a gap, the common law may permit it to be filled, and the judge has discretion as to whether they invoke authority to fill the gap. The final step in the hierarchy is the exercise of inherent jurisdiction. It may fill the gap and the judge still has discretion to invoke the authority of inherent jurisdiction or not.

[50] Applying this hierarchy to Justice Farley's conclusion in *Curragh* that the Court can enlist the Receiver to do what justice dictates and practicality demands, the Court of Appeal in *Third Eye* observed that Justice Farley was exercising his discretion under the statute, not the court's inherent jurisdiction.

[51] The Court of Appeal noted that when Parliament enacted s. 243 of the *BIA*, it was evident courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates"

and "practicality demands" (para. 57). Thus they conclude that this meaning was imported into s. 243.

[52] The Court of Appeal then quoted from Professor Wood in his text *Bankruptcy and Insolvency Law* (Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at p. 510, who concluded the following about Parliament's intention for receivers appointed under s. 243:

> The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [emphasis already added] (para. 58)

[53] The Court of Appeal stated the importance in interpreting s. 243 of reviewing the purpose of receiverships generally. This is part of understanding the scheme and object of the *BIA*. The purpose of a receivership is to:

> "enhance and facilitate the preservation and realization of the assets for the benefit of creditors" (*Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Park Ltd*. [1995] O.J. No. 1482 (O.N.C.J.), at para. 18), … generally achieved through the liquidation of the debtor's assets: Wood, at p. 515. … The receiver's primary task is "to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust CO. v. 1117387 Ontario Inc*., 2010 ONCA 340, at para. 77". (para. 73)

[54] Certainty of equitable distribution of a debtor's assets among creditors is also important. Further, the assets of an insolvent business must be managed responsibly, in compliance with regulatory requirements, in order to preserve the assets, the reputation of the insolvent and to maximize the value for creditors.

[55] The question becomes whether the authority provided by the statute is sufficient to allow the Receiver to use the Essential Items in this legal and factual context. Case law is of assistance in this assessment.

[56] Welichem relies on the case law in support of its argument that the Receiver has a binary choice only - to affirm the whole lease or disclaim the whole lease - saying this is consistent with the law of contract. Most of the cases referred to are in the context of supply contracts, not leases.

[57] Welichem refers to one case from 1896, *Re Lord and Fullerton's Contract*, [1896] 1 Ch. 228, in which the Court held that partial disclaimer was not permitted. This 124-year-old English case was decided in the context of a contested probate of a will, not in the context of an insolvency or the application of the *BIA*. The testator had appointed trustees, one of whom was the executor, to manage and distribute all of his property, which was located both in England and overseas. The executor disclaimed all the property in England, but not the testator's overseas property. In holding that the disclaimer was not valid, the Court noted that it was the testator's intention to have one trustee manage and deal with all of his property, regardless of its location.

[58] I agree with the Receiver this case has no applicability here because of its age, different context and facts.

[59] Welichem further argues that the Receiver's actions disregard Welichem's ownership of the equipment and cannot be justified by s. 243(1)(c) because of its remedial purpose and consequent limits. Welichem relies in part on the comments of the Nova Scotia Supreme Court in *Railside Developments Ltd., Re*, 2010 NSSC 13, at paras. 80 and 88, saying that the words of s. 243(1)(c) of the *BIA* are broad, but their

focus is remedial, since that section of the statute creates the remedy of receivership. The scope of this section cannot extend to affect existing property and civil rights, to the extent they are not overridden by the *BIA*. This is further supported by the wording in s. 72(1) of the *BIA* which states that the provisions of the *BIA* shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act.

[60] *Railside* dealt with whether s. 243(1)(b) of the *BIA* allowed the Receiver to register condominium units without consent of the owners required pursuant to s. 11(1)(b) of the Ontario *Condominium Act*, S.O. 1998, c. 19. Their justification was that selling individual units rather than a single complex would maximize value for stakeholders. The Court had to analyze whether there was an operational conflict between the provincial statute and the *BIA* that prevented s. 11(1)(b) from operating when s. 243 applies. The Court found that there was no operational conflict and held that the Receiver had to obtain consent of the lien holders in order to register the condominium units.

[61] In *Railside*, the focus was the ultimate goal of maximizing value of the condominium assets. In achieving that goal there was the potential for conflict with the legislative requirement to obtain consent (which may be withheld) of the owners to sell. In the case at bar, while maximizing value for all the creditors is the ultimate objective, the use of the Essential Items is not in conflict with that goal. The use of the Essential Items is necessary in order to preserve all of the debtor's assets at the Mine, and those related to those assets, and to enhance their value beyond their current state, in turn maximizing the value for all creditors. Unless the Receiver continues to carry out the

care and maintenance and environmental remediation, there is a risk of significant compromise to the debtor's property.

[62] The Receiver's actions are not an incursion on the property and civil rights of Welichem. The Receiver has paid and continues to pay Welichem monthly for their use of the Essential Items. It has invested over $200,000 in repairs (as of the date of this application) to bring the equipment to operational standards. This is more than Welichem received under its lease with YZC.

[63] Welichem argues it is prejudiced by the Receiver's attempt to retain the benefits of the Master Lease without the obligations. Welichem notes the Receiver has refused to pay insurance for the Essential Items; the use is causing wear and tear and subsequent depreciation of the equipment; and the compensation amounts are inadequate and arbitrary.

[64] The Receiver must act to benefit all creditors, not just Welichem, in preserving the debtor's assets by carrying on the necessary care and maintenance and environmental remediation. Welichem's interests are limited to preserving its position as first secured creditor and maximizing value for itself. While the Receiver owes a fiduciary duty to Welichem, it also owes fiduciary duties to the other stakeholders - Yukon, the unsecured creditors, the public, including affected First Nations. It must balance the interests of all.

[65] In my view, the unique circumstances of this case call for the application of the interpretation of s. 243(1)(c) of the *BIA* first set out in *Curragh*, a case with underlying facts similar to this one. *Curragh* was an insolvent lead-zinc-silver mine, albeit a much larger one than the Wolverine Mine, in Faro, Yukon. As noted above, Justice Farley

described the condition of insolvency as carrying its own internal seeds of chaos, unpredictability and instability, thus allowing the Court to enlist the receiver to do what justice dictates and practicality demands (*Curragh*, at para. 22).

[66] In the case at bar, the ongoing environmental instability at the Mine site; the Mine's remote location; and the chaotic circumstances that existed at the time of the Receiver's appointment, including employees who were on the verge of abandoning the site, unusable equipment due to neglect, workers' health and safety concerns, and the absence of sufficient funding to continue the most basic care and maintenance are all factors that distinguish this case from the others that are relied on by Welichem. Welichem's initial involvement with the Mine in May 2018, given the Mine's deteriorated and financially unstable state at that time raises questions about its commercial reasonability. The Receiver owes duties not only to Welichem but also to the other creditors. These are factors to be considered in determining what justice dictates and practicality demands.

[67] Topolniski J. in *Residential Warranty Co. of Canada Inc., Re*, 2006 ABQB 236, remarked that solutions to *BIA* issues will require judges to consider the realities of commerce and business efficacy:

> 27 Solutions to *BIA* concerns require consideration of the realities of commerce and business efficacy. A strictly legalistic approach is unhelpful in that regard. What is called for is a pragmatic problem-solving approach which is flexible enough to deal with unanticipated problems, often on a case-by-case basis. ...

[68] Here, the pragmatic problem-solving approach is to allow the Receiver to use the Essential Items, only 12.4% of the Master Lease Items, in order to ensure the care and maintenance and environmental remediation can continue.

[69] For the above reasons, I find there is authority under s. 243(1)(c) of the *BIA* for the Court to allow the Receiver to use the Essential Items for the purpose of carrying out necessary care and maintenance and environmental remediation.

[70] This analysis applies equally to the interpretation of s. 26 of the *Judicature Act*, which also contains broad language. Although no cases were discussed in this application that are similar to this one in which the Court interpreted and applied this section directly, the same principles apply if the *Judicature Act* were relied upon.

ii) Did the Receiver Exercise its Authority in Compliance with its Duties

[71] Upon its appointment in September 2019, the Receiver entered the Mine and did a full inventory of the items. The Receiver gave careful consideration to options available to it related to the existing lease in carrying out its mandate and the factors affecting those options. These factors included:

i) During the first three months, the Receiver had numerous discussions with Welichem about short-term rental of the Essential Items and long-term involvement of the Master Lease Items in the SISP. They were ultimately unsuccessful in achieving any agreement.

ii) The basic care and maintenance activities and necessary water treatment could not be carried out without the use of the Essential Items. Specifically the Receiver:

a) Could not control the water on site (ground water, surface water, underground water, water in the tailings storage facility);

b) Could not generate power for electricity for the site;

c) Could not maintain the 26 km access road or airstrip; and

d) Would not be able to have vehicles or living accommodations for staff to carry out care and maintenance activities.

iii) The Receiver considered the monthly lease payments of $110,000 to be high, given the poor or unusable condition of many of the Master Lease Items, due to the non-operation of the Mine and the restricted funding since 2015. Examples of the neglected items included:

a) All but one of the trucks was locked out by the Yukon Workers Compensation Health and Safety Board ("YWCHSB");

b) Only two of ten power generators were operating and on inspection one of the two was found to be a fire hazard;

c) The heat trace system was malfunctioning causing the pipes to freeze;

d) The YWCHSB had issued ten orders related to the safety certification of vehicles; the condition of emergency transport vehicles; the absence of emergency response plan; the inadequacy of fire suppression equipment; as well as stop work orders on various pieces of Master Lease equipment. The Receiver addressed all of these orders except for repairs on non-essential Master Lease Items.

iv) The Receiver considered the cost of insurance of $150,000 to be inordinately high, especially given the Receiver's use of only 79 items. It noted that insurance had not been maintained by YZC over Welichem's objections. The current continuous presence of more employees and

contractors on site, the remote location of the Mine and therefore the lower risk of access by others to the items were considered.

v) The Receiver was concerned about the potentially high cost of the end of lease requirement to return all Master Lease Items to a place of Welichem's choosing.

vi) The Receiver considered the cost and time to replace these Essential Items to be unreasonable given the remote location of the Mine and the need to continue the care and maintenance and remediation activities immediately. There was real potential for environmental damage and consequent risks to public health and safety if it became necessary to wait for replacement equipment to arrive.

[72] The Receiver calculated the $13,500 per month cost for the use of the 79 Essential Items on the basis of their percentage of the 572 Master Lease Items, as well as the percentage of their value based on the December 2017 appraisal. These Essential Items were only 12.4% of the Master Lease Items. The Receiver has made monthly payments in this amount to Welichem, since December 2019.

[73] In my view, the Receiver has not acted arbitrarily. It has exercised proper discretion in the circumstances. It carefully considered its options, was transparent about its intentions, and attempted to negotiate a mutually acceptable agreement with Welichem. It has been honest and fair. The Receiver provided legitimate reasons showing the onerous nature of the lease terms in the circumstances. In exercising its duty to maximize value for all of its stakeholders, the Receiver acted in a commercially reasonable manner in doing so.

[74] The ongoing deterioration of the condition of the Mine and the need for the Receiver to act quickly in order to prevent an environmental disaster were driving forces behind the Receiver's actions. Although not specifically contemplated in the legislation or precedents to date, the Receiver's carefully considered and fairly implemented decision to use the Essential Items in order to continue with the care and maintenance and remediation of the Mine site and to compensate Welichem for their use was justifiable and appropriate under the authority provided in s. 243(1) of the *BIA*.

[75] *Bennett on Receiverships* states at p. 436, "In the proper case, the receiver may move before the court for an order to break **or vary** an onerous or material contract including a lease of premises or an equipment lease where the payments are significant … [T]he receiver must act reasonably and exercise good business sense" in doing so [emphasis added].

[76] It is significant the term vary is used in the text in a discussion about leases of premises or equipment. The other cases referred to for the principles applicable to disclaimer are in the context of supply contracts, not leases, and vary is not mentioned in that context. Bennett also says "in the proper case" indicating the limits of its use.

[77] There is a significant body of law and legal principles explaining the meaning of 'vary' in contract law. It is not necessary here to pursue an analysis of that in this case because of the unique circumstances here.

[78] I view this text excerpt as general support for the Receiver's appropriate exercise of authority under s. 243(1) of the BIA in the proper case, such as this one, to use the Essential Items of the Master Lease.

[79] As noted at the hearing of this application by counsel for the Receiver, and explained above, it is not necessary to resort to the inherent jurisdiction of the Court in this circumstance as sufficient discretion is provided by the statute to both the Receiver and the Court.

iii) Did the Receiver Affirm the Lease, Making it Responsible for Lease Payments?

[80] Welichem argues that by using the Essential Items, the Receiver has affirmed the contract and should pay the entire monthly lease amounts and comply with all of the lease obligations.

[81] In order to fix a receiver with the burden of making payments under a contract existing at the time of the receiver's appointment, there must be an affirmation of that contract by the receiver, either expressly or by implication (*Pope & Talbot ltd.*, at para. 15).

[82] In the case at bar, the Receiver has not affirmed the contract by using only the Essential Items in the context of an urgent continuation of care and maintenance and environmental remediation. The result would be absurd in that if this amounted to an affirmation, the Receiver would be required to pay the full amount of $110,000 per month to Welichem, for the use of only 79 of the 572 items, after spending over $200,000 in repairs on those 79 items. This result also ignores the unique factual circumstances in this case and consideration by the Receiver of all the options available.

[83] The Receiver is not required to pay all amounts owing to Welichem under the Master Lease or comply with all of its obligations as a result.

CONCLUSION

[84] I find that the use by the Receiver of the Essential Items is a disclaimer of the Master Lease and a permissible variation for the reason that its terms are onerous and not commercially reasonable in the circumstances. The Receiver properly exercised its authority under s. 243(1) of the *BIA* and/or s. 26 of the *Judicature Act* to do so.

_____
DUNCAN J.

TAB 14

2010 SCC 60
Supreme Court of Canada

Ted Leroy Trucking [Century Services] Ltd., Re

2010 CarswellBC 3419, 2010 CarswellBC 3420, 2010 SCC 60, [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, [2010] S.C.J. No. 60, [2011] 2 W.W.R. 383, [2011] B.C.W.L.D. 533, [2011] B.C.W.L.D. 534, 12 B.C.L.R. (5th) 1, 196 A.C.W.S. (3d) 27, 2011 D.T.C. 5006 (Eng.), 2011 G.T.C. 2006 (Eng.), 296 B.C.A.C. 1, 326 D.L.R. (4th) 577, 409 N.R. 201, 503 W.A.C. 1, 72 C.B.R. (5th) 170, J.E. 2011-5

Century Services Inc. (Appellant) and Attorney General of Canada on behalf of Her Majesty The Queen in Right of Canada (Respondent)

Deschamps J., McLachlin C.J.C., Binnie, LeBel, Fish, Abella, Charron, Rothstein, Cromwell JJ.

Heard: May 11, 2010
Judgment: December 16, 2010
Docket: 33239

Proceedings: reversing *Ted Leroy Trucking Ltd., Re* (2009), 2009 CarswellBC 1195, 2009 G.T.C. 2020 (Eng.), 2009 BCCA 205, 270 B.C.A.C. 167, 454 W.A.C. 167, [2009] 12 W.W.R. 684, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.); reversing *Ted Leroy Trucking Ltd., Re* (2008), 2008 CarswellBC 2895, 2008 BCSC 1805, [2008] G.S.T.C. 221, 2009 G.T.C. 2011 (Eng.) (B.C. S.C. [In Chambers])

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***Deschamps J.*:**

1 For the first time this Court is called upon to directly interpret the provisions of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). In that respect, two questions are raised. The first requires reconciliation of provisions of the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*"), which lower courts have held to be in conflict with one another. The second concerns the scope of a court's discretion when supervising reorganization. The relevant statutory provisions are reproduced in the Appendix. On the first question, having considered the evolution of Crown priorities in the context of insolvency and the wording of the various statutes creating Crown priorities, I conclude that it is the *CCAA* and not the *ETA* that provides the rule. On the second question, I conclude that the broad discretionary jurisdiction conferred on the supervising judge must be interpreted having regard to the remedial nature of the *CCAA* and insolvency legislation generally. Consequently, the court had the discretion to partially lift a stay of proceedings to allow the debtor to make an assignment under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). I would allow the appeal.

1. Facts and Decisions of the Courts Below

2 Ted LeRoy Trucking Ltd. ("LeRoy Trucking") commenced proceedings under the *CCAA* in the Supreme Court of British Columbia on December 13, 2007, obtaining a stay of proceedings with a view to reorganizing its financial affairs. LeRoy Trucking sold certain redundant assets as authorized by the order.

3 Amongst the debts owed by LeRoy Trucking was an amount for Goods and Services Tax ("GST") collected but unremitted to the Crown. The *ETA* creates a deemed trust in favour of the Crown for amounts collected in respect of GST. The deemed trust extends to any property or proceeds held by the person collecting GST and any property of that person held by a secured creditor, requiring that property to be paid to the Crown in priority to all security interests. The *ETA* provides that the deemed trust operates

despite any other enactment of Canada except the *BIA*. However, the *CCAA* also provides that subject to certain exceptions, none of which mentions GST, deemed trusts in favour of the Crown do not operate under the *CCAA*. Accordingly, under the *CCAA* the Crown ranks as an unsecured creditor in respect of GST. Nonetheless, at the time LeRoy Trucking commenced *CCAA* proceedings the leading line of jurisprudence held that the *ETA* took precedence over the *CCAA* such that the Crown enjoyed priority for GST claims under the *CCAA*, even though it would have lost that same priority under the *BIA*. The *CCAA* underwent substantial amendments in 2005 in which some of the provisions at issue in this appeal were renumbered and reformulated (S.C. 2005, c. 47). However, these amendments only came into force on September 18, 2009. I will refer to the amended provisions only where relevant.

4 On April 29, 2008, Brenner C.J.S.C., in the context of the *CCAA* proceedings, approved a payment not exceeding $5 million, the proceeds of redundant asset sales, to Century Services, the debtor's major secured creditor. LeRoy Trucking proposed to hold back an amount equal to the GST monies collected but unremitted to the Crown and place it in the Monitor's trust account until the outcome of the reorganization was known. In order to maintain the *status quo* while the success of the reorganization was uncertain, Brenner C.J.S.C. agreed to the proposal and ordered that an amount of $305,202.30 be held by the Monitor in its trust account.

5 On September 3, 2008, having concluded that reorganization was not possible, LeRoy Trucking sought leave to make an assignment in bankruptcy under the *BIA*. The Crown sought an order that the GST monies held by the Monitor be paid to the Receiver General of Canada. Brenner C.J.S.C. dismissed the latter application. Reasoning that the purpose of segregating the funds with the Monitor was "to facilitate an ultimate payment of the GST monies which were owed pre-filing, but only if a viable plan emerged", the failure of such a reorganization, followed by an assignment in bankruptcy, meant the Crown would lose priority under the *BIA* (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

6 The Crown's appeal was allowed by the British Columbia Court of Appeal (2009 BCCA 205, [2009] G.S.T.C. 79, 270 B.C.A.C. 167 (B.C. C.A.)). Tysoe J.A. for a unanimous court found two independent bases for allowing the Crown's appeal.

7 First, the court's authority under s. 11 of the *CCAA* was held not to extend to staying the Crown's application for immediate payment of the GST funds subject to the deemed trust after it was clear that reorganization efforts had failed and that bankruptcy was inevitable. As restructuring was no longer a possibility, staying the Crown's claim to the GST funds no longer served a purpose under the *CCAA* and the court was bound under the priority scheme provided by the *ETA* to allow payment to the Crown. In so holding, Tysoe J.A. adopted the reasoning in *Ottawa Senators Hockey Club Corp. (Re)*, [2005] G.S.T.C. 1, 73 O.R. (3d) 737 (Ont. C.A.), which found that the *ETA* deemed trust for GST established Crown priority over secured creditors under the *CCAA*.

8 Second, Tysoe J.A. concluded that by ordering the GST funds segregated in the Monitor's trust account on April 29, 2008, the judge had created an express trust in favour of the Crown from which the monies in question could not be diverted for any other purposes. The Court of Appeal therefore ordered that the money held by the Monitor in trust be paid to the Receiver General.

2. Issues

9 This appeal raises three broad issues which are addressed in turn:

(1) Did s. 222(3) of the *ETA* displace s. 18.3(1) of the *CCAA* and give priority to the Crown's *ETA* deemed trust during *CCAA* proceedings as held in *Ottawa Senators*?

(2) Did the court exceed its *CCAA* authority by lifting the stay to allow the debtor to make an assignment in bankruptcy?

(3) Did the court's order of April 29, 2008 requiring segregation of the Crown's GST claim in the Monitor's trust account create an express trust in favour of the Crown in respect of those funds?

3. Analysis

10 The first issue concerns Crown priorities in the context of insolvency. As will be seen, the *ETA* provides for a deemed trust in favour of the Crown in respect of GST owed by a debtor "[d]espite ... any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)" (s. 222(3)), while the *CCAA* stated at the relevant time that "notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be [so] regarded" (s. 18.3(1)). It is difficult to imagine two statutory provisions more apparently in conflict. However, as is often the case, the apparent conflict can be resolved through interpretation.

11 In order to properly interpret the provisions, it is necessary to examine the history of the *CCAA*, its function amidst the body of insolvency legislation enacted by Parliament, and the principles that have been recognized in the jurisprudence. It will be seen that Crown priorities in the insolvency context have been significantly pared down. The resolution of the second issue is also rooted in the context of the *CCAA*, but its purpose and the manner in which it has been interpreted in the case law are also key. After examining the first two issues in this case, I will address Tysoe J.A.'s conclusion that an express trust in favour of the Crown was created by the court's order of April 29, 2008.

3.1 Purpose and Scope of Insolvency Law

12 Insolvency is the factual situation that arises when a debtor is unable to pay creditors (see generally, R. J. Wood, *Bankruptcy and Insolvency Law* (2009), at p. 16). Certain legal proceedings become available upon insolvency, which typically allow a debtor to obtain a court order staying its creditors' enforcement actions and attempt to obtain a binding compromise with creditors to adjust the payment conditions to something more realistic. Alternatively, the debtor's assets may be liquidated and debts paid from the proceeds according to statutory priority rules. The former is usually referred to as reorganization or restructuring while the latter is termed liquidation.

13 Canadian commercial insolvency law is not codified in one exhaustive statute. Instead, Parliament has enacted multiple insolvency statutes, the main one being the *BIA*. The *BIA* offers a self-contained legal regime providing for both reorganization and liquidation. Although bankruptcy legislation has a long history, the *BIA* itself is a fairly recent statute — it was enacted in 1992. It is characterized by a rules-based approach to proceedings. The *BIA* is available to insolvent debtors owing $1000 or more, regardless of whether they are natural or legal persons. It contains mechanisms for debtors to make proposals to their creditors for the adjustment of debts. If a proposal fails, the *BIA* contains a bridge to bankruptcy whereby the debtor's assets are liquidated and the proceeds paid to creditors in accordance with the statutory scheme of distribution.

14 Access to the *CCAA* is more restrictive. A debtor must be a company with liabilities in excess of $5 million. Unlike the *BIA*, the *CCAA* contains no provisions for liquidation of a debtor's assets if reorganization fails. There are three ways of exiting *CCAA* proceedings. The best outcome is achieved when the stay of proceedings provides the debtor with some breathing space during which solvency is restored and the *CCAA* process terminates without reorganization being needed. The second most desirable outcome occurs when the debtor's compromise or arrangement is accepted by its creditors and the reorganized company emerges from the *CCAA* proceedings as a going concern. Lastly, if the compromise or arrangement fails, either the company or its creditors usually seek to have the debtor's assets liquidated under the applicable provisions of the *BIA* or to place the debtor into receivership. As discussed in greater detail below, the key difference between the reorganization regimes under the *BIA* and the *CCAA* is that the latter offers a more flexible mechanism with greater judicial discretion, making it more responsive to complex reorganizations.

15 As I will discuss at greater length below, the purpose of the *CCAA* — Canada's first reorganization statute — is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets. Proposals to creditors under the *BIA* serve the same remedial purpose, though this is achieved through a rules-based mechanism that offers less flexibility. Where reorganization is impossible, the *BIA* may be employed to provide an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules.

16 Prior to the enactment of the *CCAA* in 1933 (S.C. 1932-33, c. 36), practice under existing commercial insolvency legislation tended heavily towards the liquidation of a debtor company (J. Sarra, *Creditor Rights and the Public Interest: Restructuring*

Insolvent Corporations (2003), at p. 12). The battering visited upon Canadian businesses by the Great Depression and the absence of an effective mechanism for reaching a compromise between debtors and creditors to avoid liquidation required a legislative response. The *CCAA* was innovative as it allowed the insolvent debtor to attempt reorganization under judicial supervision outside the existing insolvency legislation which, once engaged, almost invariably resulted in liquidation (*Reference re Companies' Creditors Arrangement Act (Canada)*, [1934] S.C.R. 659 (S.C.C.), at pp. 660-61; Sarra, *Creditor Rights*, at pp. 12-13).

17 Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected — notably creditors and employees — and that a workout which allowed the company to survive was optimal (Sarra, *Creditor Rights*, at pp. 13-15).

18 Early commentary and jurisprudence also endorsed the *CCAA's* remedial objectives. It recognized that companies retain more value as going concerns while underscoring that intangible losses, such as the evaporation of the companies' goodwill, result from liquidation (S. E. Edwards, "Reorganizations Under the Companies' Creditors Arrangement Act" (1947), 25 *Can. Bar Rev.* 587, at p. 592). Reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs (*ibid.*, at p. 593). Insolvency could be so widely felt as to impact stakeholders other than creditors and employees. Variants of these views resonate today, with reorganization justified in terms of rehabilitating companies that are key elements in a complex web of interdependent economic relationships in order to avoid the negative consequences of liquidation.

19 The *CCAA* fell into disuse during the next several decades, likely because amendments to the Act in 1953 restricted its use to companies issuing bonds (S.C. 1952-53, c. 3). During the economic downturn of the early 1980s, insolvency lawyers and courts adapting to the resulting wave of insolvencies resurrected the statute and deployed it in response to new economic challenges. Participants in insolvency proceedings grew to recognize and appreciate the statute's distinguishing feature: a grant of broad and flexible authority to the supervising court to make the orders necessary to facilitate the reorganization of the debtor and achieve the *CCAA's* objectives. The manner in which courts have used *CCAA* jurisdiction in increasingly creative and flexible ways is explored in greater detail below.

20 Efforts to evolve insolvency law were not restricted to the courts during this period. In 1970, a government-commissioned panel produced an extensive study recommending sweeping reform but Parliament failed to act (see *Bankruptcy and Insolvency: Report of the Study Committee on Bankruptcy and Insolvency Legislation* (1970)). Another panel of experts produced more limited recommendations in 1986 which eventually resulted in enactment of the *Bankruptcy and Insolvency Act* of 1992 (S.C. 1992, c. 27) (see *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)). Broader provisions for reorganizing insolvent debtors were then included in Canada's bankruptcy statute. Although the 1970 and 1986 reports made no specific recommendations with respect to the *CCAA*, the House of Commons committee studying the *BIA*'s predecessor bill, C-22, seemed to accept expert testimony that the *BIA*'s new reorganization scheme would shortly supplant the *CCAA*, which could then be repealed, with commercial insolvency and bankruptcy being governed by a single statute (*Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs and Government Operations*, Issue No. 15, October 3, 1991, at pp. 15:15-15:16).

21 In retrospect, this conclusion by the House of Commons committee was out of step with reality. It overlooked the renewed vitality the *CCAA* enjoyed in contemporary practice and the advantage that a flexible judicially supervised reorganization process presented in the face of increasingly complex reorganizations, when compared to the stricter rules-based scheme contained in the *BIA*. The "flexibility of the *CCAA* [was seen as] a great benefit, allowing for creative and effective decisions" (Industry Canada, Marketplace Framework Policy Branch, *Report on the Operation and Administration of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2002), at p. 41). Over the past three decades, resurrection of the *CCAA* has thus been the mainspring of a process through which, one author concludes, "the legal setting for Canadian insolvency restructuring has evolved from a rather blunt instrument to one of the most sophisticated systems in the developed world" (R. B. Jones, "The Evolution of Canadian Restructuring: Challenges for the Rule of Law", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 481).

22 While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law*:

> They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors. [pp. 2-3]

The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, both the *CCAA* and the *BIA* allow a court to order all actions against a debtor to be stayed while a compromise is sought.

23 Another point of convergence of the *CCAA* and the *BIA* relates to priorities. Because the *CCAA* is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a *CCAA* reorganization is ultimately unsuccessful. In addition, one of the important features of legislative reform of both statutes since the enactment of the *BIA* in 1992 has been a cutback in Crown priorities (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, ss. 73 and 125; S.C. 2000, c. 30, s. 148; S.C. 2005, c. 47, ss. 69 and 131; S.C. 2009, c. 33, ss. 25 and 29; see also *Alternative granite & marbre inc., Re*, 2009 SCC 49, [2009] 3 S.C.R. 286, [2009] G.S.T.C. 154 (S.C.C.); *Quebec (Deputy Minister of Revenue) c. Rainville* (1979), [1980] 1 S.C.R. 35 (S.C.C.); *Proposed Bankruptcy Act Amendments: Report of the Advisory Committee on Bankruptcy and Insolvency* (1986)).

24 With parallel *CCAA* and *BIA* restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation (see *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47; *Gauntlet Energy Corp., Re*, 2003 ABQB 894, [2003] G.S.T.C. 193, 30 Alta. L.R. (4th) 192 (Alta. Q.B.), at para. 19).

25 Mindful of the historical background of the *CCAA* and *BIA*, I now turn to the first question at issue.

3.2 GST Deemed Trust Under the CCAA

26 The Court of Appeal proceeded on the basis that the *ETA* precluded the court from staying the Crown's enforcement of the GST deemed trust when partially lifting the stay to allow the debtor to enter bankruptcy. In so doing, it adopted the reasoning in a line of cases culminating in *Ottawa Senators*, which held that an *ETA* deemed trust remains enforceable during *CCAA* reorganization despite language in the *CCAA* that suggests otherwise.

27 The Crown relies heavily on the decision of the Ontario Court of Appeal in *Ottawa Senators* and argues that the later in time provision of the *ETA* creating the GST deemed trust trumps the provision of the *CCAA* purporting to nullify most statutory deemed trusts. The Court of Appeal in this case accepted this reasoning but not all provincial courts follow it (see, e.g., *Komunik Corp., Re*, 2009 QCCS 6332 (C.S. Que.), leave to appeal granted, 2010 QCCA 183 (C.A. Que.)). Century Services relied, in its written submissions to this Court, on the argument that the court had authority under the *CCAA* to continue the stay against the Crown's claim for unremitted GST. In oral argument, the question of whether *Ottawa Senators* was correctly decided nonetheless arose. After the hearing, the parties were asked to make further written submissions on this point. As appears evident from the reasons of my colleague Abella J., this issue has become prominent before this Court. In those circumstances, this Court needs to determine the correctness of the reasoning in *Ottawa Senators*.

28 The policy backdrop to this question involves the Crown's priority as a creditor in insolvency situations which, as I mentioned above, has evolved considerably. Prior to the 1990s, Crown claims largely enjoyed priority in insolvency. This was widely seen as unsatisfactory as shown by both the 1970 and 1986 insolvency reform proposals, which recommended that Crown claims receive no preferential treatment. A closely related matter was whether the *CCAA* was binding at all upon the Crown. Amendments to the *CCAA* in 1997 confirmed that it did indeed bind the Crown (see *CCAA*, s. 21, as am. by S.C. 1997, c. 12, s. 126).

29 Claims of priority by the state in insolvency situations receive different treatment across jurisdictions worldwide. For example, in Germany and Australia, the state is given no priority at all, while the state enjoys wide priority in the United States and France (see B. K. Morgan, "Should the Sovereign be Paid First? A Comparative International Analysis of the Priority for Tax Claims in Bankruptcy" (2000), 74 *Am. Bank. L.J.* 461, at p. 500). Canada adopted a middle course through legislative reform of Crown priority initiated in 1992. The Crown retained priority for source deductions of income tax, Employment Insurance ("EI") and Canada Pension Plan ("CPP") premiums, but ranks as an ordinary unsecured creditor for most other claims.

30 Parliament has frequently enacted statutory mechanisms to secure Crown claims and permit their enforcement. The two most common are statutory deemed trusts and powers to garnish funds third parties owe the debtor (see F. L. Lamer, *Priority of Crown Claims in Insolvency* (loose-leaf), at § 2).

31 With respect to GST collected, Parliament has enacted a deemed trust. The *ETA* states that every person who collects an amount on account of GST is deemed to hold that amount in trust for the Crown (s. 222(1)). The deemed trust extends to other property of the person collecting the tax equal in value to the amount deemed to be in trust if that amount has not been remitted in accordance with the *ETA*. The deemed trust also extends to property held by a secured creditor that, but for the security interest, would be property of the person collecting the tax (s. 222(3)).

32 Parliament has created similar deemed trusts using almost identical language in respect of source deductions of income tax, EI premiums and CPP premiums (see s. 227(4) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*"), ss. 86(2) and (2.1) of the *Employment Insurance Act*, S.C. 1996, c. 23, and ss. 23(3) and (4) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8). I will refer to income tax, EI and CPP deductions as "source deductions".

33 In *Royal Bank v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411 (S.C.C.), this Court addressed a priority dispute between a deemed trust for source deductions under the *ITA* and security interests taken under both the *Bank Act*, S.C. 1991, c. 46, and the Alberta *Personal Property Security Act*, S.A. 1988, c. P-4.05 ("*PPSA*"). As then worded, an *ITA* deemed trust over the debtor's property equivalent to the amount owing in respect of income tax became effective at the time of liquidation, receivership, or assignment in bankruptcy. *Sparrow Electric* held that the *ITA* deemed trust could not prevail over the security interests because, being fixed charges, the latter attached as soon as the debtor acquired rights in the property such that the *ITA* deemed trust had no property on which to attach when it subsequently arose. Later, in *First Vancouver Finance v. Minister of National Revenue*, 2002 SCC 49, [2002] G.S.T.C. 23, [2002] 2 S.C.R. 720 (S.C.C.), this Court observed that Parliament had legislated to strengthen the statutory deemed trust in the *ITA* by deeming it to operate from the moment the deductions were not paid to the Crown as required by the *ITA*, and by granting the Crown priority over all security interests (paras. 27-29) (the "*Sparrow Electric* amendment").

34 The amended text of s. 227(4.1) of the *ITA* and concordant source deductions deemed trusts in the *Canada Pension Plan* and the *Employment Insurance Act* state that the deemed trust operates notwithstanding any other enactment of Canada, except ss. 81.1 and 81.2 of the *BIA*. The *ETA* deemed trust at issue in this case is similarly worded, but it excepts the *BIA* in its entirety. The provision reads as follows:

> **222.** (3) Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of

the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed ....

35 The Crown submits that the *Sparrow Electric* amendment, added by Parliament to the *ETA* in 2000, was intended to preserve the Crown's priority over collected GST under the *CCAA* while subordinating the Crown to the status of an unsecured creditor in respect of GST only under the *BIA*. This is because the *ETA* provides that the GST deemed trust is effective "despite" any other enactment except the *BIA*.

36 The language used in the *ETA* for the GST deemed trust creates an apparent conflict with the *CCAA*, which provides that subject to certain exceptions, property deemed by statute to be held in trust for the Crown shall not be so regarded.

37 Through a 1997 amendment to the *CCAA* (S.C. 1997, c. 12, s. 125), Parliament appears to have, subject to specific exceptions, nullified deemed trusts in favour of the Crown once reorganization proceedings are commenced under the Act. The relevant provision reads:

> **18.3** (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

This nullification of deemed trusts was continued in further amendments to the *CCAA* (S.C. 2005, c. 47), where s. 18.3(1) was renumbered and reformulated as s. 37(1):

> **37.** (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

38 An analogous provision exists in the *BIA*, which, subject to the same specific exceptions, nullifies statutory deemed trusts and makes property of the bankrupt that would otherwise be subject to a deemed trust part of the debtor's estate and available to creditors (S.C. 1992, c. 27, s. 39; S.C. 1997, c. 12, s. 73; *BIA*, s. 67(2)). It is noteworthy that in both the *CCAA* and the *BIA*, the exceptions concern source deductions (*CCAA*, s. 18.3(2); *BIA*, s. 67(3)). The relevant provision of the *CCAA* reads:

> **18.3** (2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

Thus, the Crown's deemed trust and corresponding priority in source deductions remain effective both in reorganization and in bankruptcy.

39 Meanwhile, in both s. 18.4(1) of the *CCAA* and s. 86(1) of the *BIA*, other Crown claims are treated as unsecured. These provisions, establishing the Crown's status as an unsecured creditor, explicitly exempt statutory deemed trusts in source deductions *(CCAA*, s. 18.4(3); *BIA*, s. 86(3)). The *CCAA* provision reads as follows:

> **18.4** (3) Subsection (1) [Crown ranking as unsecured creditor] does not affect the operation of
>
> (a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,
>
> (b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution ....

Therefore, not only does the *CCAA* provide that Crown claims do not enjoy priority over the claims of other creditors (s. 18.3(1)), but the exceptions to this rule (i.e., that Crown priority is maintained for source deductions) are repeatedly stated in the statute.

40 The apparent conflict in this case is whether the rule in the *CCAA* first enacted as s. 18.3 in 1997, which provides that subject to certain explicit exceptions, statutory deemed trusts are ineffective under the *CCAA*, is overridden by the one in the *ETA* enacted in 2000 stating that GST deemed trusts operate despite any enactment of Canada except the *BIA*. With respect for my colleague Fish J., I do not think the apparent conflict can be resolved by denying it and creating a rule requiring both a statutory provision enacting the deemed trust, and a second statutory provision confirming it. Such a rule is unknown to the law. Courts must recognize conflicts, apparent or real, and resolve them when possible.

41 A line of jurisprudence across Canada has resolved the apparent conflict in favour of the *ETA*, thereby maintaining GST deemed trusts under the *CCAA*. *Ottawa Senators*, the leading case, decided the matter by invoking the doctrine of implied repeal to hold that the later in time provision of the *ETA* should take precedence over the *CCAA* (see also *Solid Resources Ltd., Re* (2002), 40 C.B.R. (4th) 219, [2003] G.S.T.C. 21 (Alta. Q.B.); *Gauntlet*

42 The Ontario Court of Appeal in *Ottawa Senators* rested its conclusion on two considerations. First, it was persuaded that by explicitly mentioning the *BIA* in *ETA* s. 222(3), but not the *CCAA*, Parliament made a deliberate choice. In the words of MacPherson J.A.:

> The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

43 Second, the Ontario Court of Appeal compared the conflict between the *ETA* and the *CCAA* to that before this Court in *Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.), and found them to be "identical" (para. 46). It therefore considered *Doré* binding (para. 49). In *Doré*, a limitations provision in the more general and recently enacted *Civil Code of Québec*, S.Q. 1991, c. 64 ("*C.C.Q.*"), was held to have repealed a more specific provision of the earlier Quebec *Cities and Towns Act*, R.S.Q., c. C-19, with which it conflicted. By analogy, the Ontario Court of Appeal held that the later in time and more general provision, s. 222(3) of the *ETA*, impliedly repealed the more specific and earlier in time provision, s. 18.3(1) of the *CCAA* (paras. 47-49).

44 Viewing this issue in its entire context, several considerations lead me to conclude that neither the reasoning nor the result in *Ottawa Senators* can stand. While a conflict may exist at the level of the statutes' wording, a purposive and contextual analysis to determine Parliament's true intent yields the conclusion that Parliament could not have intended to restore the Crown's deemed trust priority in GST claims under the *CCAA* when it amended the *ETA* in 2000 with the *Sparrow Electric* amendment.

45 I begin by recalling that Parliament has shown its willingness to move away from asserting priority for Crown claims in insolvency law. Section 18.3(1) of the *CCAA* (subject to the s. 18.3(2) exceptions) provides that the Crown's deemed trusts have no effect under the *CCAA*. Where Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has legislated so explicitly and elaborately. For example, s. 18.3(2) of the *CCAA* and s. 67(3) of the *BIA* expressly provide that deemed trusts for source deductions remain effective in insolvency. Parliament has, therefore, clearly carved out exceptions from the general rule that deemed trusts are ineffective in insolvency. The *CCAA* and *BIA* are in harmony, preserving deemed trusts and asserting Crown priority only in respect of source deductions. Meanwhile, there is no express statutory basis for concluding that GST claims enjoy a preferred treatment under the *CCAA* or the *BIA*. Unlike source deductions, which are clearly and expressly dealt with under both these insolvency statutes, no such clear and express language exists in those Acts carving out an exception for GST claims.

46 The internal logic of the *CCAA* also militates against upholding the *ETA* deemed trust for GST. The *CCAA* imposes limits on a suspension by the court of the Crown's rights in respect of source deductions but does not mention the *ETA* (s. 11.4). Since source deductions deemed trusts are granted explicit protection under the *CCAA*, it would be inconsistent to afford a better protection to the *ETA* deemed trust absent explicit language in the *CCAA*. Thus, the logic of the *CCAA* appears to subject the *ETA* deemed trust to the waiver by Parliament of its priority (s. 18.4).

47 Moreover, a strange asymmetry would arise if the interpretation giving the *ETA* priority over the *CCAA* urged by the Crown is adopted here: the Crown would retain priority over GST claims during *CCAA* proceedings but not in bankruptcy. As courts

have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the *BIA*, creditors' incentives would lie overwhelmingly with avoiding proceedings under the *CCAA* and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the *CCAA* can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert.

48 Arguably, the effect of *Ottawa Senators* is mitigated if restructuring is attempted under the *BIA* instead of the *CCAA*, but it is not cured. If *Ottawa Senators* were to be followed, Crown priority over GST would differ depending on whether restructuring took place under the *CCAA* or the *BIA*. The anomaly of this result is made manifest by the fact that it would deprive companies of the option to restructure under the more flexible and responsive *CCAA* regime, which has been the statute of choice for complex reorganizations.

49 Evidence that Parliament intended different treatments for GST claims in reorganization and bankruptcy is scant, if it exists at all. Section 222(3) of the *ETA* was enacted as part of a wide-ranging budget implementation bill in 2000. The summary accompanying that bill does not indicate that Parliament intended to elevate Crown priority over GST claims under the *CCAA* to the same or a higher level than source deductions claims. Indeed, the summary for deemed trusts states only that amendments to existing provisions are aimed at "ensuring that employment insurance premiums and Canada Pension Plan contributions that are required to be remitted by an employer are fully recoverable by the Crown in the case of the bankruptcy of the employer" (Summary to S.C. 2000, c. 30, at p. 4a). The wording of GST deemed trusts resembles that of statutory deemed trusts for source deductions and incorporates the same overriding language and reference to the *BIA*. However, as noted above, Parliament's express intent is that only source deductions deemed trusts remain operative. An exception for the *BIA* in the statutory language establishing the source deductions deemed trusts accomplishes very little, because the explicit language of the *BIA* itself (and the *CCAA*) carves out these source deductions deemed trusts and maintains their effect. It is however noteworthy that no equivalent language maintaining GST deemed trusts exists under either the *BIA* or the *CCAA*.

50 It seems more likely that by adopting the same language for creating GST deemed trusts in the *ETA* as it did for deemed trusts for source deductions, and by overlooking the inclusion of an exception for the *CCAA* alongside the *BIA* in s. 222(3) of the *ETA*, Parliament may have inadvertently succumbed to a drafting anomaly. Because of a statutory lacuna in the *ETA*, the GST deemed trust could be seen as remaining effective in the *CCAA*, while ceasing to have any effect under the *BIA*, thus creating an apparent conflict with the wording of the *CCAA*. However, it should be seen for what it is: a facial conflict only, capable of resolution by looking at the broader approach taken to Crown priorities and by giving precedence to the statutory language of s. 18.3 of the *CCAA* in a manner that does not produce an anomalous outcome.

51 Section 222(3) of the *ETA* evinces no explicit intention of Parliament to repeal *CCAA* s. 18.3. It merely creates an apparent conflict that must be resolved by statutory interpretation. Parliament's intent when it enacted *ETA* s. 222(3) was therefore far from unambiguous. Had it sought to give the Crown a priority for GST claims, it could have done so explicitly as it did for source deductions. Instead, one is left to infer from the language of *ETA* s. 222(3) that the GST deemed trust was intended to be effective under the *CCAA*.

52 I am not persuaded that the reasoning in *Doré* requires the application of the doctrine of implied repeal in the circumstances of this case. The main issue in *Doré* concerned the impact of the adoption of the *C.C.Q.* on the administrative law rules with respect to municipalities. While Gonthier J. concluded in that case that the limitation provision in art. 2930 *C.C.Q.* had repealed by implication a limitation provision in the *Cities and Towns Act*, he did so on the basis of more than a textual analysis. The conclusion in *Doré* was reached after thorough contextual analysis of both pieces of legislation, including an extensive review of the relevant legislative history (paras. 31-41). Consequently, the circumstances before this Court in *Doré* are far from "identical" to those in the present case, in terms of text, context and legislative history. Accordingly, *Doré* cannot be said to require the automatic application of the rule of repeal by implication.

53 A noteworthy indicator of Parliament's overall intent is the fact that in subsequent amendments it has not displaced the rule set out in the *CCAA*. Indeed, as indicated above, the recent amendments to the *CCAA* in 2005 resulted in the rule previously found in s. 18.3 being renumbered and reformulated as s. 37. Thus, to the extent the interpretation allowing the GST deemed

trust to remain effective under the *CCAA* depends on *ETA* s. 222(3) having impliedly repealed *CCAA* s. 18.3(1) because it is later in time, we have come full circle. Parliament has renumbered and reformulated the provision of the *CCAA* stating that, subject to exceptions for source deductions, deemed trusts do not survive the *CCAA* proceedings and thus the *CCAA* is now the later in time statute. This confirms that Parliament's intent with respect to GST deemed trusts is to be found in the *CCAA*.

54 I do not agree with my colleague Abella J. that s. 44(*f*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, can be used to interpret the 2005 amendments as having no effect. The new statute can hardly be said to be a mere re-enactment of the former statute. Indeed, the *CCAA* underwent a substantial review in 2005. Notably, acting consistently with its goal of treating both the *BIA* and the *CCAA* as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes with respect to corporate proposals. In addition, new provisions were introduced regarding the treatment of contracts, collective agreements, interim financing and governance agreements. The appointment and role of the Monitor was also clarified. Noteworthy are the limits imposed by *CCAA* s. 11.09 on the court's discretion to make an order staying the Crown's source deductions deemed trusts, which were formerly found in s. 11.4. No mention whatsoever is made of GST deemed trusts (see Summary to S.C. 2005, c. 47). The review went as far as looking at the very expression used to describe the statutory override of deemed trusts. The comments cited by my colleague only emphasize the clear intent of Parliament to maintain its policy that only source deductions deemed trusts survive in *CCAA* proceedings.

55 In the case at bar, the legislative context informs the determination of Parliament's legislative intent and supports the conclusion that *ETA* s. 222(3) was not intended to narrow the scope of the *CCAA's* override provision. Viewed in its entire context, the conflict between the *ETA* and the *CCAA* is more apparent than real. I would therefore not follow the reasoning in *Ottawa Senators* and affirm that *CCAA* s. 18.3 remained effective.

56 My conclusion is reinforced by the purpose of the *CCAA* as part of Canadian remedial insolvency legislation. As this aspect is particularly relevant to the second issue, I will now discuss how courts have interpreted the scope of their discretionary powers in supervising a *CCAA* reorganization and how Parliament has largely endorsed this interpretation. Indeed, the interpretation courts have given to the *CCAA* helps in understanding how the *CCAA* grew to occupy such a prominent role in Canadian insolvency law.

3.3 Discretionary Power of a Court Supervising a CCAA Reorganization

57 Courts frequently observe that "[t]he *CCAA* is skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred" (*ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587, 92 O.R. (3d) 513 (Ont. C.A.), at para. 44, *per* Blair J.A.). Accordingly, "[t]he history of CCAA law has been an evolution of judicial interpretation" (*Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List])), at para. 10, *per* Farley J.).

58 *CCAA* decisions are often based on discretionary grants of jurisdiction. The incremental exercise of judicial discretion in commercial courts under conditions one practitioner aptly describes as "the hothouse of real-time litigation" has been the primary method by which the *CCAA* has been adapted and has evolved to meet contemporary business and social needs (see Jones, at p. 484).

59 Judicial discretion must of course be exercised in furtherance of the *CCAA's* purposes. The remedial purpose I referred to in the historical overview of the Act is recognized over and over again in the jurisprudence. To cite one early example:

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> (*Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 41 O.A.C. 282 (Ont. C.A.), at para. 57, *per* Doherty J.A., dissenting)

60 Judicial decision making under the *CCAA* takes many forms. A court must first of all provide the conditions under which the debtor can attempt to reorganize. This can be achieved by staying enforcement actions by creditors to allow the

debtor's business to continue, preserving the *status quo* while the debtor plans the compromise or arrangement to be presented to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed (see, e.g., *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 51 B.C.L.R. (2d) 84 (B.C. C.A.), at pp. 88-89; *Pacific National Lease Holding Corp., Re* (1992), 19 B.C.A.C. 134 (B.C. C.A. [In Chambers]), at para. 27). In doing so, the court must often be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors to include employees, directors, shareholders, and even other parties doing business with the insolvent company (see, e.g., *Canadian Airlines Corp., Re*, 2000 ABQB 442, 84 Alta. L.R. (3d) 9 (Alta. Q.B.), at para. 144, *per* Paperny J. (as she then was); *Air Canada, Re* (2003), 42 C.B.R. (4th) 173 (Ont. S.C.J. [Commercial List]), at para. 3; *Air Canada, Re* [2003 CarswellOnt 4967 (Ont. S.C.J. [Commercial List])], 2003 CanLII 49366, at para. 13, *per* Farley J.; Sarra, *Creditor Rights*, at pp. 181-92 and 217-26). In addition, courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed (see, e.g., *Canadian Red Cross Society / Société Canadienne de la Croix Rouge, Re* (2000), 19 C.B.R. (4th) 158 (Ont. S.C.J.), at para. 2, *per* Blair J. (as he then was); Sarra, *Creditor Rights*, at pp. 195-214).

61 When large companies encounter difficulty, reorganizations become increasingly complex. *CCAA* courts have been called upon to innovate accordingly in exercising their jurisdiction beyond merely staying proceedings against the debtor to allow breathing room for reorganization. They have been asked to sanction measures for which there is no explicit authority in the *CCAA*. Without exhaustively cataloguing the various measures taken under the authority of the *CCAA*, it is useful to refer briefly to a few examples to illustrate the flexibility the statute affords supervising courts.

62 Perhaps the most creative use of *CCAA* authority has been the increasing willingness of courts to authorize post-filing security for debtor in possession financing or super-priority charges on the debtor's assets when necessary for the continuation of the debtor's business during the reorganization (see, e.g., *Skydome Corp., Re* (1998), 16 C.B.R. (4th) 118 (Ont. Gen. Div. [Commercial List]); *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 135 B.C.A.C. 96 (B.C. C.A.), aff'g (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]); and generally, J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at pp. 93-115). The *CCAA* has also been used to release claims against third parties as part of approving a comprehensive plan of arrangement and compromise, even over the objections of some dissenting creditors (see Metcalfe & Mansfield). As well, the appointment of a Monitor to oversee the reorganization was originally a measure taken pursuant to the *CCAA's* supervisory authority; Parliament responded, making the mechanism mandatory by legislative amendment.

63 Judicial innovation during *CCAA* proceedings has not been without controversy. At least two questions it raises are directly relevant to the case at bar: (1) what are the sources of a court's authority during *CCAA* proceedings? (2) what are the limits of this authority?

64 The first question concerns the boundary between a court's statutory authority under the *CCAA* and a court's residual authority under its inherent and equitable jurisdiction when supervising a reorganization. In authorizing measures during *CCAA* proceedings, courts have on occasion purported to rely upon their equitable jurisdiction to advance the purposes of the Act or their inherent jurisdiction to fill gaps in the statute. Recent appellate decisions have counselled against purporting to rely on inherent jurisdiction, holding that the better view is that courts are in most cases simply construing the authority supplied by the *CCAA* itself (see, e.g., *Skeena Cellulose Inc., Re*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (B.C. C.A.), at paras. 45-47, *per* Newbury J.A.; *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (Ont. C.A.), paras. 31-33, *per* Blair J.A.).

65 I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).

66 Having examined the pertinent parts of the *CCAA* and the recent history of the legislation, I accept that in most instances the issuance of an order during *CCAA* proceedings should be considered an exercise in statutory interpretation. Particularly noteworthy in this regard is the expansive interpretation the language of the statute at issue is capable of supporting.

67 The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.

68 In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence.

69 The *CCAA* also explicitly provides for certain orders. Both an order made on an initial application and an order on subsequent applications may stay, restrain, or prohibit existing or new proceedings against the debtor. The burden is on the applicant to satisfy the court that the order is appropriate in the circumstances and that the applicant has been acting in good faith and with due diligence (*CCAA*, ss. 11(3), (4) and (6)).

70 The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

71 It is well-established that efforts to reorganize under the *CCAA* can be terminated and the stay of proceedings against the debtor lifted if the reorganization is "doomed to failure" (see *Chef Ready*, at p. 88; *Philip's Manufacturing Ltd., Re* (1992), 9 C.B.R. (3d) 25 (B.C. C.A.), at paras. 6-7). However, when an order is sought that does realistically advance the *CCAA's* purposes, the ability to make it is within the discretion of a *CCAA* court.

72 The preceding discussion assists in determining whether the court had authority under the *CCAA* to continue the stay of proceedings against the Crown once it was apparent that reorganization would fail and bankruptcy was the inevitable next step.

73 In the Court of Appeal, Tysoe J.A. held that no authority existed under the *CCAA* to continue staying the Crown's enforcement of the GST deemed trust once efforts at reorganization had come to an end. The appellant submits that in so holding, Tysoe J.A. failed to consider the underlying purpose of the *CCAA* and give the statute an appropriately purposive and liberal interpretation under which the order was permissible. The Crown submits that Tysoe J.A. correctly held that the mandatory language of the *ETA* gave the court no option but to permit enforcement of the GST deemed trust when lifting the *CCAA* stay to permit the debtor to make an assignment under the *BIA*. Whether the *ETA* has a mandatory effect in the context of a *CCAA* proceeding has already been discussed. I will now address the question of whether the order was authorized by the *CCAA*.

74 It is beyond dispute that the *CCAA* imposes no explicit temporal limitations upon proceedings commenced under the Act that would prohibit ordering a continuation of the stay of the Crown's GST claims while lifting the general stay of proceedings temporarily to allow the debtor to make an assignment in bankruptcy.

75 The question remains whether the order advanced the underlying purpose of the *CCAA*. The Court of Appeal held that it did not because the reorganization efforts had come to an end and the *CCAA* was accordingly spent. I disagree.

76 There is no doubt that had reorganization been commenced under the *BIA* instead of the *CCAA*, the Crown's deemed trust priority for the GST funds would have been lost. Similarly, the Crown does not dispute that under the scheme of distribution in bankruptcy under the *BIA*, the deemed trust for GST ceases to have effect. Thus, after reorganization under the *CCAA* failed, creditors would have had a strong incentive to seek immediate bankruptcy and distribution of the debtor's assets under the *BIA*. In order to conclude that the discretion does not extend to partially lifting the stay in order to allow for an assignment in bankruptcy, one would have to assume a gap between the *CCAA* and the *BIA* proceedings. Brenner C.J.S.C.'s order staying Crown enforcement of the GST claim ensured that creditors would not be disadvantaged by the attempted reorganization under the *CCAA*. The effect of his order was to blunt any impulse of creditors to interfere in an orderly liquidation. His order was thus in furtherance of the *CCAA's* objectives to the extent that it allowed a bridge between the *CCAA* and *BIA* proceedings. This interpretation of the tribunal's discretionary power is buttressed by s. 20 of the *CCAA*. That section provides that the *CCAA* "may be applied together with the provisions of any Act of Parliament... that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them", such as the *BIA*. Section 20 clearly indicates the intention of Parliament for the *CCAA* to operate *in tandem* with other insolvency legislation, such as the *BIA*.

77 The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all. Because the alternative to reorganization is often bankruptcy, participants will measure the impact of a reorganization against the position they would enjoy in liquidation. In the case at bar, the order fostered a harmonious transition between reorganization and liquidation while meeting the objective of a single collective proceeding that is common to both statutes.

78 Tysoe J.A. therefore erred in my view by treating the *CCAA* and the *BIA* as distinct regimes subject to a temporal gap between the two, rather than as forming part of an integrated body of insolvency law. Parliament's decision to maintain two statutory schemes for reorganization, the *BIA* and the *CCAA*, reflects the reality that reorganizations of differing complexity require different legal mechanisms. By contrast, only one statutory scheme has been found to be needed to liquidate a bankrupt debtor's estate. The transition from the *CCAA* to the *BIA* may require the partial lifting of a stay of proceedings under the *CCAA* to allow commencement of the *BIA* proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the Ontario Superintendent of Financial Services seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes which would allow the enforcement of property interests at the conclusion of *CCAA* proceedings that would be lost in bankruptcy *Ivaco Inc. (Re)* (2006), 83 O.R. (3d) 108 (Ont. C.A.), at paras. 62-63).

79 The Crown's priority in claims pursuant to source deductions deemed trusts does not undermine this conclusion. Source deductions deemed trusts survive under both the *CCAA* and the *BIA*. Accordingly, creditors' incentives to prefer one Act over another will not be affected. While a court has a broad discretion to stay source deductions deemed trusts in the *CCAA* context, this discretion is nevertheless subject to specific limitations applicable only to source deductions deemed trusts (*CCAA*, s. 11.4). Thus, if *CCAA* reorganization fails (e.g., either the creditors or the court refuse a proposed reorganization), the Crown can immediately assert its claim in unremitted source deductions. But this should not be understood to affect a seamless transition into bankruptcy or create any "gap" between the *CCAA* and the *BIA* for the simple reason that, regardless of what statute the reorganization had been commenced under, creditors' claims in both instances would have been subject to the priority of the Crown's source deductions deemed trust.

80 Source deductions deemed trusts aside, the comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA*. The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*.

81 I therefore conclude that Brenner C.J.S.C. had the authority under the *CCAA* to lift the stay to allow entry into liquidation.

3.4 Express Trust

82 The last issue in this case is whether Brenner C.J.S.C. created an express trust in favour of the Crown when he ordered on April 29, 2008, that proceeds from the sale of LeRoy Trucking's assets equal to the amount of unremitted GST be held back in the Monitor's trust account until the results of the reorganization were known. Tysoe J.A. in the Court of Appeal concluded as an alternative ground for allowing the Crown's appeal that it was the beneficiary of an express trust. I disagree.

83 Creation of an express trust requires the presence of three certainties: intention, subject matter, and object. Express or "true trusts" arise from the acts and intentions of the settlor and are distinguishable from other trusts arising by operation of law (see D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (3rd ed. 2005), at pp. 28-29 especially fn. 42).

84 Here, there is no certainty to the object (i.e. the beneficiary) inferrable from the court's order of April 29, 2008, sufficient to support an express trust.

85 At the time of the order, there was a dispute between Century Services and the Crown over part of the proceeds from the sale of the debtor's assets. The court's solution was to accept LeRoy Trucking's proposal to segregate those monies until that dispute could be resolved. Thus there was no certainty that the Crown would actually be the beneficiary, or object, of the trust.

86 The fact that the location chosen to segregate those monies was the Monitor's trust account has no independent effect such that it would overcome the lack of a clear beneficiary. In any event, under the interpretation of *CCAA* s. 18.3(1) established above, no such priority dispute would even arise because the Crown's deemed trust priority over GST claims would be lost under the *CCAA* and the Crown would rank as an unsecured creditor for this amount. However, Brenner C.J.S.C. may well have been proceeding on the basis that, in accordance with *Ottawa Senators*, the Crown's GST claim would remain effective if reorganization was successful, which would not be the case if transition to the liquidation process of the *BIA* was allowed. An amount equivalent to that claim would accordingly be set aside pending the outcome of reorganization.

87 Thus, uncertainty surrounding the outcome of the *CCAA* restructuring eliminates the existence of any certainty to permanently vest in the Crown a beneficial interest in the funds. That much is clear from the oral reasons of Brenner C.J.S.C. on April 29, 2008, when he said: "Given the fact that [*CCAA* proceedings] are known to fail and filings in bankruptcy result, it seems to me that maintaining the status quo in the case at bar supports the proposal to have the monitor hold these funds in trust." Exactly who might take the money in the final result was therefore evidently in doubt. Brenner C.J.S.C.'s subsequent order of September 3, 2008, denying the Crown's application to enforce the trust once it was clear that bankruptcy was inevitable, confirms the absence of a clear beneficiary required to ground an express trust.

4. Conclusion

88 I conclude that Brenner C.J.S.C. had the discretion under the *CCAA* to continue the stay of the Crown's claim for enforcement of the GST deemed trust while otherwise lifting it to permit LeRoy Trucking to make an assignment in bankruptcy. My conclusion that s. 18.3(1) of the *CCAA* nullified the GST deemed trust while proceedings under that Act were pending confirms that the discretionary jurisdiction under s. 11 utilized by the court was not limited by the Crown's asserted GST priority, because there is no such priority under the *CCAA*.

89 For these reasons, I would allow the appeal and declare that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada is not subject to deemed trust or priority in favour of the Crown. Nor is this amount subject to an express trust. Costs are awarded for this appeal and the appeal in the court below.

***Fish J. (concurring)*:**

I

90 I am in general agreement with the reasons of Justice Deschamps and would dispose of the appeal as she suggests.

91 More particularly, I share my colleague's interpretation of the scope of the judge's discretion under s. 11 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). And I share my colleague's conclusion that Brenner C.J.S.C. did not create an express trust in favour of the Crown when he segregated GST funds into the Monitor's trust account (2008 BCSC 1805, [2008] G.S.T.C. 221 (B.C. S.C. [In Chambers])).

92 I nonetheless feel bound to add brief reasons of my own regarding the interaction between the *CCAA* and the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*ETA*").

93 In upholding deemed trusts created by the *ETA* notwithstanding insolvency proceedings, *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), and its progeny have been unduly protective of Crown interests which Parliament itself has chosen to subordinate to competing prioritized claims. In my respectful view, a clearly marked departure from that jurisprudential approach is warranted in this case.

94 Justice Deschamps develops important historical and policy reasons in support of this position and I have nothing to add in that regard. I do wish, however, to explain why a comparative analysis of related statutory provisions adds support to our shared conclusion.

95 Parliament has in recent years given detailed consideration to the Canadian insolvency scheme. It has declined to amend the provisions at issue in this case. Ours is not to wonder why, but rather to treat Parliament's preservation of the relevant provisions as a deliberate exercise of the legislative discretion that is Parliament's alone. With respect, I reject any suggestion that we should instead characterize the apparent conflict between s. 18.3(1) (now s. 37(1)) of the *CCAA* and s. 222 of the *ETA* as a drafting anomaly or statutory lacuna properly subject to judicial correction or repair.

II

96 In the context of the Canadian insolvency regime, a deemed trust will be found to exist only where two complementary elements co-exist: first, a statutory provision *creating* the trust; and second, a *CCAA* or *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*") provision *confirming* — or explicitly preserving — its effective operation.

97 This interpretation is reflected in three federal statutes. Each contains a deemed trust provision framed in terms strikingly similar to the wording of s. 222 of the *ETA*.

98 The first is the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*ITA*") where s. 227(4) *creates* a deemed trust:

> **227 (4) Trust for moneys deducted** — Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, in trust for Her Majesty and for payment to Her Majesty in the manner and at the time provided under this Act. [Here and below, the emphasis is of course my own.]

99 In the next subsection, Parliament has taken care to make clear that this trust is unaffected by federal or provincial legislation to the contrary:

> **(4.1) Extension of trust** — Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be held by a person in trust for Her Majesty is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person ... equal in value to the amount so deemed to be held in trust is deemed
>
> > (a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, in trust for Her Majesty whether or not the property is subject to such a security interest, ...

...

... and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.

100 The continued operation of this deemed trust is expressly *confirmed* in s. 18.3 of the *CCAA*:

18.3 (1) Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

101 The operation of the *ITA* deemed trust is also confirmed in s. 67 of the *BIA*:

67 (2) Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act*....

102 Thus, Parliament has first *created* and then *confirmed the continued operation of* the Crown's *ITA* deemed trust under *both* the *CCAA* and the *BIA* regimes.

103 The second federal statute for which this scheme holds true is the *Canada Pension Plan*, R.S.C. 1985, c. C-8 ("*CPP*"). At s. 23, Parliament creates a deemed trust in favour of the Crown and specifies that it exists despite all contrary provisions in any other Canadian statute. Finally, and in almost identical terms, the *Employment Insurance Act*, S.C. 1996, c. 23 ("*EIA*"), creates a deemed trust in favour of the Crown: see ss. 86(2) and (2.1).

104 As we have seen, the survival of the deemed trusts created under these provisions of the *ITA*, the *CPP* and the *EIA* is confirmed in s. 18.3(2) the *CCAA* and in s. 67(3) the *BIA*. In all three cases, Parliament's intent to enforce the Crown's deemed trust through insolvency proceedings is expressed in clear and unmistakable terms.

105 The same is not true with regard to the deemed trust created under the *ETA*. Although Parliament creates a deemed trust in favour of the Crown to hold unremitted GST monies, and although it purports to maintain this trust notwithstanding any contrary federal or provincial legislation, it does not *confirm* the trust — or expressly provide for its continued operation — in either the *BIA* or the *CCAA*. The second of the two mandatory elements I have mentioned is thus absent reflecting Parliament's intention to allow the deemed trust to lapse with the commencement of insolvency proceedings.

106 The language of the relevant *ETA* provisions is identical in substance to that of the *ITA*, *CPP*, and *EIA* provisions:

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act*), any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, ...

...

... and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

107 Yet no provision of the *CCAA* provides for the continuation of this deemed trust after the *CCAA* is brought into play.

108 In short, Parliament has imposed *two* explicit conditions, or "building blocks", for survival under the *CCAA* of deemed trusts created by the *ITA*, *CPP*, and *EIA*. Had Parliament intended to likewise preserve under the *CCAA* deemed trusts created by the *ETA*, it would have included in the *CCAA* the sort of confirmatory provision that explicitly preserves other deemed trusts.

109 With respect, unlike Tysoe J.A., I do not find it "inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception" (2009 BCCA 205, 98 B.C.L.R. (4th) 242, [2009] G.S.T.C. 79 (B.C. C.A.), at para. 37). *All* of the deemed trust provisions excerpted above make explicit reference to the *BIA*. Section 222 of the *ETA* does not break the pattern. Given the near-identical wording of the four deemed trust provisions, it would have been surprising indeed had Parliament not addressed the *BIA* at all in the *ETA*.

110 Parliament's evident intent was to render GST deemed trusts inoperative upon the institution of insolvency proceedings. Accordingly, s. 222 mentions the *BIA* so as to *exclude* it from its ambit — rather than to *include* it, as do the *ITA*, the *CPP*, and the *EIA*.

111 Conversely, I note that *none* of these statutes mentions the *CCAA* expressly. Their specific reference to the *BIA* has no bearing on their interaction with the *CCAA*. Again, it is the confirmatory provisions *in the insolvency statutes* that determine whether a given deemed trust will subsist during insolvency proceedings.

112 Finally, I believe that chambers judges should not segregate GST monies into the Monitor's trust account during *CCAA* proceedings, as was done in this case. The result of Justice Deschamps's reasoning is that GST claims become unsecured under the *CCAA*. Parliament has deliberately chosen to nullify certain Crown super-priorities during insolvency; this is one such instance.

III

113 For these reasons, like Justice Deschamps, I would allow the appeal with costs in this Court and in the courts below and order that the $305,202.30 collected by LeRoy Trucking in respect of GST but not yet remitted to the Receiver General of Canada be subject to no deemed trust or priority in favour of the Crown.

***Abella J. (dissenting)*:**

114 The central issue in this appeal is whether s. 222 of the *Excise Tax Act*, R.S.C. 1985, c. E-15 ("*EIA*"), and specifically s. 222(3), gives priority during *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), proceedings to the Crown's deemed trust in unremitted GST. I agree with Tysoe J.A. that it does. It follows, in my respectful view, that a court's discretion under s. 11 of the *CCAA* is circumscribed accordingly.

115 Section 11 [1] of the *CCAA* stated:

> **11**. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

To decide the scope of the court's discretion under s. 11, it is necessary to first determine the priority issue. Section 222(3), the provision of the *ETA* at issue in this case, states:

> **222 (3) Extension of trust** — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed
>
> (a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and
>
> (b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest
>
> and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

116 Century Services argued that the *CCAA's* general override provision, s. 18.3(1), prevailed, and that the deeming provisions in s. 222 of the *ETA* were, accordingly, inapplicable during *CCAA* proceedings. Section 18.3(1) states:

> **18.3** (1) ... [N]otwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

117 As MacPherson J.A. correctly observed in *Ottawa Senators Hockey Club Corp. (Re)* (2005), 73 O.R. (3d) 737, [2005] G.S.T.C. 1 (Ont. C.A.), s. 222(3) of the *ETA* is in "clear conflict" with s. 18.3(1) of the *CCAA* (para. 31). Resolving the conflict between the two provisions is, essentially, what seems to me to be a relatively uncomplicated exercise in statutory interpretation: does the language reflect a clear legislative intention? In my view it does. The deemed trust provision, s. 222(3) of the *ETA*, has unambiguous language stating that it operates notwithstanding any law except the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*").

118 By expressly excluding only one statute from its legislative grasp, and by unequivocally stating that it applies despite any other law anywhere in Canada *except* the *BIA*, s. 222(3) has defined its boundaries in the clearest possible terms. I am in complete agreement with the following comments of MacPherson J.A. in *Ottawa Senators*:

> The legislative intent of s. 222(3) of the *ETA* is clear. If there is a conflict with "any other enactment of Canada (except the *Bankruptcy and Insolvency Act*)", s. 222(3) prevails. In these words Parliament did two things: it decided that s. 222(3) should trump all other federal laws and, importantly, it addressed the topic of exceptions to its trumping decision and identified a single exception, the *Bankruptcy and Insolvency Act* .... The *BIA* and the *CCAA* are closely related federal statutes. I cannot conceive that Parliament would specifically identify the *BIA* as an exception, but accidentally fail to consider the *CCAA* as a possible second exception. In my view, the omission of the *CCAA* from s. 222(3) of the *ETA* was almost certainly a considered omission. [para. 43]

119 MacPherson J.A.'s view that the failure to exempt the *CCAA* from the operation of the *ETA* is a reflection of a clear legislative intention, is borne out by how the *CCAA* was subsequently changed after s. 18.3(1) was enacted in 1997. In 2000, when s. 222(3) of the *ETA* came into force, amendments were also introduced to the *CCAA*. Section 18.3(1) was not amended.

120 The failure to amend s. 18.3(1) is notable because its effect was to protect the legislative *status quo*, notwithstanding repeated requests from various constituencies that s. 18.3(1) be amended to make the priorities in the *CCAA* consistent with those in the *BIA*. In 2002, for example, when Industry Canada conducted a review of the *BIA* and the *CCAA*, the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals recommended that the priority regime under the *BIA* be extended to the *CCAA* (Joint Task Force on Business Insolvency Law Reform, *Report* (March 15, 2002), Sch. B, proposal 71, at pp. 37-38). The same recommendations were made by the Standing Senate Committee on Banking, Trade and Commerce in its 2003 report, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*; by the Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals in its 2005 *Report on the Commercial Provisions of Bill C-55*; and in 2007 by the Insolvency Institute of Canada in a submission to the Standing Senate Committee on Banking, Trade and Commerce commenting on reforms then under consideration.

121 Yet the *BIA* remains the only exempted statute under s. 222(3) of the *ETA*. Even after the 2005 decision in *Ottawa Senators* which confirmed that the *ETA* took precedence over the *CCAA*, there was no responsive legislative revision. I see this lack of response as relevant in this case, as it was in *R. v. Tele-Mobile Co.*, 2008 SCC 12, [2008] 1 S.C.R. 305 (S.C.C.), where this Court stated:

> While it cannot be said that legislative silence is necessarily determinative of legislative intention, in this case the silence is Parliament's answer to the consistent urging of Telus and other affected businesses and organizations that there be express language in the legislation to ensure that businesses can be reimbursed for the reasonable costs of complying with evidence-gathering orders. I see the legislative history as reflecting Parliament's intention that compensation not be paid for compliance with production orders. [para. 42]

122 All this leads to a clear inference of a deliberate legislative choice to protect the deemed trust in s. 222(3) from the reach of s. 18.3(1) of the *CCAA*.

123 Nor do I see any "policy" justification for interfering, through interpretation, with this clarity of legislative intention. I can do no better by way of explaining why I think the policy argument cannot succeed in this case, than to repeat the words of Tysoe J.A. who said:

> I do not dispute that there are valid policy reasons for encouraging insolvent companies to attempt to restructure their affairs so that their business can continue with as little disruption to employees and other stakeholders as possible. It is appropriate for the courts to take such policy considerations into account, but only if it is in connection with a matter that has not been considered by Parliament. Here, Parliament must be taken to have weighed policy considerations when it enacted the amendments to the *CCAA* and *ETA* described above. As Mr. Justice MacPherson observed at para. 43 of *Ottawa Senators*, it is inconceivable that Parliament would specifically identify the *BIA* as an exception when enacting the current version of s. 222(3) of the *ETA* without considering the *CCAA* as a possible second exception. I also make the observation that the 1992 set of amendments to the *BIA* enabled proposals to be binding on secured creditors and, while there is more flexibility under the *CCAA*, it is possible for an insolvent company to attempt to restructure under the auspices of the *BIA*. [para. 37]

124 Despite my view that the clarity of the language in s. 222(3) is dispositive, it is also my view that even the application of other principles of interpretation reinforces this conclusion. In their submissions, the parties raised the following as being particularly relevant: the Crown relied on the principle that the statute which is "later in time" prevails; and Century Services based its argument on the principle that the general provision gives way to the specific (*generalia specialibus non derogani*).

125 The "later in time" principle gives priority to a more recent statute, based on the theory that the legislature is presumed to be aware of the content of existing legislation. If a new enactment is inconsistent with a prior one, therefore, the legislature

is presumed to have intended to derogate from the earlier provisions (Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 346-47; Pierre-André Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 358).

126 The exception to this presumptive displacement of pre-existing inconsistent legislation, is the *generalia specialibus non derogant* principle that "[a] more recent, general provision will not be construed as affecting an earlier, special provision" (Côté, at p. 359). Like a Russian Doll, there is also an exception within this exception, namely, that an earlier, specific provision may in fact be "overruled" by a subsequent general statute if the legislature indicates, through its language, an intention that the general provision prevails (*Doré c. Verdun (Municipalité)*, [1997] 2 S.C.R. 862 (S.C.C.)).

127 The primary purpose of these interpretive principles is to assist in the performance of the task of determining the intention of the legislature. This was confirmed by MacPherson J.A. in *Ottawa Senators*, at para. 42:

> [T]he overarching rule of statutory interpretation is that statutory provisions should be interpreted to give effect to the intention of the legislature in enacting the law. This primary rule takes precedence over all maxims or canons or aids relating to statutory interpretation, including the maxim that the specific prevails over the general (*generalia specialibus non derogant*). As expressed by Hudson J. in *Canada v. Williams*, [1944] S.C.R. 226, ... at p. 239 ...:
>
> > The maxim *generalia specialibus non derogant* is relied on as a rule which should dispose of the question, but the maxim is not a rule of law but a rule of construction and bows to the intention of the legislature, if such intention can reasonably be gathered from all of the relevant legislation.

(See also Côté, at p. 358, and Pierre-Andre Côté, with the collaboration of S. Beaulac and M. Devinat, *Interprétation des lois* (4th ed. 2009), at para. 1335.)

128 I accept the Crown's argument that the "later in time" principle is conclusive in this case. Since s. 222(3) of the *ETA* was enacted in 2000 and s. 18.3(1) of the *CCAA* was introduced in 1997, s. 222(3) is, on its face, the later provision. This chronological victory can be displaced, as Century Services argues, if it is shown that the more recent provision, s. 222(3) of the *ETA*, is a general one, in which case the earlier, specific provision, s. 18.3(1), prevails (*generalia specialibus non derogant)*. But, as previously explained, the prior specific provision does not take precedence if the subsequent general provision appears to "overrule" it. This, it seems to me, is precisely what s. 222(3) achieves through the use of language stating that it prevails despite any law of Canada, of a province, or "any other law" *other than the BIA*. Section 18.3(1) of the *CCAA*, is thereby rendered inoperative for purposes of s. 222(3).

129 It is true that when the *CCAA* was amended in 2005,[2] s. 18.3(1) was re-enacted as s. 37(1) (S.C. 2005, c. 47, s. 131). Deschamps J. suggests that this makes s. 37(1) the new, "later in time" provision. With respect, her observation is refuted by the operation of s. 44(f) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which expressly deals with the (non) effect of re-enacting, without significant substantive changes, a repealed provision (see *Canada (Attorney General) v. Canada (Public Service Staff Relations Board)*, [1977] 2 F.C. 663 (Fed. C.A.), dealing with the predecessor provision to s. 44(f)). It directs that new enactments not be construed as "new law" unless they differ in substance from the repealed provision:

> **44.** Where an enactment, in this section called the "former enactment", is repealed and another enactment, in this section called the "new enactment", is substituted therefor,
>
> > ...
> >
> > (f) except to the extent that the provisions of the new enactment are not in substance the same as those of the former enactment, the new enactment shall not be held to operate as new law, but shall be construed and have effect as a consolidation and as declaratory of the law as contained in the former enactment;

Section 2 of the *Interpretation Act* defines an enactment as "an Act or regulation or *any portion of an Act or regulation*".

130 Section 37(1) of the current *CCAA* is almost identical to s. 18.3(1). These provisions are set out for ease of comparison, with the differences between them underlined:

> **37.**(1) Subject to subsection (2), <u>despite</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as <u>being</u> held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.
>
> **18.3** (1) Subject to subsection (2), <u>notwithstanding</u> any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

131 The application of s. 44(*f*) of the *Interpretation Act* simply confirms the government's clearly expressed intent, found in Industry Canada's clause-by-clause review of Bill C-55, where s. 37(1) was identified as "a technical amendment to reorder the provisions of this Act". During second reading, the Hon. Bill Rompkey, then the Deputy Leader of the Government in the Senate, confirmed that s. 37(1) represented only a technical change:

> On a technical note relating to the treatment of deemed trusts for taxes, the bill [*sic*] makes no changes to the underlying policy intent, despite the fact that in the case of a restructuring under the CCAA, sections of the act [*sic*] were repealed and substituted with renumbered versions due to the extensive reworking of the CCAA.
>
> (*Debates of the Senate*, vol. 142, 1st Sess., 38th Parl., November 23, 2005, at p. 2147)

132 Had the substance of s. 18.3(1) altered in any material way when it was replaced by s. 37(1), I would share Deschamps J.'s view that it should be considered a new provision. But since s. 18.3(1) and s. 37(1) are the same in substance, the transformation of s. 18.3(1) into s. 37(1) has no effect on the interpretive queue, and s. 222(3) of the *ETA* remains the "later in time" provision (Sullivan, at p. 347).

133 This means that the deemed trust provision in s. 222(3) of the *ETA* takes precedence over s. 18.3(1) during *CCAA* proceedings. The question then is how that priority affects the discretion of a court under s. 11 of the *CCAA*.

134 While s. 11 gives a court discretion to make orders notwithstanding the *BIA* and the *Winding-up Act*, R.S.C. 1985, c. W-11, that discretion is not liberated from the operation of any other federal statute. Any exercise of discretion is therefore circumscribed by whatever limits are imposed by statutes *other* than the *BIA* and the *Winding-up Act*. That includes the *ETA*. The chambers judge in this case was, therefore, required to respect the priority regime set out in s. 222(3) of the *ETA*. Neither s. 18.3(1) nor s. 11 of the *CCAA* gave him the authority to ignore it. He could not, as a result, deny the Crown's request for payment of the GST funds during the *CCAA* proceedings.

135 Given this conclusion, it is unnecessary to consider whether there was an express trust.

136 I would dismiss the appeal.

Appeal allowed.

Pourvoi accueilli.

Appendix

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at December 13, 2007)**

> **11. (1) Powers of court —** Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

...

(3) Initial application court orders — A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (i);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

(4) Other than initial application court orders — A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

...

(6) Burden of proof on application — The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

11.4 (1) Her Majesty affected — An order made under section 11 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for such period as the court considers appropriate but ending not later than

(i) the expiration of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or arrangement,

(iv) the default by the company on any term of a compromise or arrangement, or

(v) the performance of a compromise or arrangement in respect of the company; and\

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company where the company is a debtor under that legislation and the provision has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for such period as the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) may apply.

(2) When order ceases to be in effect — An order referred to in subsection (1) ceases to be in effect if

(a) the company defaults on payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) under any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11, other than an order referred to in subsection (1) of this section, does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

18.3 (1) Deemed trusts — Subject to subsection (2), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

18.4 (1) Status of Crown claims — In relation to a proceeding under this Act, all claims, including secured claims, of Her Majesty in right of Canada or a province or any body under an enactment respecting workers' compensation, in this section and in section 18.5 called a "workers' compensation body", rank as unsecured claims.

...

(3) Operation of similar legislation — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

...

20. [Act to be applied conjointly with other Acts] — The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province, that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (as at September 18, 2009)**

11. General power of court — Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

...

11.02 (1) Stays, etc. — initial application — A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

(a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) Stays, etc. — other than initial application — A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(3) Burden of proof on application — The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

...

11.09 (1) Stay — Her Majesty — An order made under section 11.02 may provide that

(a) Her Majesty in right of Canada may not exercise rights under subsection 224(1.2) of the *Income Tax Act* or any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, in respect of the company if the company is a tax debtor under that subsection or provision, for the period that the court considers appropriate but ending not later than

(i) the expiry of the order,

(ii) the refusal of a proposed compromise by the creditors or the court,

(iii) six months following the court sanction of a compromise or an arrangement,

(iv) the default by the company on any term of a compromise or an arrangement, or

(v) the performance of a compromise or an arrangement in respect of the company; and

(b) Her Majesty in right of a province may not exercise rights under any provision of provincial legislation in respect of the company if the company is a debtor under that legislation and the provision has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

for the period that the court considers appropriate but ending not later than the occurrence or time referred to in whichever of subparagraphs (*a*)(i) to (v) that may apply.

(2) When order ceases to be in effect — The portions of an order made under section 11.02 that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*) cease to be in effect if

(a) the company defaults on the payment of any amount that becomes due to Her Majesty after the order is made and could be subject to a demand under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection; or

(b) any other creditor is or becomes entitled to realize a security on any property that could be claimed by Her Majesty in exercising rights under

(i) subsection 224(1.2) of the *Income Tax Act*,

(ii) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(iii) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(A) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(B) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection.

(3) Operation of similar legislation — An order made under section 11.02, other than the portions of that order that affect the exercise of rights of Her Majesty referred to in paragraph (1)(*a*) or (*b*), does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*,

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts, or

(c) any provision of provincial legislation that has a purpose similar to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, and the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

37. (1) Deemed trusts — Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

(2) Exceptions — Subsection (1) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision"), nor does it apply in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province if

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

***Excise Tax Act*, R.S.C. 1985, c. E-15 (as at December 13, 2007)**

222. (1) [Deemed] Trust for amounts collected — Subject to subsection (1.1), every person who collects an amount as or on account of tax under Division II is deemed, for all purposes and despite any security interest in the amount, to hold the amount in trust for Her Majesty in right of Canada, separate and apart from the property of the person and from property held by any secured creditor of the person that, but for a security interest, would be property of the person, until the amount is remitted to the Receiver General or withdrawn under subsection (2).

(1.1) Amounts collected before bankruptcy — Subsection (1) does not apply, at or after the time a person becomes a bankrupt (within the meaning of the *Bankruptcy and Insolvency Act)*, to any amounts that, before that time, were collected or became collectible by the person as or on account of tax under Division II.

...

(3) Extension of trust — Despite any other provision of this Act (except subsection (4)), any other enactment of Canada (except the *Bankruptcy and Insolvency Act)*, any enactment of a province or any other law, if at any time an amount deemed by subsection (1) to be held by a person in trust for Her Majesty is not remitted to the Receiver General or withdrawn in the manner and at the time provided under this Part, property of the person and property held by any secured creditor of the person that, but for a security interest, would be property of the person, equal in value to the amount so deemed to be held in trust, is deemed

(a) to be held, from the time the amount was collected by the person, in trust for Her Majesty, separate and apart from the property of the person, whether or not the property is subject to a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was collected, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to a security interest

and is property beneficially owned by Her Majesty in right of Canada despite any security interest in the property or in the proceeds thereof and the proceeds of the property shall be paid to the Receiver General in priority to all security interests.

***Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (as at December 13, 2007)**

67. (1) Property of bankrupt — The property of a bankrupt divisible among his creditors shall not comprise

(a) property held by the bankrupt in trust for any other person,

(b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides, or

(b.1) such goods and services tax credit payments and prescribed payments relating to the essential needs of an individual as are made in prescribed circumstances and are not property referred to in paragraph (*a*) or (*b*),

but it shall comprise

(c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and

(d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

(2) Deemed trusts — Subject to subsection (3), notwithstanding any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(*a*) unless it would be so regarded in the absence of that statutory provision.

(3) Exceptions — Subsection (2) does not apply in respect of amounts deemed to be held in trust under subsection 227(4) or (4.1) of the *Income Tax Act*, subsection 23(3) or (4) of the *Canada Pension Plan* or subsection 86(2) or (2.1) of the *Employment Insurance Act* (each of which is in this subsection referred to as a "federal provision") nor in respect of amounts deemed to be held in trust under any law of a province that creates a deemed trust the sole purpose of which is to ensure remittance to Her Majesty in right of the province of amounts deducted or withheld under a law of the province where

(a) that law of the province imposes a tax similar in nature to the tax imposed under the *Income Tax Act* and the amounts deducted or withheld under that law of the province are of the same nature as the amounts referred to in subsection 227(4) or (4.1) of the *Income Tax Act*, or

(b) the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan*, that law of the province establishes a "provincial pension plan" as defined in that subsection and the amounts deducted or withheld under that law of the province are of the same nature as amounts referred to in subsection 23(3) or (4) of the *Canada Pension Plan*,

and for the purpose of this subsection, any provision of a law of a province that creates a deemed trust is, notwithstanding any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as the corresponding federal provision.

86. (1) Status of Crown claims — In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of any body under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

...

(3) Exceptions — Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the *Income Tax Act*;

(b) any provision of the *Canada Pension Plan* or of the *Employment Insurance Act* that refers to subsection 224(1.2) of the *Income Tax Act* and provides for the collection of a contribution, as defined in the *Canada Pension Plan*, or an employee's premium, or employer's premium, as defined in the *Employment Insurance Act*, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the *Income Tax Act*, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, or

(ii) is of the same nature as a contribution under the *Canada Pension Plan* if the province is a "province providing a comprehensive pension plan" as defined in subsection 3(1) of the *Canada Pension Plan* and the provincial legislation establishes a "provincial pension plan" as defined in that subsection,

and for the purpose of paragraph (*c*), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2)

of the *Income Tax Act* in respect of a sum referred to in subparagraph (*c*)(i), or as subsection 23(2) of the *Canada Pension Plan* in respect of a sum referred to in subparagraph (*c*)(ii), and in respect of any related interest, penalties or other amounts.

Footnotes

1 Section 11 was amended, effective September 18, 2009, and now states:

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

2 The amendments did not come into force until September 18, 2009.

TAB 15

2020 SCC 25, 2020 CSC 25
Supreme Court of Canada

Chandos Construction Ltd. v. Deloitte

2020 CarswellAlta 1754, 2020 CarswellAlta 1755, 2020 SCC 25, 2020 CSC 25, [2020] A.W.L.D. 3072, [2020] A.W.L.D. 3084, 2 C.L.R. (5th) 193, 322 A.C.W.S. (3d) 391, 449 D.L.R. (4th) 293

Chandos Construction Ltd. (Appellant) and Deloitte Restructuring Inc. in its capacity as Trustee in Bankruptcy of Capital Steel Inc., a bankrupt (Respondent) and Attorney General of Canada, Canadian Association of Insolvency and Restructuring Professionals and Insolvency Institute of Canada (Interveners)

Wagner C.J.C., Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer JJ.

Heard: January 20, 2020
Judgment: October 2, 2020
Docket: 38571

Proceedings: affirming *Capital Steel Inc v. Chandos Construction Ltd* (2019), 91 B.L.R. (5th) 1, 2019 ABCA 32, 2019 CarswellAlta 125, 1 C.L.R. (5th) 201, 438 D.L.R. (4th) 195, 70 C.B.R. (6th) 1, Barbara Lea Veldhuis J.A., Patricia Rowbotham J.A., Thomas W. Wakeling J.A. (Alta. C.A.)

Counsel: Darren Bieganek, Q.C., Ryan Quinlan, for Appellant
Shauna N. Finlay, Victoria Merritt, for Respondent
Zoe Oxaal, for Intervener, Attorney General of Canada
Ashley Taylor, Sinziana R. Hennig, for Intervener, Canadian Association of Insolvency and Restructuring Professionals
Sean F. Collins, Brandon Kain, Cassidy Thomson, for Intervener, Insolvency Institute of Canada

Rowe J. **(Wagner C.J.C., Abella, Moldaver, Karakatsanis, Brown, Martin, Kasirer JJ. concurring):**

1 This case concerns a common law rule (the "anti-deprivation rule") that operates to prevent contracts from frustrating statutory insolvency schemes. Chandos Construction Ltd. ("Chandos") entered into a construction contract ("Subcontract") with Capital Steel Inc. ("Capital Steel"). A provision of the Subcontract would award Chandos a sum of money in the event of Capital Steel's bankruptcy, which later occurred. This case deals with whether that provision was invalid by virtue of the anti-deprivation rule.

2 I conclude that it is, essentially for the reasons of the majority of the Court of Appeal of Alberta. Accordingly, the appeal is dismissed.

I. Facts

3 Chandos, a general construction contractor, entered into the Subcontract with Capital Steel, a subcontractor. The value of the Subcontract was $1,373,300.47. The provision at issue is in clause VII Q, one of the "Conditions" of the subcontract:

> **Q Subcontractor Ceases Operation**
>
> In the event the Subcontractor commits any act of insolvency, bankruptcy, winding up or other distribution of assets, or permits a receiver of the Subcontractor's business to be appointed, or ceases to carry on business or closes down its operations, then in any of such events:

(a) this Subcontract Agreement shall be suspended but may be reinstated and continued if the Contractor, the liquidator or Trustee of the Subcontractor and the surety, if any, so agree. If no agreement is reached, the Subcontractor shall be considered to be in default and the Contractor may give written notice of default to the Subcontractor and immediately proceed to complete the Work by other means as deemed appropriate by the Contractor, and

(b) any cost to the Contractor arising from the suspension of this Subcontract Agreement or the completion of the Work by the Contractor, plus a reasonable allowance for overhead and profit, will be payable by the Subcontractor and or his sureties, and

(c) the Contractor is entitled to withhold up to 20% of the within Subcontract Agreement price until such time as all warranty and or guarantee periods which are the responsibility of the Subcontractor have expired and,

(d) the Subcontractor shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period.

(A. R., at p. 157)

4 This clause provides four consequences that follow from the insolvency, bankruptcy, or cease of business of Capital Steel. First, clause VII Q(a) provides that the Subcontract will be suspended and can only be continued if the Trustee in bankruptcy and Chandos agree. Second, clause VII Q(b) provides that Capital Steel will pay Chandos "any cost ... arising from the suspension" of the Subcontract or from Chandos having to complete the work, plus a "reasonable allowance for overhead and profit". Third, clause VII Q(c) allows Chandos to withhold certain funds from Capital Steel until the warranty and guarantee periods run out. Fourth, clause VII Q(d) provides that Capital Steel will pay Chandos 10 percent of the Subcontract price "as a fee for the inconvenience ... and/or for monitoring the work".

5 When Capital Steel filed an assignment in bankruptcy prior to completing its Subcontract with Chandos, Deloitte Restructuring Inc. was appointed as its Trustee in bankruptcy. At the time, Chandos owed Capital Steel $149,618.39 under the Subcontract. Chandos argued that it was entitled to set off $22,800 — the costs it had incurred to complete Capital Steel's work — such that it would owe Capital Steel only $126,818.39 ($149,618.39 less $22,800). In so arguing, Chandos did not have to rely on clause VII Q as it could rely on the ordinary common law rules relating to damages for breach of contract and the law of set-off, which persists in bankruptcy under s. 97(3) of the *Bankruptcy and Insolvency Act*, R.S.C 1985, c. B-3 ("*BIA*").

6 Chandos argued that it was also entitled to set off the amount triggered by the bankruptcy according to clause VII Q(d), under which Capital Steel forfeits 10 percent of the Subcontract price in the event of insolvency. The Subcontract price was $1,373,300.47, so, by its terms, clause VII Q(d) created a debt owed by Capital Steel to Chandos of $137,330.05. If clause VII Q(d) applied, it would mean Chandos had a $10,511.66 claim provable in bankruptcy proceedings rather than a debt to Capital Steel of $126,818.39.

7 Faced with these arguments, the Trustee applied for advice and directions from the Court of Queen's Bench as to whether clause VII Q(d) was valid.

II. Judgments Below

8 The application judge found the provision to be valid (Alta. Q.B., Edmonton, 242169632, 17 March 2017). He concluded that, so long as the provision was not an attempt to avoid the effect of bankruptcy laws, the anti-deprivation rule does not prevent contracting parties from agreeing that upon the insolvency of one party, the other party can make a liquidated damages claim. He found that, in this case, Chandos had not attempted to avoid the effect of bankruptcy laws. He also found that the provision was a (valid) liquidated damages clause, not an (invalid) penalty clause.

9 On appeal, the majority of the Court of Appeal reversed the decision, finding the provision invalid (2019 ABCA 32, 438 D.L.R. (4th) 195) (Alta. C.A.).

10 As Rowbotham J.A., for the majority, explained, whether a provision is a liquidated damages clause or a penalty clause is a separate and distinct analysis from whether the provision violates the anti-deprivation rule. A provision can be invalid if it violates either the anti-deprivation rule or the penalty clause rule.

11 Justice Rowbotham's reasons proceeded in three stages. First, she identified the long history of the anti-deprivation rule in Canadian jurisprudence. Second, she found that the rule has not been eliminated by either subsequent decisions or by statutory amendments. Finally, she determined that the content of the rule should remain as articulated in the Canadian jurisprudence rather than adopt the approach taken by the United Kingdom Supreme Court in *Belmont Park Investments Pty Ltd. v. BNY Corporate Trustee Services Ltd.*, [2011] UKSC 38, [2012] 1 A.C. 383 (U.K. S.C.) ("*Belmont Park*", earlier know as "*Perpetual Trustee*").

12 As Rowbotham J.A. explained, the common law has two distinct rules that both invalidate contracts that affect the distribution of proceeds in bankruptcy, although they had earlier been combined under the moniker of a "fraud upon the bankruptcy law". The rules do not stand on their own, but rather exist to give effect to an implicit prohibition in bankruptcy legislation. First, the *pari passu* rule forbids contractual provisions that would allow certain creditors to receive more than their fair share. It does not matter whether the provision is triggered by insolvency or bankruptcy, so long as it would alter the scheme of distribution after proceedings begin. Second, the anti-deprivation rule prevents parties from agreeing to remove property from a bankrupt's estate that would otherwise have vested in the trustee. It invalidates provisions that are "engaged by a debtor's insolvency and remove value from the debtor's estate to the prejudice of creditors" (para. 32). Put another way, although both rules concern creditors receiving an appropriately-sized slice of the proverbial pie, the anti-deprivation rule relates to the size of the pie and the *pari passu* rule relates to the slicing of the pie, whatever size it may be (see R. Goode, "Perpetual Trustee and Flip Clauses in Swap Transactions" (2011), 127 *L.Q.R.* 1, at p. 4).

13 Justice Rowbotham concluded that both rules have been applied in Canadian jurisprudence. She cited *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475 (S.C.C.), at para. 23, as an application of the *pari passu* rule, and the following cases as examples of the application of the anti-deprivation rule: *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692 (Ont. Gen. Div. [Commercial List]) ("*Bramalea*"); *Hoskins, Re* (1877), 1 O.A.R. 379 (Ont. C.A.); *Wetmore, Re*, [1924] 4 D.L.R. 66 (N.B. C.A.); *Westerman, Re*, 1998 ABQB 946, 234 A.R. 371 (Alta. Q.B.), rev'd on other grounds 1999 ABQB 708, 275 A.R. 114 (Alta. Q.B.); *Knechtel Furniture Ltd., Re* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.); *Daoust c. Cie de gestion Gar-Vin Inc.* (1982), 138 D.L.R. (3d) 61 (C.S. Que.); *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276 (Ont. C.A.), at paras 10-12; *HGC v. IESO*, 2019 ONSC 259 (Ont. S.C.J.), at para. 100 (CanLII); *1183882 Alberta Ltd. v. Valin Industrial Mill Installations Ltd.*, 2012 ABCA 62, 522 A.R. 285 (Alta. C.A.) (per McDonald J.A., dissenting).

14 Justice Rowbotham identified no cases where the anti-deprivation rule had been eliminated. She considered *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.*, [1996] 1 S.C.R. 900 (S.C.C.) ("*Coopérants*"), because, even though it involved a contractual provision triggered by liquidation, this Court did not discuss the anti-deprivation rule. She noted, however, that there was no evidence the provision at issue prejudiced creditors, so the anti-deprivation rule would not have been engaged.

15 Justice Rowbotham also found that no statutory changes had eliminated the anti-deprivation rule, either explicitly or by negative implication, as when Parliament occupies the field. The only changes that might arguably be relevant were to the *BIA*. They, however, addressed a different problem than that addressed by the anti-deprivation rule: whereas the anti-deprivation rule protects creditors, the changes in question protect debtors.

16 One such change came when Parliament enacted ss. 65.1 and 66.34 of the *BIA*. These sections invalidate contractual provisions triggered by insolvency in both commercial and consumer restructurings. Parliament's focus was on ensuring that debtors have time necessary to restructure their affairs. There was no suggestion that these sections were meant to affect the anti-deprivation rule, which is aimed at protecting the interest of creditors.

17 Similarly, when Parliament enacted s. 84.2 of the *BIA*, it intended to protect consumer debtors from the deleterious consequences of provisions that trigger upon bankruptcy, not to protect one creditor from a debtor's contract with another creditor.

18 Justice Rowbotham concluded that in none of these instances did Parliament intend to occupy the field and eliminate the anti-deprivation.

19 Next, Rowbotham J.A. considered whether to follow the U.K. Supreme Court's approach to the anti-deprivation rule in *Belmont Park Investments Pty Ltd.*. In *Belmont Park Investments Pty Ltd.*, the U.K. Supreme Court concluded that the anti-deprivation rule does not apply to "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy" (para. 104).

20 Justice Rowbotham declined to follow *Belmont Park Investments Pty Ltd.*. She noted that this purpose-based test was contrary to the effects-based test applied by Canadian courts, and that this new test had been criticized by British legal scholars as defeating the purpose of the anti-deprivation rule. She further noted that a party who might become insolvent has no incentive to resist a clause that directs property out of its estate upon insolvency, since, upon that event, the insolvent party will no longer have an interest in that property.

21 Finally, Rowbotham J.A. applied the common law anti-deprivation rule to clause VII Q(d). She determined that this clause triggered upon insolvency and that giving effect to it would remove value from the debtor's estate to the prejudice of creditors. The clause was therefore invalid.

22 Justice Wakeling dissented. In his view, the anti-deprivation rule has never existed in Canadian common law or, if it did, it ceased to exist after amendments to the *BIA* and the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, in 2009. Even if it did exist, he would have adopted the purpose-based test from *Belmont Park Investments Pty Ltd.*. These conclusions were advanced by Chandos before this court. Justice Wakeling also would have reformulated the penalty rule. Given my conclusions as to the anti-deprivation rule, I do not address the penalty rule.

III. Issues on appeal

23 On appeal before us, Chandos alleges the majority at the Court of Appeal made five errors, by:

a) emphasizing bankruptcy law over contract law;

b) failing to abandon the classic penalty rule of contract law;

c) finding an anti-deprivation rule exists at common law;

d) applying an effects-based anti-deprivation rule; and

e) failing to consider the effect of set off.

24 The first issue is readily dealt with: contract law and bankruptcy law work together, in this instance through the operation of the anti-deprivation rule. The second issue can also be disposed of summarily: if the provision is invalid for one reason (the anti-deprivation rule in bankruptcy law), it does not matter whether it is or is not invalid for another (the penalty rule in contract law). I will discuss the other issues below.

IV. The Existence of the Common Law Anti-Deprivation Rule

25 As to the existence of the anti-deprivation rule, I see no error in Rowbotham J.A.'s consideration of this issue, in that the rule has existed in Canadian common law and has not been eliminated by either this Court or Parliament.

26 Justice Rowbotham correctly found that there has been support for the anti-deprivation rule in the decisions to which she referred; I would add *Watson v. Mason* (1876), 22 Gr. 574 (Ont. Ch.) and *Hobbs, Osborne & Hobbs v. Ontario Loan & Debenture Co.* (1890), 18 S.C.R. 483 (S.C.C.), at p. 502 (per Strong J.), even if *Hobbs* is from a period in Canadian history where no federal bankruptcy legislation existed (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 33-35).

27 No decision of this Court has eliminated the anti-deprivation rule. *Coopérants*, as Rowbotham J.A. stated, was not an anti-deprivation case as there was no deprivation (*Coopérants*, at paras. 43-44).

28 Nor has Parliament eliminated the anti-deprivation rule. As Rowbotham J.A. observed, Parliament did not implement ss. 65.1, 66.34, or 84.2 of the *BIA* so as to eliminate the anti-deprivation rule: the anti-deprivation rule protects third party creditors, whereas Parliament's changes were directed toward protecting debtors (see *Bill C-22: Clause by clause Analysis*, cl. 87, s. 65.1 and cl. 89, s. 66.34, reproduced in the Attorney General of Canada's book of authorities, at Tab 4; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden*: *A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (2003), at pp. 74-75). This goal of protecting the debtor is relevant only where the debtor persists after the proceedings conclude. It is common for the debtor to persist after a restructuring or after the bankruptcy of a natural person. It is uncommon for the debtor to persist after a corporate bankruptcy as, typically, no assets remain for the corporation after all creditors are paid.

29 Moreover, as the intervenor Attorney General of Canada submitted, Parliament's actions are better understood as gradually codifying limited parts of the common law rather than seeking to oust all related common law. As this Court has repeatedly observed, Parliament is presumed to intend not to change the existing common law unless it does so clearly and unambiguously (*Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42, [2003] 2 S.C.R. 157 (S.C.C.), at para. 39; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 (S.C.C.), at paras. 29-30).

30 Indeed, the most relevant statutory provision in the *BIA* is not s. 65.1, s. 66.34, or s. 84.2, but rather s. 71. As this Court recognized in *Ramgotra (Trustee of) v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325 (S.C.C.), s. 71 provides that the property of a bankrupt to "passes to and vests in the trustee" (para. 44). This helps maximize the "global recovery for all creditors" in accordance with the priorities set out in the *BIA* (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 33; see also *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.), at paras. 7-9). The anti-deprivation rule renders void contractual provisions that would prevent property from passing to the trustee and thus frustrate s. 71 and the scheme of the *BIA*. This maximizes the assets that are available for the trustee to pass to creditors.

V. The Content of the Anti-Deprivation Rule

31 As *Bramalea* described, the anti-deprivation rule renders void contractual provisions that, upon insolvency, remove value that would otherwise have been available to an insolvent person's creditors from their reach. This test has two parts: first, the relevant clause must be triggered by an event of insolvency or bankruptcy; and second, the effect of the clause must be to remove value from the insolvent's estate. This has been rightly called an effects-based test.

32 Chandos submits that this Court should change the anti-deprivation rule to follow *Belmont Park Investments Pty Ltd.* and adopt a purpose-based test. As noted above, *Belmont Park Investments Pty Ltd.* held that the English anti-deprivation rule does not invalidate provisions of "bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy". Chandos says we should follow this reasoning because upholding *bona fide* commercial agreements would strike the best balance of public policy considerations and contribute to commercial certainty. It also submits that the side-effects of such a rule would not be so deleterious, as unsecured creditors tend to receive little in bankruptcy; as well, courts would be able to tell who had inserted provisions that remove value from the debtor's estate for *bona fide* commercial reasons. None of these reasons holds water.

33 The goal of public policy, in this instance, is not decided by the common law; rather, that policy has been established in the legislation. What is left to the common law is the choice of means that best gives effect to the statutory scheme adopted

by Parliament. Thus, once a court ascertains that Parliament intended, by virtue of s. 71, that all of the bankrupt's property is to be collected in the trustee, it is not for the court to substitute a competing goal that would give rise to a different result. In this, I agree with Professor Worthington that "[a]ny avoidance, whether intentional or inevitable, is surely a fraud on the statute" ("Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule" (2012), 75 *M.L.R.* 112, at p. 121).

34 In addition, I would disagree that adopting a purpose-based test would create commercial certainty. To the contrary, applying such a test would require courts to determine the intention of contracting parties long after the fact and it would detract from the efficient administration of corporate bankruptcies. Parties cannot know at the time of contracting whether a court, possibly years later, will find their contract had been entered into for *bona fide* commercial reasons. This will give rise to uncertainty at the time of contracting.

35 The effects-based rule, as it stands, is clear. Courts (and commercial parties) do not need to look to anything other than the trigger for the clause and its effect. The effect of a clause can be far more readily determined in the event of bankruptcy than the intention of contracting parties. An effects-based approach also provides parties with the confidence that contractual agreements, absent a provision providing for the withdrawal of assets upon bankruptcy or insolvency, will generally be upheld. Maintaining an effects-based test is also consistent with the existing effects-based test recognized in *Gingras*, at p. 487, for the *pari passu* rule founded on s. 141 of the *BIA* (previously s. 112 of the *Bankruptcy Act*, R.S.C. 1970, c. B-3), as well as the effects-based test set out in ss. 65.1, 66.34 and 84.2 of the *BIA*. These tests should remain consistent to prevent duplicative proceedings and avoid arcane disputes over whether the *pari passu* rule or the anti-deprivation rule is engaged by a particular provision. Although it is often easy to tell that a provision would affect the amount a creditor will receive, determining whether this is because it deprives the estate of value (thus violating the anti-deprivation rule) or because it reallocates the estate among creditors (thus violating the *pari passu* rule) depends on the precise machinery of law, disputes over such intricacies can be avoided if both rules apply an effects-based test.

36 Moreover, an intention-based test would encourage parties who can plausibly pretend to have *bona fide* intentions to create a preference over other creditors by inserting such clauses. Parties will often be able to state some commercial rationale for provisions altering contractual rights in the event of a counterparty's insolvency, such as guarding against the risk of the counterparty's non-performance. An intention-based test would render the rule ineffectual, save in the most flagrant cases of deliberate circumvention of insolvency law. This would threaten to undermine the statutory scheme of the *BIA*.

37 Reliance on general principles of contractual freedom to support an intention-based test is no less misplaced. As noted in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), at para. 70, the common law of contract "generally places great weight on the freedom of contracting parties to pursue their individual self-interest" but, by definition, an assignment in bankruptcy strips the insolvent party of their interest. As Rowbotham J.A. observed, a party who might become insolvent has no incentive to resist a clause that deprives their estate of value upon bankruptcy. Parties do not negotiate with a view to protecting the interests of their creditors in the event of their bankruptcy. The costs of accepting the clause are borne solely by the unsecured creditors of the insolvent company (who are without a seat at the bargaining table) while the benefits are enjoyed only by the company while it is solvent.

38 Finally, while it may be true that unsecured creditors tend to receive relatively little now, the effect of a purpose-based rule is that they would receive less.

39 Overall, Chandos has not shown us good reason to adopt a purpose-based test. In my view, adopting the purpose-based test would create "new and greater difficulties" of the sort cautioned against in *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at p. 762. As recognized in *Bhasin*, at para. 40, although a change to the Canadian common law may be appropriate when it creates greater certainty and coherence, it is not when the change would foster uncertainty and incoherence.

40 All that said, we should recognize that there are nuances with the anti-deprivation rule as it stands. For example, contractual provisions that eliminate property from the estate, but do not eliminate value, may not offend the anti-deprivation rule (see *Belmont Park Investments Pty Ltd.*, at para. 160, per Lord Mance; *Borland's Trustee v. Steel Brothers & Co.* (1900), [1901] 1 Ch. 279 (Eng. Ch. Div.); see also *Coopérants*). Nor do provisions whose effect is triggered by an event other than

insolvency or bankruptcy. Moreover, the anti-deprivation rule is not offended when commercial parties protect themselves against a contracting counterparty's insolvency by taking security, acquiring insurance, or requiring a third-party guarantee.

41 In sum, the Court of Appeal was correct to consider whether the effect of the contractual provision was to deprive the estate of assets upon bankruptcy rather than whether the intention of the contracting parties was commercially reasonable.

VI. Application and the Effect of Set-Off

42 This brings us to Chandos' final argument concerning the effect of set-off on the application of the anti-deprivation rule in this case. Set-off is given statutory approval in s. 97(3) of the *BIA*:

> (3) The law of set-off or compensation applies to all claims made against the estate of the bankrupt and also to all actions instituted by the trustee for the recovery of debts due to the bankrupt in the same manner and to the same extent as if the bankrupt were plaintiff or defendant, as the case may be, except in so far as any claim for set-off or compensation is affected by the provisions of this Act respecting frauds or fraudulent preferences.

As this Court described in *Husky Oil*, at para. 3, s. 97(3) incorporates the provincial law of set-off (and the related civil law concept of compensation) into the federal bankruptcy regime. Set-off is a defence to the payment of a debt. The effect of set-off is to allow a creditor who happens to be also a debtor to recover ahead of their priority.

43 The *BIA*'s affirmation of set-off and the anti-deprivation rule are not incompatible. While set-off reduces the value of assets that are transferred to the Trustee for redistribution, it is applicable only to enforceable debts or claims (see, e.g., *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.), at pp. 204-6). The anti-deprivation rule makes deprivations triggered by insolvency unenforceable. The combination means that set-off applies to debts owed by the bankrupt that were not triggered by the bankruptcy.

44 The case at bar is quite different. The chapeau of clause VII Q provides that the clause triggers "[i]n the event [Capital Steel] commits any act of insolvency, bankruptcy, winding up or other distribution of assets". Since, here, the clause was triggered by bankruptcy, the threshold for considering the anti-deprivation rule had been met. [1] Clause VII Q(d) itself provides the deprivation: "[Capital Steel] shall forfeit 10% of the within Subcontract Agreement price to [Chandos] as a fee". The effect of this provision is to create a debt from Capital Steel to Chandos that would not exist but for the insolvency. It is this "debt" created by Clause VII Q(d) because of the insolvency that Chandos seeks to "set off" against the amount it owed to Capital Steel. One can hardly imagine a more direct and blatant violation of the anti-deprivation rule.

45 Accordingly, I conclude that clause VII Q(d) violates the anti-deprivation rule and is thus void.

VII. Conclusion

46 I would dismiss the appeal with costs throughout.

***Côté J.* (dissenting):**

I. Introduction

47 I have had the advantage of reading the reasons of my colleague, Rowe J., and there is much with which I agree in them. In particular, I agree that the anti-deprivation rule has a longstanding and strong jurisprudential footing in Canadian law and that it has not been eliminated by this Court or through legislation. However, I write to express a different view on a point of law which is central to the outcome of this appeal. In short, my view is that the anti-deprivation rule should not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. I reach this conclusion essentially for three reasons.

48 First, my reading of the jurisprudence is that courts applying the anti-deprivation rule in Canada have not been content to rest their reasons for decision merely on a finding that the effect of a transaction or contractual provision was to deprive a bankrupt's estate of value. As I explain below, Canadian courts have looked past the effects of the arrangement and inquired into the presence or absence of a *bona fide* commercial purpose behind the deprivation.

49 Second, there is a principled legal basis for retaining a *bona fide* commercial purpose test. The anti-deprivation rule has its origins in the common law public policy against agreements entered into for the unlawful purpose of defrauding or otherwise injuring third parties. Unlike the related *pari passu* rule, the anti-deprivation rule should not be regarded as arising from an implied prohibition in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). Thus, the different legal bases of the two rules explain why the *pari passu* rule operates regardless of the parties' intentions while the anti-deprivation rule takes into account the parties' *bona fide* commercial purposes.

50 Third, as a matter of public policy, the considerations cited in support of an effects-based test are not sufficient to override the otherwise strong countervailing public interest in the enforcement of contracts. A purely effects-based test gives too little weight to freedom of contract, party autonomy, and the "elbow-room" which the common law traditionally accords for the aggressive pursuit of self-interest: see *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, 2014 SCC 12, [2014] 1 S.C.R. 177 (S.C.C.), at para. 31. In addition, Parliament has occupied much of the ground formerly covered by the common law such that there is a reduced need for a general anti-deprivation rule. Indeed, the many statutory protections already in place to safeguard the interests of creditors undermine any perceived policy need to expand the reach of the anti-deprivation rule for that purpose.

51 Therefore, like Wakeling J.A., dissenting in the Court of Appeal below, I would hold that the anti-deprivation rule does not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. As the chambers judge (Alta Q.B., Edmonton 24-2169632, March 17, 2017, A.R., at pp. 9-10) and the Court of Appeal (2019 ABCA 32, 438 D.L.R. (4th) 195 (Alta. C.A.), at paras. 55 and 394-97) were unanimous in finding a *bona fide* commercial purpose behind the contractual provision at issue, I would allow the appeal and restore the order made at first instance.

II. Background

52 My colleague provides a helpful summary of the essential facts in his reasons, and I am content to rely on it. I will therefore only highlight a few important aspects of the contractual relationships in this case.

53 The appellant, Chandos Construction Ltd., hired Capital Steel Inc. to perform important structural steel subcontract work on a condominium project in St. Albert, Alberta ("Subcontract"). The appeal revolves around whether clause VII Q(d) ("clause Q(d)") of the Subcontract offends the anti-deprivation rule. Clause Q(d) is reproduced in my colleague's reasons. Capital Steel also provided a guarantee by which it agreed to repair and make good any defect in its work and all resulting damages that might appear as a result of any improper work: clause III, "Guarantee", A.R., at p. 155. In addition, Clause VII G of the Subcontract required Capital Steel to indemnify Chandos and hold it harmless "from any and all claims, costs, liabilities and causes of action" and for "any loss or damage" caused to Chandos or the owner of the condominium project by Capital Steel or any of Capital Steel's subcontractors, employees, agents, licensees, and permitees in carrying out the Subcontract. The same indemnity also applied between Capital Steel and the owner.

54 The Stipulated Price Contract between Chandos and the owner-developer, Boudreau Developments Ltd., required Chandos to be "as fully responsible to the *Owner* for acts and omissions" of its subcontractors as it was for "acts and omissions of persons directly employed by" it: clause GC 3.7.1.3 (emphasis in original). Chandos also agreed that it would promptly correct defects or deficiencies in the work which appeared during the warranty period at its own expense: clause GC 12.3.4. As well, Chandos was obliged to correct or pay for damage resulting from such corrections: clause GC 12.3.5.

III. Issues

55 The focus of these reasons is whether the anti-deprivation rule applies regardless of the parties' *bona fide* commercial purposes.

56 Another issue raised by the parties is whether clause Q(d) is a valid liquidated damages provision or an unenforceable penalty clause. The chambers judge, Justice Nielsen, concluded that the clause was a valid liquidated damages provision. That finding was not disturbed on appeal, and I do not see any extricable error of law which would justify appellate interference with it. I therefore decline to address this issue further.

IV. Analysis

A. The Anti-Deprivation Rule Does Not Apply Where a Transaction or Contractual Provision Serves a Bona Fide Commercial Purpose

57 Before embarking upon an analysis of whether the jurisprudence on the anti-deprivation rule has traditionally included a purpose element, I find it useful to clearly state what I mean by a "*bona fide* commercial purpose".

58 The inquiry I propose is primarily objective and centres around the presence or absence of a legitimate commercial basis for a transaction or contractual provision. An objective approach dovetails with the approach taken in another important and related area of commercial law, the interpretation of contracts, where "the goal of the exercise is to ascertain the objective intent of the parties": *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), at para. 49. It also parallels this Court's approach to ascertaining the purpose behind commercial transactions in tax characterization cases. As this Court stated in *Symes v. R.*, [1993] 4 S.C.R. 695 (S.C.C.), at p. 736:

> As in other areas of law where purpose or intention behind actions is to be ascertained, it must not be supposed that in responding to this question, courts will be guided only by a taxpayer's statements, *ex post facto* or otherwise, as to the subjective purpose of a particular expenditure. Courts will, instead, look for objective manifestations of purpose, and purpose is ultimately a question of fact to be decided with due regard for all of the circumstances.

See also *Entreprises Ludco ltée c. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082 (S.C.C.), at para. 54.

59 Obviously, evidence of a lack of subjective good faith is relevant to such an inquiry; however, positive assertions of good faith, while relevant, are not determinative. Courts applying the anti-deprivation rule should (and do) have due regard to the parties' objective manifestations of purpose. In the case of the anti-deprivation rule, the primary means by which the parties objectively manifest their intentions is through the terms of the contractual agreements by which they bind themselves. Therefore, careful regard should be had to the terms of the contractual arrangements which are said to offend the anti-deprivation rule.

60 I add that the leading English authority on the anti-deprivation rule also employs a similar approach to determining the purpose behind the transaction or contractual provision at issue: *Belmont Park Investments Pty Ltd. v. BNY Corporate Trustee Services Ltd.*, [2011] UKSC 38, [2012] 1 A.C. 383 (U.K. S.C.), at paras. 74-79, per Lord Collins; and para. 151, per Lord Mance.

61 With this understanding in hand, I now turn to consider, as an empirical question, whether courts applying the anti-deprivation rule inquire into the presence or absence of such a purpose.

(1) Courts Applying the Anti-Deprivation Rule Inquire into the Existence of a Bona Fide Commercial Purpose

62 As Canadian courts considering the anti-deprivation rule have often had recourse to English jurisprudence on the rule, I begin by briefly looking at whether the English jurisprudence has traditionally included a *bona fide* commercial purpose test. I then turn to a more thorough consideration of the Canadian jurisprudence to determine whether Canadian courts inquire into the presence or absence of a *bona fide* commercial purpose when applying the anti-deprivation rule.

(a) English Jurisprudence

63 I do not intend to undertake an extended review of the English anti-deprivation rule in these reasons. The United Kingdom Supreme Court recently did so in *Belmont Park Investments Pty Ltd.*, and I cannot hope to add much of value to the thorough analysis offered in that decision. I will therefore confine my general comments on the English jurisprudence to *Belmont Park Investments Pty Ltd.*.

64 The respondent, Deloitte Restructuring Inc., argues that *Belmont Park Investments Pty Ltd.* "shifted" the English common law from an effects-based test to a purpose-based test for the anti-deprivation rule (R.F., at para. 115). However, in my view,

Belmont Park Investments Pty Ltd. recognized that a purpose requirement has always been an element of the English anti-deprivation rule. Lord Collins undertook an extensive review of the English jurisprudence on the anti-deprivation rule: paras. 58-73. He found that, "where the rule has been applied, it has been an almost invariably expressed element that the party seeking to take advantage of the deprivation was intending to evade the bankruptcy rules": para. 75. Further, in the English authorities "where the either ... or anti-deprivation rule was held not to apply, good faith and the commercial sense of the transaction have been important factors": para. 77. Lord Collins was thus able to conclude that the English jurisprudence reflected "an impressive body of opinion from some of the most distinguished judges that, in the case of the anti-deprivation rule, a deliberate intention to evade the insolvency laws is required": para. 78; see also paras. 152-53, per Lord Mance.

65 I find Lord Collins's review of the English jurisprudence, as well as the conclusions of law he drew from it, to be authoritative characterizations of the English position on the anti-deprivation rule. I therefore cannot accept that *Belmont Park Investments Pty Ltd.*'s recognition of a purpose requirement for the anti-deprivation rule was as novel as Deloitte suggests. Further, as I demonstrate below, the Canadian jurisprudence on the anti-deprivation rule also supports the conclusion that a purpose requirement is not a novel feature of the anti-deprivation rule.

(b) Canadian Jurisprudence

(i) Supreme Court of Canada Jurisprudence

66 While this appeal gives this Court its first opportunity to fully consider and apply the anti-deprivation rule, in three previous decisions the Court either commented in *obiter* on this area of the law or considered contractual arrangements which would have been subject to the anti-deprivation rule or the *pari passu* rule had the contracts in question been governed by the common law. On my reading, this Court's jurisprudence favours a *bona fide* commercial purpose test for the anti-deprivation rule.

67 This Court had an opportunity to comment in *obiter* on the fraud upon the bankruptcy laws principle in *Hobbs, Osborne & Hobbs v. Ontario Loan & Debenture Co.* (1890), 18 S.C.R. 483 (S.C.C.). A mortgage provided that the mortgagees leased the mortgaged property to the mortgagor and that the rent was equal to the principal payments under the mortgage. The issue was whether the rights created by the lease were enforceable as against a third party execution creditor.

68 Chief Justice Ritchie (Taschereau J., as he then was, concurring) concluded that a sham lease in a mortgage which is not intended to create a *bona fide* landlord-tenant relationship is void as against assignees in bankruptcy: pp. 486-89. Justice Strong, as he then was (Fournier J., concurring) agreed: pp. 502-3 and 507. However, they disagreed as to the result. Chief Justice Ritchie found that there was a *bona fide* arrangement because there was no bankruptcy law in force, whereas Strong J. found that there was not such an arrangement because the principle has wider application outside of bankruptcy: pp. 485-87 and 508-9.

69 The authorities on which Ritchie C.J. and Strong J. relied were based on the English fraud upon the bankruptcy laws principle. Chief Justice Ritchie relied heavily upon the decision of the English Court of Appeal in *Ex parte Voisey*21 Ch. D 442, quoting the reasons of Lord Brett, at pp. 459 and 461:

> ... The only way in which it can cease to be a *bona fide* contract is if it was not intended to be acted upon between the parties at all, and was only a device to evade the bankruptcy laws. That would not be what is ordinarily called a fraud, but it would be what is called a fraud upon the bankruptcy laws, that is, an attempt to evade the bankruptcy laws in case of a bankruptcy. Now that attempted evasion, that want of *bona fides* with regard to the bankruptcy laws, must exist, if at all, at the moment when the contract is made ....
>
> . . . . .
>
> ... the question is whether there was a real honest stipulation between the parties, intended to be acted upon whether there should be a bankruptcy or not, or whether it was a stipulation which they intended to be acted upon only for the purpose of defeating the bankruptcy law.

70 Justice Strong also relied on *Thompson, Re* (1877), 7 Ch. D. 138 (Eng. C.A.) [hereinafter Williams], the *ratio decidendi* of which he described as being that "any provision by a debtor that in the event of his becoming bankrupt or insolvent there shall be a different distribution of his effects from that which the law provides is void": p. 502. While noting that *Williams* was

of limited value due to the lack of bankruptcy legislation in Canada, Strong J. went on to comment favourably upon the English cases which followed it, including *Voisey*. He described the law established by those authorities as being that, if it appears that the tenancy for which a mortgage provides is not intended by the parties to be a *bona fide* agreement, and is instead a sham or pretence, then such a lease is "void ... as against the assignees in bankruptcy": p. 503. Justice Strong adopted these principles, adding that they must have a wider application beyond the bankruptcy context in order to protect third parties more generally.

71 The separate opinion of Patterson J. is also noteworthy because he stated that the enforceability of the tenancy between the mortgagor and a third party depended in part on the "*bona fides* of the transaction": p. 543. He noted that the *bona fides* of a transaction "has usually been tested in England in the light of the bankruptcy law", and, while Canada did not have a bankruptcy law at that time, it did "not therefore follow that the intention with which the lease is made is to be disregarded": p. 543.

72 In my view, the reasons of Ritchie C.J. and Strong and Patterson JJ. indicate this Court's nearly unanimous *obiter* approval both of the existence of a general fraud upon the bankruptcy laws principle, even if it could not be applied at the time, and of a *bona fide* commercial purpose test corresponding to that principle.

73 This Court addressed a set of circumstances resembling those governed by the common law anti-deprivation rule in *Coopérants, Société mutuelle d'assurance-vie c. Raymond, Chabot, Fafard, Gagnon Inc.*, [1996] 1 S.C.R. 900 (S.C.C.). Mr. Dubois and Coopérants were the undivided co-owners of two immovables situated in Laval, Quebec. Their interests in the immovables were governed by two agreements in which they waived the right to demand a partition of the immovables for 35 years. Each agreement also provided that, in the event that one of the parties applied to a court for the appointment of a liquidator for the party's property, that party's interest in the immovable in question had to be sold to the counterparty. If the parties did not agree on the price, the defaulting party's interest would be sold to the counterparty at 75 percent of its fair market value, which was to be determined without regard to the fact that the immovable was held in undivided co-ownership. Subsequently, Coopérants applied to a court for the appointment of a liquidator due to insolvency, and Mr. Dubois sought to rely on the forced sale clause in their agreements.

74 This Court held that the liquidator was bound by the clause because there was no evidence that the contractual method for determining the sale price resulted in a price which was less than fair market value, nor was there any evidence that the clause gave Mr. Dubois an "unjust preference": para. 41.

75 I caution against overreliance on *Coopérants* for the purposes of ascertaining the content of a common law rule. The agreements at issue were governed by the *Civil Code of Lower Canada*, not the common law, and the Court's comments regarding the enforceability of the clause in question were directed at how a court should exercise its discretion under what is now the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11. Nonetheless, *Coopérants* is significant for having recognized the importance of enforcing arrangements which reflect a *bona fide* commercial purpose. The Court noted that the clause at issue created an obligation to sell a unique, non-fungible and indivisible property in which Mr. Dubois, as co-owner, had a specific interest. The Court also observed that the agreements in which the clause was found included reciprocal obligations between the co-owners, which called for ongoing performance. This Court stated that "[i]t is advisable to respect such contracts and ensure that they are as stable as possible": para. 38. Thus, this Court acknowledged that the clause at issue served a *bona fide* commercial purpose which the law should strive to uphold, even if doing so granted a degree of preference over other creditors.

76 Finally, this Court addressed a set of circumstances resembling those governed by the *pari passu* rule in *A.N. Bail Co. v. Gingras*, [1982] 2 S.C.R. 475 (S.C.C.) . A contract between a general contractor and a subcontractor authorized the general contractor to pay the subcontractor's suppliers directly in order to discharge obligations arising out of a construction project. The subcontractor entered into bankruptcy proceedings and the general contractor made use of the provision in question to pay one of the subcontractor's suppliers, which was a creditor of the subcontractor. This Court held that in the bankruptcy context such arrangements could not be used to supplant the *pari passu* distribution scheme in the *BIA*. This was so notwithstanding the general contractor's good faith.

77 *Gingras* is consistent with the English approach to the *pari passu* rule. The House of Lords held in *British Eagle International Air Lines Ltd. v. Cie Nationale Air France*, [1975] 1 W.L.R. 758 (U.K. H.L.), that the *pari passu* rule applies where

the effect of a contract is that a bankrupt's assets would be distributed to the bankrupt's creditors otherwise than in accordance with the bankruptcy laws, notwithstanding the parties' legitimate commercial purposes. However, as I explain in detail below, it does not follow that the anti-deprivation rule must adopt a similar effects-based test. Certainly, the United Kingdom Supreme Court did not regard *British Eagle International Air Lines Ltd.* as precluding it from holding that the English anti-deprivation rule includes a *bona fide* commercial purpose element: *Belmont Park Investments Pty Ltd.*. Therefore, I do not view *Gingras* as undermining the existence of a *bona fide* commercial purpose test for the anti-deprivation rule.

78 In summary, *Hobbs, Osborne & Hobbs* and *Coopérants* include significant *obiter dicta* which are suggestive of a *bona fide* commercial purpose test for the common law anti-deprivation rule. *Gingras* neither contradicts those *obiter dicta* nor departs from the law of England as stated in *Belmont Park Investments Pty Ltd.* and *British Eagle International Air Lines Ltd.*. Therefore, I am of the view that this Court's jurisprudence favours a *bona fide* commercial purpose test for the anti-deprivation rule — though, to be clear, this Court has not previously bound itself as a matter of *stare decisis* in this regard. My empirical inquiry must, therefore, live or die on the jurisprudence of the courts that have actually applied the common law anti-deprivation rule.

(ii) Superior Court and Appellate Jurisprudence

79 On my reading of the jurisprudence, courts applying the anti-deprivation rule in Canada have not been content to rest their reasons for decision merely on a finding that the effect of a transaction or contractual provision was to deprive a bankrupt's estate of value. As I explain below, courts have looked past the effects of the arrangement and inquired into the presence or absence of a *bona fide* commercial purpose behind the deprivation. In the minority of cases where this discussion has not occurred, the absence of a *bona fide* commercial purpose has been readily inferable from the circumstances. These observations lead me to conclude that a *bona fide* commercial purpose element has a strong jurisprudential footing in Canadian law.

80 The Ontario Court of Appeal, in *Hoskins, Re* (1877), 1 O.A.R. 379 (Ont. C.A.), applied the anti-deprivation rule to a lease which provided that upon the insolvency of the tenant, the current year's rent and the succeeding year's rent would be due and payable. The landlord argued that the additional year's rent was intended as compensation for his loss of a tenant. If the test the Court of Appeal applied had been focused solely on the effects of the provision, it would not have had to address this argument. Nonetheless, it did. The court rejected the landlord's argument, noting that it was "discredited by the circumstance that a surrender by a tenant, who had become insolvent, imports advantage rather than loss" for the landlord: p. 384. At p. 385, the court quoted with approval the decision of Lord Chancellor Redesdale in *Murphy, a Bankrupt* 1 Ch. 44, at p. 49, which has often been cited in Canada:

> The question is, whether a person can be admitted to prove as a creditor, on the foundation of an instrument contrived for the purpose of defeating the effect of the bankrupt laws; where the only ground of the claim is an instrument executed for the purpose of giving a right against creditors, which would not exist against the bankrupt if he were solvent. All the cases in England have held this to be a fraud upon the bankrupt laws, which cannot be supported ... [Emphasis added.]

81 Applying *Murphy*, the Court of Appeal concluded that the provision stipulating the payment of an additional year's rent to the landlord was invalid. In essence, the court found that there was no legitimate commercial purpose for the landlord to receive what would effectively be a gratuitous payment of an additional year's worth of rent long after the tenancy had come to an end.

82 The same Court of Appeal applied the anti-deprivation rule to void an agreement in *Watson v. Mason* (1876), 22 Gr. 574 (Ont. Ch.). A partnership and the creditors of an insolvent business entered into an arrangement which permitted the partnership to purchase the assets of the business, with the stipulation that, upon the insolvency of the partnership, the partnership would then owe the creditors the balance of the business's unpaid debt. Justice Burton (as he then was) held that there was no authority to support the validity of an agreement "where the only ground of the claim is an instrument executed for the *purpose* of giving a right against creditors": p. 588 (emphasis added). Justice Patterson (then a member of the Court of Appeal) noted there was no evidence that the partnership had paid a discounted price on the assets in exchange for this *quid pro quo* and Burton J.A. was of the view that the partnership had paid the full value of the assets, rendering the contingent debt obligation essentially gratuitous. When I consider these comments in conjunction with the various judges' approving citations of English authorities referring to intention or purpose (pp. 583-84, for example), I take the court to have found that there was no legitimate commercial interest

in conjuring the insolvent business's debt into existence upon the insolvency of the partnership after the partnership had already agreed to pay the creditors the full value of the goods which had belonged to the business.

83 The anti-deprivation rule was also applied by Meyer J. in *Daoust c. Cie de gestion Gar-Vin Inc.* (1982), 138 D.L.R. (3d) 61 (C.S. Que.) [hereinafter Frechette]. The bankrupt was a shareholder in a private company. The shareholders' agreement provided for a right of first refusal should a shareholder voluntarily wish to dispose of his shares to a third party, and also included a right to purchase the shares of any shareholder who became bankrupt. The agreement further provided that the price to be paid on the forced sale of a bankrupt's shares was to be 80 percent of the price which would otherwise be paid if the shares were sold voluntarily through the right of first refusal.

84 Justice Meyer concluded that the provision requiring the sale of a bankrupt shareholder's shares for 80 percent of their value was contrary to public policy because it granted the shareholders a special reduction in the price to be paid for those shares. If the standard he was applying had looked only to the effects of the provision on bankruptcy, he could have ended his analysis there. However, he went on to consider the shareholders' purpose in entering into the arrangement.

85 While Meyer J. accepted that the discount of 20 percent might have been agreed upon in good faith, he considered that it was essentially a gratuitous benefit granted by the shareholders to one another. Indeed, he analogized it to a "gift": p. 69. He observed that there "was no evidence before the court as to the existence of any consideration for such a reduction, other than a desire to confer a benefit on one's fellow shareholders in the event of one's bankruptcy": para. 20. In effect, this was a finding that there was no objectively ascertainable *commercial* interest behind the provision. A desire to give gifts to friends is plainly not a legitimate commercial interest which the law should protect over the interests of third party creditors in bankruptcy. Finally, I note that Meyer J. quoted and followed an English decision, *Borland's Trustee v. Steel Brothers & Co.* (1900), [1901] 1 Ch. 279 (Eng. Ch. Div.), the significance of which I examine below when discussing another Canadian decision.

86 Justice Saunders considered the anti-deprivation rule in *Knechtel Furniture Ltd., Re* (1985), 56 C.B.R. (N.S.) 258 (Ont. S.C.). The bankrupt, Knechtel Furniture, had an employee pension plan that had been wound up on the company's bankruptcy with a surplus of $471,300, after all the beneficiaries had been fully paid in accordance with the terms of the plan. The plan stated that in the event of its termination, any surplus would be paid over to the company, provided, however, that, in the event that the company had become bankrupt or insolvent, the surplus would be allocated to the beneficiaries. The company's trustee in bankruptcy argued that the provision entitling the beneficiaries to the funds was contrary to public policy.

87 The beneficiaries argued that the provision had not been inserted to defeat the bankrupt's creditors. They submitted that its purpose was to provide additional benefits to employees who would probably suffer great hardship if the plan were to be wound up after the company became bankrupt. In other words, they argued that the provision had a *bona fide* commercial purpose. Justice Saunders rejected this argument, not because he regarded it as irrelevant to his analysis, but rather because he found it "difficult to see why the hardship would necessarily be any less if the plan had been terminated when Knechtel was solvent": p. 264. In other words, he did not accept that there was a legitimate commercial interest in giving the beneficiaries what would amount to gratuitous pension benefits. He observed that the beneficiaries had already been paid their benefits in full under the plan, and that, if the plan had been terminated while the company was solvent, the beneficiaries would have had no entitlement to the surplus. As enforcing the provision would redirect funds which would otherwise have gone into the bankrupt's estate, the provision was contrary to public policy.

88 The anti-deprivation rule was also considered by Blair J. (as he then was) in *Canadian Imperial Bank of Commerce v. Bramalea Inc.* (1995), 33 O.R. (3d) 692 (Ont. Gen. Div. [Commercial List]). Bramalea and the Canadian Imperial Bank of Commerce were in a partnership formed to develop and operate a shopping mall. A clause in their partnership agreement provided that, in the event of the insolvency of one of the partners, the solvent partner could purchase the insolvent partner's interest at the lesser of book value or fair market value. Bramalea entered into bankruptcy proceedings, and the bank sought to exercise its right under the partnership agreement. The book value of Bramalea's interest was estimated at $200,000, and the evidence suggested that the fair market value might exceed the book value by as much as $2 million to $3 million. Thus, the clause would have given the bank a rather staggering discount on the value of Bramalea's partnership interest. Justice Blair

neither expressly accepted nor rejected these figures for the fair market valuation, but he did find that the difference in price was "more than minimal": p. 694.

89 Justice Blair stated that it was "clear from the provisions of the partnership agreement itself that the parties had contemplated a transfer to one of the partners of the other partner's partnership interest, solely in the event of insolvency of the latter, at a price which was less than what could be obtained for that interest on the market": p. 695. Although he was at pains to point out that there was no suggestion of a fraudulent or dishonest intent in this case, he also observed that the parties had intended to sell an asset at an undervalue. As a result, he found that the clause was contrary to public policy. Thus, while Blair J. did not expressly discuss whether there was an absence of an objective commercial purpose, he clearly did engage in a search for an objective purpose.

90 In addition, I take Blair J.'s statement that the rule encompasses "fraud in the effect" as meaning no more than that a subjective intent to defraud the bankrupt's creditors does not have to be shown in order for the anti-deprivation rule to apply: p. 694. In *Belmont Park Investments Pty Ltd.*, Lord Mance explained that references in the jurisprudence to "fraud" of the bankruptcy law are not references to fraud "in a strict sense" or to "morally opprobrious" conduct: para. 151. Lord Brett also made this point clear at p. 459 of *Voisey*. Thus, a showing of subjective dishonesty or deceit is unnecessary. However, Lord Mance, at para. 151 of *Belmont Park Investments Pty Ltd.*, and Lord Brett, at p. 461 of *Voisey*, both held that the anti-deprivation rule requires an assessment of whether there was a legitimate purpose behind a transaction. I see nothing contradictory in holding that deceit, dishonesty, or impropriety need not be shown, while also holding that the anti-deprivation rule does not apply to transactions or contractual provisions which serve a *bona fide* commercial purpose. I therefore do not see Blair J.'s comments regarding "fraud in the effect" as inconsistent with the view I put forward.

91 Further, Blair J., at p. 695, like Meyer J. in *Frechette*, at p. 68, quoted directly from the English case of *Borland*, in which Farwell J. stated the following in the context of a share purchase agreement:

> If I came to the conclusion that there was any provision in these articles compelling persons to sell their shares in the event of bankruptcy at something less than the price that they would otherwise obtain, such a provision would be repugnant to the bankruptcy law .... [p. 291]

This leaves open the question, however, of whether the repugnancy would arise because the provision would amount to a deprivation "in effect", notwithstanding the parties' *bona fide* intentions, or whether the sale at an undervalue would undermine the parties' claim that they had drafted the provision so as to serve legitimate commercial interests. I think the latter view reflects the better reading of Farwell J.'s reasons in *Borland Trustee*, to which I now turn.

92 Mr. Borland was a shareholder in a private company which carried on business in Burma. The company's articles of association provided that each of the shareholders was "entitled to continue to hold the shares then held by him or any of them until he should die or voluntarily transfer the same or become bankrupt": p. 281. Mr. Borland was adjudicated bankrupt, the company attempted to force the sale of his shares, and the trustee of his estate resisted the sale, arguing that the provision was a fraud upon the bankruptcy laws.

93 Justice Farwell found that the forced sale provision in the articles of association was not contrary to public policy. He found that the provision had been inserted *bona fide* and constituted a "fair agreement for the purpose of the business of the company": p. 291. Justice Farwell observed that the shares were difficult to value because they came with a number of restrictive clauses that made it "impossible to find a market value". He added that the price offered by the company likely represented the fair value of the shares, given that they were essentially incapable of valuation. The same share price applied to all shareholders and applied for sales of shares outside of bankruptcy as well as in bankruptcy.

94 It was in this context that Farwell J. made the statement quoted by Blair J. in *Bramalea*. However, given Farwell J.'s observation that the shares were essentially impossible to value, his conclusion that the anti-deprivation rule did not apply depended more on his view that the arrangement was a *bona fide* commercial agreement than it did on establishing a fixed principle that the absence of evidence of a deprivation was determinative of the rule's application: see A. Ho, "The Treatment

of *Ipso Facto* Clauses in Canada" (2015), 61 *McGill L.J.* 139, at p. 161. Therefore, to the extent that the courts in *Bramalea* and *Frechette* followed *Borland's Trustee*, either they did so on a mistaken view of what it stands for, or (and I prefer this view) implicit in their reasons is the notion that the anti-deprivation rule does not apply to *bona fide* commercial agreements.

95 The Ontario Court of Appeal relied on *Bramalea* to invalidate a contractual provision in *Aircell Communications Inc. (Trustee of) v. Bell Mobility Cellular Inc.*, 2013 ONCA 95, 14 C.B.R. (6th) 276 (Ont. C.A.). Aircell and Bell were parties to an independent dealer agreement which provided that Bell could terminate the agreement on notice if Aircell defaulted on its payments to Bell for purchases of inventory. It further provided that, should the agreement be terminated for specified reasons, Bell's obligations to pay commissions "shall cease immediately": para. 8. Owing to financial difficulties, Aircell defaulted on its payments and then entered into bankruptcy proceedings. It owed Bell $64,000 for inventory, and Bell retained $188,981 worth of commissions it owed to Aircell. As Bell was entitled to set-off under the *BIA*, Aircell's trustee brought an action against Bell to recover only the difference between the commissions retained by Bell and the amounts which Aircell owed to Bell. The Court of Appeal found that the clause at issue provided "a windfall to ... Bell": para. 12. Applying *Bramalea*, it held that the clause was unenforceable as contrary to public policy.

96 The Court of Appeal described the test from *Bramalea* as being essentially effects-based. However, as indicated by my analysis of*Bramalea* above, that is an oversimplification of Blair J.'s reasons. Further, and I admit that the court did not discuss the case on this basis, it is implicit in the court's description of the effect of the clause as a "windfall" that the clause was offensive not only because it deprived Aircell's estate of value, but also because there was no legitimate commercial basis in bankruptcy for Bell to withhold payments which were in excess of the debt it was owed by Aircell. I therefore do not view *Aircell Communications Inc. (Trustee of)* as inconsistent with my approach.

97 The anti-deprivation rule was considered by Registrar Quinn in *Westerman, Re*, 1998 ABQB 946, 234 A.R. 371 (Alta. Q.B.), rev'd on other grounds 1999 ABQB 708, 275 A.R. 114 (Alta. Q.B.). The bankrupt was a party to a partnership agreement which provided that a bankrupt partner could be expelled from the partnership and the partnership would then be obliged to pay that partner only 50 percent of his capital account. Registrar Quinn found that allowing the partnership to take 50 percent of the bankrupt's capital account would grant it an unjust preference, as any losses incurred by the partnership as a result of the expulsion of the bankrupt partner were "purely speculative". He therefore concluded that the partnership was not entitled to retain the funds. As Registrar Quinn did not address the commercial purpose behind the provision, it does not appear that any commercial purpose was offered. As the provision was to the effect that the partner's capital account could be settled at a 50 percent discount in the event of bankruptcy, an objective commercial purpose is not readily apparent. I therefore do not view *Westerman* as authority against my reading of the jurisprudence.

98 In his reasons, Registrar Quinn expressed the view that *Coopérants* was at odds with *Bramalea*, *Knetchel*, and *Frechette*. However, as the preceding analysis demonstrates, the golden thread weaving its way through the tapestry of the Canadian jurisprudence is the presence or absence of an objective commercial purpose behind the agreements under review. In *Coopérants*, there was such a purpose, whereas in *Bramalea*, *Knetchel*, and *Frechette*, there was not. Moreover, the analyses in *Coopérants*, *Bramalea*, *Knetchel*, and *Frechette* went past the question of whether the provisions in question had the effect of removing assets from the debtors' estates and extended to the legitimacy of the intentions behind them. This is also true of *Hoskins* and, arguably, of *Watson*, as well. Meanwhile, the more recent authorities applying the rule in which the parties' purposes are not expressly discussed — *Westerman* and *Aircell Communications Inc. (Trustee of)* — do not detract from my reading of the jurisprudence because they do not show any intent to break with past precedent and because an absence of a legitimate commercial purpose is discernable on the facts of those cases.

99 In the weight of lower court cases in which the anti-deprivation rule was addressed, the rule has been found not to apply where the provision in question has a *bona fide* commercial purpose. When I consider this jurisprudence in light of *Hobbs, Osborne & Hobbs* and *Coopérants*, I am led to the conclusion that a *bona fide* commercial purpose element has a strong jurisprudential footing in Canadian law. I therefore cannot accept my colleague's position that a *bona fide* commercial purpose test would amount to a change to the existing law: Rowe J.'s Reasons, at paras. 32 and 39. With respect, it is my colleague's adoption of a purely effects-based test which represents a break with the past. To declare that an absence of a *bona*

fide commercial purpose is required in order to apply the anti-deprivation rule is to discover the law as it has always been — as it has been handed down to us in the reasoned opinions of the jurists who preceded us.

100 Of course, the law could be incrementally developed away from this position. Courts may adapt the common law where they deem it necessary to keep the law in step with the dynamic and evolving fabric of society: see *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.). In my view, when courts consider whether to introduce such innovations to the common law, they should base their decision making on sound legal principles and compelling considerations of public policy. Thus, I now turn to consider whether there is a principled legal basis for distinguishing between the *pari passu* rule, with its effects-based test, and the anti-deprivation rule, with its traditionally purpose-based test.

(2) There is a Principled Legal Basis for distinguishing between the Anti-Deprivation Rule and the Pari Passu Rule

101 One of the reasons my colleague cites in favour of an effects-based test for the anti-deprivation rule is that it would be consistent with the test for the *pari passu* rule: Rowe J.'s Reasons, at para. 35. In my view, however, there is a principled legal basis upon which to distinguish the two rules: the anti-deprivation rule is based on a common law public policy, whereas the *pari passu* rule is based on an implied statutory prohibition in the *BIA*.

102 The anti-deprivation rule and the *pari passu* rule form part of a more general and longstanding doctrine in the common law to the effect that an agreement that is contrary to public policy may be struck down as unenforceable: S. M. Waddams, *The Law of Contracts* (7th ed. 2017), at para. 562. This public policy doctrine has at least two branches: (1) common law public policy; and (2) statutory public policy: Waddams, at para. 566. The common law branch concerns agreements struck down on the basis of a judicial apprehension of a public policy interest which outweighs the general public interest in the enforcement of contracts: e.g., *KRG Insurance Brokers (Western) Inc. v. Shafron*, 2009 SCC 6, [2009] 1 S.C.R. 157 (S.C.C.), at paras. 15-20. The statutory branch concerns agreements struck down because they are expressly or impliedly prohibited by statute: *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7, [2004] 1 S.C.R. 249 (S.C.C.), at paras. 20-26. On my reading of the jurisprudence, the anti-deprivation rule falls under the common law branch of the public policy doctrine, which includes a policy against agreements entered into for the purpose of defrauding or otherwise injuring third parties. I rest this conclusion on the following two observations about the jurisprudence.

103 My first observation relates to the rule's origins. The early English authorities which underpin the Canadian anti-deprivation rule routinely described the agreements at issue as fraudulent, dishonest or evasive: see *Belmont Park Investments Pty Ltd.*, at paras. 74-79, per Lord Collins; Ho, at pp. 151-52; R. J. Wood, "Direct Payment Clauses and the Fraud Upon the Bankruptcy Law Principle: Re *Horizon Earthworks Ltd. (Bankrupt)*" (2014), 52 *Alta. L.R.* 171, at p. 175. Lord Chancellor Eldon held that a term "adopted with the express object of taking the case out of reach of the Bankrupt Laws" was "a direct fraud upon the Bankrupt Laws" in *Higinbotham v. Holme* (1812), 19 Ves. Jr. 88, 34 E.R. 451 (Eng. Ch.), at p. 453. Justice Vaughan Williams held that an agreement that a debtor's interest in property would determine upon their bankruptcy was "evidence of an intention to defraud [their] creditors" in *Stephenson, Re*, [1897] 1 Q.B. 638 (Eng. Q.B.), at p. 640. Vice Chancellor Wood stated that "no one can be allowed to derive benefit from a contract that is in fraud of the bankrupt laws" in *Whitmore v. Mason* (1861), 2 John. & H. 204, 70 E.R. 1031 (Eng. K.B.), at p. 1035. Lord James described the contractual arrangement which he found void as "a clear attempt to evade the operation of the bankruptcy laws" in *Jeavons, Re* (1873), 8 Ch. App. 643 (Eng. Ch. Div.), p. 647; see also *Voisey*, per Brett L.J. and *Murphy*, per Redesdale L.C., both quoted above. The earliest Canadian decisions, *Hobbs*, *Hoskins*, and *Watson*, are to similar effect.

104 The reasoning employed by these courts appears to have turned on their apprehension that the arrangements at issue were aimed at an unlawful purpose which approximated fraud, not on a finding that they were impliedly prohibited by statute. The early common law courts applying the rule needed to analogize the public policy ground upon which they based their decisions to an established category, and the comparatively less sophisticated insolvency legislation in force at the time did not provide a basis for invalidating such contracts. In my view, this is why the jurisprudence is replete with references to "fraud" and similar terminology.

105 My next observation relates to the mode of reasoning in anti-deprivation rule decisions. If the anti-deprivation rule were based on an implied prohibition in the relevant bankruptcy statute, one would expect both the English and the Canadian authorities to turn on an appreciation of Parliament's legislative intent as embodied in the wording of the relevant statute: see J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 457 and 486. However, on my reading of those authorities, courts considering the application of the anti-deprivation rule have routinely recited the principles and policies articulated in prior authorities with little or no regard for the wording of the relevant statute in force. Thus, the rule is more in the nature of a judicially-apprehended public policy than an implied prohibition in the various insolvency statutes which have been enacted and revised throughout the centuries of the rule's trans-Atlantic existence. In this regard, it should be recalled that this Court adopted the early English authorities and then extended their reach to cases outside of the bankruptcy context in *Hobbs, Osborne & Hobbs*, notwithstanding the fact that there was no bankruptcy legislation in force in Canada at the time. To me, this suggests that the public policy is judicially derived.

106 My view, based on these two observations, is that the anti-deprivation rule falls under the common law branch of the public policy doctrine, which includes a policy against agreements entered into for the purpose of defrauding or otherwise injuring third parties: see McCamus, at p. 456; *Elford v. Elford* (1922), 64 S.C.R. 125 (S.C.C.); *McKinnon v. Campbell River Lumber Co.* (1922), 64 S.C.R. 396 (S.C.C.); *Letkeman v. Zimmermann* (1977), [1978] 1 S.C.R. 1097 (S.C.C.).

107 My colleague appears to take the view that the anti-deprivation rule falls under the statutory branch of the public policy doctrine: Rowe J.'s Reasons, at para. 30. With respect, however, the provision on which my colleague relies, s. 71 of the *BIA*, is far from clear in this regard. Under s. 71, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property only when a bankruptcy order is made or an assignment into bankruptcy is filed. It is not clear from its wording that this provision has any effect on the validity of an agreement entered into before that time. This ambiguity is particularly apparent in relation to agreements which qualify the bankrupt's interest in an asset from the outset, as is the case with Condition Q of the Subcontract. It is a well-established principle that the *BIA* does not grant a trustee any greater interest in a bankrupt's property than that enjoyed by the bankrupt prior to bankruptcy: *Giffen, Re*, [1998] 1 S.C.R. 91 (S.C.C.), at para. 50; *Lefebvre, Re*, 2004 SCC 63, [2004] 3 S.C.R. 326 (S.C.C.), at para. 37; *Flintoft v. Royal Bank*, [1964] S.C.R. 631 (S.C.C.), at p. 634. The trustee "steps into the shoes" of the bankrupt and takes the bankrupt's property "warts and all": *Saulnier (Receiver of) v. Saulnier*, 2008 SCC 58, [2008] 3 S.C.R. 166 (S.C.C.), at para. 50. With respect, my colleague breaks with this principle by, in effect, holding that s. 71 converts the bankrupt's qualified interest in an asset into an absolute or unqualified interest in the hands of the trustee. Although the common law may restrict parties' freedom to qualify a party's interest in the event of insolvency, there is nothing in the wording of s. 71 which purports to do so.

108 Nor is the picture made any clearer when one considers the statutory context, which includes numerous provisions indicating that arm's length *bona fide* commercial transactions — even transfers of assets at an undervalue — are valid as against the trustee of the bankrupt's estate: *BIA*, ss. 95(1), 96(1), 97(1) and 99(1). Thus, it would appear that Parliament's objective of maximizing "global recovery for all creditors" was not intended to be achieved at the expense of all *bona fide* agreements which may stand in the way of that goal: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 33. At the very least, then, s. 71 is ambiguous.

109 Courts applying the statutory branch of the public policy doctrine "should be slow to imply the statutory prohibition of contracts, and should do so only when the implication is quite clear": *St. John Shipping Corp. v. Joseph Rank Ltd.* (1956), [1957] 1 Q.B. 267 (Eng. Q.B.), at p. 289. To approach the matter otherwise would introduce significant uncertainty into commercial affairs given the enormous body of statute law in force in modern times. Indeed, the modern approach to the statutory branch of the public policy doctrine has been to relax the rigidity of the classical doctrine by permitting the enforcement of contracts in appropriate cases even where they contravene the provisions of a statute: *Still v. Minister of National Revenue* (1997), [1998] 1 F.C. 549 (Fed. C.A.), at para. 37; *Transport North American Express Inc.*, at paras. 19-26. Therefore, the better approach, in my opinion, is to treat the anti-deprivation rule as falling under the common law branch of the public policy doctrine rather than adopting a strained interpretation of s. 71 of the *BIA*.

110 In contrast with s. 71, the *pari passu* provision in the *BIA*, s. 141, establishes a very clear bright-line rule that "*all claims* proved in a bankruptcy *shall* be paid rateably": s. 141. This was the provision on which this Court rested its decision in *Gingras*, and it is substantially similar to s. 302 of the *Companies Act, 1948* (U.K.), 11 & 12 Geo. 6, c. 38, on which Lord Cross relied in *British Eagle International Air Lines Ltd.*. This clear and straightforward statutory language readily supports a conclusion that Parliament intended to prohibit a debtor from contracting with creditors for a different distribution of the debtor's assets in bankruptcy than that provided for in s. 141. Thus, the *pari passu* rule falls under the statutory branch of the public policy doctrine.

111 In sum, the reason behind the different tests for the *pari passu* rule and the anti-deprivation rule lies in the difference in the juridical character of the two rules. The *pari passu* rule is based on an implied prohibition in the *BIA* that operates regardless of the parties' intentions, whereas the anti-deprivation rule has its origins in the common law public policy against agreements entered into for an unlawful purpose: see *Still*, at para. 22. There is therefore a principled legal basis for maintaining different tests for the two rules.

112 It remains to be considered, however, whether sufficient policy considerations can be mustered to justify departing from the anti-deprivation rule's objective purpose test.

(3) The Weight of Public Policy Considerations Favours the Bona Fide Commercial Purpose Test Over the Effects-Based Test

113 The anti-deprivation rule's common law character does not preclude it from operating in tandem with the *BIA* in support of Parliament's statutory objectives. Although the common law and statutory branches of the public policy doctrine are distinct, they are not watertight compartments. It is prudent for courts applying the common law branch to take into account the policies embodied in legislation as a reflection of society's public policy concerns: Waddams, at para. 566. Therefore, the anti-deprivation rule's common law character does not preclude a court from taking into account Parliament's objective of maximizing global recovery for all creditors when considering how to formulate the anti-deprivation rule. What it does mean, however, is that Parliament's objectives must be weighed against the other policy interests protected by the common law when considering how best to formulate the rule.

114 It may appear that my colleague and I differ on this point. However, in my view, our differences in approach flow from our disagreement about the legal nature of the anti-deprivation rule: Rowe J.'s Reasons, at para. 33. If I shared my colleague's view that the anti-deprivation rule should be understood as an implied statutory prohibition, then I would have no hesitation in agreeing that the inquiry should be more narrowly focused on selecting the test that best gives effect to Parliament's legislative intent. However, I see the anti-deprivation rule as a judicially derived public policy and, as a result, my approach is informed by Parliament's policy objectives as well as by the other interests and values protected by the common law.

115 Freedom of contract is the general rule, and it can be displaced only by an "overriding public policy ... that outweighs the very strong public interest in the enforcement of contracts": *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at para. 123, per Binnie J., dissenting, but not on this point. Therefore, I see the policy issue as being whether the effects-based test put forward by my colleague or the *bona fide* commercial purpose test confirmed, in my view, by the existing jurisprudence most accurately reflects the point at which the public policy furthered by the anti-deprivation rule outweighs the public interest in the enforcement of contracts. In my judgment, that point is reached only where there is no legitimate and objectively ascertainable commercial purpose for the deprivation in bankruptcy.

116 The common law "places great weight on the freedom of contracting parties to pursue their individual self-interest": *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.), at para. 70. The common law even accepts that "a party may sometimes cause loss to another ... in the legitimate pursuit of economic self-interest": para. 70. In my view, a purely effects-based test gives too little weight to freedom of contract, party autonomy, and the "elbow-room" which the common law traditionally accords for the aggressive pursuit of self-interest: see *A.I. Enterprises Ltd.*, at para. 31, quoting C. Sappideen and P. Vines, eds., *Fleming's The Law of Torts* (10th ed. 2011), at para. 30.120. On the other hand, adopting a purely subjective

test may create significant uncertainty by introducing a vague standard which unduly restricts the scope of the anti-deprivation rule. A subjective purpose test would place too little weight on Parliament's objective of maximizing global recovery for all creditors. That is why, in my opinion, the middle path of following the objective *bona fide* commercial purpose test is the best way to balance freedom of contract, the interests of third party creditors, and commercial certainty.

117 My colleague fears that a purpose-based test would render the anti-deprivation rule ineffective because the rule would apply only in the clearest of cases: Rowe J.'s Reasons, at para. 36. However, as I demonstrated in my discussion of the Canadian jurisprudence, there is not a single Canadian decision applying the anti-deprivation rule in which an absence of a *bona fide* commercial purpose could not be discerned from the objective circumstances in the record. Indeed, the majority of the courts applying the rule have, in fact, inquired into the objective purpose behind the transaction or contractual provision in question rather than simply resting their decision on its effects. I therefore do not agree that retaining the objective purpose element would "threaten to undermine the statutory scheme of the *BIA*": Rowe J.'s Reasons, at para. 36. Further, this Court's jurisprudence establishes that the public policy doctrine "should be invoked only in clear cases": *Millar, Re* (1937), [1938] S.C.R. 1 (S.C.C.), at p. 7, quoting *Fender v. Mildmay* (1937), [1938] A.C. 1 (U.K. H.L.), at p. 12. A more restricted scope for the anti-deprivation rule is therefore in keeping with this Court's jurisprudence on the public policy doctrine. It is also in line with the modern trend in the English cases, which has been to restrict rather than to broaden the scope of the anti-deprivation rule: *Lomas v. JFB Firth Rixson Inc.*, [2010] EWHC 3372, [2011] 2 B.C.L.C. 120 (Eng. Ch. Div.), at para. 96, aff'd [2012] EWCA Civ 419, [2012] All E.R. (Comm) 1076 (Eng. C.A.).

118 My colleague also argues that an effects-based test is consistent with the American-style *ipso facto* provisions in the *BIA*: Rowe J.'s Reasons, at para. 35. These *ipso facto* provisions state that no one may terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement by reason only of a person's insolvency: *BIA*, ss. 84.2 (individual bankruptcies), 65.1 (corporate proposals) and 66.34 (consumer proposals). I do not regard these *ipso facto* provisions as analogous to an effects-based test because they apply to contractual terms that are triggered on insolvency, regardless of the terms' effects. The test applied by these provisions is more aptly characterized as trigger-based, not effects-based. In addition, as Rowe J. observes, the statutory *ipso facto* provisions were enacted for a purpose different than that served by the anti-deprivation rule: Rowe J.'s Reasons, at para. 28. The *ipso facto* provisions are aimed at protecting debtors; the anti-deprivation rule, by contrast, protects creditors. I therefore do not view the statutory *ipso facto* provisions as relevant statements of public policy on the matter at hand.

119 If regard is to be had to Parliament's policies enacted in the *BIA*, then this Court should take notice of Parliament's policy of upholding the validity of arm's length *bona fide* commercial transactions that have the effect of giving one creditor a preference over another or of depriving the bankrupt's estate of value: ss. 95(1)(a), 96(1) and 97(3). In addition, "good faith" continues to play a role in upholding the validity of protected transactions, which occur after the date of the initial bankruptcy event: ss. 97(1) and s. 99(1). In my view, these provisions reflect Parliament's policy preference for upholding the validity of *bona fide* commercial arrangements, even when they have the effect of reducing the pool of assets available to a debtor's creditors in bankruptcy. Indeed, it would be a "significant departure from [the] bankruptcy principle to void transactions with a valid commercial purpose based on a mechanical application of a broad principle", such as the effects-based test favoured by my colleague: M. Grottenthaler and E. Pillon, "Financial Products and the Anti-Forfeiture Principle" (2012), 1 *J. Insolvency Inst. Canada* 139. In this regard, I agree with my colleague that courts should pay close attention to the policies which Parliament has enacted through legislation and should not develop the common law in a way that would create "new and greater difficulties": Rowe J.'s Reasons, at paras. 33 and 39, quoting *Watkins v. Olafson*, [1989] 2 S.C.R. 750 (S.C.C.), at p. 762. However, it is the adoption of an effects-based test in lieu of the traditional purpose-based test that offends these principles in this appeal.

120 My colleague also states that a purpose-based test gives rise to uncertainty at the time of contracting because parties cannot know if a court will accept their *bona fide* commercial reasons: Rowe J.'s Reasons, at para. 34. However, given that the *bona fide* commercial purpose test is objective, purpose is discernable from the objective circumstances at the time of contract formation and can thus be determined just as readily as effects can under the effects-based test. Therefore, either standard provides the same measure of clarity. In addition, certainty in commercial affairs is typically better served by giving effect to,

rather than invalidating, contracts which were freely entered into, particularly when they serve commercial purposes and are not directed at an unlawful objective.

121 I also do not share my colleague's view that applying a *bona fide* commercial purpose test would require a significantly more onerous analysis of the parties' intentions than that entailed by an effects-based test: Rowe J.'s Reasons, at para. 34. An objective assessment of purpose is inescapable on either standard. Like the purpose-based test, ascertaining the effects of a provision when applying an effects-based test would require an interpretation of the impugned contractual arrangement. The interpretation of a contract requires an objective assessment of the parties' intentions: *Sattva Capital Corp.*, at para. 49. In addition, a test which requires a court to assess the parties' *bona fides* is not new in the realm of commercial law, especially in light of this Court's recognition of a general organizing principle of good faith performance in the common law of contract: *Bhasin*, at para. 33.

122 Finally, my colleague argues that the anti-deprivation rule should involve an effects-based test in order to better protect the interests of creditors, because debtors are not properly incentivized to protect their creditors' interests when dealing with third parties: Rowe J.'s Reasons, at para. 37. However, one must take into account the full range of options available to creditors to protect their rights. For example, the *Canadian Business Corporations Act*, R.S.C. 1985, c. C-44, includes in s. 241 what this Court has described as a "broad oppression remedy" which provides a "mechanism for creditors to protect their interests from the prejudicial conduct of directors": *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.), at para. 51; see also paras. 48-50. I view the oppression remedy, the directors' duty of care, the various anti-avoidance provisions in the *BIA* and in provincial statutes and the ability of creditors to bargain for contractual protections as alleviating any perceived need to extend the reach of the anti-deprivation rule.

123 In conclusion, I am not persuaded that the policy considerations raised by my colleague are sufficient to override the otherwise strong countervailing public interest in the enforcement of contracts. There is a strong jurisprudential basis for concluding that the anti-deprivation rule has always included a *bona fide* commercial purpose element in Canada, and there is a principled legal basis for maintaining this distinct feature of the anti-deprivation rule as compared to the *pari passu* rule. I would therefore hold that the anti-deprivation rule does not apply to transactions or contractual provisions which serve a legitimate and objectively ascertainable commercial purpose.

B. Paragraph (d) of Condition Q Furthers a Bona Fide Commercial Purpose

124 Nielsen J. found that clause Q(d) was a genuine pre-estimate of damages. He noted that Chandos would incur administration and management costs as a result of Capital Steel's bankruptcy and that it was at risk for future liabilities of Capital Steel. He added that the clause was not an attempt to contract out of the bankruptcy laws. He thus found that clause Q(d) served a *bona fide* commercial purpose. That finding was not disturbed on appeal, as the Court of Appeal was unanimous in its view that clause Q(d) serves "legitimate commercial interests": paras. 55 and 394-97. The application of the anti-deprivation rule in this appeal could therefore be dealt with on the basis of the standard of review.

125 However, Deloitte urges a different interpretation of the Subcontract, which, if persuasive, may call into question Nielsen J.'s finding of fact. Deloitte argues that clause Q(d) grants Chandos a sum which is essentially gratuitous or duplicative because clause Q(b) completely covers all costs to Chandos arising from Capital Steel's bankruptcy. Thus, it argues, the 10 percent fee arising from clause Q(d) is in addition to the full indemnity of Chandos arising from clause Q(b).

126 One problem Deloitte faces is that the interpretation of a contract is generally considered to be a question of mixed fact and law reviewable on the palpable and overriding error standard: *Sattva Capital Corp.*, at para. 50; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306 (S.C.C.) , at paras. 21-24. There is an exception which permits correctness review where the contract at issue is "a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix ... to assist in the interpretation process": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (S.C.C.), at para. 24. While we are told that the Subcontract is a standard form contract, it is not suggested that it is widely used throughout the construction industry or that the interpretation of clause VII Q is of precedential value. It is therefore unclear that the interpretation of the Subcontract falls within the *Ledcor*

exception. I express no firm conclusion on the matter, however, because assuming, without deciding, that the interpretation of the Subcontract could be reviewed on the correctness standard, I am not persuaded by the interpretation of clause VII Q urged upon this Court by Deloitte.

(1) Clause VII Q Does Not Permit Double Recovery

127 The overriding concern when interpreting a contract is to determine the objective intent of the parties and the scope of their understanding. The court must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva Capital Corp.*, at para. 47.

128 Clause Q(b) provides that Chandos may recover from Capital Steel "any cost ... arising from the suspension of this Subcontract Agreement or the completion of the Work by the Contractor, plus a reasonable allowance for overhead and profit". On its face, this appears to be a very broad basis for recovery. However, clause Q(d), the clause at issue, adds some ambiguity, because it provides that Capital Steel "shall forfeit 10% of the within Subcontract Agreement price to the Contractor as a fee for the inconvenience of completing the work using alternate means and/or for monitoring the work during the warranty period." It might be assumed that the specific matters mentioned in clause Q(d) would also fall under the general term in clause Q(b). Does Condition Q, then, permit Chandos to, in effect, double recover against Capital Steel? I answer this question in the negative, for three reasons.

129 First, it is apparent from the ordinary and grammatical meaning of the words that clause Q(b) applies to different matters than clause Q(d). The focus of clause Q(b) is on the cost to Chandos of completing Capital Steel's unfinished structural steel work. By contrast, clause Q(d) applies after the work is completed as a fee for, among other things, Chandos having to monitor Capital Steel's work during the warranty period. As well, clause Q(b) applies to the cost to Chandos arising from the suspension of the Subcontract, whereas clause Q(d) covers the inconvenience to Chandos specifically of completing the work using alternate means, which would require the reallocation by Chandos of significant administrative and managerial resources as well as the reallocation of the risks assumed under the Subcontract (e.g. Condition G, "Indemnity"). Thus, the matters covered by clause Q(d) may be difficult to quantify in monetary terms, and so the parties agreed beforehand on a figure for them, while leaving clause Q(b) to cover the more direct and quantifiable costs.

130 Second, if the grammatical and ordinary meaning does not resolve the matter, then there is an apparent conflict between clause Q(b) and clause Q(d). "[W]here there is an apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term": *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.), at p. 24; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751 (S.C.C.), at para. 46. Thus, the general grounds for recovery listed in clause Q(b) should not be read as extending to the specific matters in clause Q(d), that is, "the inconvenience of completing the work using alternate means" and "monitoring the work during the warranty period".

131 Third, a court may deviate from the plain meaning of the words if a literal interpretation of the contractual language would lead to a commercially unrealistic or absurd result: *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at p. 901. In my view, permitting double recovery under clause Q(b) would be commercially impractical and unrealistic. Therefore, clause Q(b) should be read so as to avoid such an absurdity.

132 For these reasons, I disagree with the interpretation of Condition Q advanced by Deloitte. The 10 percent fee arising under clause Q(d) is not duplicative of the amounts which may accrue under clause Q(b). Nielsen J.'s finding that clause Q(d) furthers a *bona fide* commercial purpose is, as a result, left unimpeached. Nonetheless, it is worth briefly exploring the objective commercial basis for the provision to show why it is important that the law give effect to such a clause.

(2) Paragraph (d) of Condition Q Advances a Legitimate and Objectively Ascertainable Commercial Interest

133 In my view, it is significant that the Subcontract included ongoing obligations on the part of Capital Steel that were unperformed at the time of its bankruptcy. The bankruptcy of a party with an unperformed or ongoing obligation under a contract

is likely to necessitate a commercial rearrangement of rights in order to protect the legitimate interests of the counterparty because the party's bankruptcy is likely to undermine the counterparty's assurance of ongoing performance or to change the risk allocation under the contract: Grottenthaler and Pillon; see also *Lomas* (2010), at paras. 108-10; *Lomas* (2012), at paras. 88-91. There are therefore ample legitimate commercial reasons for rearranging contractual rights in such circumstances.

134 An important element of the Subcontract is that it created a general contractor-subcontractor relationship between two parties in the construction industry. The construction industry generally operates in a pyramid-like structure, with the owner or developer at the top of the pyramid, a general contractor or contractors one level down, subcontractors under them, and possibly further sub-subcontractors: J. Westeinde, "Construction is 'Risky Business'" (1988), 29 *C.L.R.* 119. Generally, payment flows down the pyramid once the work has been completed. Thus, the insolvency of a subcontractor during the construction of a project can have major ramifications up and down the pyramid structure, causing costly delays and fundamentally altering the allocation of risk created by the web of contractual relationships involved.

135 Capital Steel had significant unperformed obligations under the Subcontract at the time of its bankruptcy. It had agreed to "repair and make good any defect in its work and all resulting damages that might appear as the result of any improper work or defective materials" it furnished: clause III. The operative period for this guarantee corresponded to the period specified in the Stipulated Price Contract, which was one year from the date of substantial performance: clause GC 12.3.1. However, Capital Steel's bankruptcy occurred before it had even completed its own work under the Subcontract, let alone before the date of substantial performance of the entirety of the project. Therefore, the Subcontract was still executory at the time of its bankruptcy.

136 In this case, Capital Steel's bankruptcy exposed Chandos to significant risks under the StipulatedPrice Contract. In it, Chandos had agreed to be "as fully responsible to the *Owner* for acts and omissions" of Capital Steel, or a replacement subcontractor, as it was for "acts and omissions of persons directly employed by" it: clause GC 3.7.1.3 (emphasis in original). Chandos had also agreed that it would promptly correct defects or deficiencies in the work which appeared during the warranty period at its own expense: clause GC 12.3.4. As well, Chandos was required to correct or pay for damage resulting from such corrections: clause GC 12.3.5. Owing to its bankruptcy, Capital Steel was not available to monitor or correct its work during the warranty period. Chandos therefore had to do so or face liability to the owner under the Stipulated Price Contract. Thus, a fee for monitoring the work during the warranty period is legitimate.

137 A general contractor's role is essentially to oversee and coordinate the construction of a project by various subcontractors according to a set schedule. It is evident that a subcontractor's bankruptcy during the construction of the project would require the general contractor to redirect significant administrative and management resources in order to respond, for example by seeking a substitute subcontractor willing to complete a job already partially performed by another company. The general contractor would also incur administrative and management costs from mitigating the fallout up and down the pyramid. Undoubtedly, costly delays would ensue as well. Thus, a fee for the inconvenience of completing the work using alternate means is also legitimate.

138 As to the quantum of the fee, 10 percent of the Subcontract price, Nielsen J. found as a fact that this was a genuine pre-estimate of damages, and I am content to rely on this finding: A.R., at pp. 9-10. In my view, this amount is not extravagant in light of the importance of the structural steel work to the project, the Stipulated Price Contract's total value of $56,852,453.45, and the fact that the risks reallocated to Chandos by Capital Steel's bankruptcy were likely difficult to state in monetary terms. I do not see in clause Q(d) any intent on the part of Chandos or Capital Steel to avoid the operation of bankruptcy laws or to prejudice Capital Steel's creditors. There is, therefore, a *bona fide* commercial purpose behind clause Q(d).

V. Conclusion

139 As clause Q(d) furthers a *bona fide* commercial purpose, I would dispose of this appeal by holding that provisions of this kind do not offend the anti-deprivation rule. I therefore conclude that clause Q(d) is enforceable against the trustee of Capital Steel's estate in bankruptcy. As a result, I would allow the appeal and restore the original order made at first instance.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 Whether clause VII Q (d) would have been enforceable if Capital Steel had stopped operations in other circumstances is not before us and not relevant here (*Aircell Communications Inc. (Trustee of)*, at para. 12).

TAB 16

At para. 46

In the Court of Appeal of Alberta

Citation: 12178711 Canada Inc v Wilks Brothers, LLC, 2020 ABCA 430

Date: 20201201
Docket: 2001-0206-AC
Registry: Calgary

Between:

12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. and Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc.

Respondents

- and -

Wilks Brothers, LLC

Appellant

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Mr. Justice Peter Martin
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment of the Honourable Madam Justice Paperny
Concurred in by the Honourable Mr. Justice Martin

Memorandum of Judgment of the Honourable Mr. Justice Slatter
Concurring in the Result

Appeal from the Final Order by
The Honourable Mr. Justice D.B. Nixon
Dated the 30th day of October, 2020
Filed on the 2nd day of November, 2020
(Docket: 2001 08434)

Memorandum of Judgment of
The Honourable Madam Justice Paperny

Introduction

[1] This is an appeal from the approval of a plan of arrangement put forward by the respondent Calfrac Entities under the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*), s. 192 (the Plan). The Plan is a recapitalization transaction designed to reduce Calfrac's outstanding indebtedness and annual cash interest payments and improve its liquidity to provide the sustainable capital structure required for Calfrac to continue its business operations. The chambers judge reviewed the Plan pursuant to s 192 of the *CBCA*, concluded it met the statutory requirements and was fair and reasonable, and granted the Final Order approving the Plan on October 30, 2020.

[2] The appellant Wilks Brothers (Wilks Bros) is a competitor of Calfrac and a shareholder, holding approximately 20% of the Calfrac shares. Wilks Bros is also a creditor of Calfrac, having recently acquired over 50% of Calfrac's Second Lien Notes. Wilks Bros submits that the Final Order was granted in error and should be overturned.

Background

[3] Calfrac commenced the *CBCA* proceedings on July 31, 2020. The drop in global energy markets and commodity prices in the first quarter of 2020, combined with the COVID-19 pandemic, saw the demand for Calfrac's services decline precipitously. This necessitated a recapitalization. Although Calfrac had earlier attempted to reduce its debt, including an exchange offer of its Senior Unsecured Notes for Second Lien Notes completed in February 2020, its capital structure and liquidity position became untenable and Calfrac could no longer operate effectively. It therefore embarked on a financial structure review process.

[4] The capital structure of Calfrac consists of: (a) first lien credit facilities provided by a syndicate of banks and other financial institutions pursuant to a credit agreement (First Lien Credit Agreement); (b) Second Lien Notes issued pursuant to a trust indenture dated February 14, 2020; (c) Senior Unsecured Notes due 2026 to the Senior Unsecured Noteholders (SUNs); and (d) the common shares of Calfrac.

[5] A US$18,352,265 interest payment to the SUNs was due on June 15, 2020. Calfrac deferred the interest payment for a 30-day grace period. Non-payment prior to the expiry of the grace period would have resulted in cross-defaults under Calfrac's First Lien Credit Agreement and its Second Lien Note indenture.

[6] Calfrac negotiated a recapitalization with those of its key stakeholders who were supportive and willing to enter into discussions, and obtained the preliminary interim order on July 13, 2020,

to stay creditor action and preserve the status quo. Wilks Bros was invited to participate in these negotiations but declined. Wilks Bros commenced buying Second Lien Notes, ultimately acquiring over 50%, to try to block the recapitalization.

The recapitalization transaction

[7] The fundamentals of the recapitalization are as follows: some SUNs will provide financing to Calfrac through a $60 million loan facility known as the 1.5 Lien Notes. The 1.5 Lien Notes are convertible to shares at the option of the holder on certain terms. The proceeds of the 1.5 Lien Notes will be used to reduce Calfrac's debt under the First Lien Credit Agreement.

[8] The transaction reduces Calfrac's outstanding indebtedness by approximately $561 million and its annual cash interest payments by approximately $52.7 million. In addition, it improves Calfrac's liquidity by approximately $41 million, thus providing a sustainable capital structure to allow Calfrac to continue operating.

[9] Existing holders of common shares will retain their holdings and will own approximately 8% of the common shares outstanding immediately after implementation of the Plan. Lenders under the First Lien Credit Agreement (First Lien Lenders) will be unaffected, as will the Second Lien Noteholders. Calfrac's customers, employees and trade creditors will also be unaffected.

[10] In his reasons granting the Final Order, the chambers judge noted that the Plan, as proposed, was supported by all, or substantially all, stakeholders, with the exception of Wilks Bros.

Section 192 of the *CBCA*

[11] Section 192 of the *CBCA* sets out the process for approval of complex corporate arrangements; it provides a mechanism to allow a corporation to alter individual rights to permit changes in corporate structure. The approval process "focuses on whether the arrangement, objectively viewed, is fair and reasonable and looks primarily to the interests of the parties whose legal rights are being arranged": *BCE v 1976 Debentureholders*, 2008 SCC 69 at para 119, [2008] 3 SCR 560. The process is designed to ensure that those whose rights may be affected are treated fairly, and its spirit is to achieve a fair balance among conflicting interests. The Supreme Court discussed this aspect of s 192 at para 133 of its decision in *BCE*:

> ... the s 192 procedure was conceived and has traditionally been viewed as aimed at permitting a corporation to make changes that affect the *rights* of the parties. It is the fact that rights are being altered that places the matter beyond the power of the directors and creates the need for shareholder and court approval.
>
> [emphasis in original]

[12] A court sitting on review of an arrangement must look through the lens of the purpose of the *CBCA* provisions. The focus is whether the arrangement, as a whole and viewed objectively,

is fair and reasonable. It looks primarily, but not exclusively, to the interests of parties whose legal rights are being arranged. The *CBCA* arrangement provisions provide a practical and flexible way to effect complicated transactions, and have been broadly interpreted to deal not only with reorganization of share capital but corporate reorganization more generally. The aim of the legislation goes beyond shareholders to other security holders whose *legal* rights are affected, not their economic interests which may well be prejudiced. The fact that a group whose legal rights are left intact might face reduction in the value of its securities is not on its own an extraordinary circumstance that would warrant consideration of those interests.

[13] Section 192(3) requires that the corporation obtain court approval of the plan. "In determining whether a plan of arrangement should be approved, the court must focus on the terms and impact of the arrangement itself, rather than on the process by which it was reached. What is required is that the arrangement itself, viewed substantively and objectively, be suitable for approval": *BCE* at para 136. In seeking court approval for an arrangement, the corporation must establish that: (1) the statutory procedures have been met; (2) the application has been put forth in good faith; and (3) the arrangement is fair and reasonable: *BCE* at para 137.

[14] In assessing whether the proposed arrangement is fair and reasonable, the court must be satisfied that (a) the arrangement has a valid business purpose, and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way: *BCE* at para 138. The approach to this two-pronged framework was set out in detail by the Supreme Court in *BCE*, and is summarized below.

[15] The first prong, whether there is a valid business purpose, asks whether there is a positive value to the corporation to offset the fact that rights are being altered. The court must be satisfied that "the burden imposed by the arrangement on security holders is justified by the interests of the corporation": *BCE* at para 145. If the arrangement is necessary for the corporation's continued existence, the court will more willingly approve it despite its prejudicial effect on some security holders.

[16] The second prong of the analysis focuses on whether the objections of those whose rights are being arranged are resolved in a fair and balanced way. As was noted at para 148 of *BCE*, (citing *Trizec Corp* (1994), 21 Alta LR (3d) 435 (QB) at para 36):

> The judge must be satisfied that the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstance of the case.
> ...
>
> > The court must be careful not to cater to the special needs of one particular group but must strive to be fair to all involved in the transaction depending on the circumstances that exist. The overall fairness of any arrangement must be considered as well as fairness to various individual stakeholders.

[17] There are various potential indicia of whether the plan is fair and reasonable, including whether a majority of security holders has voted to approve the arrangement, the proportionality of compromise between various security holders, the security holders' positions before and after the arrangement, and the impact on various security holders' rights: *BCE* at paras 150-2. The overall assessment is fact specific, and the relevant factors will vary depending on the circumstances. "[T]here is no such thing as a perfect arrangement. What is required is a reasonable decision in light of the specific circumstances of each case": *BCE* at para 155.

Decision of the chambers judge

[18] The chambers judge began his assessment of Calfrac's proposed arrangement by commenting on the purpose of arrangements under s. 192 of the *CBCA*, noting in particular that the provision "recognizes that major changes may be appropriate, even where they have an adverse impact on the rights of particular individuals or groups". He rightly noted that s 192 seeks to ensure that the interests of those rights holders are considered and treated fairly. In the context of debt restructuring, the goal of the section is to provide a broad procedure aimed at facilitating the restructuring and the provisions should be interpreted broadly and liberally.

[19] The chambers judge noted that the evidence showed the current financial situation of the Calfrac Entities is unsustainable, and an approved capital structure is required to ensure the survival of the corporate group. He further noted that the arrangement resulted from a process by Calfrac and its advisors, assisted by guidance from the lead independent director, the independent special committee, and the Board of Directors. The process included a review of alternatives to the proposed arrangement.

[20] The chambers judge first considered the requirement that the arrangement comply with all statutory requirements, and concluded that it did. The only controversial aspect of this consideration relates to s 192(3), which requires that a corporation not be insolvent to undertake a plan of arrangement. The chambers judge reviewed the financial information provided and concluded that "the Calfrac Group as a whole will be solvent at the conclusion of the Amended Recapitalization Transaction", and that the applicable tests (the cash-flow test and the balance sheet solvency test) are met "at the relevant time".

[21] The second consideration is whether the application was put forward in good faith; whether the applicants are proceeding with the arrangement for a valid business purpose. The chambers judge concluded:

> ... the Arrangement serves a valid business purpose because it will significantly reduce the outstanding indebtedness in annual cash interest payments of Calfrac Entities. ... It will also provide new liquidity, reduce financial risk, and strengthen working capital.

[22] The chambers judge then considered the "key issue" on the application: whether the arrangement is fair and reasonable. He referred to the two-part inquiry described in *BCE*: (1) does

the arrangement have a valid business purpose; and (2) are the objections of those whose rights are being arranged being resolved in a fair and balanced way.

[23] On the first prong of the test, the chambers judge noted that the court must be satisfied that the burden imposed by the arrangement on security holders is justified by the interests of the corporation as an ongoing concern. He concluded that the arrangement is necessary for the Calfrac Group's ongoing operation, reviewing several factors that led him to that conclusion. He found that, in the absence of the arrangement, the Calfrac Entities would not be viable in the long term and would be forced into an insolvency process, which would see the stakeholders realize less than they would under the arrangement. The evidence supported the proposition that the arrangement is the best option available to the Calfrac Entities in the circumstances. He acknowledged the Wilks Bros proposed offer, which he noted was the only potential alternative available, but based on the evidence before him he found that proposal was not viable. The chambers judge also found:

> In this case, the Arrangement will significantly reduce the outstanding indebtedness and annual interest costs of the Calfrac Entities. Further, the evidence is that it will provide significant liquidity and working capital. Those steps will result in a capital structure for the Calfrac Entities that will allow them to go forward, clearly furthering the interests of the corporate group as an ongoing concern. This will result in a positive benefit not only for the Calfrac Entities but also for all of its stakeholders, including its employees, creditors, shareholders, suppliers and customers.

[24] In addressing the second prong, whether the rights of those being arranged had been resolved in a fair and balanced way, the chambers judge considered the following: whether a majority of security holders voted to approve the arrangement; the proportionality of the compromise between the various security holders; the security holders' position before and after and the impact on their rights; the reputation of the directors and advisors who endorse the arrangement; the fairness opinion; and the access of shareholders to dissent and appraisal remedies.

[25] The chambers judge gave significant weight to the results of the vote by affected security holders. He noted that those security holders had the benefit of numerous press releases and related analyses, a Circular, two reports advocating against the arrangement, and other sources of information. With that high level of knowledge, and in the face of a clear economic alternative and a cash bid available to shareholders, the security holders voted with their feet in favour of the arrangement.

[26] The chambers judge observed that votes cast against the arrangement were significantly attributable to Wilks Bros; when the Wilks Bros' votes were excluded, approval of the arrangement was in excess of 90 per cent. Even with the Wilks Bros' negative vote, the requisite majorities were achieved.

[27] The chambers judge considered the impact of the Plan on the various security holders, and concluded that the First Lien Noteholders and Second Lien Noteholders (including Wilks Bros)

are not legally affected. He found that not only were obligations to these security holders not increasing, they were decreasing in quantum. Under the Amended and Restated First Lien Credit Agreement, the First Lien obligations were reduced from $375 million to $290 million. The maximum aggregate under the new 1.5 Lien financing is $70 million, such that the total amount of face debt ranking ahead of the Second Lien Noteholders will be reduced from $375 million to $360 million upon implementation of the Plan. He undertook a review of the agreements involving the Second Lien Noteholders, and concluded that the arrangement is permitted under their terms.

[28] The SUNs, on the other hand, are clearly legally affected. The chambers judge referred to this group as the Fulcrum creditor, meaning the creditor that will bear the brunt of the reorganization and without whose support the arrangement could not happen. He noted that 99.7% of votes cast by the SUNs supported the arrangement. The chambers judge considered that the recommendation of the Board was in the best interests of Calfrac and its stakeholders.

[29] The chambers judge took into account that the Board recommended the arrangement as being in the best interests of Calfrac and its stakeholders. In doing so, he acknowledged the affidavit of William Gula, put forward by Wilks Bros, but found it to be inadmissible as containing opinions on matters of law that are for the court to decide. He was cognizant of and took into consideration the fairness opinion obtained by the Board, but noted deficiencies raised by Wilks Bros. He agreed that the fairness opinion should have addressed fairness with respect to each of the noteholders and shareholders, as well as the corporate entity, and accordingly gave it modest weight.

[30] The chambers judge concluded that the arrangement is fair and reasonable, and summarized the relevant factors that supported his conclusion as follows:

- Despite Wilks Bros' aggressive position, the affected security holders voted with their feet and approved the arrangement, even in the face of clear economic alternatives;
- The vote of security holders occurred after an extensive publicly disclosed campaign with competing proposals;
- Board support came after a careful consideration, detailed consultation and negotiation with stakeholders and was led by the Board's independent lead director;
- Legal and financial advisors considered and endorsed the arrangement;
- The fairness opinion indicates the arrangement is fair, although the chambers judge gave it only modest weight;
- If the arrangement is not implemented, Calfrac would not have a sustainable capital structure going forward, with a severe impact on all stakeholders;
- The evidence established there was no reasonable alternative to the arrangement and the Wilks Bros proposal was not viable;

- The affected securityholders will receive more value under the Arrangement than they would under a liquidation;
- The arrangement is the most reasonable option for Calfrac and its stakeholders, and will ensure a sustainable future.

[31] The chambers judge concluded the arrangement meets all the applicable *CBCA* tests for approval, is in the best interests of Calfrac and was advanced in good faith, and is fair and reasonable to Calfrac and its stakeholders. He therefore approved the transaction.

Issues on appeal

[32] The appellant challenges several conclusions made by the chambers judge in approving the arrangement under s 192. Specifically, the appellant says the chambers judge: (1) incorrectly interpreted the waiver provision in the Final Order and the applicable law in determining that defaults triggered by the implementation of the Plan that would affect the Second Lien Noteholders should be waived without a vote by the Second Lien Noteholders; (2) erred in his application of the solvency test under s 192(3) of the *CBCA*; and (3) erred in determining the transaction was fair and reasonable by (a) disregarding the rate of interest that would attach to a conversion of the 1.5 Lien Notes into shares, (b) failing to properly consider the lack of safeguards put in place to address conflicts of interest in the transaction, and (c) unfairly characterizing the actions of Wilks Bros on the proposed transaction.

Standard of review

[33] All the issues raised are questions of fact or questions of mixed fact and law and are therefore subject to the most deferential standard of review, palpable and overriding error. A decision to approve a plan of arrangement on the basis that it is fair and reasonable under s. 192 is an exercise of judicial discretion which is accorded deference on appeal, unless it is demonstrated to have been based on a wrong principle or fundamental error in the application of law to the facts.

Analysis

[34] The chambers judge was familiar with this arrangement, having presided over all aspects of the proceedings. He was aware of the approval process required by s 192 and the relevant authorities. He understood that the court must consider whether there is positive value to the corporation to offset the fact that rights are being altered, and that the burden imposed by the arrangement on security holders is justified by the interests of the corporation. He also assessed whether the arrangement strikes a fair balance, having regard to the ongoing interests of the corporation and the circumstances of the case. He noted the observation of the Supreme Court of Canada that "there is no perfect plan", only one that in the circumstances is fair and reasonable. As the chambers judge noted, there are various relevant factors in the assessment of whether an arrangement is fair and reasonable, including: the votes of the majority; if there has been no vote, whether as a member of the class a reasonable person might approve the plan; the proportionality

of the compromise between various security holders; the presence of a special committee or independent directors; and the presence of a fairness opinion. These same considerations may also inform the inquiry as to whether there is a valid business purpose.

[35] The chambers judge gave careful consideration to the relevant factors and concluded:

> In this case, the Arrangement will significantly reduce the outstanding indebtedness and annual interest costs of the Calfrac Entities. Further, the evidence is that it will provide significant liquidity and working capital. Those steps will result in a capital structure for the Calfrac Entities that will allow them to go forward, clearly furthering the interests of the corporate group as an ongoing concern. This will result in a positive benefit not only for the Calfrac Entities but also for all of its stakeholders, including its employees, creditors, shareholders, suppliers and customers.

[36] The appellant submits that certain aspects of the Final Order are unfair or contrary to law and cannot be included in a plan of arrangement. We do not agree that any of the issues raised by the appellant go directly to either the issue of valid business purpose, or to the issue of fairness more broadly.

Issue 1: The waiver provision

[37] Paragraphs 13 and 14 of the Final Order contain a waiver provision that, in effect, permanently waives or releases and enjoins claims by the Second Lien Noteholders for defaults triggered by the implementation of the transaction itself under the Second Lien Noteholders indenture agreement. Wilks Bros says this provision affects the rights of Wilks Bros as a Second Lien Noteholder, and should not have been approved as part of the Final Order without a vote of that group.

[38] That a court, in approving a plan, has the jurisdiction to order that any default provisions that might have been triggered by the implementation of the plan are waived is well accepted in Canadian law and is not disputed on this appeal. In this case, the only interest said to be affected is an affiliate transaction provision that Wilks Bros seeks to use as leverage, or potentially to effectively veto the Plan, by saying that the implementation of the Plan itself will immediately trigger a default. The chambers judge was well within his jurisdiction to ensure any attempt to raise the clause as a basis to undo the transaction would not succeed.

[39] The thrust of the appellant's argument is based on its interpretation of the definition of an "affiliate transaction" in the Second Lien Note indenture. This argument was made before the chambers judge and dismissed by him. He concluded that the arrangement would not create an affiliate transaction default under the Second Lien Note indenture. He rejected the opinion evidence of Mr. Carr, a lawyer from New York whose evidence was relied upon by Wilks Bros, and preferred to rely on his own interpretation of the agreement. The chambers judge concluded

that the arrangement was permitted and would not trigger a default under the terms of the indenture.

[40] In my view, and for the reasons set out below, the chambers judge's interpretation of the agreement is supportable. However, even if it were not, a waiver in the circumstances is in keeping with the purpose of the *CBCA*.

[41] The breach is said to occur because MATCO, the holding company of the Executive Chairman of Calfrac, is one of the initial commitment parties that have agreed to underwrite the $60 million of the new 1.5 Lien Notes. In total, MATCO may be contributing up to 28% of the injection of the funds. This, it is submitted, triggers the Affiliate Transaction clause.

[42] The purpose of the Affiliate Transaction clause is to protect the Second Lien Noteholders against non-arms-length transactions at undervalue that might prejudice their position. In the abstract, the Noteholders could use any breach of that clause to accelerate the debt, without having to show actual prejudice arising from the breach. Here, the Noteholders object to a waiver, made as part of an arrangement, of their rights under the clause where the clause might be triggered by the implementation of the arrangement itself; the absence of prejudice in these circumstances is material. There is nothing on this record to suggest any actual prejudice to the Noteholders by virtue of the existence of an Affiliate Transaction. The mere loss of the opportunity to destabilize the Arrangement is not prejudice and is, moreover, contrary to the fundamental purpose of s. 192.

[43] Nor does the fact that the Second Lien Noteholders did not vote on the arrangement alter the fairness of the Plan. First, as found by the chambers judge, the Second Lien Notes are not compromised by the Plan. As the Supreme Court has noted, "only security holders whose legal rights stand to be affected by the proposal are envisioned": BCE at para 133. The chambers judge found there is no impact on the legal rights of the Second Lien Noteholders, and the record supports that finding. Second, even if any legal rights were compromised by the waiver provision, the absence of a vote would not be determinative. No vote is required by the statute.

[44] The appellant submits that the failure to grant it a vote as Second Lien Noteholder and then require it to waive defaults is contrary to Canadian law, citing a decision of the British Columbia Supreme Court in *Re Doman Industries*, 2003 BCSC 376. I disagree. First, I do not interpret *Doman* to require that all persons who might have default provisions that exist prior to or arising during restructuring must have a vote. Rather, the court concluded that it ought not to grant an order waiving a *future* default, not a default that occurred before or during implementation of the plan itself. Second, I agree with the respondents that in these circumstances the absence of the waiver will very likely frustrate the restructuring efforts and is likely to be used by the appellant to attack the arrangement in a different forum.

[45] Moreover, the complaint that the Second Lien Noteholders were not given a vote on the inclusion of the waiver provision cannot be sustained. On August 7, 2020, the chambers judge granted an interim order that did not give Second Lien Noteholders a vote on the arrangement. The materials filed at that time made clear that the impugned waiver provision would be included in

the Final Order. Wilks Bros did not argue for a vote at that time, nor did it appeal the interim order. It cannot be seen to do so now.

[46] It is further submitted that the chambers judge improperly relied on the anti-deprivation rule, as set out in *Chandos Construction Ltd v Deloitte Restructuring Inc*, 2020 SCC 25, in the interpretation of the anti-affiliate clause. The precise contours of the anti-deprivation rule and its application to this clause in particular need not be determined for purposes of this appeal. The underlying rationale of the anti-deprivation rule, that one creditor by reliance on its ipso facto clause might remove value from all creditors, has resonance in this transaction to this extent: the clause is being used as an indirect threat or veto that has the potential to completely derail and therefore defeat the Plan, however fair and reasonable it might otherwise be.

[47] The Trustee under the Second Lien Notes Indenture submitted before us, although not before the court below, that the "precedence and priority" provision found in para 13 of the Final Order, may be too broadly worded in that it may apply to future events. I disagree. Interpreted properly, that is in context, that paragraph only applies to the implementation of the Arrangement.

Issue 2: The solvency test

[48] One of the statutory prerequisites under s 192 is that the corporation is not insolvent: s 192(3). Section 192(2) defines insolvency in this context:

> 192(2) For the purpose of this section a corporation is insolvent
>
> (a) Where it is unable to pay its liabilities as they become due; or
>
> (b) Where the realizable value of the assets of the corporation are less than the aggregate of its liabilities and stated capital of all classes.

[49] The appellant submits that Calfrac does not meet the first part of the test, which requires liquidity solvency. The appellant submits that the chambers judge improperly concluded that liquidity solvency need only be satisfied at the point in time of implementation of the arrangement, and not thereafter. The appellant submits that the liquidity test requires that the cash flow or liquidity solvency be demonstrated to be positive for a reasonable period after implementation, and that Calfrac is unlikely to be solvent after August 2021.

[50] The chambers judge expressed his findings regarding the cash flow test as follows:

> … concerning the Cash-Flow Test, that test is met at the critical time, based on my review of the evidence. While the Wilks Financial Expert Report and the corresponding expert focus was on the possible status of the Calfrac Entities in August 2021, that is not the test. The legislative test does not specify a runway that equates to what the Wilks Brothers is arguing. I find the Cash Flow Test is met at the relevant time.

[51] I do not read the chambers judge's reasons as suggesting that the state of solvency is assessed only as at the time of the closing of the transaction. What is really at issue here is whether the conclusion of the chambers judge that the test was met post-arrangement, and for a reasonable period thereafter, is sustainable on the record. The chambers judge accepted Calfrac's internal business information and its data on its customers' future plans as a reasonable forecast of revenues. On that basis, he found that the solvency requirement was met in the circumstances. This conclusion was available on the record and I see no basis for appellate intervention.

Issue 3: Fair and reasonable arrangement

[52] The appellant raises several sub-issues in support of its argument that the chambers judge erred in concluding the arrangement is fair and reasonable as required by s 192.

Board governance and conflict of interest

[53] Wilks Bros submits that the chambers judge erred by failing to appropriately weigh the failure of the Board to deal with the alleged conflict of interest of Ronald Mathison, director and executive chairman of Calfrac, through the implementation of an adequate governance process. It submits that, because Mr. Mathison is indirectly involved in the refinancing of the 1.5 Lien Notes, he was in a conflict and the Board was obliged to appoint an independent committee to negotiate with the financiers of the lien notes rather than Mr Mathison.

[54] This ground of appeal cannot succeed. The Calfrac Board did appoint an independent director (Mr Fletcher) to lead the negotiations in this respect and it was under Mr Fletcher's leadership that the arrangement was negotiated. A special committee was not legally mandated.

[55] The appellant also submits that the chambers judge de-emphasized the importance of corporate governance and process in analyzing fairness, contrary to statements by the Supreme Court in *BCE*. I cannot agree with this characterization of the reasons of the chambers judge. He noted that the process was an *indicia* of fairness, but that the court must ultimately focus on the terms and impact of the arrangement itself. The chambers judge reviewed the relevant passages from *BCE*, and stated:

> Broadly speaking, a plan of arrangement must be suitable for approval both substantively and objectively: *BCE* at para 136. In assessing such suitability, the Court examines – in addition to other elements – whether the plan of arrangement was put forward in good faith, and whether it was fair and reasonable.
>
> Although there is no one determinative factor, corporate governance process or the lack thereof, may provide useful guidelines in answering these questions. The corporate governance process, however, is but one consideration among many factors. The primary and holistic focus lies within the terms and impact of the plan of arrangement, and the issue of whether the plan of arrangement was put forth in good faith. Whether it is fair and reasonable must be assessed within that

> substantive framework. This is the point that the Supreme Court of Canada stated with abundant clarity: *BCE* at para 136.
>
> While the Wilks Brothers made many allegations, there is no evidence to suggest that the Calfrac Entities failed to engage in an extensive and robust process in considering and approving the Arrangement.

[56] I agree. *BCE* stands for the proposition that it is not the process that is being examined for fairness, but the result. The process can provide *indicia* of fairness, but regardless of whether it is a perfect process, the assessment is about the extent to which the creditors are asked to compromise their legal rights and what they will get in return. The ultimate question to be answered is whether the burden of the arrangement is being appropriately and fairly shared. The chambers judge fully considered these issues and I see no reviewable error in his assessment.

Criminal rate of interest

[57] Another alleged error in the review of the fairness of the transaction arises from the rate of interest that the appellant asserts will result if and when the 1.5 Lien Notes are converted to common shares. Wilks Bros submits that the conversion will result in a criminal rate of interest and is thus contrary to law. It argues that even though the notes bear interest at 10% per annum, their possible conversion in the future, if capable of being sold completely at a particular price, could result in a profit that would effectively make the interest rate in the notes excessive and in violation of s 347 of the *Criminal Code*.

[58] The chambers judge rejected this characterization, relying on case law that concluded, after an in-depth statutory interpretation analysis, that s 347 could not be applied to conversion rights, shares or warrants: see *Cirius Messaging Inc v Epstein Enterprise Inc*, 2018 BCSC 1859. He concluded that where the interest calculation is based on assumptions, it is not fixed or calculable with precision and as such could not run afoul of the section. His conclusion is supportable on the record. I do, however, note that it was an error to apply a standard of proof of "beyond a reasonable doubt" to this analysis, which should be assessed on the civil standard. That error does not affect the result, however, as even assessed on a balance of probabilities this argument is without merit.

Consideration of the appellant's conduct

[59] There was evidence before the chambers judge regarding the "intentions and motivations" of Wilks Bros in opposing the transaction. The chambers judge referred to several authorities in which such motivation has been held to be a relevant consideration: (see *Re West Coast Logistics*, 2017 BCSC 1970; *Laserworks Computer Services Inc*, 1998 NSCA 42), noting that "where a stakeholder is voting for a purpose collateral to the intention of the applicable legislation, its votes can be disregarded". The chambers judge also noted that, even with the Wilks Bros "no" vote, the arrangement was approved by the requisite majorities, but if the Wilks Bros votes are removed, "the majority vote is overwhelming".

[60] The appellant takes issue with the characterization of its motivations by the chambers judge, and says it was an error for the chambers judge to conclude that Wilks Bros had no legitimate reason to object to the transaction, and to characterize Wilks Bros' actions as a "collateral attack" on the transaction.

[61] The chambers judge made several fact findings regarding Wilks Bros' motivations, based on his review of the evidence:

> First, the Wilks Brothers is a competitor to the Calfrac Entities;
>
> Second, Wilks Brothers has indicated that it believes these actions should be a Chapter 11 proceeding. I find that would be collateral to the purpose of the *CBCA* planned arrangement provisions, which have been broadly interpreted to support restructuring debt outside of insolvency proceedings;
>
> Third, Wilks Brothers has aggressively purchased securities in an attempt to block this arrangement from proceeding;
>
> Fourth, it its role as Shareholder, there has been no legitimate commercial reason for Wilks Brothers to oppose the Arrangement in this manner. I make that observation because the general body of the Shareholders in Calfrac will benefit from the completion of the Arrangement, relative to other outcomes.
>
> Fifth, the Wilks Brothers' proposal represents an attempt to obtain control of the Calfrac Group for an improper purpose, and
>
> Sixth, the Takeover Bid, including its opportunistically late timing, is a collateral attack upon the Applicant's restructuring transactions.

[62] The chambers judge found that the intentions and motivations of Wilks Bros demonstrated it was acting not as a genuine creditor, but rather as a competitor of Calfrac, and its ultimate aim was to see Calfrac forced into a Chapter 11 proceeding in the United States so as to enable Wilks Bros to purchase Calfrac's assets in a distressed situation.

[63] In making these findings and considering them as part of his assessment, the trial judge relied on long standing recognition that where a stakeholder is voting for a purpose collateral to the intention of the applicable legislation its votes can be disregarded. The Supreme Court of Canada recently described this discretion in the context of the CCAA (*9354-9186 Quebec Inc v Callidus Capital Corp*, 2020 SCC 10 at para 56):

> A creditor can generally vote on a plan of arrangement or compromise that affects its rights, subject to … a proper exercise of discretion by the supervising judge to constrain or bar the creditor's right to vote. We conclude that one such constraint arises from s 11 of the CCAA, which provides supervising judges with the

> discretion to bar a creditor from voting where the creditor is acting for an improper purpose. Supervising judges are best-placed to determine whether this discretion should be exercised in a particular case.

[64] The finding that a creditor is acting for an improper purpose is contextual. In *Laserworks*, a Nova Scotia Court of Appeal decision under the *Bankruptcy and Insolvency Act*, the court defined an improper purpose as "any purpose collateral to the purpose for which the *Bankruptcy and Insolvency Act* was enacted by Parliament": see para 54. The motive of the creditor was to remove a competitor, said by the registrar to "offend the integrity of the bankruptcy process".

[65] In *Callidus*, in the context of the CCAA (which requires a vote), the Supreme Court of Canada found a creditor to be acting for an improper purpose where it is "seeking to exercise its voting rights in a manner that frustrates, undermines or runs counter to the [above-stated] objectives": para 70. The *CBCA*, of course, does not require a vote.

[66] All three statutes have common purposes: facilitating a restructuring that compromises certain legal rights of stakeholders in a manner that is fair having regard to the broader goal – a restructured company for the benefit of all stakeholders. It is reasonable to conclude that, where a creditor is acting contrary to that purpose, to thwart the restructuring for its own purposes, it may well be found to be acting for an improper purpose. Having regard to the recent amendments to the CCAA, and particularly to the requirement in s 18.6 that all parties act in good faith, it is fair to assume that there will be increased scrutiny of stakeholder conduct, and that principles of creditor democracy and good faith dealings will be invoked to limit unbridled self interest.

[67] The determination of whether Wilks Bros was acting for an improper purpose is a finding of mixed fact and law and as such is subject to a deferential standard of review. The findings of the chambers judge are supported in the evidence and no palpable and overriding error has been demonstrated. In any event, the chambers judge did not use these findings to constrain the appellant's right to vote. Rather, he noted these findings to contrast the appellant's position with that of all other stakeholders who had an interest in the outcome and who were supportive of the arrangement. There was nothing improper or unfair in this characterization.

[68] The chambers judge was entitled to conclude, as he did, that there was no genuine commercial reason for Wilks Bros to oppose the arrangement other than its desire to see the arrangement fail. That conclusion, however, did not impact his analysis on the overall fairness of the transaction.

Conclusion

[69] The focus of the inquiry under s. 192 is a determination of whether the statutory prerequisites are satisfied, whether the arrangement serves a valid business purpose, and whether the arrangement is fair and reasonable. The chambers judge heard every application with respect to this arrangement and made a careful review of the record. He concluded that the prerequisites

were met, that the purpose of the arrangement is to ensure Calfrac's ongoing financial viability for the benefit of all its stakeholders, and that the affected stakeholders had been treated fairly.

[70] I see no reviewable error in the findings and analysis of the chambers judge or in his ultimate conclusions on the relevant issues. The appeal is accordingly dismissed.

Appeal heard on November 25, 2020

Memorandum filed at Calgary, Alberta
this 1st day of December, 2020

Paperny J.A.

I concur:

Authorized to sign for: Martin J.A.

Slatter J.A. (concurring in the result):

[71] For the reasons given by the Majority, I agree that this appeal should be dismissed. The Arrangement fairly balanced the interests of all stakeholders. I only wish to add a few observations about what may have been an unfortunate overemphasis on the motivations of Wilks Brothers in the process.

[72] The test for approving an arrangement is whether it promotes a valid business purpose, and whether the "objections of those whose legal rights are being arranged are being resolved in a fair and balanced way": ***BCE Inc v 1976 Debentureholders***, 2008 SCC 69 at para. 138, [2008] 3 SCR 560. "Fairness" must be measured objectively, having regard to the legal rights and reasonable expectations of various stakeholders. No stakeholder can exercise a veto on any aspect of the arrangement. During the approval process, all stakeholders are allowed to identify their own best interests, and pursue those best interests. Acting in one's own best interests is not bad faith: ***Bhasin v Hrynew***, 2014 SCC 71 at para. 70, [2014] 3 SCR 494. In rare circumstances, the motivations of a stakeholder might be contrary to the public policy behind the statute, but the subjective motivations of individual stakeholders are rarely determinative.

[73] In this litigation there was an unfortunate focus on the perceived legitimacy of Wilks Brothers' opposition to the Arrangement. The respondent describes Wilks Brothers as an "activist investor", that is "in pursuit of its own business interests and as a competitor". Wilks Brothers is said to have relentlessly and tenaciously opposed the Arrangement through "press releases and other statements and tactics that are intended to influence Calfrac's shareholders to vote against the Arrangement". It launched a hostile takeover bid, and presented alternative arrangements. None of this was inappropriate, or particularly relevant to the issue of whether the proposed Arrangement fairly balanced the interests of the stakeholders. Stakeholders are not required to acquiesce in a proposed arrangement; opposing an arrangement is not improper. If nothing else, Wilks Brothers' opposition caused Calfrac to sweeten the deal for the shareholders.

[74] An issuer cannot sell its securities to the public, and then object when investors buy them on the secondary market. Raising money from the public has consequences. Investors who buy those securities may have varying investment objectives and motivations. A competitor may buy the issuer's securities. Someone may mount a hostile takeover bid. "Activist" investors may seek to change the issuer's management and business strategies. The issuer has no basis to object to any of those consequences, and investors who buy the securities cannot be criticized for pursuing their own best interests, and for seeking to persuade other security holders to support them.

[75] When approving an arrangement, the court is to consider the "legal" interests of the various stakeholders. That does not, however, mean that the economic interests of security holders are irrelevant, or that they are not allowed to assert them during the approval process. ***BCE*** held at para. 161 that it would be unfair for the debenture holders to veto the transaction, but "it remained open to the trial judge to consider the debentureholders' economic interests in his assessment of whether the arrangement was fair and reasonable". Likewise, although Wilks Brothers cannot assert any right to veto the Arrangement, it was entitled to pursue what it perceived to be its own

best interests. Those may favour abandoning the Arrangement, and promoting an outcome by which Calfrac's American operations would become available for purchase by Wilks Brothers' American subsidiary. Wilks Brothers' ultimate objective was not a secret. Wilks Brothers was entitled to try to convince the other security holders that they would be better off financially under a sale scenario than under the Arrangement. Wilks Brothers was not successful, but it was not improper for it to try.

[76] There are extreme cases where the motivations of a particular stakeholder have been held to amount to an "improper purpose". However, merely opposing an arrangement, or promoting an interest that differs from that of other stakeholders does not qualify. Merely attempting to direct the corporation into liquidation also does not qualify, as it is open to any stakeholder to conclude that its economic interests will best be served by winding up rather than arrangement.

[77] One example can be found in ***9354-9186 Québec inc v Callidus Capital Corp***, 2020 SCC 10, which involved an arrangement under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36. In ***Callidus*** the corporation's sole remaining asset appeared to be a claim against its largest creditor. That creditor attempted to block the arrangement, purely as a method of insulating itself from the claim. The Court confirmed that the ordinary rights of a creditor to vote on the arrangement could be withdrawn when the vote was for an "improper purpose" that would frustrate, undermine, or run counter to the objectives of the statute. It was improper for the creditor to try to deplete the estate of its only asset, while at the same time insulating itself from the claim. The purpose of the statute was to maximize the recovery of the stakeholders, whereas this creditor intended the opposite outcome.

[78] Another example is found in ***Laserworks Computer Services Inc (Re)***, 1998 NSCA 42 at paras. 62-65, 165 NSR (2d) 296. This was a bankruptcy proceeding, in which a competitor (which was not previously a creditor) acquired sufficient claims against the bankrupt to defeat the proposal it made. The objective was simply to drive a competitor out of business by preventing it from restructuring. There would be a significant loss to the bankrupt estate, without the competitor achieving any advantage for itself other than to drive the bankrupt out of the market. This was held to be an improper purpose, and the competitor was not allowed to vote.

[79] The opposition of Wilks Brothers to the Calfrac Arrangement was not analogous to either of these two examples. Stakeholders are not obliged to acquiesce in any arrangement proposed by existing management, and mere opposition does not frustrate, undermine, or run counter to the objectives of the statute. The message of Wilks Brothers to the other stakeholders was that its hostile takeover bid, its proposed alternative arrangements, or a sale of the Calfrac American assets through an insolvency process would maximize the recovery for all. Wilks Brothers was unsuccessful in convincing the other stakeholders, but its objective was not contrary to the purposes of the statute, and was not so improper as to make Wilks Brothers' motivations a primary consideration in the fairness analysis.

[80] The chambers judge noted that the motives and intentions of Wilks Brothers were in evidence and not disputed. He concluded that its opposition was "collateral" to the purposes of the

Arrangement, which justified discounting its opposition. The trial judge identified six specific factors that led to this conclusion:

> First, Wilks Brothers is a competitor to the Calfrac Entities;
>
> Second, Wilks Brothers has indicated that it believes these actions should be a Chapter 11 proceeding. I find that would be collateral to the purpose of the CBCA planned arrangement provisions, which have been broadly interpreted to support restructuring debt outside of insolvency proceedings;
>
> Third, Wilks Brothers has aggressively purchased securities in an attempt to block this Arrangement from proceeding;
>
> Fourth, in its role as Shareholder, there has been no legitimate commercial reason for Wilks Brothers to oppose the Arrangement in this manner. I make that observation because the general body of the Shareholders in Calfrac will benefit from the completion of the Arrangement, relative to other outcomes. This is evidenced by the overwhelming support of such remaining Shareholders, other than Wilks Brothers;
>
> Fifth, the Wilks Brothers' proposal represents an attempt to obtain control of the Calfrac Group for an improper purpose; and
>
> Sixth, the Takeover Bid, including its opportunistically late timing, is a collateral attack upon the Applicant's restructuring transactions.

Whether opposition to an Arrangement is in some respects "collateral" or improper must be measured globally and in context. These objections, however, do not disclose anything improper.

[81] The fact that Wilks Brothers was a competitor of Calfrac was well known, as was Wilks Brothers' interest in acquiring the Calfrac American assets. It was no less legitimate for Wilks Brothers to advance that proposal, than it was for the management of Calfrac to propose that Calfrac continue to be the owner of those American assets. The arrangement provisions of the *Canada Business Corporations Act* do not contain any presumption that existing management will stay in control of the corporation, or that the corporation's core business philosophy will remain unchanged.

[82] Secondly, the Calfrac Entities had chosen to propose an arrangement under the *Canada Business Corporations Act*. Identification of an alternative procedure which was said to have greater advantages is not "collateral" in any improper sense. Just because arrangements can be used in debt restructuring situations does not mean that it is "collateral" for a stakeholder to propose a different method of resolving debt problems. Stakeholders in the corporation are entitled to put forward alternative methodologies, including a method of liquidation.

[83] Thirdly, the *Act* does not distinguish between shareholders based on when or why they bought their securities. As noted, when an issuer offers securities to the public, members of the public are entitled to purchase the securities for any reason they think is advantageous. Some may purchase for the income they will receive, some may anticipate capital appreciation, and others may anticipate short-term gains resulting from extraordinary events, such as takeovers or arrangements. The ability of purchasers to enter and leave the market is what creates the market: ***Deer Creek Energy Ltd v Paulson & Co Inc***, 2009 ABCA 280 at para. 20, 460 AR 180.

[84] "In its role as Shareholder" Wilks Brothers was entitled to decide where its best interests lay. If it foresees potential changes contrary to its interests, a shareholder is entitled to purchase more publicly traded securities to strengthen its position. Those who purchase securities with voting rights are presumptively entitled to vote. The fact that Wilks Brothers "aggressively purchased" shares so that it could have more influence over the approval of the Arrangement is not collateral in any improper sense.

[85] Fourthly, the fact that the Takeover Bid would give Wilks Brothers control of the Calfrac Group was noteworthy, but the trial judge did not explain why this was an "improper purpose". A takeover bid might likely come from someone already in the industry. Wilks Brothers made what it thought was an advantageous offer to the other shareholders. So long as they are not anti-competitive in effect, there is no objection to one company attempting to take over a competitor. This was not a case like ***Laserworks Computer Services*** where the objective appeared to be to simply drive a competitor out of business by preventing it from restructuring.

[86] Fifthly, there is nothing inappropriate about a competing, hostile takeover bid. Takeover bids are authorized by statute. In this case the Wilks Brothers' Takeover Bid outlined to the other security holders another option they had, apart from the Arrangement. As the chambers judge pointed out, one indicia of the fairness of the Arrangement was that it was approved by the stakeholders "even in the face of their economic alternatives", and "competing proposals". The Takeover Bid cannot helpfully be described as being "collateral" to the Arrangement, as there was nothing improper about making it.

[87] As noted, the holders of securities are *prima facie* entitled to exercise their right to vote. There may be circumstances where the votes of a securities holder with a dominant or controlling position should be disregarded, in order to properly measure the support of the minority. However, merely because the interests of one securities holder differ from those of others is not a basis to deny either group the right to vote. Absent any abuse, Wilks Brothers was entitled to conclude that its Takeover Bid was more advantageous than the proposed Arrangement and vote accordingly. That was a "legitimate commercial reason". Different shareholders are entitled to have a different view of the merits of any proposed arrangement; dissenting views are not *per se* "illegitimate".

[88] In this case the votes of the approximately 20% shareholding interest of MATCO were counted for most purposes, even though MATCO appears to be the only person permitted to participate in the restructuring transaction purely because it is a shareholder. As the founding shareholder, Mathison had an interest in Calfrac continuing as a going concern, and maintaining

control of its American assets. These motivations were no more or less legitimate than the motivations of Wilks Brothers. There was no reason on this record to discount the votes of either MATCO or Wilks Brothers.

[89] It follows that the votes cast by Wilks Brothers should not have been disregarded or discounted for the reasons given by the chambers judge. Further, Wilks Brothers' opposition should not have been downplayed because of its admitted motivations. Nevertheless, even if Wilks Brothers' votes were counted, the Arrangement was approved by a majority of the other stakeholders, notwithstanding the alternatives made available to them by Wilks Brothers. The focus on the motivation of Wilks Brothers was an unfortunate distraction in the analysis. The ultimate issue was whether the Arrangement fairly balanced the interests of all stakeholders. On this record, it did.

Appeal heard on November 25, 2020

Memorandum filed at Calgary, Alberta
this 1st day of December, 2020

Authorized to sign for: Slatter J.A.

Appearances:

C.D Simard
D.H. Brunsdon/M.S. Shakra/K.J. Zych (no appearance)
for the Respondents

T.P. O'Leary
J. Salmas/S. Van Allen (no appearance)
for Wilimington Trust National Association

R.J. Chadwick
B. Whiffin (no appearance)
for Ad Hoc Committee Noteholders

L.E. Thacker/D. Knoke
P.H. Griffin (no appearance)
for G2S2 Capital Inc.

J.G.A. Kruger, Q.C.
for First Lienholders

H.A. Gorman, Q.C.
for Special Committee of Directors

T. Pinos
L. Jackson/J.M. Holowachuk/R. Jacobs/J.L. Oliver (no appearance)
for the Appellant

TAB 17

At para. 11

2020 ABCA 313
Alberta Court of Appeal

12178711 Canada Inc. v. Wilks Brothers LLC

2020 CarswellAlta 1570, 2020 ABCA 313, [2020] A.W.L.D. 2955,
[2020] A.W.L.D. 2956, 323 A.C.W.S. (3d) 59, 82 C.B.R. (6th) 167

12178711 Canada Inc., Calfrac Well Services Ltd., Calfrac (Canada) Inc., Calfrac Well Services Corp. and Calfrac Holdings LP, by its General Partner Calfrac (Canada) Inc. (Respondents) and Wilks Brothers, LLC (Applicant) and G2S2 Capital Inc. (Interested Party)

Marina Paperny J.A.

Heard: September 1, 2020
Judgment: September 8, 2020
Docket: Calgary Appeal 2001-0151-AC

Counsel: C.D. Simard, K.J. Zych, for Respondents
L. Jackson, for Applicant
P.H.Griffin, L.E. Thacker, for G2S2 Capital Inc.
H. Gorman, Q.C., for Special Committee of the Board of Directors
R. Chadwick, for Ad Hoc Committee of Noteholders

***Marina Paperny J.A.*:**

1 Wilks Bros, LLC (Wilks) seeks permission to appeal a decision interpreting a stay of proceedings (the stay provision) granted under s 192 of the *Canada Business Corporations Act*, RSC 1985, c C-44 (*CBCA*) as part of a broader Preliminary Interim Order.

2 The respondents, collectively referred to as the Calfrac entities, applied under the *CBCA* to put forward a plan of arrangement. As part of those proceedings, they sought and obtained a Preliminary Interim Order that included the impugned stay provision. The stay provision has the intention and effect of suspending the rights and remedies of various creditors of the Calfrac entities. The Calfrac entities have found considerable support among stakeholders, sufficient to advance the arrangement, and the court has authorized a stakeholder meeting for September 17, 2020 to permit a vote on the arrangement and, if the vote is successful, to authorize the Calfrac entities to apply for a final order.

3 On the comeback application, Wilks applied to vary the stay provision so that it would not apply to the Second Lien Noteholders (a creditor class which includes Wilks). Wilks argued that the Second Lien Notes have automatically accelerated by their terms and by operation of law. As such, they say, the notes are now fully due and payable and the stay provision has no impact on the automatic acceleration of the notes.

4 The presiding judge rejected that proposition. In doing so, he concluded that the court has jurisdiction to order the stay provision. He noted that courts stay proceedings against a broad spectrum of third parties, and that stay provisions can and may interfere with or suspend contractual rights if to do so is in keeping with the general purpose of the plan and the *CBCA* in order to effect a restructuring.

5 There is no legal test for leave to appeal under s 249 of the *CBCA* spelled out in that Act. The parties agree that it would be appropriate to apply the same test as that under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (*CCAA)*, although Wilks argues that other provisions of the *CCAA* and the jurisprudence arising from their application ought not apply here.

6 The test under the *CCAA* was developed having regard to the purpose of that Act. The considerations articulated under that test are also germane to the proceedings under the *CBCA* in this case: a proposed plan of arrangement that will affect a host of stakeholders and is driven by commercial realities and timelines. The plan is an effort to restructure a corporate entity so that it can ultimately remain viable and repay its creditors and other affected stakeholders. Interestingly, and as an aside, the substantive rights of the Second Lien Noteholders are not affected by the proposed plan. The matter at issue before the court is whether the rights of the Second Lien Noteholders under their indenture can be suspended for the period during which the stay is operative. In this case, that would be something less than two months.

7 The test has four parts:

a) Is the point on appeal significant to the practice;

b) Is the point of significance to the action itself;

c) Is the appeal prima facie meritorious;

d) Will the appeal unduly hinder the progress of the action.

8 Wilks wishes to advance the following arguments on appeal: the court had no jurisdiction to grant the order; the chambers judge incorrectly applied the anti-deprivation rule to the *ipso facto* clause in the indenture; and the chambers judge erred in interpreting the stay provision. The fundamental question raised before the chambers judge, and which would be before this court if leave to appeal is granted, is whether or not the *ipso facto* clause in the Second Lien Indenture is valid, or if it offends the common law anti-deprivation rule.

9 The application for leave to appeal is dismissed for the following reasons.

10 First, that there is jurisdiction to grant this order cannot be seriously questioned. Without exhaustively reviewing the case law, courts have recognized the flexibility afforded by s 192 of the *CBCA* to propose a plan of arrangement. Courts often use the mechanics and jurisprudence developed under the *CCAA* to bring such plans forward. They have also looked to the purpose of the *CCAA* for guiding principles under the *CBCA*. In my view, there is no error in doing so and the first ground of appeal is without sufficient merit to justify an appeal.

11 Insofar as reliance on the anti-deprivation rule is concerned, this court recently concluded that rule is very much a part of, indeed fundamental to, Canadian insolvency and restructuring law: see *Capital Steel Inc v. Chandos Construction Ltd*, 2019 ABCA 32 (Alta. C.A.) (recently appealed to the Supreme Court of Canada and currently under reserve). As such, acceleration clauses like that found in the Second Lien Indenture can be stayed or overridden by courts under insolvency and restructuring legislation. That law is binding on me as it was on the chambers judge.

12 The characterization of the issues raised as novel does not withstand scrutiny, in my view. It cannot fairly be said that there is no jurisprudence under the *CBCA* that provides for the proposal of a plan of arrangement. That is what is being done here. Stay provisions are an important mechanism to give the corporate entity an opportunity to put forward a proposal that will find favour with creditors and other stakeholders — to afford a reasonable but not infinite amount of breathing space to negotiate with stakeholders and to provide an even playing field for stakeholders during that process.

13 Moreover, the issue raised by the proposed appeal is not of particular significance to the action. The Second Lien Noteholders are unaffected in the proposed plan. The stay provision results in only a temporary stay of their rights under the indenture; the purpose of the stay provision is to preserve the status quo ante as it existed immediately prior to the Calfrac

entities' filing of the application. At most, the provision suspends their rights for a brief period of time. The rights of the Second Lien noteholders are not compromised under this plan.

14 At this point, the plan appears to be finding favour among stakeholders. An appeal on this issue will unduly hinder any potential implementation of the plan. There is a serious question as to whether the appeal could reasonably be disposed of before the return date of the fairness hearing, September 30, 2020. On the other hand, the Second Lien Noteholders and Wilks are unaffected creditors whose rights are, at most, suspended for a brief period of time. There can be little if any prejudice to them in the circumstances.

15 For these reasons, the application for leave to appeal is dismissed.

Application dismissed.

TAB 18

At paras. 22-23

Original

2001 CarswellOnt 3893
Ontario Superior Court of Justice [Commercial List]

Playdium Entertainment Corp., Re

2001 CarswellOnt 3893, [2001] O.J. No. 4252, 109
A.C.W.S. (3d) 207, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302

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

In the Matter of a Plan of Compromise or Arrangement of Playdium Entertainment Corporation et al.

Spence J.

Heard: October 29 and 30, 2001
Judgment: November 2, 2001 *
Docket: 01-CL-4037

Proceedings: additional reasons at [2001] CarswellOnt 4109 (Ont. S.C.J. [Commercial List])

Counsel: *Paul G. Macdonald*, *Alexander L. MacFarlane*, for Covington Fund I Inc.
Gary C. Grierson, *J. Anthony Caldwell*, for Famous Players Inc.
Craig J. Hill, for Pricewaterhouse Coopers Inc.
Roger Jaipargas, for Monitor
Gavin J. Tighe, for Toronto-Dominion Bank
Michael B. Rosztain, for Canadian Imperial Bank of Commerce
Geoff R. Hall, for Ontario Municipal Employees Retirement Board
David B. Bish, for Playdium Entertainment Corporation
Julian Binavince, for Cambridge Shopping Centres Limited

Headnote

Corporations --- Arrangements and compromises — Under Companies' Creditors Arrangement Act — Miscellaneous issues

Group of corporations which operated chain of cinemas attempted restructuring under Companies' Creditors Arrangement Act, but no viable plan was arrived at — Corporations proposed that all their assets be transferred to new corporation, to be indirectly controlled by corporations' two primary secured creditors — Transaction would involve assignment of all material contracts of business, including agreement with film distribution company — Corporations were not in compliance with agreement, but proposed that new corporation would take steps to achieve compliance — Corporations brought application for court approval of proposed transfer — Application granted — Interim receiver appointed — Corporations did not have right to make assignment pursuant to s. 35 of agreement, because transfer was not to "affiliate" and film distribution company's consent to transfer was not unreasonably withheld — Film distribution company was entitled to look for better deal elsewhere in view of corporations' ongoing non-compliance with agreement — Court had jurisdiction to approve transfer, however, by reason of Companies' Creditors Arrangement Act — Appropriate to approve transfer in circumstances — Corporations had made sufficient effort to obtain best price and had not acted improvidently — Proposal took into account interests of trade creditors, employees and members of public — There had been no unfairness in process by which offer was obtained — Right of film production company to seek relief for default under agreement

adequately addressed risk of new corporation's continuing non-compliance — Fact that film production company could obtain better deal with another entity did not furnish reason to refuse to approve transfer, especially since propriety of alternate transaction was in dispute — If transfer were not approved, likely that corporations would go into bankruptcy.

Table of Authorities

Cases considered by *Spence J.*:

Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc. (1994), 27 C.B.R. (3d) 148, 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]) — considered

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

Dominion Stores Ltd. v. Bramalea Ltd. (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) — considered

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

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

T. Eaton Co., Re (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — considered

***Spence J.*:**

1 These reasons are provided in brief form to accommodate the exigencies of this matter.

2 The Playdium corporations and entities (the "Playdium Group") have been engaged in restructuring efforts under the *Companies' Creditors Arrangement* Act (the "*CCAA*"). These efforts have been unsuccessful. It is now proposed that substantially all the Playdium assets will be transferred to a new corporation ("New Playdium") which will be indirectly controlled by Covington Fund I Inc. and Toronto-Dominion Bank. This transfer would be made in satisfaction of the claims of those two creditors and Canadian Imperial Bank of Commerce, the primary secured creditors and the only creditors with an economic interest in the Playdium Group.

3 The primary secured creditors intend that the Playdium Group's business will continue to be operated as a going concern. If successful, this would potentially save 300 jobs as well as various existing trade contracts and leases.

4 This transaction is considered to be the only viable alternative to a liquidation of Playdium Group and the adverse consequences that would flow from a liquidation. Interests of members of the public also stand to be affected, in respect of prepaid game cards and discount coupons, which are to be honoured by the new entity.

5 The proposed transaction would involve assignment to the new entity of the material contracts of the business, including the Techtown Agreement with Famous Players.

6 Playdium Group is not currently in compliance with the equipment supply provisions of s.9(e) of the Techtown Agreement. The new entity is to take steps, as soon as reasonably practicable, that are intended to achieve compliance with s.9(e). Famous Players disputes that the proposed steps will have that effect and opposes approval of the proposed assignment of the Techtown Agreement to the new entity.

7 Covington says that the assignment of the Techtown Agreement is a critical condition of the proposed transaction: without the assignment, the transaction cannot proceed.

8 Covington says that the structure of the proposed transaction is such that it does not require the consent of Famous Players. This is disputed by Famous Players, based on s.35 of the Agreement and the fact that the assignee is to be controlled by Covington and TD Bank.

9 Covington submits that it is in the best interests of all the shareholders that the proposed transaction, including the assignment of the Techtown Agreement, be implemented. Covington and TD Bank seek an order authorising the assignment and precluding termination of the Techtown Agreement by reason only of the assignment or certain defaults. Famous Players has not given any notice of default to date. The prohibition against termination for default is not to apply to a continuing default under para.9(e) of the Agreement.

10 The primary secured creditors also seek an extension of the existing stay until November 29, 2001 to finalize these transactions. To facilitate the transactions, Covington and TD Bank seek the appointment of Pricewaterhouse Coopers as Interim Receiver.

11 Based on the cases cited, including *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), and *T. Eaton Co., Re* (1999), 14 C.B.R. (4th) 298 (Ont. S.C.J. [Commercial List]), and the statutory provisions and text commentary cited, the court has the jurisdiction to grant the orders that are sought, and may do so over the objections of creditors or other affected parties. Also, the decision in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), supports the appointment of an interim receiver to do what "justice dictates" and "practicality demands".

12 Famous Players says that no reason has been shown to expect the proposed course of action will bring the Techtown Agreement into compliance and make it properly operational; Covington has not shown it has expertise to bring to the business operations; the operations are grossly in default at present, and the indicated plans are inadequate to cure the default, which has serious adverse consequences to Famous Players.

The Relief Sought

13 The applicants revised the form of order that they seek, to provide (in paragraph 15) that a counterparty to a Material Agreement is not to be prevented from exercising a contractual right to terminate such an agreement as a result of a default that arises or continues to arise after the filing of the Interim Receiver's transfer certificate following completion of the contemplated transactions.

14 Famous Players moved for certain relief that was apparently formulated before the applicants' revisions to their draft order. From the submissions made at the hearing, I understand the position of Famous Players to be that it opposes the order sought by the applicants, at least insofar as it would approve the assignment of the Techtown Agreement, but the submissions of Famous Players did not address specifically the relief sought in their notice of motion, presumably because of the revision to the applicants' draft order as regards continuing defaults.

Section 35 of the Techtown Agreement

15 Section 35 permits an assignment to a Playdium affiliate. The proposed assignee is to be a new company, "New Playdium", to be incorporated on behalf of the Playdium Group, and to be owned by it at the precise time when the assignment occurs. The assignment will occur, it may be presumed, if and only if the contemplated transactions of transfer are completed. On completion of the contemplated transactions, New Playdium will be owned by a corporation controlled by Covington and TD Bank. That outcome reflects the purpose of the assignment, which is to transfer the benefit of the Techtown Agreement to the new owners. Accordingly the assignment, viewed in terms of its substance and not simply its momentary constituent formalities, is not a transfer to a Playdium affiliate. This view is in keeping with the decision in *GATX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div. [Commercial List]).

16 Under s.35, the Agreement therefore may not be assigned without the consent of Famous Players, which consent may not be unreasonably withheld. Famous Players says that it has not been properly requested to

consent and it has not received adequate financial information and assurances as to the provision of satisfactory management expertise and as to how the Agreement is to be brought into good standing.

17 The submission to the contrary is that the Agreement is really in the nature of a lease, not a joint venture involving the requirement for the provision to the venture of management services. This submission has some merit. Playdium seems principally to be required to supply game equipment. Section 26 of the Agreement disclaims any partnership or joint venture. If the business is to be sold to the new owners as a going concern, it would be likely to have the same competence as before, unless the contrary is shown, which is not so. Covington says that financial information was offered and not accepted and (although this is either disputed or not accepted) that no further request was made for it.

18 Reference was made to the decision in *Dominion Stores Ltd. v. Bramalea Ltd.* (1985), 38 R.P.R. 12 (Ont. Dist. Ct.) that an assignment clause of this kind is to be construed strictly, as a restraint upon alienation, and its purpose is to protect the landlord as to the type of business carried on. The case also says that a refusal for a collateral purpose or unconnected with the lease is unreasonable.

19 On the material filed, Famous Players has the prospect of a better deal with Starburst and this must be considered a factor in their withholding of consent. It is also relevant that Playdium is not in compliance with the Agreement and it is not clear how soon compliance is intended to be achieved under the Covington proposal. It is not clearly unreasonable for a party in the position of Famous Players to look for a better deal when the counterparty is in a condition of continuing non-compliance.

20 The propriety of the proposed Starburst deal is disputed on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. The relevance of this dispute is considered below.

Whether Court should approve the Assignment of the Techtown Agreement

21 This is the pivotal issue in respect of the motion.

22 Famous Players objects to the assignment. Famous Players refuses its consent. With regard to s.35 of the Agreement, and without reference to considerations relating to *CCAA* (which are dealt with below), I cannot conclude that the withholding of consent is unreasonable. So s.35 does not provide any right of assignment.

23 If there were no *CCAA* order in place and Playdium wished to assign to the proposed assignees, it would not be able to do so, in view of Famous Players' withholding of its consent. The *CCAA* order affords a context in which the court has the jurisdiction to make the order. For the order to be appropriate, it must be in keeping with the purposes and spirit of the regime created by *CCAA*: see the *Red Cross* decision.

The factors to be considered

24 The applicants submit that it is clear from the Monitor's reports that a viable plan cannot be developed under *CCAA* and the present proposal is the only viable alternative to a liquidation in bankruptcy. The applicants say that the present proposal has the potential to save jobs and to benefit the interests of other stakeholders.

25 Famous Players submits that, on the basis of the *Red Cross* decision, the court should approve the appointment of an interim receiver with power to vest assets, in a *CCAA* situation, where there is no plan, only where certain appropriate circumstances exist as set out in *Red Cross*, and those circumstances do not exist here.

26 In this regard, the first factor mentioned in *Red Cross* is whether the debtor has made a sufficient effort to obtain the best price and has not acted unprovidently. Famous Players says that there has been no substantial effort to develop a plan to sell the business components (such as the LBE's) as going concerns, no tender process, no marketing effort and no expert analysis. From the reports of the monitor it appears efforts were made to find prospects to purchase debt or equity or assets and there was no indication of viable deals. Whether or not the

best price has been obtained, on the material it appears the value of the assets would not satisfy the claims of the principal secured creditors. There is nothing to suggest that a better deal could be done without including the Techtown Agreement; according to the monitor it would have been a key part of any viable plan. Famous Players is not in the position of a creditor looking to be paid out, so its submissions as to the need to get the best price do not seem to be well addressed to its proper interest in this case, and the others who have appeared who are creditors are not objecting to the process and the result.

27 The second factor mentioned in the *Red Cross* decision is that the proposal should take into consideration the interests of the parties. The proposal has potential benefits for trade creditors, employees and members of the public which would flow from continuing the business operations as proposed.

28 The other two criteria in *Red Cross* are that the court is to consider the efficacy and integrity of the process by which the offers were obtained and whether there has been unfairness in the working out of the process. Famous Players says that, as regards its interests, there has been no participation afforded to it in designing the proposal, although the Techtown Agreement is said to be critical to the proposal, and nothing to show how or when the s.9(e) requirements will be brought into compliance. There were discussions between the parties in August but they did not lead to any productive result. It is true that it is not clear how or when compliance will be brought about. This point is considered below.

The effect on Famous Players

29 Famous Players says that if the applicants are given the relief they seek, the proposed transactions will close and the *CCAA* stay will be lifted — which would happen at the end of November, on the present proposal — and the prospect would be that Famous Players would then issue notices of default in respect of s.9(e), notice of termination would follow and the entire matter would end up in litigation within two months. That is possible. It is also possible that the parties would work out a deal. Covington is to invest about $3 million in the new entity so there will be an incentive for it to find ways to make the new business work.

30 If the parties cannot resolve their differences, then litigation might well result. Famous Players would be saved that prospect if the assignment were not to be approved and the companies instead were liquidated in bankruptcy. The delay occasioned by a further stay and subsequent litigation would also presumably result in increased losses of revenue to Famous Players compared to a full compliance situation or an immediate termination. There is nothing before the court to suggest that, if Famous Players has to resort to litigation and succeeds, it would not be able to recover from the new company. On this basis, the right of Famous Players to seek relief for a default seems to address adequately the risk of continuing non-compliance with s.9(e). Accordingly, the provision preserving that right is a key consideration in favour of the motion.

31 The other reason Famous Players evidently has for opposing the applicants' motion is that it could do a better deal with Starburst. If that were the only reason it had for withholding consent to an assignment of the Agreement, it would not be a reasonable basis for withholding consent under s.35 of the Agreement. It can be inferred from that consideration that it should also not be regarded as, by itself, a proper reason to allow the objection to stand in the way of the proposed assignment as part of the proposal to enable the business to continue.

32 Moreover, as noted above, the propriety of the Starburst transaction is disputed, on the basis of a possible breach of the Non-Disclosure Agreement between Starburst and Playdium. Based on the submissions before the court, the dispute could not be said to be without substance. If the proposed transactions are allowed to proceed and litigation ensues between Famous Players and New Playdium, there would presumably also be an opportunity for the dispute about the possible breach, and its implications for the propriety of the proposed deal between Starburst and Famous Players, to be pursued in litigation.

33 If instead the proposed transactions are precluded by a denial of the requested order, Playdium would go into bankruptcy and it would lose any opportunity to obtain the benefit of any rights it would otherwise have to oppose the proposed deal between Starburst and Famous Players. Allowing the Playdium transactions to proceed would effectively preserve those rights.

Conclusion

34 For the above reasons the motion of the applicants is granted. The initial order of this court made February 22, 2001 shall be continued to November 29, 2001, and the stay period provided for therein shall be extended to November 29, 2001. The parties may consult me about the other terms of the order, and costs.

Application granted.

Footnotes

* Additional reasons at 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

TAB 19

2009 CarswellOnt 8071
Ontario Superior Court of Justice

Nexient Learning Inc., Re

2009 CarswellOnt 8071, [2009] O.J. No. 5507, 183 A.C.W.S. (3d) 636, 62 C.B.R. (5th) 248

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 Nexient Learning Inc. and Nexient Learning Canada Inc.

H.J Wilton-Siegel J.

Heard: November 30, 2009
Judgment: December 23, 2009
Docket: CV-09-8257-00CL

Counsel: George Benchetrit for Nexient Learning Inc., Nexient Learning Canada Inc.
Margaret Sims, Arthi Sambasivan for Global Knowledge Network (Canada) Inc.
Catherine Francis, David T. Ullman, Melissa McCready for ESI International Inc.
Lynne O'Brien for Monitor

***H.J Wilton-Siegel J.*:**

1 On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and (3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination
>
> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> . . . . .
>
> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.
>
> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings under the CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

> **2.7 Purchaser's Rights to Exclude**
>
> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding

to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?

2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (Ont. S.C.J. [Commercial List]).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Woodward's Ltd., Re*, [1993] B.C.J. No. 42 (B.C. S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to Nexient except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by Nexient for the BA materials developed by a predecessor of Nexient. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in Nexient's hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by Nexient and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while Nexient and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium*illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA

Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers - the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the

BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction - in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets - it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not

yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the

evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline,

such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Motion dismissed.

TAB 20

2015 BCSC 1204
British Columbia Supreme Court

Veris Gold Corp., Re

2015 CarswellBC 1949, 2015 BCSC 1204, [2015] B.C.W.L.D. 4800, 256 A.C.W.S. (3d) 765, 26 C.B.R. (6th) 310

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

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

In the Matter of Veris Gold Corp., Queenstake Resources Ltd.,
Ketza River Holdings, and Veris Gold USA, Inc., Petitioners

Fitzpatrick J.

Heard: May 28, 2015
Judgment: July 10, 2015
Docket: Vancouver S144431

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***Fitzpatrick J.*:**

Introduction

1 This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The assets of the petitioner companies (collectively, "Veris Gold") principally comprise a gold mine in the State of Nevada, United States of America and mining properties in Yukon, Canada.

2 There has been no shortage of effort in these proceedings to restructure the considerable debt or monetize the assets of Veris Gold for the benefit of the stakeholders. However, in the face of considerable operational setbacks and disappointing refinancing and sale results, those stakeholders now face two stark options: (i) allow the interim lender to deal with the assets in a receivership or liquidation scenario; or (ii) allow an orderly transfer of the assets to that interim lender by way of a credit bid which would allow operations in the U.S. to continue.

3 The court-appointed monitor, Ernst & Young Inc., (the "Monitor") now applies to complete the sale to a new entity created by the interim lender, which is said to provide the best result achievable in less than desirable circumstances.

Background Facts

4 Much of the history of these proceedings was set out in my reasons for judgment issued earlier this year: *Veris Gold Corp., Re*, 2015 BCSC 399 (B.C. S.C.) . For the purposes of this application, I will summarize that history as follows.

5 On June 9, 2014, this Court granted an initial order. This filing was necessary in light of the imminent steps that were to be taken by Veris Gold's major secured creditor, Deutsche Bank A.G. ("DB") to collect its debt of approximately US$90 million.

6 The Canadian filing was immediately followed by the Monitor commencing proceedings in Nevada pursuant to Chapter 15 of the *United States Bankruptcy Cod*e, 11 U.S.C. §§ 101-1532 (the "*Bankruptcy Code*").

7 Arising from orders granted in both the Canadian and Nevada proceedings and the agreements reached between Veris Gold and DB, matters were stabilized. Those orders and agreements allowed Veris Gold to continue its efforts to restructure its debt and equity with the assistance of Raymond James & Associates. In addition, firm milestone dates were put in place to conclude any refinancing and also to commence a sales process if those refinancing efforts were not successful.

8 In October 2014, this Court approved interim financing to be obtained from WBox 2014-1 Ltd. ("WBox") in the amount of US $12 million.

9 On November 18, 2014, this Court approved a detailed sale and solicitation process to be conducted by Moelis and Company ("Moelis"), again with firm deadlines for such matters as receipt of qualified bids. Although certain of the deadlines under the sales process were extended, no qualified bids were received by the extended bid deadline, January 30, 2015.

10 Following these disappointing sale results, the Monitor engaged in discussions with Veris Gold and the two stakeholders who appeared to have the only economic interest remaining in the assets, being DB and WBox. What was critical at this time was allowing Veris Gold to continue to operate in the ordinary course while these stakeholders considered their next steps.

11 In mid-February 2015, DB issued various notices of default under its security and the agreements reached earlier with Veris Gold. This also resulted in an immediate default under the interim financing agreements between Veris Gold and WBox. With a view to securing greater oversight over the continued operations of Veris Gold, DB later applied for and was granted an order expanding the powers of the Monitor on February 23, 2015. That order was later recognized by the U.S. court in the Chapter 15 proceedings on March 2, 2015.

12 By late March 2015, both DB and WBox were continuing to consider their options, including the possibility of making a credit bid for the assets. WBox conducted due diligence of the assets toward that possibility. The Monitor reported at that time that, absent a credit bid from DB, a credit bid from WBox was the only viable alternative.

13 Accordingly, on March 30, 2015, this Court granted an order extending the stay of proceedings to April 7, 2015 to enable completion of discussions in relation to a credit bid transaction whereby certain of Veris Gold's assets would be transferred to a nominee of WBox.

14 On April 2, 2015, Veris Gold suffered yet another operational setback when a fire occurred at the processing plant, causing an estimated shutdown of one week. The already tenuous cash problems were therefore exacerbated by the deferral of revenue of approximately US$4 million as a result of the shutdown. The timing of this difficulty was unfortunate, in that by this time, the Monitor had negotiated an agreement in principle with WBox for the purchase of the assets and an increase in the interim funding to allow operations to continue to the closing date.

15 Not surprisingly, the fire and ensuing difficulties caused WBox to delay any credit bid and the provision of further financing while it considered, among other things, the impact on the cash requirements of continuing operations. In addition, in light of what the Monitor described as the "mounting challenges", the Monitor and WBox moved to a consideration of liquidation scenarios. Preliminary work on various shutdown options, including care and maintenance, indicated that significant monies would have to be expended even before the assets could be transferred on an orderly basis to environmental regulators.

16 On April 7, 2015, this Court extended the stay of proceedings to April 24, 2015 in order to enable WBox and other interested parties to assess their options and to allow the Monitor time to have further discussions with the environmental regulators. During this extension of the stay period, WBox renewed discussions with the Monitor in respect of a potential transaction that would involve the equity participation of a financial partner. It was discussed that this partner could participate in WBox's nominee, which would be the entity to hold and operate Veris Gold's mining assets.

17 Discussions were also ongoing at this time whereby WBox would provide increased financing to Veris Gold in order to allow further time to finalize a transaction.

18 On April 24, 2015, this Court granted an order extending the stay of proceedings to June 12, 2015. In addition, at the request of the Monitor, an order was granted increasing the interim funding from WBox by US$3 million to US$15 million, which would allow Veris Gold's operations to continue. WBox approved a cash flow forecast and it was agreed that WBox would maintain control over payments made from this further facility. On April 29, 2015, the U.S. court approved this amendment to the interim financing facility.

19 On May 28, 2015, Veris Gold entered into an asset sale agreement (the "Agreement") with WBVG, LLC ("WBVG"). WBVG is an entity wholly owned by WBox although, as anticipated, WBox sought and obtained the future participation of another equity partner. The transaction provides that WBox will transfer a majority interest in WBVG to 2176423 Ontario Ltd., a company owned by Eric Sprott. Mr. Sprott was already involved in Veris Gold, having a 20% equity interest and also having a royalty interest in the Nevada mining properties.

20 The salient terms of the Agreement are as follows:

a) WBVG will purchase all tangible and intangible assets of Veris Gold, subject to certain defined excluded assets;

b) the Monitor is to continue efforts to sell the Ketza assets in Yukon over a 60-day period with any sale proceeds being payable to WBVG. If no sale occurs, then those assets will be transferred to WBVG;

c) WBVG is to assume certain obligations arising under assumed contracts, including all bonds, and also pay any "cure costs" relating to such assumed contracts, limited to US$10 million;

d) WBVG will assume the amounts owing to WBox under the interim lending facility and will pay certain of the court-ordered charges, such as the administration charges, having priority over the interim lender's charge in favour of WBox to a maximum of US$1.8 million;

e) WBVG will not assume any liabilities for pre-closing obligations;

f) all employees of Veris Gold are to be terminated on closing and WBVG may offer employment to some or all of them; and

g) a "DIP Financing Cash Reserve" fund estimated in the amount of US$3.1 million is to be established to pay certain post-filing obligations that will be outstanding as of the closing date, including employee wages and amounts due to suppliers and contractors for the supply of goods and services. Any funds remaining in the DIP Financing Cash Reserve after these payables have been satisfied shall be returned to WBVG.

21 The Agreement is still conditional in that it is subject to approval by both this Court and the U.S. court. Further conditions relate to obtaining an assignment of certain critical contracts, such as bonding agreements and other arrangements with the Nevada environmental regulators.

Statutory Framework

22 The authority of this Court to approve the sale is found in s. 36 of the *CCAA*. Section 36(3) of the *CCAA* sets out a list of non-exhaustive factors to be considered by the court:

> (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 a 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.

23 A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.) at para. 49, (2010), 72 C.B.R. (5th) 49 (C.S. Que.), leave to appeal ref'd 2010 QCCA 1950 (C.A. Que.).

24 In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6 are helpful in considering whether to approve a sale:

> 1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
>
> 2. The interests of all parties;
>
> 3. The efficacy and integrity of the process by which offers were obtained; and
>
> 4. Whether there has been any unfairness in the sales process.

25 Various authorities support that, in considering the test under s. 36 of the *CCAA*, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) at para. 13; *White Birch Paper Holding Co., Re* at para. 50; *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 3367 (Ont. S.C.J. [Commercial List]) at para. 54.

Discussion

(a) CCAA Factors

26 I am more than satisfied that the factors set out in s. 36(3) of the *CCAA* support the granting of the order approving the Agreement with WBVG.

27 I have already outlined the extensive process by which Veris Gold's assets were exposed to the market by Moelis in accordance with the court-approved sales process. That process, which took place over many months, unfortunately did not yield any realistic offers, despite an extension of the bid deadline.

28 The Monitor did receive a non-binding expression of interest from a party on May 8, 2015. Some of the persons behind this expression of interest had been involved in the unsuccessful sales process. However, despite the purchase price being slightly above the WBox borrowings (US$20 million), the Monitor's view was that it would not be pursued by reason of the numerous significant conditions and the reality that the delay in pursuing any offer would place Veris Gold's operations at significant risk given its precarious financial (cash) condition. On May 13, 2015, this indicative offer was increased to US$23 million but that increase did not elicit any support from either WBox or the Monitor.

29 In response to the concerns of WBox and the Monitor, this party submitted a non-binding indicative offer on May 22, 2015 with additional materials indicating that financing had been tentatively obtained. Even so, the Monitor supported WBox's continued position that this offer should not be pursued further given the risk and delay in doing so. DB did not challenge this assessment.

30 It should be noted that, with the possible exception of DB, no one was more interested in obtaining an offer to purchase the assets than WBox in terms of seeing some recovery under the interim financing. In large part, WBVG's offer is made somewhat reluctantly by WBox as the only real alternative to obtaining some value from the assets secured under its court-ordered charge.

31 The Monitor has been extensively involved throughout these proceedings and the sales efforts, particularly given the Monitor's role in brokering the peace between Veris Gold and DB that allowed the refinancing and sale efforts to continue without much controversy. To that extent, the Monitor was very much involved in fashioning the sales process that was eventually approved by the court on November 18, 2014.

32 At this time, the stark reality is that no other viable options exist other than this sale or a receivership and liquidation, with the latter providing considerable uncertainty in terms of future operations. That uncertainty has justifiably caused some concern with the regulators, both in Nevada and Yukon, who must necessarily address any environmental issues that might precipitously arise from a failure to continue operations.

33 In my view, the process leading to this transaction was fair and reasonable in the circumstances. No person has suggested that these efforts were insufficient or inadequate.

34 Needless to say, the Monitor, being the applicant, is in favour of the transaction with WBVG and recommends its approval by the court. The Monitor has been involved in the negotiations and finalization of the asset sale agreement throughout.

35 The reasons to approve the sale to WBVG and to do so quickly are outlined in the Monitor's sixteenth report to the court dated May 25, 2015. The portions of the report that highlight those reasons are:

> [Veris Gold] would unlikely be able to recover from a further significant interruption of operations. The result would likely be the commencement of a liquidation process with the resultant loss of jobs, supply chain benefits and heightened environmental risks related to the need to transition care and maintenance activities to the Nevada environmental regulators on an extremely short timeline.
>
> . . .
>
> The [transaction] is essentially a realization process by [WBox], which has no viable alternatives. The operations continue on borrowed time, and prolonging any process results, in the Monitor's view, in significant risk to numerous stakeholders - [WBox], employees, suppliers of goods and services, and the environmental regulators.
>
> . . .
>
> [I]t is urgent to have an expedited resolution to these proceedings. ... The alternative, which would involve facilitating due diligence by the EOI Party or other late emerging parties, together with the related purchase agreement negotiations and discussions with the environmental regulators, translates into an extended timeframe and a higher risk of non-completion or future operational disruption. The party exposed to the risk of loss in the event on non-completion is [WBox].

36 There has obviously been extensive consultation with WBox throughout these proceedings since the interim financing was initially approved in October 2014.

37 Since February 2015, when it was clear that no sales had materialized, DB's interest in these proceedings has undoubtedly lessened. This is largely due to the realization that there was likely no value beyond what was owed to WBox under its interim

financing, which stands in priority to the secured debt of DB. In essence, DB's lack of opposition to this sale is in recognition that it will obtain no recovery of the substantial debt owed by Veris Gold to it in excess of US$90 million.

38 Other creditors junior in priority to DB have not been consulted; however, it has been abundantly clear since January 2015 that DB stood little chance of collecting even a portion of its debt, let alone realize a refinancing or sale that would see these junior creditors recover from any excess. Therefore, the proposed transaction will have no material effect on these other creditors.

39 It has also necessarily been the case that the various parties, and in particular the Monitor, WBox, Mr. Sprott and WBVG, have been in extensive discussions with the environmental regulators throughout these proceedings and specifically regarding the proposed transaction with WBVG. Discussions were held with the Nevada Division of Environmental Protection and the U.S. Forest Service in connection with the proposed transaction and any alternative scenarios. Those regulators were either in support or not opposed to the relief sought on this application, having secured terms in the proposed court order to address any concerns on their part.

40 While the outcome for DB and other pre-filing creditors is complete non-recovery, the benefits for various other stakeholders, being WBox, the employees, suppliers and the environmental regulators, is evident enough. It is these stakeholders who will suffer in the event that Veris Gold's operations do not continue and the environmental regulators in Nevada are left with the significant care and maintenance responsibilities for the mine site in a liquidation scenario. This transaction will see a continuation of Veris Gold's operations in Nevada. Accordingly, I agree with the Monitor that this is the best outcome for these operational stakeholders.

41 The operations in Yukon have been dormant for some time. Discussions between the Monitor and the Yukon regulators are continuing at this time toward a potential purchase of the Ketza assets by Yukon and a relinquishment of Veris Gold's mineral claims and mining leases there. The Agreement contemplates that these discussions will continue, hopefully toward a satisfactory conclusion.

42 The Monitor and WBox have also addressed in part concerns expressed by the court concerning the ongoing supply of goods and services and the uncertainty of payment for those goods and services while the Agreement was being negotiated. As noted above, upon the closing of the transaction, employees and suppliers to the Nevada mine site will be paid by Veris Gold for goods and services supplied up to the time of closing. As it relates to the employees, this addresses the requirement in the *CCAA*, s. 36(7) in that the court is satisfied that employee-related claims will be paid. Additional benefits will also redound to all of these stakeholders by either the potential of continued employment with WBVG or the continuation of many of the supply contracts which are to be assumed by WBVG post-closing.

43 I also conclude that the history of these proceedings, as outlined above, demonstrates that the consideration to be received for Veris Gold's assets is reasonable and fair, taking into account their market value. While no appraisals of the assets have been obtained, that fair market value is reflected in the market response to the extensive sales efforts undertaken.

44 No one misunderstands that if the transaction is not approved WBox will withdraw funding and Veris Gold will almost certainly have to commence an orderly wind down of its operations and liquidation of its assets to satisfy the debt owed to WBox. It is more than likely that WBox will suffer a shortfall in a liquidation scenario. A liquidation scenario will also likely result in the Nevada environmental regulators taking over care and maintenance of the mine site on an expedited basis, at significant expense and with the possibility of environmental damage resulting from a surrender of the mine site without the lead time needed by the regulators.

45 In all the circumstances, a consideration of all the factors in s. 36 of the *CCAA* supports the conclusions that the proposed transaction is fair and reasonable and that the Agreement should be approved.

(b) Assignment of Contracts

46 The asset sale agreement provides that WBVG will be assigned the "Assigned Contracts", which are defined as meaning "all Designated Seller Contracts" and also described as "Required Assigned Contracts". All of these contracts are listed in a schedule attached to the purchaser disclosure schedule delivered by WBVG to Veris Gold.

47 The Monitor seeks approval of the assignment of the Designated Seller Contracts, save to the extent that consents from counterparties have not already been obtained.

48 The relevant statutory authority to approve such assignments is found in s. 11.3 of the *CCAA*:

> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
>
> . . .
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> (a) whether the monitor approved the proposed assignment;
>
> (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
>
> (c) whether it would be appropriate to assign the rights and obligations to that person.
>
> (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.
>
> (5) The applicant is to send a copy of the order to every party to the agreement.

49 The Monitor's report and recommendations are in support of approval of these assignments. These approvals are part of the Monitor's overall recommendations in favour of the Agreement. WBVG has indicated its willingness to continue the operations of Veris Gold in Nevada on a going concern basis. The participation of WBox and Mr. Sprott lend credibility to its ability to do so, while performing any obligations under these contracts.

50 In that context, it is appropriate that WBVG obtain the benefit of contracts that will facilitate its ability to continue these operations. Indeed, some of the contracts are critical or necessary for future operations.

51 In addition, the Agreement contemplates the payment of "cure costs" which are defined in the Agreement in relation to statutory obligations arising under both s. 11.3(4) of the *CCAA* and s. 365(b)(1) of the *Bankruptcy Code* where the assignment of contracts is approved. Cure costs are defined in the Agreement as follows:

> "Cure Cost" means, as applicable with respect to any Seller, (i) any amounts or assurances required by Section 365(b)(1) of the U.S. Bankruptcy Code under any applicable Designated Seller Contract or (ii) any amounts required to satisfy monetary defaults in relation to the applicable Designated Seller Contract pursuant to Section 11.3 of the CCAA.

52 Each of the Designated Seller Contracts and related anticipated cure costs are set out in a schedule to the Agreement. Pursuant to the Agreement, such cure costs are payable on closing. The order sought provides that upon payment, and upon assignment:

> 10. ... the Required Assigned Contracts [aka the Designated Seller Contracts] shall be deemed valid and binding and in full force and effect at the Closing, and the Purchaser shall enjoy all of the rights and benefits under each such Required Assigned Contract as of the applicable date of assumption.

53 Section 11.3 of the *CCAA* came into force in September 2009. Prior to that time, there was little case authority in terms of a *CCAA* court approving assignments of contracts over the objections of counterparties. One of those early cases is *Playdium Entertainment Corp., Re* (2001), 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]); additional reasons (2001), 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]).

54 In *Nexient Learning Inc., Re* (2009), 62 C.B.R. (5th) 248 (Ont. S.C.J.) at 258, Wilton-Siegel J. cited both Spence J. in *Playdium Entertainment Corp., Re* and Tysoe J. (as he then was) in *Woodward's Ltd., Re* (1993), 79 B.C.L.R. (2d) 257 (B.C. S.C.), in framing the test as being whether the assignment was "important to the reorganization process". Also of relevance was the effect of the assignment on the counterparty and the principle that third party rights should only be affected as is absolutely required to assist in the reorganization and in a manner fair to that counterparty: see the additional reasons in *Playdium Entertainment Corp., Re* at 319; *Nexient Learning Inc., Re* at 259. See also discussion in *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945 (B.C. S.C.) at paras. 107-108.

55 The approach of the courts in these earlier cases was essentially confirmed in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.), where the Court stated the basis upon which relief might be "appropriate" and that any relief should result in "fair" treatment to all stakeholders:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.
>
> [Emphasis added.]

56 Like many other amendments to the *CCAA* in September 2009, s. 11.3 was intended, in my view, to codify what had been the general approach to assignment issues, while also clarifying certain matters that had been to that time uncertain. One example of certainty achieved, although irrelevant on this application, arises by s. 11.3(2) which excludes certain contracts from the statutory authority of the court in s. 11.3(1).

57 Since its enactment, judicial consideration of s. 11.3 is scarce. In *TBS Acquireco Inc., Re*, 2013 ONSC 4663 (Ont. S.C.J. [Commercial List]), D.M. Brown J. (as he then was) approved the assignment of certain leases and designated contracts, finding that this would result in the continuation of the business in the greatest number of stores and the continued employment of the greater number of people. Cure costs were also to be paid: see paras. 19-25.

58 I do not see the result in *TBS Acquireco Inc., Re* as deviating from the previous approach of the courts in considering whether to approve an assignment based on the twin goals of assisting the reorganization process (i.e., the sale in this case) while also treating a counterparty fairly and equitably. These considerations can be discerned in particular from the factors set out in s. 11.3(3) set out above.

59 That brings me to the only issue that arises here in relation to the assignments. While no objection was raised to the assignments by persons who did not otherwise consent, the Monitor's counsel was candid in advising the court that only those persons on the service list were served with the Canadian application materials. It is not therefore apparent that the counterparties to the contracts did in fact receive a copy of the application materials.

60 This is not an approach that I would endorse. It may often be the case that a counterparty is not a creditor of the estate and therefore, that party would not get notice of the filing at the commencement of those proceedings. Further, even if that is

the case, no assignment issue may be apparent at the time of initial service to the point that such person would take steps to be placed on the service list.

61 The best practice in these circumstances is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not. Section 11.3(1) specifically provides that the application is to be "on notice to every party to an agreement". Common sense dictates that the person to be directly affected by the assignment should have the ability to consider whether the applicant debtor company has satisfied its burden that the order is appropriate, including the factors set out in s. 11.3(3). Only by service will that counterparty be made aware of the need to consider its position if such approval is granted and possibly advance evidence and considerations that would be equally relevant to the court's decision on the issue.

62 Before proceeding with the application in *TBS Acquireco Inc., Re* , Brown J. was satisfied that the applicant had given notice of the request to seek a court-authorized assignment of the contracts: para. 25.

63 As I have mentioned, there was urgency in approving the Agreement so that Veris Gold's operations could continue in the ordinary course. Further delay was not feasible nor was it in the interests of all the stakeholders. The Monitor's counsel advised that all of the counterparties were in the U.S. and most of those counterparties, being capital lessors, were represented by Nevada counsel. Finally, I was advised that all of these counterparties were served with the U.S. application materials in anticipation of an application in Nevada to also approve the Agreement immediately after this application. Therefore, specific notice of the terms of the Agreement and the fact that approval of the assignment was sought would have been provided in any event, albeit in the context of the U.S. court materials.

64 In these exigent and extraordinary circumstances, I approved the assignments on the terms sought, but subject to the U.S. court being satisfied with the notification to and service on the counterparties to the Required Assigned Contracts who did not receive direct notice of this application. In that way, these counterparties will have been given the ability to attend the U.S. hearing and make submissions on the relief sought, all of which is a required condition to closing the Agreement.

Conclusion

65 Veris Gold has faced a number of operational challenges and adverse events over the course of this restructuring proceeding. Initially at least, they faced significant opposition by their major secured creditor, DB. Efforts to refinance or sell the assets have been met with little interest and certainly no offer was received by that process on which to base a transaction.

66 As matters stand, Veris Gold's operations are undercapitalized and susceptible to further disruptions unless stability is achieved quickly to avoid a liquidation process. That process would undoubtedly result in a loss of jobs, disruption of supply arrangements and heightened environmental risk.

67 The only realistic alternative is the one before the court on this application; namely, a credit bid by WBox, the interim lender, which would see a continuation of the operations in Nevada. The Monitor's view is that proceeding to close the Agreement on an expedited basis is necessary to protect the interests of the principal stakeholders in Veris Gold's operations, namely WBox, the employees, suppliers of goods and services and the environmental regulators.

68 The statutory requirements of the *CCAA* in ss. 36 and 11.3 have been satisfied by the Monitor toward approval of the Agreement, including approving the assignments of the Required Assigned Contracts. I am also satisfied that the orders sought are appropriate in the circumstances and consistent with the objectives of the *CCAA*.

69 The relief sought by the Monitor is granted. The Agreement is approved and Veris Gold and the Monitor are authorized to proceed to finalize the transactions with WBVG. The vesting of the assets on closing will be subject to an order of the U.S. court approving the Agreement and making such other ancillary orders as are appropriate in accordance with the *Bankruptcy Code*. The order provides that any issues that may be raised by the U.S. environmental regulators will be addressed by the U.S. court. Accordingly, this Court requests the aid, recognition and assistance of the U.S. court in terms of the carrying out of the terms of the order granted.

70 Finally, all orders sought with respect to the approval of the assignment by Veris Gold to WBVG of the Required Assigned Contracts are granted on the terms sought, including that such approval is subject to the payment of the cure costs.

Application granted.

URBANCORP RENEWABLE POWER INC.
Application Under Section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43, as amended, and Section 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended

Court File No. CV-18-600624-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES

(RETURNABLE December 11, 2020 – Sale Approval and Vesting Order)

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