Court File No. CV-21-00658423-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC., JUST ENERGY CORP., ONTARIO ENERGY COMMODITIES INC., UNIVERSAL ENERGY CORPORATION, JUST ENERGY FINANCE CANADA ULC, HUDSON ENERGY CANADA CORP., JUST MANAGEMENT CORP., 11929747 CANADA INC., 12175592 CANADA INC., JE SERVICES HOLDCO I INC., JE SERVICES HOLDCO II INC., 8704104 CANADA INC., JUST ENERGY ADVANCED SOLUTIONS CORP., JUST ENERGY (U.S.) CORP., JUST ENERGY ILLINOIS CORP., JUST ENERGY INDIANA CORP., JUST ENERGY MASSACHUSETTS CORP., JUST ENERGY NEW YORK CORP., JUST ENERGY TEXAS I CORP., JUST ENERGY, LLC, JUST ENERGY PENNSYLVANIA CORP., JUST ENERGY MICHIGAN CORP., JUST ENERGY SOLUTIONS INC., HUDSON ENERGY SERVICES LLC, HUDSON ENERGY CORP., INTERACTIVE ENERGY GROUP LLC, HUDSON PARENT HOLDINGS LLC, DRAG MARKETING LLC, JUST ENERGY ADVANCED SOLUTIONS LLC, FULCRUM RETAIL ENERGY LLC, FULCRUM RETAIL HOLDINGS LLC, TARA ENERGY, LLC, JUST ENERGY MARKETING CORP., JUST ENERGY CONNECTICUT CORP., JUST ENERGY LIMITED, JUST SOLAR HOLDINGS CORP. AND JUST ENERGY (FINANCE) HUNGARY ZRT.

APPLICANTS

BOOK OF AUTHORITIES OF THE DIP LENDERS

MOTION FOR SALE PROCESS APPROVAL ORDER
RETURNABLE AUGUST 17, 2022

August 15, 2022

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SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **OCTOBER 6, 2009**

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

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

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

And
ERNST & YOUNG INC.
Monitor

And
THE AD HOC COMMITTEE OF THE SENIOR SECURED NOTEHOLDERS AND U.S. BANK NATIONAL ASSOCIATION, INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTES
Respondents

And
DDJ CAPITAL MANAGEMENT, LLC
And
NEWSTART FACTORS, INC.
And
STICHTING PENSIONENFONDS ABP
And
THE FOOTHILL GROUP, INC.
And
FOOTHILL CLO I, LTD.
Intervening Parties, ès qualités

2009 QCCS 6460 (CanLII)

JG1793

CORRECTED JUDGMENT
ON AMENDED MOTION FOR THE ISSUANCE OF AN ORDER AUTHORIZING THE SALE OF PETITIONER ABITIBI-CONSOLIDATED COMPANY OF CANADA'S INDIRECT INTEREST IN THE MCCORMICK HYDROELECTRIC FACILITY (#233)

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[1] **WHEREAS** the Court rendered Judgment on September 29, 2009 on the Amended Motion for the Issuance of an Order Authorizing the Sale of Petitioner Abitibi-Consolidated Company of Canada's Indirect Interest in the McCormick Hydroelectric Facility;

[2] **WHEREAS** the Court was advised that there is a typographical error in paragraph 18(a) of the Conclusions in that the word "*to*" is missing in the second line after the words "*subordinated and postponed*";

[3] **CONSIDERING** Article 475 CCP and the authority of the Court to correct such an error of its own motion;

FOR THESE REASONS, THE COURT:

[4] **ORDERS** the correction of the Judgment rendered on September 29, 2009, so that paragraph 18(a) of the conclusions reads as follows:

> **[18] ORDERS** that, at the option of the Trustee, the ULC shall provide to the Trustee, concurrently with the completion of the Proposed Transactions, a guarantee (the "**ULC Subordinated Guarantee**) of the payment of the Secured Notes held by the Senior Secured Noteholders on the following terms:
>
> a) the ULC Subordinated Guarantee to be for all purposes, and shall at all times remain, inferior, junior, subordinated and postponed to the ULC's obligations to all Alcoa Indemnified Persons and all MPCo Indemnified Persons, in each case as defined in the Implementation Agreement (the "**Alcoa Obligations**") on terms and conditions as to subordination, postponement and enforcement satisfactory to Alcoa, in its sole discretion;
>
> (…)

[5] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

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2009 QCCS 6460 (CanLII)

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Dates of hearing: September 25, 28 and 29, 2009

2009 QCCS 6460 (CanLII)

SCHEDULE "A"

ABITIBI PETITIONERS

2009 QCCS 6460 (CanLII)

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.**

SCHEDULE "B"

BOWATER PETITIONERS

2009 QCCS 6460 (CanLII)

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**

2009 QCCS 6460 (CanLII)

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **SEPTEMBER 29, 2009**

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

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

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

And
ERNST & YOUNG INC.
Monitor

And
THE AD HOC COMMITTEE OF THE SENIOR SECURED NOTEHOLDERS AND U.S. BANK NATIONAL ASSOCIATION, INDENTURE TRUSTEE FOR THE SENIOR SECURED NOTES
Respondents

And
DDJ CAPITAL MANAGEMENT, LLC
And
NEWSTART FACTORS, INC.
And
STICHTING PENSIONENFONDS ABP
And
THE FOOTHILL GROUP, INC.
And
FOOTHILL CLO I, LTD.
Intervening Parties, ès qualités

2009 QCCS 6460 (CanLII)

2009 QCCS 6460 (CanLII)

JUDGMENT ON AMENDED MOTION FOR THE ISSUANCE OF AN ORDER AUTHORIZING THE SALE OF PETITIONER ABITIBI-CONSOLIDATED COMPANY OF CANADA'S INDIRECT INTEREST IN THE MCCORMICK HYDROELECTRIC FACILITY (#233)

THE MOTION AT ISSUE

[1] On April 17, 2009, the Court issued an order (the "**Initial Order**") pursuant to the CCAA[1] in respect of (i) Abitibi-Consolidated Inc. ("**ACI**") and subsidiaries thereof (collectively, the "**Abitibi Petitioners**"), (ii) Bowater Canadian Holdings Inc. and subsidiaries thereof (collectively, the "**Bowater Petitioners**") and (iii) certain partnerships[2].

[2] By virtue of this Initial Order, Ernst & Young Inc. ("**EYI**") was appointed as monitor of the Petitioners (the "Monitor"). A stay of proceedings in favour of the Petitioners was also granted until May 14, 2009 (the "Stay Period"). On May 14, 2009, it was extended until September 4, 2009 (the "First Stay Extension Order"), and thereafter, until December 15, 2009 (the "Second Stay Extension Order").

[3] In the context of these CCAA proceedings, the Petitioners now seek, by their Amended Motion, to implement certain transactions designed to transfer the indirect interest of Abitibi-Consolidated Company of Canada ("**ACCC**"), a subsidiary of ACI, in the business of Manicouagan Power Company ("**MPCo**") to Hydro-Québec or one of its wholly-owned subsidiary (collectively, **"HQ**").

[4] ACCC holds a 60% equity interest in MPCo (the "**ACCC Interest**"), while Alcoa Canada Ltd. ("**Alcoa Canada**") holds the remaining 40% equity interest (the "**Alcoa Interest**").

[5] At this stage, the Petitioners request this Court more particularly to:

a) authorize ACCC to sell the 60% interest it indirectly holds in the McCormick hydroelectric facility (the "**McCormick Hydroelectric Facility**") owned and operated by MPCo;

b) approve the terms and conditions of the Implementation Agreement and the exhibits thereto (the "**Implementation Agreement**") between ACI, ACCC, MPCo, Alcoa Canada and Alcoa Ltd. (collectively, Alcoa Canada

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[1] *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "**CCAA**").

[2] For purposes of this Judgment, all capitalized terms, unless otherwise defined herein, have the same meaning as set out in the Amended Motion of the Petitioners.

and Alcoa Ltd. are referred to herein as "**Alcoa**"), to which HQ has intervened;

c) authorize and direct ACI and ACCC to implement and complete the transactions and steps (the "**Proposed Transactions**") as contemplated in the Implementation Agreement and as outlined in Exhibit A to the Implementation Agreement (the "**Step Plan**"), with such alterations, amendments, deletions or additions as the parties agree, with the consent of the Monitor, and to perform the obligations in the Implementation Agreement;

d) declare that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of ULC (as defined in the Amended Motion), shall constitute the proceeds of the disposition of ACCC's MPCo shares (collectively, the "**MPCo Share Proceeds**");

e) declare that the MPCo Share Proceeds will be subject to a replacement charge (the "**MPCo Noteholder Charge**") in favour of US Bank, National Association as Indenture Trustee and Collateral Trustee (the "**Trustee**") for the benefit of the holders (the "**Senior Secured Noteholders**") of the 13.75% senior secured notes due April 1, 2011 (the "**Secured Notes**"), with the same rank and priority as the security held by the Trustee in respect of the shares of MPCo held by ACCC.

[6] Initially, the Senior Secured Noteholders had filed a written Contestation to the Amended Motion, which the Intervening Parties supported in part. The Senior Secured Noteholders were in disagreement with the way in which they were being treated in the contemplated transaction.

[7] The Senior Secured Noteholders have advanced approximately US$413 million to ACCC in April 2008, under the terms of a Senior Secured Loan. With accrued interest, the approximate amount presently owing in respect of this Senior Secured Loan is in excess of US$450 million, and interest continues to accrue on the Notes monthly.

[8] To secure the obligations of ACCC, ACCC, ACI and other guarantors granted security to the Trustee, which includes a Senior Secured Notes Hypothec. The Senior Secured Notes' Hypothec provides specific rights to the Senior Secured Noteholders with respect to the equity interest detained by ACCC in MPCo that is at issue here.

[9] However, during the course of the hearing, the Senior Secured Noteholders filed a Reamended Contestation that included numerous alternative conclusions that were acceptable to them. Since most of these alternative conclusions mirrored the conclusions of the Amended Motion and the suggestions contained in the Monitor

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Sixteenth Report, these were, in the end, agreed upon as acceptable by the Petitioners, the Monitor and the Intervening Parties.

[10] In view of this, the Amended Motion sought is thus not contested by anyone anymore.

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THE RELEVANT BACKGROUD

[11] In short, the following facts explain the presentation of the motion at issue.

[12] MPCo owns and operates the McCormick Hydroelectric Facility, which is located on the Manicouagan River, in the Province of Quebec. The McCormick Hydroelectric Facility consists of a dam, seven hydroelectric-generating units with a total capacity of 335 MW and certain electricity transmission and distribution facilities.

[13] MPCo is a stand-alone company and has 17 employees. It has not filed for protection in these CCAA Proceedings.

[14] MPCo has two main customers: i) Alcoa and ii) ACCC's Baie-Comeau newsprint mill (the "**Baie-Comeau Mill**") which, together, utilize approximately 98% of MPCo's generation capacity. MPCo also sells electricity to other small customers in the region, including the town of Baie-Comeau.

[15] The electricity sold by MPCo to ACCC and Alcoa is sold pursuant to power purchase agreements that expire in 2011. MPCo sells the electricity it produces to ACCC and Alcoa at a price that approximates MPCo's cost of production. This price is significantly below the current market price for electricity for large customers in the Province of Quebec.

[16] In December 1996, ACCC and Alcoa Canada entered into an agreement (the "**MPCo Shareholder Agreement**") which provides, among other things, for a right of first refusal ("**ROFR**") in favour of Alcoa Canada should ACCC wish to sell its 60% interest in MPCo to a third party.

[17] HQ, which is owned by the Province of Quebec, holds, subject to limited exceptions, exclusive rights for the distribution of electricity in the territory of the Province of Quebec. The McCormick Hydroelectric Facility is a "private electric power system" which allows it to distribute, as an exception to HQ's monopoly, electricity within a specified territory subject to certain regulations including limitations on electricity prices and restrictions with respect to exporting electricity outside Quebec.

[18] MPCo is required to distribute electricity generated from the McCormick Hydroelectric Facility to each of its current customers (i.e. ACCC and Alcoa Canada), unless these customers choose to enter into a new distribution agreement with HQ. However, as such agreements with HQ would likely be at current market prices, which are much higher than the rates charged by MPCo, this is unlikely to occur.

[19] Following the merger of ACI and BI on October 29, 2007, the Petitioners began a comprehensive review of the combined operations to reduce costs, improve profitability and generate liquidity. As part of this review, the Petitioners decided to dispose of certain non-core assets, including the ACCC Interest.

[20] The following factors played a significant role in the decision to sell the ACCC Interest:

a) MPCo's water rights on the Manicouagan River (the "**MPCo Water Rights**") will expire in 2011**.** The Quebec Government could renew the MPCo Water Rights for an additional period of 25 years, but such renewals typically would be subject to the fulfillment of certain terms and conditions to be negotiated with the Quebec Government; and

b) ACCC was advised by the Quebec Ministry of Natural Resources and Wildlife (the "**MNR**") that one of the potential conditions for the renewal of MPCo Water Rights could be a significant capital investment in the Province of Quebec.

[21] The number of purchasers potentially interested in acquiring the ACCC Interest was limited to three potential third party purchasers (Alcoa, another third party and HQ) on account of the following factors:

a) MPCo is only entitled to distribute its electricity on its territory to its existing grandfathered customers, thereby limiting the potential for expansion of its customer base;

b) MPCo would have to continue to supply both the Baie-Comeau Mill and Alcoa pursuant to its existing power purchase agreements at the current rates (which are below current market rates), unless ACCC and Alcoa agreed to a rate change;

c) the prices at which electricity may be sold by a private electric power system, such as MPCo, are subject to legislative limitations;

d) electricity generated by MPCo may not be exported outside of Quebec without the authorization of the Quebec government, thereby limiting MPCo's revenue potential;

e) the MPCo Water Rights on the Manicouagan River expire in 2011 and there is no certainty that a potential purchaser could obtain a renewal. A renewal of the MPCo Water Rights would likely require significant capital investments by MPCo and/or its shareholders; and

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f) Alcoa and another third party each had a ROFR in respect of the ACCC Interest and a ROFR tends to discourage potential purchasers from spending time and money on due diligence.

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[22] Accordingly, it was not likely that a potential purchaser would be in a position to maximize the value of MPCo in the same manner as HQ, given the latter's ability to sell the electricity produced by MPCo to any third-party at market rates and HQ's likely success in obtaining the renewal of the MPCo Water Rights.

[23] Hence, the efforts of the Petitioners and their advisors were focused upon negotiating with HQ. The initial discussions with HQ in respect of the ACCC Interest began in November 2008 and a letter of intent (the "LOI") was executed with HQ on February 19, 2009, namely prior to the CCAA proceedings. It provided, *inter alia*, for the sale of the ACCC Interest for gross proceeds of CDN$615 million and an exclusivity period in favour of HQ until March 23, 2009.

[24] Upon the execution of the LOI, ACCC sent a notice to Alcoa providing Alcoa with the opportunity to purchase the ACCC Interest for CDN$615 million, in accordance with Alcoa's ROFR. On March 6, 2009, Alcoa confirmed that it would not exercise its right to purchase the ACCC Interest.

[25] During the course of its due diligence investigation, HQ required that the sale of the ACCC Interest, originally contemplated as a sale of shares, be structured as an asset sale so that HQ would not be indirectly liable, as the 60% shareholder of MPCo, for certain potential contingent liabilities. In addition, as HQ is a non-taxable entity, the Proposed Transactions were required to be structured by HQ to allow the net profits from the New LP (as defined in the Amended Motion) to flow directly to HQ from the New LP without any deductions for taxes.

[26] As a result of this structural change from a share sale to an asset sale, Alcoa's consent was required to the terms of the Implementation Agreement, as the MPCo assets were to be transferred out of MPCo to ACCC and then from ACCC to New LP.

[27] Based on these parameters, the Petitioners and Alcoa negotiated the terms of the Implementation Agreement to which HQ has intervened.

[28] Alcoa agreed that it would support an asset sale on the basis that it would not incur any direct or indirect cost, expense or liability as a result of the MPCo transaction, including any incremental tax exposure.

THE IMPLEMENTATION AGREEMENT

[29] The Implementation Agreement sets out the terms of the transactions to be carried out by ACCC, MPCo, HQ and Alcoa in order to effect the sale of the ACCC Interest to HQ and transfer the MPCo assets and power purchase agreements to a limited partnership to be held 60% by HQ and 40% by Alcoa.

[30] Many of the steps set out in the Implementation Agreement are necessary in order to utilize some of ACCC's tax attributes to shelter some of the gains and to allow the net profits from the New LP to flow directly to HQ from the New LP without any liability for taxes.

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[31] The Implementation Agreement sets out the terms and conditions of the Proposed Transactions, of which the following are most significant:

a) ACCC will acquire Alcoa's 40% interest in MPCo in exchange for a promissory note;

b) MPCo will be wound up into ACCC;

c) ACCC will cause all of the assets and liabilities (except for certain excluded liabilities) of MPCo to be transferred to New LP;

d) an unlimited liability company ("**GP**") will be formed and will be the general partner of New LP holding a 0.001% interest in the New LP. ACCC will become the 99.999% limited partner of New LP;

e) ACCC will sell to HQ a 59.9994% interest in New LP and its rights in the MPCo power purchase agreements for gross proceeds of CDN$615 million;

f) ACCC will repay the promissory note issued to Alcoa referred to in step (i) above by way of a transfer of a 39.9996% interest in New LP to Alcoa; and

g) ACCC will transfer a 60% and 40% interest in GP to HQ and Alcoa, respectively, for nominal consideration.

[32] The Petitioners expect that the gross proceeds of approximately CDN$615 million from the Proposed Transactions will be applied as follows (subject to adjustments):

a) about $25 million for the payment of the taxes reimbursed to Alcoa at closing;

b) about $31 million to HQ for the payment of the ACCC Debt estimated by HQ;

c) about $30.75 million by way of a 2-year purchase price holdback by HQ (the "**HQ Holdback**");

d) up to $282.3 million to be held by ULC as Permitted Investments (the "**ULC Reserve**");

e) up to US$87.5 million for the repayment of the ACI DIP Facility, of which about US$58.4 million is currently outstanding, plus any accrued interest and expenses; and

f) about $10 million in other amounts paid or payable in connection with or pursuant to the Transaction Documents.

[33] The net proceeds after adjustments, holdback, reserves and payment of the ACI DIP Facility (if fully drawn) will stand at approximately CDN$138 million.

[34] As appears from the conclusions of the Amended Motion, the following measures will be taken in connection with the Proposed Transactions to ensure that the rights of the Senior Secured Noteholders are protected:

a) the granting of a replacement charge (the "**MPCo Noteholder Charge**") in favour of the Senior Secured Noteholders with the same rank and priority as the existing security held in respect of the shares of MPCo held by ACCC over: (i) the net proceeds from the Proposed Transactions; and (ii) the shares of ULC;

b) the granting of a guarantee in favour of the Senior Secured Noteholders by ULC (the "**ULC Subordinated Guarantee**");

c) an order (the "Subrogation **Order**") which provides that the Senior Secured Noteholders shall be subrogated in the ACI DIP Charge in accordance with paragraph 61.10 of the Initial Order to the extent that any payment from the transaction proceeds is made to the ACI DIP Lender under the ACI DIP Agreement;

d) an order (the "**Net** Cash **Proceeds Order**") which provides that the cash component of the MPCo Share Proceeds and the ULC Reserve shall be paid to and be held by the Monitor; and

e) an order (the "**ULC** Borrowing **Order**") which provides that the Abitibi Petitioners may not borrow any portion of the ULC Reserve except on terms and conditions permitted under the Implementation Agreement, including as to amount, security, priority, interest rates, fees, default, reporting and repayment, and except upon approval of the Court made on notice to the Trustee.

[35] The parties to the Proposed Transactions have agreed to use reasonable commercial efforts to finalize all of the legal documentation to implement the Proposed Transactions by September 30, 2009 and to close the Proposed Transactions by October 15, 2009. If the Proposed Transactions have not closed by December 31, 2009, any party may terminate any of its obligations to complete the Proposed Transactions.

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ANALYSIS AND DISCUSSION

[36] The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally[3].

[37] In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:

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

[38] These principles were enunciated in *Royal Bank* v. *Soundair Corp*.[4]. They are equally applicable in a CCAA sale situation[5].

[39] In this case, the Court considers that all these factors are satisfied.

[40] First, the Petitioners' sales process for the ACCC Interest was proper even if limited to only one potential purchaser. There were valid and compelling reasons for the narrow focus of the sales process. Suffice to highlight in that regard the unique characteristics of the asset, the market in which the asset is situated and the external factors that most likely deterred or failed to attract potential purchasers.

[41] The regulatory environment, the restrictions on pricing for the sale of electricity and the significant risk that the expiry of the MPCo Water Rights could disrupt the power production at MPCo indefinitely easily explain why the market for the ACCC Interest was severely limited.

[42] The Petitioners have acted in good faith and with due diligence in their efforts to sell the ACCC Interest.

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[3] See, notably, *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467, at para. 35 (Ont. S.C.J.); *Boutiques San Francisco, Re*, (2004), 7 C.B.R. (5th) 189 (S.C.); *Calpine Canada Energy Ltd, Re*, (2007), 35 C.B.R. (5th) 1 (Alta Q.B.).

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

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

[43] Second, even though the sale of the ACCC Interest was not widely canvassed in the market, in order to assess the reasonableness of the Purchase Price contemplated in the Proposed Transactions, the Monitor performed certain financial analyses.

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[44] Based on the compiled trading multiples, the review of transaction multiples and the discounted cash-flows analysis that he made, the Monitor was of the view that a Purchase Price of CDN$615 million for the ACCC Interest was fair and reasonable based on the assumptions, forecasts and other financial information that he considered.

[45] The Proposed Transactions will generate estimated net proceeds before holdbacks and reserves of approximately CDN$547.9 million, of which up to CDN$97.2 million will be used to repay the ACI DIP Facility.

[46] Third, the evidence indicates that the sale is warranted at this time because the Petitioners need cash to repay the ACI DIP Facility in accordance with the ACI DIP Agreement and to continue and implement their restructuring. Moreover, the projected costs of holding onto MPCo are too high, as the renewal of the water rights expiring in 2011 would require important infrastructure investments.

[47] From that standpoint, the sale will benefit the whole economic community because it will allow the Petitioners to monetize certain non-liquid assets, use net cash proceeds to repay certain secured creditors (including the Senior Secured Noteholders) and secure cash to fund their ongoing restructuring effort, for the benefit of all stakeholders.

[48] In fact, it is fair to say there may well be material prejudice to the Petitioners' stakeholders if the transaction does not proceed because the value of MPCo's assets would likely be far less in a liquidation scenario than in the proposed going concern sale.

[49] In addition, despite the fact that ACCC will have to purchase electricity at a higher price as a result of the transaction, the Petitioners are of the view that the Baie-Comeau Mill will remain competitive.

[50] Fourth, the MPCo sale and the Proposed Transactions form part of the Petitioners' continuing objective and strategy to reduce costs and improve profitability. The ACCC Interest is not required to continue the operations of the Abitibi Petitioners, nor is it vital for the Petitioners to retain it to successfully restructure their business.

[51] Fifth, the Amended Motion provide to the Senior Secured Noteholders assurances that prove, in the end, to be satisfactory to safeguard their rights and protect the value of their security.

[52] Finally, even though it is highly unusual in a CCAA proceeding to have significant levels of pre-filing obligations satisfied in full other than through a plan of arrangement as it is the case here with the HQ pre-filing claims, the Court finds that the unique

situation at hand, coupled with the importance of the sale in the present restructuring, justify adopting a flexible approach to the issue.

[53] The payment of these intercompany payables was imposed as an essential condition by HQ in order to enter into the MPCo transaction. Furthermore, this condition was negotiated prior to the CCAA proceedings, when the Purchase Price agreed upon was arrived at. This price remains the same even today.

[54] While it is important to maintain a fair and delicate balance between the positions of all stakeholders in a CCAA restructuring, equitable treatment does not entail inflexibility at all costs. Here, it is clear that the chances of a successful restructuring are enhanced considerably by the Proposed Transactions. From that perspective, there is a definite benefit to all stakeholders by the approval of the Implementation Agreement.

[55] To some extent, the situation bears some analogy with that of a critical vendor or key supplier. This is, no doubt, a critical asset sale with the only available purchaser in the market. Having to concede the payment of these HQ claims may not be the perfect outcome, but it remains, all things considered, an acceptable one under the circumstances.

[56] Indeed, although this aspect of the Proposed Transactions is unusual, the Monitor notes, rightly so, that HQ could have achieved the same net economic terms had it simply required, in order to complete the transaction, a lower Purchase Price on account of all pre-transaction outstanding liabilities, including the pre-filing liabilities stayed as a result of the filing by the Petitioners.

[57] Furthermore, the Monitor notes as well that, to the extent ACCC pays a liability on behalf of BCFPI (approximately CDN$9 million), ACCC will benefit from the intercompany charge described in the Initial Order.

[58] All in all, the completion of the Proposed Transactions will both materially advance the restructuring of the Petitioners and benefit stakeholders, while the failure of the Proposed Transactions would greatly complicate the restructuring if not completely frustrate it.

[59] The balance of interests clearly favours approval. The Monitor supports and recommends the approval sought. The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders[6].

[6] See, in this respect, *Consumers Packaging Inc., Re*, 2001 CarswellOnt 3331, at para. 2; *Ivaco Inc., Re*, 2004 CarswellOnt 2397, at para. 21; *Boutiques Euphoria Inc, Re*, 500-11-030746-073, Que. S.C., August 29, 2007, Gascon J., at paras. 90 to 95.

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[60] In view of the urgency in closing the Proposed Transactions rapidly, and to take away any uncertainty in a context where, after much discussions and compromises, the conclusions sought are acceptable to all, the Court is satisfied that provisional execution of this Judgment should be ordered.

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FOR THESE REASONS, THE COURT:

[1] **GRANTS** the Petitioners' *Amended Motion for the Issuance of an Order Authorizing the Sale of Petitioners' Interests in Manicouagan Power Company* (the "**Motion**").

[2] **EXEMPTS**, if applicable, the Petitioners from having to serve the Motion and from any notice or delay of presentation.

[3] **DECLARES** that, unless otherwise provided, undefined capitalized terms and expressions used herein shall have the respective meanings ascribed thereto in the Second Amended Initial Order of the Honourable Mr. Justice Clement Gascon, J.S.C. of the Court dated May 6, 2009, as amended (the "**Initial Order**").

Approval of Implementation Agreement and Related Transactions

[4] **ORDERS** that the terms and conditions of a certain Implementation Agreement (the "**Implementation Agreement**) among Abitibi-Consolidated Inc., Abitibi Consolidated Company of Canada ("**ACCC**"), Manicouagan Power Company ("**MPCo**"), Alcoa Canada Ltée and Alcoa Ltd. (collectively, "**Alcoa**"), to which has intervened HQ Energie Inc., a wholly-owned subsidiary of Hydro-Quebec, a copy of which is filed as Exhibit R-1 to the Motion, are approved.

[5] **ORDERS AND DECLARES** that Petitioners are authorized to implement and complete the transactions and steps contemplated in the Implementation Agreement and the Step Plan (Exhibit A thereto) (the "**Proposed Transactions**") with such non-material alterations, amendments, deletions or additions as the parties thereto may agree to with the consent of the Monitor, and to perform the obligations contained in the Implementation Agreement.

[6] **ORDERS** that in completing the Proposed Transactions, subject to the terms and conditions of the Implementation Agreement, the Petitioners are authorized:

a) to execute the agreements and to execute and deliver any documents and assurances governing or giving effect to the Implementation Agreement (including, without limitation, the directions of payment contemplated therein) as the Petitioners, in their discretion, may deem to be reasonably necessary or advisable to conclude the Proposed Transactions, including, without limitation, the execution of such deeds, contracts or documents, as may be contemplated in the Implementation Agreement and all such deeds, contracts or documents are hereby ratified, approved and

confirmed (collectively with the Implementation Agreement, the "**Transaction Documents**"); and

b) to take such steps as are, in the opinion of the Petitioners, necessary or incidental to the performance of their obligations pursuant to the Implementation Agreement.

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[7] **ORDERS AND DECLARES** that this Order shall constitute the only authorization required by the Petitioners to proceed with the Proposed Transactions and that no shareholder or regulatory approval shall be required in connection with the Proposed Transactions save and for those contemplated in the Implementation Agreement.

[8] **ORDERS AND DECLARES** that the assets or shares of MPCo to be transferred to ACCC under the Implementation Agreement shall not become subject to any charges, liens or encumbrances granted in respect of ACCC or its assets, including, without limitation, any and all CCAA Charges, and that the assets to be transferred by ACCC to the New LP (as defined in the Implementation Agreement) shall be transferred to the New LP free and clear of any charges, liens or encumbrances including, without limitation (i) the CCAA charges and any and all other encumbrances, liens, assignments, charges, hypothecs, pledges, mortgages, title retention agreements, security interests of any nature, adverse claims, exceptions, reservations, easements, servitudes, rights of occupation, matters capable of registration against title, options, rights of pre-emption, privileges or any contract to create any of the foregoing, or (ii) any liability or obligation of any kind, character or description, whether known or unknown, absolute or contingent, accrued or unaccrued, liquidated or unliquidated, secured or unsecured, joint or several, solidary or not solidary, due or to become due, vested or unvested, executory, determined, determinable or otherwise and whether or not the same is required to be accrued on any financial statements, the whole save and except for the liabilities to be assumed by the New LP pursuant to the Implementation Agreement.

Treatment of Proceeds and Related Matters Pending Further Order

[9] **ORDERS AND DECLARES** that, subject to paragraph 11 hereof, (i) the net proceeds from the Proposed Transactions paid to or for the benefit of ACCC or any Abitibi Petitioner under or as contemplated by the Transaction Documents, and (ii) the shares of ULC (as defined in the Implementation Agreement), shall constitute and shall for all purposes be treated as proceeds of disposition of the shares of MPCo held by ACCC (the "**MPCo Share Proceeds**"); for greater certainty the MPCo Share Proceeds shall not include the following:

a) subject to paragraph 11 of this Order, any amount paid in satisfaction of the Abitibi Petitioners' obligations under the ACI DIP Agreement (whether as principal, interest, fees or otherwise);

b) subject to paragraph 13 of this Order, about $282.3 million (the "**ULC Reserve**") contributed to the ULC;

c) about $25 million (current estimate) paid in connection with taxes;

d) subject to paragraph 10 of this Order, about $30.75 million representing a commercially negotiated holdback on the purchase price payable by HQ to ACCC, as contemplated in the Intervention section of the Implementation Agreement (the “**HQ Holdback**”);

e) subject to paragraph 10 of this Order, about $31 million in connection with MPCo intercompany accounts payable; and

f) any amounts paid or payable by ACCC or by ACI in connection with or pursuant to the Transaction Documents, including any fees, costs, expenses, indemnities and closing adjustments provided for therein.

[10] **ORDERS AND DECLARES** that the MPCo Share Proceeds extend to and include:

a) ACCC’s interest in the HQ Holdback; and

b) ACCC’s interest (without set off or recoupment) in claims arising from the satisfaction of related party claims in the amounts of $31.3 million and $0.9 million referred to as “Outstanding Balance Among ACCC/BCFPI and HQ” and referred to as “Prefiling amounts payable by the ACI Group to Alcoa and MPCo” respectively in paragraph 48 of the Monitor’s 16th Report to the Court.

[11] **ORDERS** that in accordance with paragraph 61.10 of the Second Amended and Restated Initial Order, the Trustee for the benefit of the Senior Secured Noteholders has the benefit of and is entitled to be subrogated to the ACI DIP Charge to the extent of any repayment of the ACI DIP Facility from proceeds of or as part of the Proposed Transactions, provided that such subrogation to the ACI DIP Charge may only be enforced once all of the obligations of the ACI DIP Lender have been paid in full, and further **ORDERS** that upon payment in full of such obligations, the Borrowers under the ACI DIP Facility will be precluded from any other borrowings thereunder.

[12] **ORDERS** that the MPCo Share Proceeds will be subject to a replacement charge (the "**MPCo Noteholder Charge**") in favour of US Bank, National Association as Indenture Trustee and Collateral Trustee for the benefit of the holders of the Secured Notes (the "**Trustee**" and the "**Senior Secured Noteholders**" respectively) with the same rank and priority as the Senior Notes Security held by the Trustee in respect of the shares of MPCo held by ACCC, without requirement for further registration or action; provided further that the Trustee shall be authorized to require the shares of

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ULC to be pledged by ACCC to the Trustee or, at the election of the Trustee, in favour of a nominee of the Trustee established for such purpose.

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[13] **ORDERS** that the ULC Reserve is subject to a charge in favour of the Trustee for the benefit of the Senior Secured Noteholders subordinate to a charge in favour of Alcoa (as defined in the Implementation Agreement ("Alcoa") and on behalf of itself and on behalf of all Alcoa Indemnified Persons and MPCo Indemnified Persons, in each case as defined in the Implementation Agreement) on terms and conditions as to subordination and enforcement satisfactory to Alcoa, in its sole discretion.

[14] **ORDERS** that the ULC shall not incur any further liabilities except as may be approved by the Court on appropriate notice to the stakeholders including the Trustee, the ad hoc committee of senior secured noteholders (the "**Committee**"), and Alcoa and, in any case, only as permitted by the Transaction Documents, save for ordinary course charges such as bank fees in connection with the investment of the ULC Reserve in investment grade marketable securities.

[15] **ORDERS** that no investment of the ULC Reserve or any portion other than in investment grade marketable securities shall be made without approval of the Court made on notice to the Trustee, the Committee, Alcoa and the service list.

[16] **ORDERS** that the cash component of the MPCo Share Proceeds and the ULC Reserve shall be paid to and be held by the Monitor:

a) in the case of the MPCo Share Proceeds, in an interest bearing account subject to the terms of this Order, and shall not be released by the Monitor except upon approval of the Court made on notice to the Trustee, the Committee and the service list; and

b) in the case of the ULC Reserve, in an interest bearing account or investment grade marketable securities and shall not be released by the Monitor except pursuant to the terms of the Transaction Documents.

[17] **ORDERS** that, for greater certainty, nothing in this Order, including without limitation, the approval of the Implementation Agreement contained in paragraph 4 hereof and the authorizations contained in paragraphs 5 and 6 hereof, shall be construed as the Court granting authority or approval, in principle or otherwise, to the Abitibi Petitioners to borrow any portion of the ULC Reserve.

[18] **ORDERS** that, at the option of the Trustee, the ULC shall provide to the Trustee, concurrently with the completion of the Proposed Transactions, a guarantee (the "**ULC Subordinated Guarantee**) of the payment of the Secured Notes held by the Senior Secured Noteholders on the following terms:

a) the ULC Subordinated Guarantee to be for all purposes, and shall at all times remain, inferior, junior, subordinated and postponed the ULC's

obligations to all Alcoa Indemnified Persons and all MPCo Indemnified Persons, in each case as defined in the Implementation Agreement (the "**Alcoa Obligations**") on terms and conditions as to subordination, postponement and enforcement satisfactory to Alcoa, in its sole discretion;

b) the Alcoa Obligations shall be paid in full before any payment on account of, or in respect of, the ULC Subordinated Guarantee (whether as principal, interest, fees or otherwise) is paid; and

c) any payments or distributions on account of, or in respect of, the Secured Notes which are received contrary to these provisions shall be received in trust for the benefit of the ULC, shall be segregated from other funds and property held by recipient and shall be immediately paid over to the ULC.

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[19] **ORDERS**, consistent with paragraph 92 of the Initial Order, that:

a) nothing herein shall affect any determination of (i) the validity or perfection of the Senior Notes Security, (ii) whether such security is opposable to third parties or (iii) whether such security is avoidable under applicable Canadian or United States laws; and

b) the validity, perfection and opposability of the MPCo Noteholder Charge and of the ULC Subordinated Guarantee, as the case may be, are conditional upon and subject to the validity, perfection and opposability of the Senior Notes Security in respect of the shares of MPCo held by ACCC.

[20] **ORDERS AND DECLARES** that leave be reserved to the Abitibi Petitioners or to any party or intervenor to the Implementation Agreement, to apply for such orders or directions as may be required to complete the Proposed Transactions or otherwise in connection with the foregoing orders.

[21] **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

[22] **WITHOUT COSTS**.

CLÉMENT GASCON, J.S.C.

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Dates of hearing: September 25, 28 and 29, 2009

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SCHEDULE "A"

ABITIBI PETITIONERS

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20. **ABITIBI-CONSOLIDATED INC.**

21. **ABITIBI-CONSOLIDATED COMPANY OF CANADA**

22. **3224112 NOVA SCOTIA LIMITED**

23. **MARKETING DONOHUE INC.**

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

25. **3834328 CANADA INC.**

26. **6169678 CANADA INC.**

27. **4042140 CANADA INC.**

28. **DONOHUE RECYCLING INC.**

29. **1508756 ONTARIO INC.**

30. **3217925 NOVA SCOTIA COMPANY**

31. **LA TUQUE FOREST PRODUCTS INC.**

32. **ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED**

33. **SAGUENAY FOREST PRODUCTS INC.**

34. **TERRA NOVA EXPLORATIONS LTD.**

35. **THE JONQUIERE PULP COMPANY**

36. **THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY**

37. **SCRAMBLE MINING LTD.**

38. **9150-3383 QUÉBEC INC.**

SCHEDULE "B"

BOWATER PETITIONERS

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20. **BOWATER CANADIAN HOLDINGS INC.**
21. **BOWATER CANADA FINANCE CORPORATION**
22. **BOWATER CANADIAN LIMITED**
23. **3231378 NOVA SCOTIA COMPANY**
24. **ABITIBIBOWATER CANADA INC.**
25. **BOWATER CANADA TREASURY CORPORATION**
26. **BOWATER CANADIAN FOREST PRODUCTS INC.**
27. **BOWATER SHELBURNE CORPORATION**
28. **BOWATER LAHAVE CORPORATION**
29. **ST-MAURICE RIVER DRIVE COMPANY LIMITED**
30. **BOWATER TREATED WOOD INC.**
31. **CANEXEL HARDBOARD INC.**
32. **9068-9050 QUÉBEC INC.**
33. **ALLIANCE FOREST PRODUCTS (2001) INC.**
34. **BOWATER BELLEDUNE SAWMILL INC.**
35. **BOWATER MARITIMES INC.**
36. **BOWATER MITIS INC.**
37. **BOWATER GUÉRETTE INC.**
38. **BOWATER COUTURIER INC.**

SCHEDULE "C"

18.6 CCAA PETITIONERS

17. **ABITIBIBOWATER INC.**
18. **ABITIBIBOWATER US HOLDING 1 CORP.**
19. **BOWATER VENTURES INC.**
20. **BOWATER INCORPORATED**
21. **BOWATER NUWAY INC.**
22. **BOWATER NUWAY MID-STATES INC.**
23. **CATAWBA PROPERTY HOLDINGS LLC**
24. **BOWATER FINANCE COMPANY INC.**
25. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
26. **BOWATER AMERICA INC.**
27. **LAKE SUPERIOR FOREST PRODUCTS INC.**
28. **BOWATER NEWSPRINT SOUTH LLC**
29. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
30. **BOWATER FINANCE II, LLC**
31. **BOWATER ALABAMA LLC**
32. **COOSA PINES GOLF CLUB HOLDINGS LLC**

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SUPERIOR COURT
Commercial Division

2015 QCCS 1920 (CanLII)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: April 27, 2015

PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.

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

BLOOM LAKE GENERAL PARTNER LIMITED
QUINTO MINING CORPORATION
8568391 CANADA LIMITED
CLIFFS QUÉBEC IRON MINING ULC
Petitioners
And
THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP
BLOOM LAKE RAILWAY COMPANY LIMITED
Mises-en-cause
And
FTI CONSULTING CANANDA INC.
Monitor
And
9201955 Canada inc.
Mise-en-cause
And

EABAMETOONG FIRST NATION
GINOOGAMING FIRST NATION
CONSTANCE LAKE FIRST NATION and
LONG LAKE # 58 FIRST NATION
AROLAND FIRST NATION
MARTEN FALLS FIRST NATION
Objectors

And
8901341 CANADA INC.
CANADIAN DEVELOPMENT AND MARKETING CORPORATION
Interveners

JUDGMENT ON PETITIONERS' AMENDED MOTION FOR THE ISSUANCE OF AN APPROVAL AND VESTING ORDER WITH RESPECT TO THE SALE OF THE CHROMITE SHARES (#82)

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INTRODUCTION

[1] The Petitioners have made an Amended Motion for the Issuance of an Approval and Vesting Order with respect to the Sale of the Chromite Shares (#82 on the plumitif; the original motion was #65). Objections were filed by (1) six First Nation bands (#85, as amended at the hearing) and (2) 8901341 Canada Inc. and Canadian Development and Marketing Corporation (together, CDM) (#87).

CONTEXT

[2] On January 27, 2015, Mr. Justice Castonguay issued an Initial Order placing the Petitioners and the Mises-en-cause under the protection of the *Companies' Creditors Arrangement Act*.[1] The ultimate parent of the Petitioners and the Mises-en-cause is Cliffs Natural Resources Inc. (Cliffs), which is neither a Petitioner nor a Mise-en-cause.

[3] The Petitioner Cliffs Québec Iron Mining ULC (CQIM) owns, through two subsidiaries, a 100% interest in the Black Thor and Black Label chromite mining projects and a 70% interest in the Big Daddy chromite mining project. All three projects form part of the Ring of Fire, a mining district in northern Ontario.

[4] Other entities related to Cliffs but which are not parties to the CCAA proceedings own other mining interests in the Ring of Fire.

[5] The proposed transaction with respect to which the Petitioners are seeking an approval and vesting order involves the sale of those various interests, including in particular the sale of CQIM's shares in the subsidiaries described above.

[6] Cliffs and its affiliates paid approximately US$350 million to acquire their interests in the Ring of Fire projects, and invested a further US$200 million in developing these projects.

[7] By 2013, Cliffs had suspended all activities related to the Ring of Fire and began making general inquiries with potential interested parties with a view to selling its interests in the Ring of Fire. No material interest resulted from these efforts.

---

[1] R.S.C. 1985, c. C-36, as amended.

[8] By September 2014, Cliffs's desire to sell its interests in the Ring of Fire was publicly known.[2] It hired Moelis & Company LLC to assist with the sale process for various assets including the Ring of Fire in October 2014.[3]

[9] The sale process will be described in greater detail below. It resulted in the execution of a letter of intent with Noront on February 13, 2015.[4]

[10] While the sellers were negotiating the Share Purchase Agreement with Noront, CDM sent an unsolicited letter of intent to acquire the Ring of Fire interests on March 14, 2015.[5] That letter of intent was analyzed by the sellers, Moelis and the Monitor and was rejected.[6] Two revised letters of intent followed and were also rejected.[7]

[11] The sellers executed the initial Share Purchase Agreement with Noront on March 22, 2015, which provided for a price of US $20 million.[8] Noront issued a press release describing the transaction on March 23, 2015.[9]

[12] The initial SPA provided in Section 7.1 a "Superior Proposal" mechanism that allowed the sellers to accept an unsolicited and superior offer from a third party.

[13] On April 2, 2015, the Petitioners made a motion for the issuance of an approval and vesting order with respect to the initial SPA. Four First Nations bands who live and exercise their Aboriginal and treaty rights in and on the land and territories surrounding the Ring of Fire filed an objection to the motion. CDM did not. Instead, on April 13, 2015, CDM made an unsolicited offer for the interests in the Ring of Fire which included a purchase price of US $23 million.[10]

[14] CDM's offer was considered by the sellers, Moelis and the Monitor to be a "Superior Proposal" as defined in Section 7.1 of the initial SPA. As a result, they advised Noront,[11] which expressed an interest in making a new offer.

[15] The sellers, after consulting Moelis and the Monitor, developed the Supplemental Bid Process to give each party the chance to submit its best and final offer.[12]

[16] Both Noront and CDM participated in the Supplemental Bid Process and submitted new offers, with Noront's offer at US $27.5 million and CDM's at US $25.275 million.[13]

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2 An article from the Globe & Mail dated September 17, 2014 was produced as Exhibit R-7.
3 The CCAA Parties formally engaged Moelis by engagement letter dated March 23, 2015, and the Court approved the engagement of Moelis by order dated April 17, 2015.
4 Exhibit R-9.
5 Exhibit R-17.
6 Exhibit R-18.
7 Exhibits R-19 to R-22.
8 Exhibit R-3 (redacted) and R-4 (unredacted).
9 The press release was provided to the Court during argument and was not given an exhibit number.
10 Exhibit R-23.
11 Exhibit R-24.
12 Exhibits R-25 and R-26.
13 Exhibits R-29 and R-30.

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[17] The sellers accepted the Noront offer and entered into a revised SPA with Noront on April 17, 2015.[14] The Petitioners then amended their motion to allege the additional facts since April 2, 2015 and to seek the issuance of an approval and vesting order with respect to the revised SPA.

[18] The First Nation bands maintained their objection (#85)[15] and CDM filed a Declaration of Intervention and Contestation with respect to the amended motion (#87).

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POSITION OF THE PARTIES

[19] The Petitioners argue that the revised SPA should be approved because:

1. the marketing and sales process was fair, reasonable, transparent and efficient;
2. the price offered by Noront was the highest binding offer received in the process;
3. CQIM exercised its commercial and business judgment with assistance from Moelis;
4. the Monitor assisted and advised CQIM throughout the process and recommends the approval of the motion.

[20] Moreover, they argue that no creditor has opposed the motion, and that the First Nations bands and CDM do not have legal standing to oppose the motion.

[21] The Monitor and Noront supported the position put forward by the Petitioners.

[22] The First Nations bands argued the following points:

1. they have a legitimate interest and standing to contest the motion as an “other interested party” under Section 36 of the CCAA, because they have Aboriginal and treaty rights that are affected by the change in control of the Ring of Fire interests;
2. there was a duty on the part of the sellers and their advisers to consult with and advise the First Nations bands about the sale process. Instead, the First Nations bands were ignored and did not even learn of the existence of the sale process until March 23, 2015;
3. the sale process was not open, fair or transparent and did not recognize the rights of the First Nations bands;
4. there was no sales process order; and
5. there is no urgency and they should be given the opportunity to present an offer.

[23] Finally, CDM argued as follows:

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14 Exhibit R-11 (redacted) and R-12 (unredacted).

15 It was amended at the hearing to add two First Nations bands as objectors.

1. the sellers were required to accept the “Superior Proposal” made by CDM on April 13, 2015;
2. the Supplemental Bid Process did not treat the two parties fairly;
3. the Monitor’s support of the process is not determinative;
4. it had the necessary interest to intervene in the CCAA proceedings and contest the motion.

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ISSUES

[24] The Court will analyze the following issues:

1. Was the sale process “fair, reasonable, transparent and efficient”?

   In the context of the analysis of this issue, the Court will consider various sub-issues, including the business judgement rule, the importance of the Monitor’s recommendation, and the interpretation of Section 7.1 of the initial SPA.
2. Do the First Nations bands have other grounds on which to object to the proposed transaction?
3. Do the First Nations bands and CDM have legal standing to raise there issues?

ANALYSIS

1. Was the sale process “fair, reasonable, transparent and efficient”?

[25] Section 36 of the CCAA provides in part as follows:

> 36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> …
>
> (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 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.
>
> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> …

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[26] The criteria in Section 36(3) of the CCAA have been held not to be cumulative or exhaustive. The Court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable:

> [48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.
>
> [49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.[16]

[27] Further, in the context of one of the asset sales in *AbitibiBowater*, Mr. Justice Gascon, then of this Court, adopted the following list of relevant factors:

> [36] The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally.
>
> [37] In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:
>
> - have sufficient efforts to get the best price been made and have the parties acted providently;
> - the efficacy and integrity of the process followed;
> - the interests of the parties; and
> - whether any unfairness resulted from the working out process.

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16 *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (leave to appeal refused: 2010 QCCA 1950), par. 48-49.

> [38] These principles were enunciated in *Royal Bank* v. *Soundair Corp.* They are equally applicable in a CCAA sale situation.[17]

[28] The Court must give due consideration to two further elements in assessing whether the sale should be approved under Section 36 CCAA:

1. the business judgment rule:

> [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.[18]

2. the weight to be given to the recommendation of the Monitor:

> The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders.[19]

[29] Debtors often ask the Court to authorize the sale process in advance. This has the advantage of ensuring that the process is clear and of reducing the likelihood of a subsequent challenge. In the present matter, the Petitioners did seek the Court's authorization with respect to a sale process for their other assets, but they did not seek the Court's authorization with respect to the sale process for the Ring of Fire interests because that sale process was already well under way before the CCAA filing. There is no legal requirement that the sale process be approved in advance, but it creates the potential for the process being challenged after the fact, as in this case.

[30] The Court will therefore review the sale process in light of these factors.

(1) From October 2014 to the execution of the Noront letter of intent on February 13, 2015

[31] The sale process began in earnest in October 2014 when Cliffs engaged Moelis.

[32] Moelis identified a group of eighteen potential buyers and strategic partners, with the assistance of CQIM and Cliffs. The group included traders, resource buyers,

[17] *AbitibiBowater inc. (Arrangement relatif à)*, 2009 QCCS 6460, par. 36-38. See also *White Birch*, *supra* note 16, par. 53-54, and *Aveos Fleet Performance Inc. (Arrangement relatif à)*, 2012 QCCS 4074, par. 50.

[18] *AbitibiBowater inc. (Arrangement relatif à)*, 2010 QCCS 1742, par. 70-71. See also *White Birch Paper Holding Company (Arrangement relatif à)*, 2011 QCCS 7304, par. 68-70.

[19] *AbitibiBowater*, *supra* note 17, par. 59. See also *White Birch*, *supra* note 18, par. 73-74.

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financial sector participants, local strategic partners, and market participants, as well as parties who had previously expressed an interest in the Ring of Fire.

[33] Moelis began contacting the potential interested parties to solicit interest in purchasing the Ring of Fire project. It sent a form of non-disclosure agreement to fifteen parties. Fourteen executed the agreement and were given access to certain confidential information.

[34] Negotiations ensued with seven of the interested parties, and six were given access to the data room that was established in November 2014.

[35] By January 21, 2015, non-binding letters of intent were received from Noront and from a third party. There were also two verbal expressions of interest, but neither resulted in a letter of intent.

[36] The Noront letter of intent was determined by the sellers in consultation with Moelis and the Monitor to be the better offer. Moelis then contacted all parties who had indicated a preliminary level of interest to give them the opportunity to submit a letter of intent in a price range superior to the Noront letter of intent, but no such letter was received.

[37] Negotiations continued with Noront and a letter of intent was executed with Noront on February 13, 2015.[20]

[38] With respect to this portion of the process, CDM does not raise any issue but the First Nations bands complain that they were not included in the list of potential interested parties and were not otherwise consulted.

[39] The Court will discuss the special status of the First Nations bands in the next section of this judgment. At this stage, it is sufficient to note that the sale process must be reasonable, but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that the sellers, with Moelis and the Monitor, took reasonable steps.[21] The Court is satisfied that this test was met.

(2) From letter of intent to initial SPA

[40] Between February 13, 2015 and March 22, 2015, the sellers negotiated the SPA with Noront and signed the initial SPA. In that same period, CDM expressed an interest in the Ring of Fire interests and sent three separate offers, all of which were refused by the sellers.

[41] CDM does not contest the reasonability of the sellers' actions in this period. In fact, CDM did not contest the original motion to approve the initial SPA, but chose instead to make a new offer.

(3) The initial SPA and the "Superior Proposal"

[42] The initial SPA with Noront dated March 22, 2015 provided for a purchase price of US $20 million.

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[20] Exhibit R-9.
[21] *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247, par. 48.

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[43] Section 7.1 of the initial SPA allowed the sellers to pursue a “Superior Proposal”, defined as an unsolicited offer from a third party which appeared to be more favourable to the sellers. In that eventuality, the sellers had the right to terminate the initial SPA upon reimbursing Noront’s expenses up to $250,000.

[44] CDM made a new offer on April 13, 2015.[22] The sellers, in consultation with their advisers and the Monitor, concluded that it was a Superior Proposal.

[45] CDM argues that in those circumstances, the sellers had the obligation to terminate the initial SPA and to accept the CDM offer.

[46] The Court does not agree.

[47] On its face, the language in Section 7.1 is permissive and not mandatory. It says that the sellers “may” terminate the initial SPA and enter into an agreement with the new offeror. It does not require them to do so.

[48] CDM argued that Section 7.1 does not provide for a right to match, which is found in other agreements of this nature. That may be true, but a right to match is different. Specific language would be necessary to contractually require the sellers to accept an offer from Noront that matched the new offer. No language was required to give Noront the right to make a new offer. Further, specific language would be required to remove the possibility of Noront making a new offer. There is no such language. It would be surprising to find such language: why would Noront give up the right to make another offer, and why would the sellers prevent Noront from making another offer? Any such language would be to the detriment of the two contracting parties and for the exclusive benefit of an unknown third party. As the Monitor pointed out, Section 12.2 of the initial SPA specifies that the SPA is for the sole benefit of the parties and is not intended to give any rights, benefits or remedies to a third party.

[49] As a result, the sellers had no obligation to accept the April 13 offer from CDM.

(4) The Supplemental Bid Process

[50] Once the sellers, their advisers and the Monitor determined that the April 13 offer from CDM was a Superior Proposal, they had to decide how to manage the process. They had two interested parties and they decided to give them both the chance to make their best and final offer through a process that they created for the purpose, which is referred to as the Supplemental Bid Process. This was a very reasonable decision, in the best interests of the creditors, although probably not one that either offeror was very happy with.

[51] The sellers, their advisers and the Monitor established a series of rules, and they sent the rules to the two offerors at the same time:

> 1. Each of the Bidders’ best and final offer is to be delivered in the form of an executed Share Purchase Agreement (the “Final Bid”), together with a blackline mark-up against the March 22 SPA to show proposed changes.

[22] Exhibit R-23.

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2. Final Bids can remove section 7.1(d) and the related provisions of the March 22 SPA.

3. Final bids are to be received by Moelis by no later than 5:00 p.m. (Toronto time) on Wednesday, April 15, 2015 in accordance with paragraph 7 below.

4. Final Bids may be accompanied by a cover letter setting any additional considerations that the Bidder wishes to be considered in connection with its Final Bid but such cover letter should not amend or modify any of the terms and conditions contained in the executed SPA.

5. Final Bids will be reviewed by the Sellers in consultation with moelis and the Monitor. A determination of the Superior Proposal will be made as soon as practicable and communicated to the Bidders.

6. Any clarifications or other communications with respect to this process should be made in writing to the Sale Advisor, with a copy to the Monitor.

7. Final Bids are to be submitted to the Sale Advisor c/o Carlo De Giroloamo by email at **carlo.degirolamo@moelis.com**.

8. All initially capitalized terms used herein unless otherwise defined shall have the meanings given to them in the March 22 SPA.[23]

[52] They declined a request from Noront to modify the rules.[24]

[53] Both Noront and CDM decided to participate in the Supplemental Bid Process and both submitted offers.

[54] All parties agree that the CDM offer was in compliance with the rules of the Supplemental Bid Process.

[55] Noront's offer was received at 5:00 p.m. on April 15.[25] CDM argues that the offer was not in compliance with the rules:

- The cover email states that final approvals are still required (presumably from Franco-Nevada which was advancing the funds for the transaction and Resource Capital Fund (RCF) which was the principal lender to Noront) and that Noront expected to receive them within the next hour;
- The cover letter was not signed;
- The cover letter stated that the revised offer was effective only if the sellers received another offer; and
- The email did not include an executed SPA, but only a blackline mark-up of the SPA.

[56] Subsequent to 5:00 p.m., Noront completed the requirements:

23 Exhibits R-25 and R-26.
24 Exhibit CDM-1.
25 Exhibit R-30A.

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- At 5:34 p.m., Noront sent a signed cover letter. A paragraph was added to explain that "certain representations and warranties and conditions to the advance of the loan with Franco-Nevada have been reduced in order to provide certainty on Noront's financing" and that the signature pages for the SPA and the fully executed loan agreement would be sent separately;[26]
- At 8:50 p.m., Noront's counsel sent the executed SPA and the amended and restated loan agreement. The executed SPA included some changes described as "cleanup" and "not substantive" since 5:00 p.m. Among those changes, Noront deleted RCF from Exhibit C (Required Consents), suggesting that it had obtained that consent;[27]
- At 10:00 p.m., Moelis asked Noront for confirmation of the RCF consent and an executed copy of it, an explanation for the source of the additional funds, and clarification of the deadline for the vesting order;[28]
- At 10:35 p.m., Noront provided the executed RCF consent and an explanation of the funding;[29] and
- At 1:25 p.m. on April 16, Noront agreed to extend the date for the vesting order from April 20 to April 27.[30]

[57] The Noront offer was the higher of the two offers in terms of the purchase price. The issue is whether these issues are such as to invalidate the process such that the Court should require the sellers to start over.

[58] The Court considers that these issues are relatively minor and that they do not invalidate the process:

- Noront submitted its offer on time;
- The offer was not amended in any substantive way after 5:00 p.m. In particular, the purchase price was not amended;
- The lack of a signature on the cover letter was irrelevant;
- The condition that the revised offer was effective only if the sellers received another offer had already been fulfilled before Noront submitted its offer. Noront did not know this, but the sellers, Moelis and the Monitor did;
- The missing third party consents were not within Noront's control. Noront said at 5:00 p.m. that it expected to receive them within the next hour. In fact, it provided the consents to Moelis at 8:50 p.m.;

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[26] Exhibit CDM-3.
[27] Exhibit CDM-4.
[28] Exhibit CDM-4.
[29] Exhibit CDM-4.
[30] Exhibit CDM-4.

- The executed SPA was provided at 8:50 p.m. The delay appears to be related to the missing consents. There is no evidence that Noront was using this as a means to preserve an out from the offer; and
- The questions with respect to the source of the funding and the date were clarifications requested by Moelis for its evaluation of the offer and were not elements missing from the offer.

[59] This is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process was fair. It was not perfect, but the Courts do not require perfection.

(5) Conclusion

[60] As a result, the Court concludes that the sale process was reasonable within Section 36(3)(a) of the CCAA. Moreover, the other factors in Section 36(3) favour the approval of the sale:

- The monitor approved the process and was involved throughout;
- The monitor filed a report with the Court in which he recommends the approval of the sale;
- The creditors were not consulted, but the motion and amended motion were served on the service list and no creditor has objected to the sale;
- The consideration appears to be fair, given that it is the result of a reasonable process. The Court gives weight to the business judgment of the sellers and their advisers.

[61] For all of these reasons, the Court dismisses CDM's contestation of the motion.

[62] There remain the issues raised by the First Nations bands.

2. Do the First Nations bands have other grounds on which to object to the transaction?

[63] The First Nations bands raise issues of two natures.

[64] First, they argue that they were denied the opportunity to participate in the sale process and they ask for time to examine the possibility of presenting an offer for the Ring of Fire interests.

[65] Second, they argue that the transaction has an impact on their Aboriginal and treaty rights protected under Section 35 of the *Constitution Act, 1982*.

[66] The Court has already concluded that the process of identifying potential buyers and strategic partners was reasonable.

[67] Further, it is not clear to what extent the First Nations bands had knowledge of the sale process and could have participated. The September 17, 2014 newspaper article says that Cliffs is exploring alternatives including the possibility of selling its

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Ring of Fire interests.[31] That article refers to a letter which was sent to the First Nations bands in the area which again would have referred to a possible sale.

[68] At the very latest, they knew about the potential sale when a press release was published on March 23, 2015.

[69] Moreover, in its materials, CDM alleged that its final offer on April 15 "had the support of two of the most impacted First Nations communities",[32] which suggests that the First Nations bands had at lest some involvement in the sale process.

[70] Nevertheless, the interest of the First Nations bands remains at a very preliminary level. Although the First Nations bands say that they have hired a financial adviser and that they want a delay to analyze the possibility of making an offer for the Ring of Fire interests, whether on their own or with a partner, there is no evidence to suggest that the bands on their own would make a serious offer, or that they would partner with a party that was not already identified by Moelis and included in the process. It is pure speculation as to whether they will ever present an offer in excess of the Noront offer. The Courts have rejected firm offers for greater amounts received after the sale process has concluded.[33] The Courts should also refuse to stop the sale process because a party arriving late might be interested in presenting an offer which might be better than the offer on the table.

[71] The First Nations bands also plead that they have a special interest in this transaction because they live and exercise their Aboriginal and treaty rights guaranteed by the Constitution on the land and territories surrounding the Ring of Fire.

[72] For the purposes of this motion, the Court will assume that to be true. It is nevertheless unclear to what extent a change of control of the corporations which own the interests in the Ring of Fire project impacts on those rights. The identity of the shareholders of the corporations does not change the rights of the First Nations bands or the obligations of the corporations in relation to the development of the project.

[73] The First Nations bands pointed to two specific issues.

[74] First, they argued that there was a duty to consult which was not respected. It is clear that as a matter of constitutional law, there is a duty to consult. It is equally clear that this duty lies on the Crown, not on private parties.[34] As a result, the Crown has a duty to consult when it acts, including when it sells shares in a corporation with interests that impact on the rights of the First Nations.[35] However, a sale of shares from one private party to another does not trigger the duty to consult. The First Nations bands also produced the Regional Framework Agreement between nine First Nation bands in the Ring of Fire area, including the six objectors, and the Ontario Crown.[36] Cliffs was not a party to this agreement, and the sale of the sellers' interests

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31 Exhibit R-7.

32 Declaration of Intervention and Contestation (#87), par. 30.

33 See, for example, *Boutiques San Francisco inc. (Arrangement relatif aux)*, [2004] R.J.Q. 965 (C.S.), par. 11-25; *AbitibiBowater*, *supra* note 18, par. 72-73.

34 *Haida Nation* v. *British Columbia (Minister of Forests)*, 2004 SCC 73, par. 35, 56; *Rio Tinto Alcan Inc.* v. *Carrier Sekani Tribal Council*, 2010 SCC 43, par. 79..

35 *In the Matter of CCAA and Skeena Cellulose Inc.*, 2002 BCSC 597, par. 14.

36 Exhibit O-1.

in the Ring of Fire project does not affect any party's rights and obligations under the agreement. It is indeed unfortunate that the First Nations bands were not included in the sale process, because they will have an important role to play in the development of the Ring of Fire. But the failure to include them was not a breach of the duty to consult or of the Regional Framework Agreement.

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[75] Second, the First Nations bands gave as an example of how the proposed transaction might prejudice their rights a royalty arrangement which Noront appears to have entered into with Franco-Nevada as part of the financing for the proposed transaction. The press release announcing the initial transaction on March 23, 2015 provided:

> Franco-Nevada will receive a 3% royalty over the Black Thor chromite deposit and a 2% royalty over all of Noront's property in the region with the exception of Eagle's Nest, which is excluded.[37]

[76] Assuming that the financing arrangements for the final transaction include a similar provision, which seems likely, the Court is unconvinced that it should refuse the approval of the transaction for this reason.

[77] It is difficult to see how granting a 2 or 3% royalty impacts the rights of the First Nations bands, unless it is their position that they are entitled to a royalty of more than 97%. They did not advance such an argument during the hearing.

[78] Further, the Court is not being asked to approve the financing arrangements between Noront and Franco-Nevada. If there is something in those financing arrangements that infringes on the rights of the First Nations bands, their rights and their remedies are not affected by the order that the Court is being asked to issue today.

[79] For all of these reasons, the Court dismisses the objection made by the First Nations bands.

3. Interest or Standing

[80] For the reasons set out above, the Court will dismiss CDM's contestation and the objection made by the First Nations bands. In principle, it is not necessary to deal with the issue of interest or standing. Also, given that the Court was given only a short delay to draft this judgment, it might not be wise to get too far into the issue.

[81] However, all parties pleaded the question at length and the Court will therefore deal with it.

[82] The Ontario authorities supporting the position that the "bitter bidder" has no interest or standing to challenge the approval motion are clear[38] and they have been followed in Québec.[39]

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[37] *Supra*, note 9.

[38] *Crown Trust* v. *Rosenberg*, 1986 CanLII 2760 (ON SC), p. 43; *Skyepharma plc* v. *Hyal Pharmaceutical Corp.*, [2000] O.J. No 467 (ON CA), par. 24-26, 30; *Consumers Packaging Inc. (Re)*, 2001 CanLII 6708 (ON CA), par. 7; *BDC Venture Capital Inc.* v. *Natural Convergence Inc.*, 2009 ONCA 665, par. 7-8.

[83] However, the issues which the Court must consider before approving a sale include the reasonableness of the sale process, which involves questions of the fairness and the integrity of the process.

[84] A losing bidder is not seeking to promote the best interests of the creditors, but is looking to promote its own interest. It will seek to raise these issues, not because it has any particular interest in fairness or integrity, but because it lost and it wants a second kick at the proverbial can. The narrow technical ground on which the losing bidder is found to have no interest is that it has no legal or proprietary right in the property being sold.[40] The underlying policy reason is that the losing bidder is a distraction, with the potential for delay and additional expense.

[85] However, if the losing bidder is excluded from the process, who will raise the issues of fairness and integrity? The creditors will not do so, because their interest is limited to getting the best price. Where there is a subsequent higher bid, their interest will be in direct conflict with the integrity of the sale process.

[86] Perhaps the way to reconcile all of this is to exclude the losing bidder from the Court approval process and instead require the losing bidder to make its complaints and objections to the monitor. The monitor would then be required to report to the Court on any such complaints and objections. In this case, the Monitor's Fourth Report deals with the objection of the First Nations bands in fair and objective manner. However, because CDM filed its intervention after the Monitor filed his report, the Monitor's Fourth Report does not deal with the issues raised by CDM. In that sense, the CDM intervention was useful to the Court in exercising its jurisdiction under Section 36 of the CCAA.

[87] The objection of the First Nations bands went beyond their status as losing bidders or excluded bidders, and included issues related to their Aboriginal and treaty rights guaranteed by the Constitution.

[88] The case law on the interest or standing of the "bitter bidder" and the policy considerations underlying that case law have no application to these issues. The interest of the First Nations bands is closer to the interest of "social stakeholders" that have been recognized in a number of cases.[41]

[89] Although the Court will dismiss the objections raised by the First Nations bands and CDM, it will not do so on grounds of a lack of interest or standing.

FOR THESE REASONS, THE COURT HEREBY:

[90] **GRANTS** the Petitioners' Amended Motion for the Issuance of an Approval and Vesting Order (#82).

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[39] *AbitibiBowater*, *supra* note 18, par. 81-88; *White Birch*, *supra* note 16, par. 55-56.

[40] Purchasers generally do not have a proprietary interest in the property they are buying.

[41] *Re Canadian Airlines Corporation*, 2000 ABQB 442, par. 95; *Canadian Red Cross Society, Re*, 1998 CanLII 14907 (Ont. Gen. Div. [Commercial List]), par. 50; *Anvil Range Mining Corp., Re*, 1998 CarswellOnt 5319 (Ont. Gen. Div. [Commercial List]), par. 9; *Skydome Corp., Re*, 1998 CarswellOnt 5922 (Ont. Gen. Div. [Commercial List]), par. 6-7.

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[91] **ORDERS** that all capitalized terms in this Order shall have the meaning given to them in the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "**Share Purchase Agreement**") by and among Petitioner Cliffs Québec Iron Mining ULC ("**CQIM**"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers, as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "**Purchaser**"), a redacted copy of which was filed as Exhibit R-11 to the Motion, unless otherwise indicated herein.

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SERVICE

[92] **ORDERS** that any prior delay for the presentation of this Motion is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

[93] **PERMITS** service of this Order at any time and place and by any means whatsoever.

SALE APPROVAL

[94] **ORDERS and DECLARES** that the transaction (the "**Transaction**") contemplated by the Share Purchase Agreement is hereby approved, and the execution of the Share Purchase Agreement by CQIM is hereby authorized and approved, *nunc pro tunc,* with such non-material alterations, changes, amendments, deletions or additions thereto as may be agreed to but only with the consent of the Monitor.

[95] **AUTHORIZES and DIRECTS** the Monitor to hold the Deposit, *nunc pro tunc*, and to apply, disburse and/or deliver the Deposit or the applicable portions thereof in accordance with the provisions of the Share Purchase Agreement.

EXECUTION OF DOCUMENTATION

[96] **AUTHORIZES and DIRECTS** CQIM and the Monitor to perform all acts, sign all documents and take any necessary action to execute any agreement, contract, deed, provision, transaction or undertaking stipulated in or contemplated by the Share Purchase Agreement (Exhibit R-12) and any other ancillary document which could be required or useful to give full and complete effect thereto.

AUTHORIZATION

[97] **ORDERS and DECLARES** that this Order shall constitute the only authorization required by CQIM to proceed with the Transaction and that no shareholder approval, if applicable, shall be required in connection therewith.

VESTING OF THE AMALCO SHARES

[98] **ORDERS and DECLARES** that upon the issuance of a Monitor's certificate substantially in the form appended as **Schedule "A"** hereto (the "**Certificate**"), all of CQIM's right, title and interest in and to the Amalco Shares shall vest absolutely and exclusively in and with the Purchaser, free and clear of and from any and all right, title,

benefits, priorities, claims (including claims provable in bankruptcy in the event that CQIM should be adjudged bankrupt), liabilities (direct, indirect, absolute or contingent), obligations, interests, prior claims, security interests (whether contractual, statutory or otherwise), liens, charges, hypothecs, mortgages, pledges, trusts, deemed trusts (whether contractual, statutory, or otherwise), assignments, judgments, executions, writs of seizure or execution, notices of sale, options, agreements, rights of distress, legal, equitable or contractual setoff, adverse claims, levies, taxes, disputes, debts, charges, rights of first refusal or other pre-emptive rights in favour of third parties, 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 "**Encumbrances**") by or of any and all persons or entities of any kind whatsoever, including without limiting the generality of the foregoing (i) any Encumbrances created by the Initial Order of this Court dated January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time), 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 British Columbia Personal Property Security Act or any other applicable legislation providing for a security interest in personal or movable property, and, for greater certainty, **ORDERS** that all of the Encumbrances affecting or relating to the Amalco Shares be expunged and discharged as against the Amalco Shares, in each case effective as of the applicable time and date of the Certificate.

[99] **ORDERS and DIRECTS** the Monitor to file with the Court a copy of the Certificate, forthwith after issuance thereof.

[100] **DECLARES** that the Monitor shall be at liberty to rely exclusively on the Conditions Certificates in issuing the Certificate, without any obligation to independently confirm or verify the waiver or satisfaction of the applicable conditions.

[101] **AUTHORIZES and DIRECTS** the Monitor to receive and hold the Purchase Price and to remit the Purchase Price in accordance with the provisions of this Order.

[102] **AUTHORIZES and DIRECTS** the Monitor to remit, following closing of the Transaction, that portion of the Purchase Price payable to the Non-Filing Sellers, to the Non-Filing Sellers in accordance with the Purchase Price Allocation described under Exhibit D of the Share Purchase Agreement (Exhibit R-12), as it may be amended by the Non-Filing Sellers, or as the Non-Filing Sellers may otherwise direct.

CANCELLATION OF SECURITY REGISTRATIONS

[103] **ORDERS** the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Order and the Certificate, to reduce the scope of or strike the registrations in connection with the Amalco Shares, listed in **Schedule "B"** hereto, in order to allow the transfer to the Purchaser of the Amalco Shares free and clear of such registrations.

[104] **ORDERS** that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing

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change statements in the Ontario Personal Property Registry ("**OPPR**") as may be necessary, from any registration filed against CQIM in the OPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

[105] **ORDERS** that upon the issuance of the Certificate, CQIM shall be authorized and directed to take all such steps as may be necessary to effect the discharge of all Encumbrances registered against the Amalco Shares, including filing such financing change statements in the British Columbia Personal Property Security Registry (the "**BCPPR**") as may be necessary, from any registration filed against CQIM in the BCPPR, provided that CQIM shall not be authorized or directed to effect any discharge that would have the effect of releasing any collateral other than the Amalco Shares, and CQIM shall be authorized to take any further steps by way of further application to this Court.

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CQIM NET PROCEEDS

[106] **ORDERS** that the proportion of the Purchase Price payable to CQIM in accordance with the Share Purchase Agreement (the "**CQIM Net Proceeds**") shall be remitted to the Monitor and shall be held by the Monitor pending further order of the Court.

[107] **ORDERS** that for the purposes of determining the nature and priority of the Encumbrances, the CQIM Net Proceeds shall stand in the place and stead of the Amalco Shares, and that upon payment of the Purchase Price by the Purchaser, all Encumbrances shall attach to the CQIM Net Proceeds with the same priority as they had with respect to the Amalco Shares immediately prior to the sale, as if the Amalco Shares had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

VALIDITY OF THE TRANSACTION

[108] **ORDERS** that notwithstanding:

a) the pendency of these proceedings;

b) any petition 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

c) the provisions of any federal or provincial legislation;

the vesting of the Amalco Shares contemplated in this Order, as well as the execution of the Share Purchase Agreement pursuant to this 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 preference, assignment, fraudulent conveyance, transfer at undervalue or other reviewable transaction under the BIA or any other applicable federal or provincial legislation, as against CQIM,

the Purchaser or the Monitor, and shall not constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

LIMITATION OF LIABILITY

[109] **DECLARES** that, subject to other orders of this Court, nothing herein contained shall require the Monitor to take control, or to otherwise manage all or any part of the Purchased Shares. The Monitor shall not, as a result of this Order, be deemed to be in possession of any of the Purchased Shares within the meaning of environmental legislation, the whole pursuant to the terms of the CCAA.

[110] **DECLARES** that no action lies against the Monitor by reason of this Order or the performance of any act authorized by this Order, except by leave of the Court. The entities related to the Monitor or belonging to the same group as the Monitor shall benefit from the protection arising under the present paragraph.

CONFIDENTIALITY

[111] **ORDERS** that the unredacted Initial Purchase Agreement filed with the Court as Exhibit R-3, the summary of the two LOIs filed with the Court as Exhibit R-8, the unredacted Share Purchase Agreeement filed with the Court as Exhibit R-12 and the unredacted blackline of the Share Purchase Agreement showing changes from the Initial Purchase Agreement filed with the Court as Exhibit R-16 shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.

GENERAL

[112] **DECLARES** that this Order shall have full force and effect in all provinces and territories in Canada.

[113] **DECLARES** that the Monitor shall be authorized to apply as it may consider necessary or desirable, with or without notice, to any other court or administrative body, whether in Canada, the United States of America or elsewhere, for orders which aid and complement this Order and, without limitation to the foregoing, an order under Chapter 15 of the U.S. Bankruptcy Code, for which the Monitor shall be the foreign representative of the Petitioners and Mises-en-cause. All courts and administrative bodies of all such jurisdictions are hereby respectfully requested to make such orders and to provide such assistance to the Monitor as may be deemed necessary or appropriate for that purpose.

[114] **REQUESTS** the aid and recognition of any court or administrative body in any Province of Canada and any Canadian federal court or administrative body and any federal or state court or administrative body in the United States of America and any court or administrative body elsewhere, to act in aid of and to be complementary to this Court in carrying out the terms of this Order.

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[115] **ORDERS** the provisional execution of the present Order notwithstanding any appeal and without the requirement to provide any security or provision for costs whatsoever.

[116] **THE WHOLE WITHOUT COSTS**.

2015 QCCS 1920 (CanLII)

STEPHEN W. HAMILTON J.S.C.

Me Bernard Boucher
Me Sébastien Guy
Me Steven J. Weisz
BLAKE, CASSELS & GRAYDON, S.E.N.C.R.L.
for:
Bloom Lake General Partner Limited
Quinto Mining Corporation
8568391 Canada Limited
Cliffs Quebec Iron Mining ULC
The Bloom Lake Iron Ore Mine Limited Partnership
Bloom Lake Railway Company Limited

Me Sylvain Rigaud
Me Chrystal Ashby
NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L.
for:
FTI Consulting Canada Inc.

Me Jean-Yves Simard
LAVERY DE BILLY, S.E.N.C.R.L.
Me Sean Zweig
BENNETT JONES
for:
9201955 CANADA INC.

Me Stéphane Hébert
Me Maurice Fleming
MILLER THOMSON, S.E.N.C.R.L./LLP
for:
Eabametoong First Nation
Ginoogaming First Nation
Constance Lake First Nation and
Long Lake # 58 First Nation
Aroland First Nation
Marten Falls First Nation

Me Sandra Abitan
Me Éric Préfontaine
Me Julien Morissette
OSLER, HOSKIN & HARCOURT, S.E.N.C.R.L./S.R.L.
for:
8901341 Canada inc.
Canadian Development and Marketing Corporation

Date of hearing: April 24, 2015

2015 QCCS 1920 (CanLII)

SCHEDULE "A"
FORM OF CERTIFICATE OF THE MONITOR
SUPERIOR COURT
(Commercial Division)

2015 QCCS 1920 (CanLII)

C A N A D A
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL
File: **No:** 500-11-048114-157

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

BLOOM LAKE GENERAL PARTNER LIMITED

QUINTO MINING CORPORATION

8568391 CANADA LIMITED

CLIFFS QUEBEC IRON MINING ULC

Petitioners

-and-

THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP

BLOOM LAKE RAILWAY COMPANY LIMITED

Mises-en-cause

-and-

9201955 CANADA INC.

Mise-en-cause

-and-

THE REGISTRAR OF THE REGISTER OF PERSONAL AND MOVABLE REAL RIGHTS

Mise-en-cause

-and-

FTI CONSULTING CANADA INC.

Monitor

CERTIFICATE OF THE MONITOR

RECITALS

A. Pursuant to an initial order rendered by the Honourable Mr. Justice Martin Catonguay, J.S.C., of the Superior Court of Québec, [Commercial Division] (the "**Court**") on January 27, 2015 (as amended on February 20, 2015 and as may be further amended from time to time, the "**Initial Order**"), FTI Consulting Canada Inc. (the "**Monitor**") was appointed to monitor the business and financial affairs of the Petitioners and the Mises-en-cause (together with the Petitioners, the "**CCAA Parties**").

B. Pursuant to an order (the "**Approval and Vesting Order**") rendered by the Court on <*>, 2015, the transaction contemplated by the Share Purchase Agreement dated as of March 22, 2015, as amended and restated as of April 17, 2015 (the "**Share Purchase Agreement**") by and among Petitioner Cliffs Québec Iron Mining ULC ("**CQIM**"), Cliffs Greene B.V., Cliffs Netherlands B.V. and the Additional Sellers (as defined therein), as vendors, Noront Resources Ltd., as parent, and 9201955 Canada Inc., as purchaser (the "**Purchaser**") was authorized and approved, with a view, *inter alia*, to vest in and to the Purchaser, all of CQIM's right, title and interest in and to the Amalco Shares.

C. Each capitalized term used and not defined herein has the meaning given to such term in the Share Purchase Agreement.

D. The Approval and Vesting Order provides for the vesting of all of CQIM's right, title and interest in and to the Amalco Shares in the Purchaser, in accordance with the terms of the Approval and Vesting Order and upon the delivery of a certificate (the "**Certificate**") issued by the Monitor confirming that the Sellers and the Purchaser have each delivered Conditions Certificates to the Monitor.

E. In accordance with the Approval and Vesting Order, the Monitor has the power to authorize, execute and deliver this Certificate.

F. The Approval and Vesting Order also directed the Monitor to file with the Court, a copy of this Certificate forthwith after issuance thereof.

THEREFORE, THE MONITOR CERTIFIES THE FOLLOWING:

A. The Sellers and the Purchaser have each delivered to the Monitor the Conditions Certificates evidencing that all applicable conditions under the Share Purchase Agreement have been satisfied and/or waived, as applicable.

B. The Closing Time is deemed to have occurred on at <TIME> on <*>, 2015.

THIS CERTIFICATE was issued by the Monitor at <TIME> on <*>, 2015.

FTI Consulting Canada Inc., in its capacity as Monitor of the CCAA Parties, and not in its personal capacity.

By: ______________________________

Name: Nigel Meakin

2015 QCCS 1920 (CanLII)

SCHEDULE "B"
REGISTRATIONS TO BE REDUCED OR STRICKEN

Nil.
[NTD: Updated searches will be run before motion is heard to confirm no registrations in Quebec.]

8453339.6

2015 QCCS 1920 (CanLII)

COURT FILE NO.: 09-8482-00CL
DATE: 20091218

2009 CanLII 72333 (ON SC)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BRAINHUNTER INC., BRAINHUNTER CANADA INC., BRAINHUNTER (OTTAWA) INC., PROTEC EMPLOYMENT SERVICES LTD., TREKLOGIC INC.

APPLICANTS

BEFORE: **MORAWETZ J.**

COUNSEL: **Jay Swartz and Jim Bunting, for the Applicants**

G. Moffat, for Deloitte & Touche Inc., Monitor

Joseph Bellissimo, for Roynat Capital Inc.

Peter J. Osborne, for R. N. Singh and Purchaser

Edmond Lamek, for the Toronto-Dominion Bank

D. Dowdall, for Noteholders

D. Ullmann, for Procom Consultants Group Inc.

HEARD & DECIDED: **DECEMBER 11, 2009**

ENDORSEMENT

[1] At the conclusion of the hearing on December 11, 2009, I granted the motion with reasons to follow. These are the reasons.

[2] The Applicants brought this motion for an extension of the Stay Period, approval of the Bid Process and approval of the Stalking Horse APA between TalentPoint Inc., 2223945 Ontario Ltd., 2223947 Ontario Ltd., and 2223956 Ontario Ltd., as purchasers (collectively, the "Purchasers") and each of the Applicants, as vendors.

[3] The affidavit of Mr. Jewitt and the Report of the Monitor dated December 1, 2009 provide a detailed summary of the events that lead to the bringing of this motion.

[4] The Monitor recommends that the motion be granted.

[5] The motion is also supported by TD Bank, Roynat, and the Noteholders. These parties have the significant economic interest in the Applicants.

[6] Counsel on behalf of Mr. Singh and the proposed Purchasers also supports the motion.

[7] Opposition has been voiced by counsel on behalf of Procom Consultants Group Inc., a business competitor to the Applicants and a party that has expressed interest in possibly bidding for the assets of the Applicants.

[8] The Bid Process, which provides for an auction process, and the proposed Stalking Horse APA have been considered by Breakwall, the independent Special Committee of the Board and the Monitor.

[9] Counsel to the Applicants submitted that, absent the certainty that the Applicants' business will continue as a going concern which is created by the Stalking Horse APA and the Bid Process, substantial damage would result to the Applicants' business due to the potential loss of clients, contractors and employees.

[10] The Monitor agrees with this assessment. The Monitor has also indicated that it is of the view that the Bid Process is a fair and open process and the best method to either identify the Stalking Horse APA as the highest and best bid for the Applicants' assets or to produce an offer for the Applicants' assets that is superior to the Stalking Horse APA.

[11] It is acknowledged that the proposed purchaser under the Stalking Horse APA is an insider and a related party. The Monitor is aware of the complications that arise by having an insider being a bidder. The Monitor has indicated that it is of the view that any competing bids can be evaluated and compared with the Stalking Horse APA, even though the bids may not be based on a standard template.

[12] Counsel on behalf of Procom takes issue with the $700,000 break fee which has been provided for in the Stalking Horse APA. He submits that it is neither fair nor necessary to have a break fee. Counsel submits that the break fee will have a chilling effect on the sales process as it will require his client to in effect outbid Mr. Singh's group by in excess of $700,000 before its bid could be considered. The break fee is approximately 2.5% of the total consideration.

2009 CanLII 72333 (ON SC)

[13] The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Re Nortel Networks Corp*. [2009] O.J. No. 3169, I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(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?

[14] The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

[15] Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

[16] Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

[17] I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

[18] In this case, the Special Committee, the advisors, the key creditor groups and the Monitor all expressed support for the Applicants' process.

[19] In my view, the Applicants have established that a sales transaction is warranted at this time and that the sale will be of benefit to the "economic community". I am also satisfied that no better alternative has been put forward. In addition, no creditor has come forward to object to a sale of the business.

[20] With respect to the possibility that the break fee may deter other bidders, this is a business point that has been considered by the Applicants, its advisors and key creditor groups. At 2.5% of the amount of the bid, the break fee is consistent with break fees that have been approved by this court in other proceedings. The record makes it clear that the break fee issue

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has been considered and, in the exercise of their business judgment, the Special Committee unanimously recommended to the Board and the Board unanimously approved the break fee. In the circumstances of this case, it is not appropriate or necessary for the court to substitute its business judgment for that of the Applicants.

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[21] For the foregoing reasons, I am satisfied that the Bid Process and the Stalking Horse APA be approved.

[22] For greater certainty, a bid will not be disqualified as a Qualified Bid (or a bidder as a Qualified Bidder) for the reason that the bid does not contemplate the bidder offering employment to all or substantially all of the employees of the Applicants or assuming liabilities to employees on terms comparable to those set out in s. 5.6 of the Stalking Horse Bid. However, this may be considered as a factor in comparing the relative value of competing bids.

[23] The Applicants also seek an extension of the Stay Period to coincide with the timelines in the Bid Process. The timelines call for the transaction to close in either February or March, 2010 depending on whether there is a plan of arrangement proposed.

[24] Having reviewed the record and heard submissions, I am satisfied that the Applicants have acted, and are acting, in good faith and with due diligence and that circumstances exist that make the granting of an extension appropriate. Accordingly, the Stay Period is extended to February 8, 2010.

[25] An order shall issue to give effect to the foregoing.

MORAWETZ J.

DECIDED: December 11, 2009

REASONS: December 18, 2009

CITATION: Danier Leather Inc. (Re), 2016 ONSC 1044
COURT FILE NO.: 31-CL-2084381
DATE: 20160210

2016 ONSC 1044 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF INTENTION TO MAKE A PROPOSAL OF DANIER LEATHER INC.

BEFORE: Penny J.

COUNSEL: *Jay Swartz* and *Natalie Renner* for Danier

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

Linda Galessiere for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

[1] On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

[2] Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to :

(a) approve a stalking horse agreement and SISP;

(b) approve the payment of a break fee, expense reimbursement and signage costs obligations in connection with the stalking horse agreement;

(c) authorize Danier to perform its obligations under engagement letters with its financial advisors and a charge to secure success fees;

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

(g) grant a sealing order in respect of the KERP and a stalking horse offer summary.

2016 ONSC 1044 (CanLII)

Background

[3] Danier is an integrated designer, manufacturer and retailer of leather and suede apparel and accessories. Danier primarily operates its retail business from 84 stores located throughout Canada. It does not own any real property. Danier employs approximately 1,293 employees. There is no union or pension plan.

[4] Danier has suffered declining revenues and profitability over the last two years resulting primarily from problems implementing its strategic plan. The accelerated pace of change in both personnel and systems resulting from the strategic plan contributed to fashion and inventory miscues which have been further exacerbated by unusual extremes in the weather and increased competition from U.S. and international retailers in the Canadian retail space and the depreciation of the Canadian dollar relative to the American dollar.

[5] In late 2014, Danier implemented a series of operational and cost reduction initiatives in an attempt to return Danier to profitability. These initiatives included reductions to headcount, marketing costs, procurement costs and capital expenditures, renegotiating supply terms, rationalizing Danier's operations, improving branding, growing online sales and improving price management and inventory mark downs. In addition, Danier engaged a financial advisor and formed a special committee comprised of independent members of its board of directors to explore strategic alternatives to improve Danier's financial circumstances, including soliciting an acquisition transaction for Danier.

[6] As part of its mandate, the financial advisor conducted a seven month marketing process to solicit offers from interested parties to acquire Danier. The financial advisor contacted approximately 189 parties and provided 33 parties with a confidential information memorandum describing Danier and its business. Over the course of this process, the financial advisor had meaningful conversations with several interested parties but did not receive any formal offers to provide capital and/or to acquire the shares of Danier. One of the principal reasons that this process was unsuccessful is that it focused on soliciting an acquisition transaction, which ultimately proved unappealing to interested parties as Danier's risk profile was too great. An acquisition transaction did not afford prospective purchasers the ability to restructure Danier's affairs without incurring significant costs.

[7] Despite Danier's efforts to restructure its financial affairs and turn around its operations, Danier has experienced significant net losses in each of its most recently completed fiscal years and in each of the two most recently completed fiscal quarters in the 2016 fiscal year. Danier currently has approximately $9.6 million in cash on hand but is projected to be cash flow

negative every month until at least September 2016. Danier anticipated that it would need to borrow under its loan facility with CIBC by July 2016. CIBC has served a notice of default and indicate no funds will be advanced under its loan facility. In addition, for the 12 months ending December 31, 2015, 30 of Danier's 84 store locations were unprofitable. If Danier elects to close those store locations, it will be required to terminate the corresponding leases and will face substantial landlord claims which it will not be able to satisfy in the normal course.

[8] Danier would not have had the financial resources to implement a restructuring of its affairs if it had delayed a filing under the BIA until it had entirely used up its cash resources. Accordingly, on February 4, 2016, Danier commenced these proceedings for the purpose of entering into a stalking horse agreement and implementing the second phase of the SISP.

The Stalking Horse Agreement

[9] The SISP is comprised of two phases. In the first phase, Danier engaged the services of its financial advisor to find a stalking horse bidder. The financial advisor corresponded with 22 parties, 19 of whom had participated in the 2015 solicitation process and were therefore familiar with Danier. In response, Danier received three offers and, with the assistance of the financial advisor and the Proposal Trustee, selected GA Retail Canada or an affiliate (the "Agent") as the successful bid. The Agent is an affiliate of Great American Group, which has extensive experience in conducting retail store liquidations.

[10] On February 4, 2016, Danier and the Agent entered into the stalking horse agreement, subject to Court approval. Pursuant to the stalking horse agreement, the Agent will serve as the stalking horse bid in the SISP and the exclusive liquidator for the purpose of disposing of Danier's inventory. The Agent will dispose of the merchandise by conducting a "store closing" or similar sale at the stores.

[11] The stalking horse agreement provides that Danier will receive a net minimum amount equal to 94.6% of the aggregate value of the merchandise, provided that the value of the merchandise is no less than $22 million and no more than $25 million. After payment of this amount and the expenses of the sale, the Agent is entitled to retain a 5% commission. Any additional proceeds of the sale after payment of the commission are divided equally between the Agent and Danier.

[12] The stalking horse agreement also provides that the Agent is entitled to (a) a break fee in the amount of $250,000; (b) an expense reimbursement for its reasonable and documented out-of-pocket expenses in an amount not to exceed $100,000; and (c) the reasonable costs, fees and expenses actually incurred and paid by the Agent in acquiring signage or other advertising and promotional material in connection with the sale in an amount not to exceed $175,000, each payable if another bid is selected and the transaction contemplated by the other bid is completed. Collectively, the break fee, the maximum amount payable under the expense reimbursement and the signage costs obligations represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. Another liquidator submitting a successful bid in the course of the SISP will be required to purchaser the signage from the Agent at its cost.

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[13] The stalking horse agreement is structured to allow Danier to proceed with the second phase of the SISP and that process is designed to test the market to ascertain whether a higher or better offer can be obtained from other parties. While the stalking horse agreement contemplates liquidating Danier's inventory, it also establishes a floor price that is intended to encourage bidders to participate in the SISP who may be interested in going concern acquisitions as well.

The SISP

[14] Danier, in consultation with the Proposal Trustee and financial advisor, have established the procedures which are to be followed in conducting the second phase of the SISP.

[15] Under the SISP, interested parties may make a binding proposal to acquire the business or all or any part of Danier's assets, to make an investment in Danier or to liquidate Danier's inventory and furniture, fixtures and equipment.

[16] Danier, in consultation with the Proposal Trustee and its financial advisors, will evaluate the bids and may (a) accept, subject to Court approval, one or more bids, (b) conditionally accept, subject to Court approval, one or more backup bids (conditional upon the failure of the transactions contemplated by the successful bid to close, or (c) pursue an auction in accordance with the procedures set out in the SISP.

[17] The key dates of the second phase of the SISP are as follows:

(1) The second phase of the SISP will commence upon approval by the Court

(2) Bid deadline: February 22, 2016

(3) Advising interested parties whether bids constitute "qualified bids": No later than two business days after bid deadline

(4) Determining successful bid and back-up bid (if there is no auction): No later than five business days after bid deadline

(5) Advising qualified bidders of auction date and location (if applicable): No later than five business days after bid deadline

(6) Auction (if applicable): No later than seven business days after bid deadline

(7) Bringing motion for approval: Within five business days following determination by Danier of the successful bid (at auction or otherwise)

(8) Back-Up bid expiration date: No later than 15 business days after the bid deadline, unless otherwise agreed

(9) Outside date: No later than 15 business days after the bid deadline

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[18] The timelines in the SISP have been designed with regard to the seasonal nature of the business and the fact that inventory values will depreciate significantly as the spring season approaches. The timelines also ensure that any purchaser of the business as a going concern has the opportunity to make business decisions well in advance of Danier's busiest season, being fall/winter. These timelines are necessary to generate maximum value for Danier's stakeholders and are sufficient to permit prospective bidders to conduct their due diligence, particularly in light of the fact that is expected that many of the parties who will participate in the SISP also participated in the 2015 solicitation process and were given access to a data room containing non-public information about Danier at that time.

[19] Danier does not believe that there is a better viable alternative to the proposed SISP and stalking horse agreement.

[20] The use of a sale process that includes a stalking horse agreement maximizes value of a business for the benefit of its stakeholders and enhances the fairness of the sale process. Stalking horse agreements are commonly used in insolvency proceedings to facilitate sales of businesses and assets and are intended to establish a baseline price and transactional structure for any superior bids from interested parties, *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies*, 2012 ONSC 1750 at para. 7 [Commercial List].

[21] The Court's power to approve a sale of assets in a proposal proceeding is codified in section 65.13 of the BIA, which sets out a list of non-exhaustive factors for the Court to consider in determining whether to approve a sale of the debtor's assets outside the ordinary course of business. This Court has considered section 65.13 of the BIA when approving a stalking horse sale process under the BIA, *Re Colossus Minerals Inc.*, 2014 CarswellOnt 1517 at paras. 22-26 (S.C.J.).

[22] A distinction has been drawn, however, between the approval of a sale process and the approval of an actual sale. Section 65.13 is engaged when the Court determines whether to approve a sale transaction arising as a result of a sale process, it does not necessarily address the factors a court should consider when deciding whether to approve the sale process itself.

[23] In *Re Brainhunter*, the Court considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring proceeding under the *Companies' Creditors Arrangement Act*. Citing his decision in *Nortel*, Justice Morawetz (as he then was) confirmed that the following four factors should be considered by the Court in the exercise of its discretion to determine if the proposed sale process should be approved:

(1) Is a sale transaction warranted at this time?

(2) Will the sale benefit the whole "economic community"?

(3) Do any of the debtors' creditors have a bona fide reason to object to a sale of the business?

(4) Is there a better viable alternative?

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Re Brainhunter, 2009 CarswellOnt 8207 at paras. 13-17 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.,* 2009 CarswellOnt 4467 at para. 49 (S.C.J. [Commercial List]).

[24] While *Brainhunter* and *Nortel* both dealt with a sale process under the CCAA, the Court has recognized that the CCAA is an analogous restructuring statute to the proposal provisions of the BIA, *Re Ted Leroy Trucking [Century Services] Ltd.,* 2010 SCC 60 at para 24; *Re Indalex Ltd*., [2013] 1 S.C.R. 271 at paras. 50-51.

[25] Furthermore, in *Mustang*, this Court applied the *Nortel* criteria on a motion to approve a sale process backstopped by a stalking horse bid in a proposal proceeding under the BIA, *Re Mustang GP Ltd*., 2015 CarswellOnt 16398 at paras. 37-38 (S.C.J.).

[26] These proceedings are premised on the implementation of a sale process using the stalking horse agreement as the minimum bid intended to maximize value and act as a baseline for offers received in the SISP. In the present case, Danier is seeking approval of the stalking horse agreement for purposes of conducting the SISP only.

[27] The SISP is warranted at this time for a number of reasons.

[28] First, Danier has made reasonable efforts in search of alternate financing or an acquisition transaction and has attempted to restructure its operations and financial affairs since 2014, all of which has been unsuccessful. At this juncture, Danier has exhausted all of the remedies available to it outside of a Court-supervised sale process. The SISP will result in the most viable alternative for Danier, whether it be a sale of assets or the business (through an auction or otherwise) or an investment in Danier.

[29] Second, Danier projects that it will be cash flow negative for the next six months and it is clear that Danier will be unable to borrow under the CIBC loan facility to finance its operations (CIBC gave notice of default upon Danier’s filing of the NOI). If the SISP is not implemented in the immediate future, Danier's revenues will continue to decline, it will incur significant costs and the value of the business will erode, thereby decreasing recoveries for Danier's stakeholders.

[30] Third, the market for Danier's assets as a going concern will be significantly reduced if the SISP is not implemented at this time because the business is seasonal in nature. Any purchaser of the business as a going concern will need to make decisions about the raw materials it wishes to acquire and the product lines it wishes to carry by March 2016 in order to be sufficiently prepared for the fall/winter season, which has historically been Danier's busiest.

[31] Danier and the Proposal Trustee concur that the SISP and the stalking horse agreement will benefit the whole of the economic community. In particular:

(a) the stalking horse agreement will establish the floor price for Danier's inventory, thereby maximizing recoveries;

(b) the SISP will subject the assets to a public marketing process and permit higher and better offers to replace the Stalking horse agreement; and

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(c) should the SISP result in a sale transaction for all or substantially all of Danier's assets, this may result in the continuation of employment, the assumption of lease and other obligations and the sale of raw materials and inventory owned by Danier.

[32] There have been no expressed creditor concerns with the SISP as such. The SISP is an open and transparent process. Absent the stalking horse agreement, the SISP could potentially result in substantially less consideration for Danier's business and/or assets.

[33] Given the indications of value obtained through the 2015 solicitation process, the stalking horse agreement represents the highest and best value to be obtained for Danier's assets at this time, subject to a higher offer being identified through the SISP.

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, 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 trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee 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.

[35] In the present case, in addition to satisfying the *Nortel* criteria, the SISP will result in a transaction that is at least capable of satisfying the 65.13 criteria. I say this for the following reasons.

[36] The SISP is reasonable in the circumstances as it is designed to be flexible and allows parties to submit an offer for some or all of Danier's assets, make an investment in Danier or acquire the business as a going concern. This is all with the goal of improving upon the terms of the stalking horse agreement. The SISP also gives Danier and the Proposal Trustee the right to extend or amend the SISP to better promote a robust sale process.

[37] The Proposal Trustee and the financial advisor support the SISP and view it as reasonable and appropriate in the circumstances.

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[38] The duration of the SISP is reasonable and appropriate in the circumstances having regard to Danier's financial situation, the seasonal nature of its business and the fact that many potentially interested parties are familiar with Danier and its business given their participation in the 2015 solicitation process and/or the stalking horse process.

[39] A sale process which allows Danier to be sold as a going concern would likely be more beneficial than a sale under a bankruptcy, which does not allow for the going concern option.

[40] Finally, the consideration to be received for the assets under the stalking horse agreement appears at this point, to be *prima facie* fair and reasonable and represents a fair and reasonable benchmark for all other bids in the SISP.

The Break Fee

[41] Break fees and expense and costs reimbursements in favour of a stalking horse bidder are frequently approved in insolvency proceedings. Break fees do not merely reflect the cost to the purchaser of putting together the stalking horse bid. A break fee may be the price of stability, and thus some premium over simply providing for out of pocket expenses may be expected, Daniel R. Dowdall & Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies", 2005 ANNREVINSOLV 1 at 4.

[42] Break fees in the range of 3% and expense reimbursements in the range of 2% have recently been approved by this Court, *Re Nortel Networks Corp*., [2009] O.J. No. 4293 at paras. 12 and 26 (S.C.J. [Commercial List]); *Re W.C. Wood Corp. Ltd.,* [2009] O.J. No. 4808 at para. 3 (S.C.J. [Commercial List], where a 4% break fee was approved.

[43] The break fee, the expense reimbursement and the signage costs obligations in the stalking horse agreement fall within the range of reasonableness. Collectively, these charges represent approximately 2.5% of the minimum consideration payable under the stalking horse agreement. In addition, if a liquidation proposal (other than the stalking horse agreement) is the successful bid, Danier is not required to pay the signage costs obligations to the Agent. Instead, the successful bidder will be required to buy the signage and advertising material from the Agent at cost.

[44] In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

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(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

[45] I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

[46] Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

[47] Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Re Sino-Forest Corp., 2012 ONSC 2063 at paras. 46-47 [Commercial List]; *Re Colossus Minerals Inc.,supra.*

[48] The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

[49] The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

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[50] In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

[51] Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which would result in a more competitive sales process. OCI will only be compensated if a transaction is originated by OCI or OCI introduces the ultimate purchaser and/or investor to Danier.

[52] Danier and the Proposal Trustee believe that the quantum and nature of the success fee payable under the OCI engagement letter is reasonable in the circumstances. Specifically, because the fees payable to OCI are dependent on the success of transaction or purchaser or investor originated by OCI, the approval of this fee is necessary to incentivize OCI.

[53] Accordingly, an order approving the financial advisor and OCI engagement letters is appropriate.

[54] A charge ensuring payment of the success fee is also appropriate in the circumstances, as noted below.

Administration Charge

[55] In order to protect the fees and expenses of each of the Proposal Trustee, its counsel, counsel to Danier, the directors of Danier and their counsel, Danier seeks a charge on its property and assets in the amount of $600,000. The Administration Charge would rank behind the existing security, *pari passu* with the Consensus Charge and ahead of the D&O Charge and KERP Charge. It is supported by the Proposal Trustee.

[56] Section 64.2 of the BIA confers on the Court the authority to grant a charge in favour of financial, legal or other professionals involved in proposal proceedings under the BIA.

[57] Administration and financial advisor charges have been previously approved in insolvency proposal proceedings, where, as in the present case, the participation of the parties whose fees are secured by the charge is necessary to ensure a successful proceeding under the BIA and for the conduct of a sale process, *Re Colossus Minerals Inc.,* 2014 CarswellOnt 1517 at paras. 11-15 (S.C.J.).

[58] This is an appropriate circumstance for the Court to grant the Administration Charge. The quantum of the proposed Administration Charge is fair and reasonable given the nature of the SISP. Each of the parties whose fees are to be secured by the Administration Charge has played (and will continue to play) a critical role in these proposal proceedings and in the SI. The Administration Charge is necessary to secure the full and complete payment of these fees. Finally, the Administration Charge will be subordinate to the existing security and does not prejudice any known secured creditor of Danier.

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D&O Charge

[59] The directors and officers have been actively involved in the attempts to address Danier's financial circumstances, including through exploring strategic alternatives, implementing a turnaround plan, devising the SISP and the commencement of these proceedings. The directors and officers are not prepared to remain in office without certainty with respect to coverage for potential personal liability if they continue in their current capacities.

[60] Danier maintains directors and officers insurance with various insurers. There are exclusions in the event there is a change in risk and there is potential for there to be insufficient funds to cover the scope of obligations for which the directors and officers may be found personally liable (especially given the significant size of the Danier workforce).

[61] Danier has agreed, subject to certain exceptions, to indemnify the directors and officers to the extent that the insurance coverage is insufficient. Danier does not anticipate it will have sufficient funds to satisfy those indemnities if they were ever called upon.

[62] Danier seeks approval of a priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the NOI. It is proposed that the D&O Charge be in an amount not to exceed $4.9 million and rank behind the existing security, the Administration Charge and the Consensus Charge but ahead of the KERP Charge.

[63] The amount of the D&O Charge is based on payroll obligations, vacation pay obligations, employee source deduction obligations and sales tax obligations that may arise during these proposal proceedings. It is expected that all of these amounts will be paid in the normal course as Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

[64] The Court has the authority to grant a directors' and officers' charge under section 64.1 of the BIA.

[65] In *Colossus Minerals* and *Mustang*, *supra*, this Court approved a directors' and officers' charge in circumstances similar to the present case where there was uncertainty that the existing insurance was sufficient to cover all potential claims, the directors and officers would not continue to provide their services without the protection of the charge and the continued involvement of the directors and officers was critical to a successful sales process under the BIA.

[66] I approve the D&O Charge for the following reasons.

[67] The D&O Charge will only apply to the extent that the directors and officers do not have coverage under the existing policy or Danier is unable to satisfy its indemnity obligations.

[68] The directors and officers of Danier have indicated they will not continue their involvement with Danier without the protection of the D&O Charge yet their continued involvement is critical to the successful implementation of the SISP.

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[69] The D&O Charge applies only to claims or liabilities that the directors and officers may incur after the date of the NOI and does not cover misconduct or gross negligence.

[70] The Proposal Trustee supports the D&O Charge, indicating that the D&O Charge is reasonable in the circumstances.

[71] Finally, the amount of the D&O Charge takes into account a number of statutory obligations for which directors and officers are liable if Danier fails to meet these obligations. However, it is expected that all of these amounts will be paid in the normal course. Danier expects to have sufficient funds to pay these amounts. Accordingly, it is unlikely that the D&O charge will be called upon.

Key Employee Retention Plan and Charge

[72] Danier developed a key employee retention plan (the "KERP") that applies to 11 of Danier's employees, an executive of Danier and Danier's consultant, all of whom have been determined to be critical to ensuring a successful sale or investment transaction. The KERP was reviewed and approved by the Board.

[73] Under the KERP, the key employees will be eligible to receive a retention payment if these employees remain actively employed with Danier until the earlier of the completion of the SISP, the date upon which the liquidation of Danier's inventory is complete, the date upon which Danier ceases to carry on business, or the effective date that Danier terminates the services of these employees.

[74] Danier is requesting approval of the KERP and a charge for up to $524,000 (the "KERP Charge") to secure the amounts payable thereunder. The KERP Charge will rank in priority to all claims and encumbrances other than the existing security, the Administration Charge, the Consensus Charge and the D&O Charge.

[75] Key employee retention plans are approved in insolvency proceedings where the continued employment of key employees is deemed critical to restructuring efforts, *Re Nortel Networks Corp. supra.*

[76] In *Re Grant Forest Products Inc.,* Newbould J. set out a non-exhaustive list of factors that the court should consider in determining whether to approve a key employee retention plan, including the following:

(a) whether the court appointed officer supports the retention plan;

(b) whether the key employees who are the subject of the retention plan are likely to pursue other employment opportunities absent the approval of the retention plan;

(c) whether the employees who are the subject of the retention plan are truly "key employees" whose continued employment is critical to the successful restructuring of Danier;

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(d) whether the quantum of the proposed retention payments is reasonable; and

(e) the business judgment of the board of directors regarding the necessity of the retention payments.

Re Grant Forest Products Inc., [2009] O.J. No. 3344 at paras. 8-22 (S.C.J. [Commercial List]).

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[77] While *Re Grant Forest Products Inc*. involved a proceeding under the CCAA, key employee retention plans have frequently been approved in proposal proceedings under the BIA, see, for example, *In the Matter of the Notice of Intention of Starfield Resources Inc.*, Court File No. CV-13-10034-00CL, Order dated March 15, 2013 at para. 10.

[78] The KERP and the KERP Charge are approved for the following reasons:

(i) the Proposal Trustee supports the granting of the KERP and the KERP Charge;

(ii) absent approval of the KERP and the KERP Charge, the key employees who are the subject of the KERP will have no incentive to remain with Danier throughout the SISP and are therefore likely to pursue other employment opportunities;

(iii) Danier has determined that the employees who are the subject of the KERP are critical to the implementation of the SISP and a completion of a successful sale or investment transaction in respect of Danier;

(iv) the Proposal Trustee is of the view that the KERP and the quantum of the proposed retention payments is reasonable and that the KERP Charge will provide security for the individuals entitled to the KERP, which will add stability to the business during these proceedings and will assist in maximizing realizations; and

(v) the KERP was reviewed and approved by the Board.

Sealing Order

[79] There are two documents which are sought to be sealed: 1) the details about the KERP; and 2) the stalking horse offer summary.

[80] Section 137(2) of the *Courts of Justice Act* provides the court with discretion to order that any document filed in a civil proceeding can be treated as confidential, sealed, and not form part of the public record.

[81] In *Sierra Club of Canada v. Canada (Minister of Finance)*, the Supreme Court of Canada held that courts should exercise their discretion to grant sealing orders where:

(1) the order is necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonable alternative measures will not prevent the risk; and

(2) the salutary effects of the order outweigh its deleterious effects, including the effects on the right of free expression, which includes the public interest in open and accessible court proceedings.

[2002] S.C.J. No. 42 at para. 53 (S.C.C.).

[82] In the insolvency context, courts have applied this test and authorized sealing orders over confidential or commercially sensitive documents to protect the interests of debtors and other stakeholders, *Re Stelco Inc.*, [2006] O.J. No. 275 at paras. 2-5 (S.C.J. [Commercial List]); *Re Nortel Networks Corp.*, *supra*.

[83] It would be detrimental to the operations of Danier to disclose the identity of the individuals who will be receiving the KERP payments as this may result in other employees requesting such payments or feeling underappreciated. Further, the KERP evidence involves matters of a private, personal nature.

[84] The offer summary contains highly sensitive commercial information about Danier, the business and what some parties, confidentially, were willing to bid for Danier's assets. Disclosure of this information could undermine the integrity of the SISP. The disclosure of the offer summary prior to the completion of a final transaction under the SISP would pose a serious risk to the SISP in the event that the transaction does not close. Disclosure prior to the completion of a SISP would jeopardize value-maximizing dealings with any future prospective purchasers or liquidators of Danier's assets. There is a public interest in maximizing recovery in an insolvency that goes beyond each individual case.

[85] The sealing order is necessary to protect the important commercial interests of Danier and other stakeholders. This salutary effect greatly outweighs the deleterious effects of not sealing the KERPs and the offer summary, namely the lack of immediate public access to a limited number of documents filed in these proceedings.

[86] As a result, the *Sierra Club* test for a sealing order has been met. The material about the KERP and the offer summary shall not form part of the public record pending completion of these proposal proceedings.

Penny J.

Date: February 10, 2016

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COURT FILE NO.: CV-09-8247-00CL
DATE: 20090811

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SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

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

Applicants

BEFORE: Justice Newbould

COUNSEL: A. Duncan Grace for GE Canada Leasing Services Company

Daniel R. Dowdall and Jane O. Dietrich, for Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Sean Dunphy and Katherine Mah for the Monitor Ernst & Young Inc.

Kevin McElcheran for The Toronto-Dominion Bank

Stuart Brotman for the Independent Directors

DATE HEARD: August 6, 2009

ENDORSEMENT

[1] KERP is an acronym for key employee retention plan. In the Initial Order of June 25, 2009, a KERP agreement between Grant Forest Products Inc. and Mr. Peter Lynch was approved and a KERP charge on all of the property of the applicants as security for the amounts that could be owing to Mr. Lynch under the KERP agreement was granted to Mr. Lynch ranking after the Administration Charge and the Investment Offering Advisory Charge. The Initial Order was

made without prejudice to the right of GE Canada Leasing Services Company ("GE Canada") to move to oppose the KERP provisions.

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[2] GE Canada has now moved for an order to delete the KERP provisions in the Initial Order. GE Canada takes the position that these KERP provisions have the effect of preferring the interest of Mr. Lynch over the interest of the other creditors, including GE Canada.

KERP Agreement and Charge

[3] The applicant companies have been a leading manufacturer of oriented strand board and have interests in three mills in Canada and two mills in the United States. The parent company is Grant Forest Products Inc. Grant Forest was founded by Peter Grant Sr. in 1980 and is privately owned by the Grant family. Peter Grant Sr. is the CEO, his son, Peter Grant Jr., is the president, having worked in the business for approximately fourteen years. Peter Lynch is 58 years old. He practised corporate commercial law from 1976 to 1993 during which time he acted on occasion for members of the Grant family. In 1993 he joined the business and became executive vice-president of Grant Forest. Mr. Lynch owns no shares in the business.

[4] The only KERP agreement made was between Grant Forest and Mr. Lynch. It provides that if at any time before Mr. Lynch turns 65 years of age a termination event occurs, he shall be paid three times his then base salary. A termination event is defined as the termination of his employment for any reason other than just cause or resignation, constructive dismissal, the sale of the business or a material part of the assets, or a change of control of the company. The agreement provided that the obligation was to be secured by a letter of credit and that if the company made an application under the CCAA it would seek an order creating a charge on the assets of the company with priority satisfactory to Mr. Lynch. That provision led to the KERP charge in the Initial Order.

Creditors of the Applicants

[5] Grant Forest has total funded debt obligations of approximately $550 million in two levels of primary secured debt. The first lien lenders, for whom TD Bank is the agent, are owed approximately $400 million. The second lien lenders are owed approximately $150 million.

[6] Grant Forest has unsecured trade creditors of over $4 million as well as other unsecured debt obligations. GE Canada is an unsecured creditor of Grant Forest pursuant to a master aircraft leasing agreement with respect to three aircraft which have now been returned to GE Canada. GE Canada expects that after the aircraft have been sold, it will have a deficiency claim of approximately U.S. $6.5 million.

[7] The largest unsecured creditor is a numbered company owned by the Grant family interests which is owed approximately $50 million for debt financing provided to the business.

Analysis

[8] Whether KERP provisions such as the ones in this case should be ordered in a CCAA proceeding is a matter of discretion. While there are a small number of cases under the CCAA dealing with this issue, it certainly cannot be said that there is any established body of case law settling the principles to be considered. In *Houlden & Morawetz Bankruptcy and Insolvency Analysis, West Law, 2009*, it is stated:

> In some instances, the court supervising the CCAA proceeding will authorize a key employee retention plan or key employee incentive plan. Such plans are aimed at retaining employees that are important to the management or operations of the debtor company in order to keep their skills within the company at a time when they are likely to look for other employment because of the company's financial distress. (Underlining added)

[9] In *Canadian Insolvency in Canada* by Kevin P. McElcheran (LexisNexis - Butterworths) at p. 231, it is stated:

> KERPs and special director compensation arrangements are heavily negotiated and controversial arrangements. … Because of the controversial nature of KERP arrangements, it is important that any proposed KERP be scrutinized carefully by the monitor with a view to insisting that only true key employees are covered by

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> the plan and that the KERP will not do more harm than good by failing to include the truly key employees and failing to treat them fairly. (Underlining added)

[10] I accept these statements as generally applicable. In my view it is quite clear on the basis of the record before me that the KERP agreement and charge contained in the Initial Order are appropriate and should be maintained. There are a number of reasons for this.

[11] The Monitor supports the KERP agreement and charge. Mr. Morrison has stated in the third report of the Monitor that as Mr. Lynch is a very seasoned executive, the Monitor would expect that he would consider other employment options if the KERP agreement were not secured by the KERP charge, and that his doing so could only distract from the marketing process that is underway with respect to the assets of the applicants. The Monitor has expressed the view that Mr. Lynch continuing role as a senior executive is important for the stability of the business and to enhance the effectiveness of the marketing process.

[12] Mr. Hap Stephen, the Chairman and CEO of Stonecrest Capital Inc., appointed as the Chief Restructuring Advisor of the applicants in the Initial Order, pointed out in his affidavit that Mr. Lynch is the only senior officer of the applicants who is not a member of the Grant family and who works from Grant Forest's executive office in Toronto. He has sworn that the history, knowledge and stability that Mr. Lynch provides the applicants is crucial not only in dealing with potential investors during the restructuring to provide them with information regarding the applicants' operations, but also in making decisions regarding operations and management on a day-to-day basis during this period. He states that it would be extremely difficult at this stage of the restructuring to find a replacement to fulfill Mr. Lynch's current responsibilities and he has concern that if the KERP provisions in the Initial Order are removed, Mr. Lynch may begin to search for other professional opportunities given the uncertainty of his present position with the applicants. Mr. Stephen strongly supports the inclusion of the KERP provisions in the Initial Order.

[13] It is contended on behalf of GE Canada that there is little evidence that Mr. Lynch has or will be foregoing other employment opportunities. Reliance is placed upon a statement of Leitch R.S.J. in *Textron Financial Canada Ltd. v. Beta Brands Ltd.* (2007), 36 C.B.R. (5th) 296. In that

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case Leitch J. refused to approve a KERP arrangement for a number of reasons, including the fact that there was no contract for the proposed payment and it had not been reviewed by the court appointed receiver who was applying to the court for directions. Leitch J. stated in distinguishing the case before her from Re *Warehouse Drug Store Ltd.,* [2006] O.J. No. 3416, that there was no suggestion that any of the key employees in the case before her had alternative employment opportunities that they chose to forego.

[14] I do not read the decision of Leitch J. in *Textron* to state that there must be an alternative job that an employee chose to forego in order for a KERP arrangement to be approved. It was only a distinguishing fact in the case before her from the *Warehouse Drug Store* case. Moreover, I do not think that a court should be hamstrung by any such rule in a matter that is one of discretion depending upon the circumstances of each case. The statement in *Houlden Morawetz* to which I have earlier referred that a KERP plan is aimed at retaining important employees when they are likely to look for other employment indicates a much broader intent, i.e. for a key employee who is likely to look for other employment rather than a key employee who has been offered another job but turned it down. In *Re Nortel Networks Corp*. [2009] O.J. No. 1188, Morawetz J. approved a KERP agreement in circumstances in which there was a "potential" loss of management at the time who were sought after by competitors. To require a key employee to have already received an offer of employment from someone else before a KERP agreement could be justified would not in my view be something that is necessary or desirable.

[15] In this case, the concern of the Monitor and of Mr. Stephen that Mr. Lynch may consider other employment opportunities if the KERP provisions are not kept in place is not an idle concern. On his cross-examination on July 28, 2009, Mr. Lynch disclosed that recently he was approached on an unsolicited basis to submit to an interview for a position of CEO of another company in a different sector. He declined to be interviewed for the position. He stated that the KERP provisions played a role in his decision which might well have been different if the KERP provisions did not exist. This evidence is not surprising and quite understandable for a person of Mr. Lynch's age in the uncertain circumstances that exist with the applicants' business.

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[16] It is also contended by GE Canada that Mr. Lynch shares responsibilities with Mr. Grant Jr., the implication being that Mr. Lynch is not indispensable. This contention is contrary to the views of the Monitor and Mr. Stephen and is not supported by any cogent evidence. It also does not take into account the different status of Mr. Lynch and Mr. Grant Jr. Mr. Lynch is not a shareholder. One can readily understand that a prospective bidder in the marketing process that is now underway might want to hear from an experienced executive of the company who is not a shareholder and thus not conflicted. Mr. Dunphy on behalf of the Monitor submitted that Mr. Lynch is the only senior executive independent of the shareholders and that it is the Monitor's view that an unconflicted non-family executive is critical to the marketing process. The KERP agreement providing Mr. Lynch with a substantial termination payment in the event that the business is sold can be viewed as adding to his independence insofar as his dealing with respective bidders are concerned.

[17] It is also contended on behalf of GE Canada that there is no material before the court to establish that the quantum of the termination payment, three times Mr. Lynch's salary at the time he is terminated, is reasonable. I do not accept that. The KERP agreement and charge were approved by the board of directors of Grant Forest, including approval by the independent directors. These independent directors included Mr. William Stinson, the former CEO of Canadian Pacific Limited and the lead director of Sun Life, Mr. Michael Harris, a former premier of Ontario, and Mr. Wallace, the president of a construction company and a director of Inco. The independent directors were advised by Mr. Levin, a very senior corporate counsel. One cannot assume without more that these people did not have experience in these matters or know what was reasonable.

[18] A three year severance payment is not so large on the face of it to be unreasonable, or in this case, unfair to the other stakeholders. The business acumen of the board of directors of Grant Forest, including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and Mr. Stephens for the KERP provisions. Their business judgment cannot be ignored.

[19] The Monitor is, of course, an officer of the court. The Chief Restructuring Advisor is not but has been appointed in the Initial Order. Their views deserve great weight and I would be reluctant to second guess them. The following statement of Gallagan J.A., in *Royal Bank v. Soundair Corp*. (1991), 4 O.R. (3d) 1, while made in the context of the approval by a court appointed receiver of the sale of a business, is instructive in my view in considering the views of a Monitor, including the Monitor in this case and the views of the Chief Restructuring Advisor:

> 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.

[20] The first lien security holders owed approximately $400 million also support the KERP agreement and charge for Mr. Lynch. They too take the position that it is important to have Mr. Lynch involved in the restructuring process. Not only did they support the KERP provisions in the Initial Order, they negotiated section 10(l) of the Initial Order that provides that the applicants could not without the prior written approval of their agent, TD Bank, and the Monitor, make any changes to the officers or senior management. That is, without the consent of the TD Bank as agent for the first lien creditors, Mr. Lynch could not be terminated unless the Initial Order were later amended by court order to permit that to occur.

[21] With respect to the fairness of the KERP provisions for Mr. Lynch and whether they unduly interfere with the rights of the creditors of the applicants, it appears that the potential cost of the KERP agreement, if it in fact occurs, will be borne by the secured creditors who either consent to the provisions or do not oppose them. The first lien lenders owed approximately $400 million are consenting and the second lien lenders owed approximately $150 million have not taken any steps to oppose the KERP provisions. It appears from marketing information provided by the Monitor and Mr. Stephen to the Court on a confidential basis that the secured creditors will likely incur substantial shortfalls and that there likely will be no recovery for the unsecured creditors. Mr. Grace fairly acknowledged in argument that it is highly unlikely that there will be

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any recovery for the unsecured creditors. Even if that were not the case, and there was a reasonable prospect for some recovery by the unsecured creditors, the largest unsecured creditor, being the numbered company owned by the Grant family that is owed approximately $50 million, supports the KERP provisions for Mr. Lynch.

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[22] In his work, *Canadian Insolvency in Canada, supra*, Mr. McElcheran states that because a KERP arrangement is intended to keep key personnel for the duration of the restructuring process, the compensation covered by the agreement should be deferred until after the restructuring or sale of the business has been completed, although he acknowledges that there may be stated "staged bonuses". While I agree that the logic of a KERP agreement leads to it reflecting these principles, I would be reluctant to hold that they are necessarily a code limiting the discretion of a CCAA court in making an order that is just and fair in the circumstances of the particular case.

[23] In this case, the KERP agreement does not expressly provide that the payments are to await the completion of the restructuring. It proves that they are to be made within five days of termination of Mr. Lynch. There would be nothing on the face of the agreement to prevent Mr. Lynch being terminated before the restructuring was completed. However, it is clear that the company wants Mr. Lynch to stay through the restructuring. The intent is not to dismiss him before then. Mr. Dunphy submitted, which I accept, that the provision to pay the termination pay upon termination is to protect Mr. Lynch. Thus while the agreement does not provide that the payment should not be made before the restructuring is complete, that is clearly its present intent, which in my view is sufficient.

[24] I have been referred to the case of *Re MEI Computer Technology Group Inc*. (2005), 19 C.B.R. (5th) 257, a decision of Gascon J. in the Quebec Superior Court. In that case, Gascon J. refused to approve a charge for an employee retention plan in a CCAA proceeding. In doing so, Justice Gascon concluded there were guidelines to be followed, which included statements that the remedy was extraordinary that should be used sparingly, that the debtor should normally establish that there was an urgent need for the creation of the charge and that there must be a reasonable prospect of a successful restructuring. I do not agree that such guidelines are

necessarily appropriate for a KERP agreement. Why, for example, refuse a KERP agreement if there was no reasonable prospect of a successful restructuring if the agreement provided for a payment on the restructuring? Justice Gascon accepted the submission of the debtor's counsel that the charge was the same as a charge for DIP financing, and took guidelines from DIP financing cases and commentary. I do not think that helpful. DIP financing and a KERP agreement are two different things. I decline to follow the case.

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[25] The motion by GE Canada to strike the KERP provisions from the Initial Order is denied. The applicants are entitled to their costs from GE Canada. If the quantum cannot be agreed, brief written submissions may be made.

NEWBOULD J.

DATE: August 11, 2009

CITATION: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
COURT FILE NO.: CV-20-00641220-00CL
DATE: 20200617

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ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

Ashley Taylor and *Sanja Sopic*, for the Applicants

Marc Wasserman and *Mary Paterson*, for the Monitor

Wael Rostom, *Stephen Brown-Okruhlik*, *Guneev Bhinder*, for All Js Greenspace LLC

Wojtek Jaskiewicz, for the Capital Transfer Agency, ULC

Graham Phoenix and *Thomas Lambert*, for WMB Resources LLC and Green Ops Group LLC

Lou Brzezinski, *Stephen Gaudreau*, *Eric Golden* and *Varoujan Arman*, for Michael D. Horvitz Revocable Trust

Joe Groia and *Martin Mendelzon*, for Chiron Ventures Inc.

HEARD: May 29 and June 1, 2020

ENDORSEMENT

MCEWEN J.

[1] On May 20, 2020 I granted the Initial Order sought by the Applicants, Green Growth Brands Inc. ("GGB"), GGB Canada Inc., Green Growth Brands Realty Ltd., and Xanthic Biopharma Limited (collectively, "the Applicants"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, As Amended ("*CCAA*"). The Initial Order provided for,

amongst other things, a stay of proceedings to allow GGB, the parent entity, an opportunity to market the sale of its business.

[2] At that time, I also appointed Ernst & Young Inc. as the Monitor (the "Monitor") and approved a stay of proceedings for the initial 10-day period. I further approved certain court ordered charges and interim financing (the "DIP Financing") to be provided by All Js Green Space LLC ("All Js").

[3] The comeback motion was scheduled for May 29, 2020 and ultimately was heard on May 29 and June 1, 2020.

[4] Due to the COVID-19 crisis, the comeback motion proceeded by way of video conference. It was held in accordance with the Notices to the Profession issued by Morawetz C.J. and the Commercial List Advisory.

[5] At the comeback motion, I granted the orders sought, being an Amended and Restated Initial Order, and a Sale and Investment Solicitation Process ("SISP") Order, the latter of which approved the SISP and the fully binding and conditional Acquisition Agreement dated May 19, 2020 (the "Stalking Horse Agreement"). I further granted a sealing order with respect to a Term Sheet and the Florida LOI that will be referred to in the body of this endorsement, on an unopposed basis, as the criteria set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, were met. I dismissed the cross-motion brought by Mr. Michael D. Horvitz.

[6] I indicated at the comeback motion that I would provide a more detailed endorsement. This is my endorsement.

BACKGROUND

[7] The Applicants are part of a corporate group ("GGB Group"). The GGB Group is in the business of growing, processing and selling cannabis. GGB is the parent entity of the GGB Group.

[8] The GGB Group, until recently, operated two distinct lines of business. The first involves cannabis cultivation, processing, and production, and the distribution of certain tetrahydrocannabinol (commonly referred to as THC) products through wholesale and retail channels in medical and adult-use dispensaries in Florida, Massachusetts and Nevada (the "MSO Business"). The second concerned cannabidiol (commonly referred to as CBD)-infused consumer product production, wholesale and retail operations online and through a mall-based kiosk shop system (the "CBD Business").

[9] The MSO Business continues to operate through indirect, wholly-owned subsidiaries of GGB. Operations of the CBD Business, however, were indefinitely suspended at the outset of the COVID-19 crisis. Thereafter, an Ohio court appointed a Receiver over the CBD Business to wind-down their operations.

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[10] I note from the outset that Mr. Horvitz, an investor in GGB, makes significant allegations against the GGB Group and other significant stakeholders, particularly Jay, Joseph and Jean Schottenstein and Wayne Boich.

[11] In order to put this dispute between Mr. Horvitz, GGB and some of the other stakeholders in context, it is important to understand the relationship between the relevant stakeholders with respect to the secured debt that was in place at the time of the Initial Order, which secured debt included:

- A promissory note issued by GA Opportunities Corp. (the "GAOC Note") in the amount of CAD $39,000,000. It was held by an arm's-length investor, Aphria Inc. Shortly before the May 20, 2020 motion the GAOC Note was acquired by Green Ops Group LLC ("Green Ops").

- Secured convertible debentures issued in May 2019 in the aggregate principal amount of US $45,500,000 (the "May Debentures"). The May Debentures were issued pursuant to the terms of a Debenture Indenture (the "May Debenture Indenture") between GGB and Capital Transfer Agency, ULC ("CTA").

- Secured convertible debentures issued pursuant to equity commitment letters with All Js and Chiron Ventures Inc. ("Chiron") (the "Backstop Debentures"). All Js and Chiron committed to subscribe for the Backstop Debentures in the aggregate principal amounts of US $57,350,000 and US $10,000,000, respectively, although not all of these funds had been fully drawn. The Backstop Debentures, too, were issued pursuant to the terms of a Debenture Indenture (the "Backstop Debenture Indenture") between GGB and CTA.

- Two promissory notes issued to All Js in May 2020, each in the amount of US $400,000.

[12] Mr. Horvitz, as Grantor and Trustee for and on behalf of the Michael D. Horvitz Revocable Trust, owns US $5 million of the May Debentures.

[13] Mr. Wayne Boich, generally speaking, controls Green Ops, which purchased the GAOC Note. He also controls WMB Resources LLC ("WMB"), which owns US $5 million in the May Debentures. In addition to the above, Green Ops also acquired the "Spring Oaks Notes" from GGB Florida LLC ("GGB Florida") in May 2020. I will comment more about this transaction later in this endorsement.

[14] Jay Schottenstein and his sons, Joseph and Jean Schottenstein, generally speaking, control a trust that owns All Js. As noted, All Js owns a majority of the Backstop Debentures. All Js also owns a significant number of shares in GGB and is the Debtor-in-possession ("DIP") Lender.

[15] Messrs. Schottenstein also control LS Green Investments LLC and Delancey Financial LLC, which own US $20 million and US $10 million of the May Debentures, respectively.

[16] As can be seen from the above, Messrs. Schottenstein and Mr. Boich, through companies controlled by them, own a great deal of GGB's debt (and, in fact, the majority of that debt) with All Js also being a significant shareholder in GGB.[1]

[17] The Stalking Horse Agreement contemplates the purchase of GGB's assets, as defined, by All Js and CTA, in its capacity as the Debenture Trustee of the May Debentures and the Backstop Debentures (collectively, the "Stalking Horse Bidder"). The purchase is comprised of a credit bid of all of the secured debt held by All Js, the May Debentures, the Backstop Debentures and certain assumed liabilities totaling approximately US $106 million. It does not involve any cash consideration.

[18] The Schottensteins' and Mr. Boich's controlled companies, All Js and Green Ops, respectively, have entered into a Term Sheet for the capitalization of a company ("AcquireCo") to ultimately purchase the shares and inter-company debt of GGB as set out in the Term Sheet. Accordingly, the Term Sheet, amongst other things, sets out how the May Debentures will be treated.

[19] Mr. Horvitz' complaints essentially surround two events. The first was an Extraordinary Resolution that was passed by the holders of the May Debentures on May 3, 2020 without notice to him, which permitted the incurrence of new senior indebtedness and related security which allowed the All Js Secured Notes to rank in priority to the security held by the holders of the May Debentures. The second event involves another Extraordinary Resolution that was passed on May 18, 2020, again without notice, which approved the provisions of the Term Sheet that further diluted the value of his ownership in the May Debentures by removing any priority the May Debentures had over the Backstop Debentures (amongst other things). Mr. Horvitz also submits that provisions of the Term Sheet ensure that the Stalking Horse Bid is unbeatable.

[20] As a result, Mr. Horvitz raised a number of objections to the proposed SISP and the Stalking Horse Agreement. Mr. Horvitz' position was not supported by any of the other stakeholders. All of the significant stakeholders who attended at the comeback motion supported the relief sought by GGB. The Monitor also supported the relief sought.

[21] I also pause to note that Mr. Horvitz' counsel in his submissions conceded that the provisions of the May Debentures allowed the requisite majority to pass the Extraordinary Resolutions without notice to Mr. Horvitz. Mr. Horvitz' submission, however, is that the majority of the holders of the May Debentures, the corporations controlled by Messrs.

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[1] The exact nature of Messrs. Schottensteins' and Mr. Boich's involvement in the above companies was not disclosed. No one, however, objected to the above general description.

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Schottenstein, failed to act in good faith towards Mr. Horvitz as did others, notably companies controlled by Mr. Boich, with respect to the creation of AcquireCo and the related Term Sheet.

THE RELIEF SOUGHT BY THE APPLICANTS AND MR. HORVITZ

The Applicants

[22] As noted, the Applicants sought an extension of the stay period to August 15, 2020 as well as approval of the SISP and the Stalking Horse Agreement entered into between GGB and CTA/All Js.

Mr. Horvitz

[23] Mr. Horvitz, at the initial return of the motion on May 29, 2020, sought the following relief:

- an order setting aside my Initial Order of May 20, 2020 granting the Applicants protection under the *CCAA* for failure to make full and fair disclosure;
- an order adjourning the comeback motion of GGB for 14 days so that he could obtain an order pursuant to s. 11.9 of the *CCAA* requiring the production of financial records of several persons and corporations including GGB, Jay, Joseph and Jean Schottenstein, Mr. Boich, All Js, WMB, Chiron and others;
- compliance, within three days, with a Request to Inspect he served on May 25, 2020 and with a cross-examination of GGB's interim chief executive officer, Raymond Whitaker III; and
- an order requiring, within seven days, Messrs. Schottenstein and Mr. Boich to attend a r. 39.03 examination.

[24] After hearing submissions, I adjourned the motion to June 1, 2020 and ordered that the examination of Mr. Whitaker (which GGB had agreed to) take place in the interim and that there be fulsome production of relevant documents without ordering any particular documents be produced (All Js agreed to produce the Term Sheet on a confidential basis).

[25] Mr. Whitaker's examination was completed and documents produced to Mr. Horvitz. When the matter returned before me on June 1, 2020, Mr. Horvitz, as per para. 3 of his Supplementary Factum, pursued only the following relief:

- an order dismissing the Applicants' motion approving the SISP, the Stalking Horse Agreement and DIP Financing;
- an order requiring the Applicants to resubmit a revised process that is fair and meets the purpose and policies of the *CCAA*;

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- an order directing the Monitor to investigate the following: Green Ops' acquisition of the GAOC Note; the Term Sheet (as being a preference); Green Ops' purchase of the Spring Oaks Notes (as being a preference); the Spring Oaks Forbearance Agreement (as being a preference); and whether certain of these transactions should be set aside; and

- additional disclosure of documentation and examination of witnesses, as requested.

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ANALYSIS

The Abandoned Relief

[26] I wish to deal briefly with the relief originally sought by Mr. Horvitz but that was abandoned upon the return of the motion on June 1, 2020.

[27] At the return of the motion, Mr. Horvitz did not pursue the relief originally sought setting aside the Initial Order on the basis that the Applicants failed to act in good faith. This is a serious accusation, however, that merits comment.

[28] Had Mr. Horvitz continued to pursue this relief, such a request would have been dismissed.

[29] The Applicants, at the initial hearing, provided the court with the necessary information needed to consider whether the Initial Order should be granted. All relevant agreements were attached. Mr. Horvitz' complaints concerning lack of good faith and disclosure deal with his own disputes with Messrs. Schottenstein and Mr. Boich, the companies they control and how he was treated with respect to his ownership of the May Debentures and the provisions of the Term Sheet. They do not involve the Applicants. While knowledge of the interaction between the investors and GGB would have helped add context it would not have affected the granting of the Initial Order.

[30] Mr. Horvitz' complaints concerning his treatment, as I will outline below, constitute inter-creditor disputes and ought to be dealt with outside of the parameters of this *CCAA* proceeding.

Discovery

[31] As noted, Mr. Whitaker was examined and documentary discovery was made in advance of the June 1, 2020 hearing date. The documentary production that was made, or refused, is set out in the Second Report of the Monitor dated May 31, 2020 (the "Second Report") at paras. 65-78. No further documentation was requested on the return of the motion. In any event, it is my view that adequate production was made to Mr. Horvitz.

[32] With respect to the examinations, Mr. Horvitz did not pursue the examinations of Messrs. Schottenstein or Mr. Boich. I would not have granted the order in any event. They were not properly served with the motion record and reside in the United States of America. They were not represented at the motion. At the May 29, 2020 motion, I questioned Mr. Horvitz' counsel as

to whether I had jurisdiction to make the orders sought and whether letters rogatory were appropriate. Mr. Horvitz did not take the necessary steps to attempt to comply with the letters rogatory process. I therefore considered this issue to be at an end.

Mr. Horvitz' Complaints Concerning the May Debentures and the Term Sheet

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[33] In my view, as noted, Mr. Horvitz' objections with respect to the way his investment in the May Debentures was treated, and the provisions of the Term Sheet, are inter-creditor issues that fall outside of the context of this *CCAA* proceeding.

[34] Notwithstanding the fact that counsel conceded at the motion that the other May Debentures holders had the legal right to pass the Extraordinary Resolutions, without notice to Mr. Horvitz, Mr. Horvitz nonetheless alleges that the May Debentures holders who passed the Extraordinary Resolutions failed to act in good faith. He makes the same claim with respect to the parties to the Term Sheet.

[35] This issue was considered by the Court of Appeal for Ontario in *Stelco Inc., Re* (2005), 78 O.R. (3d) 241 (C.A.), at para. 32, wherein the court stated:

> First, as the supervising judge noted, the CCAA itself is more compendiously styled "An Act to facilitate compromises and arrangements between companies and their creditors." There is no mention of dealing with issues that would change the nature of the relationships as between the creditors themselves. As Tysoe J. noted in *Pacific Coastal Airlines Ltd. v. Air Canada*, [2001] B.C.J. No. 2580 (QL), 110 A.C.W.S. (3d) 259 (B.C.S.C.), at para. 24 (after referring to the full style of the legislation):
>
>> [The purpose of the CCAA proceeding] is not to deal with disputes between a creditor of a company and a third party, even if the company was also involved in the subject matter of the dispute. While issues between the debtor company and non-creditors are sometimes dealt with in CCAA proceedings, **it is not a proper use of a CCAA proceeding to determine disputes between parties other than the debtor company**. [Emphasis added.]

[36] The objections raised by Mr. Horvitz concerning the May Debentures and the Term Sheet all constitute inter-creditor disputes. The terms of the May Debentures and the capitalization of AcquireCo, set out in the Term Sheet, do not involve the Applicants. Accordingly, these *CCAA* proceedings are not the proper venue for Mr. Horvitz to seek these remedies.

[37] As I have noted, Mr. Horvitz conceded at this motion that the Extraordinary Resolutions were passed in accordance with the terms of the May Debenture Indenture. Similarly, the terms of the AcquireCo Term Sheet involved matters concerning the May Debentures holders that have

been determined by the aforementioned requisite majority. While All Js owns a significant amount of GGB shares, Mr. Horvitz' complaints, with respect to the May Debentures and the Term Sheet, do not lie with GGB but rather with the way he feels he has been treated by the other investors, primarily Messrs. Schottenstein and Mr. Boich.

Mr. Horvitz' Request for the Monitor's Investigation

[38] I am not prepared to order that the Monitor conduct investigations concerning Green Ops' acquisition of the GAOC Note, the Term Sheet (as being a preference) and Green Ops' purchase of the Spring Oaks Notes (as being a preference). This relief was not contained in the Notice of Motion and only arose in Mr. Horvitz' Supplementary Factum. While I would not dismiss the request for this relief on this ground alone, it typifies the shifting nature of the relief that Mr. Horvitz sought during the hearings.

[39] These investigations, sought by Mr. Horvitz, relate to inter-creditor issues between Mr. Horvitz and others. None of the proposed investigations involve the Applicants. The focus of this motion should be on the *CCAA*-related issues, primarily the SISP and the Stalking Horse Agreement. The issues surrounding the May Debentures and the Term Sheet should only be considered to the extent that they are germane to the *CCAA* proceeding.

[40] The Monitor does not believe that it is appropriate to carry out these investigations based on the materials that it has reviewed. I accept the Monitor's submission that it would not be appropriate in a *CCAA* proceeding to have it carry out an investigation of transfers for value between American corporations which are non-debtors. I further agree with the Monitor that the case upon which Mr. Horvitz relies, *Cash Store Financial Services, Re*, 2014 ONSC 4326, 31 B.L.R. (5th) 313, is entirely distinguishable since it dealt with a transfer of value from the debtor to an unsecured creditor.

[41] I also do not believe the Monitor ought to conduct the investigation requested by Mr. Horvitz with respect to the Spring Oaks Forbearance Agreement (as being a preference).

[42] Mr. Horvitz' complaint in this regard essentially involves two issues. The first being that the SISP should include the Florida Assets to maximize value. The second involves his complaint concerning Mr. Boich. Mr. Boich's company, Green Ops, as noted, purchased the Spring Oaks Notes which holds unsecured debt as security for the Florida Assets. Mr. Horvitz claims that this is another example of self-dealing and lack of transparency.

[43] While I agree that the Florida Assets would add value to the *CCAA* process, it is not practicable to add them to the SISP. Prior to the Initial Order being granted Green Ops could have foreclosed on the debt. GGB looked for another solution and has obtained an LOI from a third-party buyer in excess of the debt held by Green Ops. If the transaction is not completed by mid-June, Green Ops has the right to foreclose. While the situation is not ideal, the mid-June deadline precludes rolling the Florida Assets into the SISP. It seems to me, however, that GGB has followed a reasonable path to deal with the Florida Assets, which is subject to its agreement with Green Ops which had the right to foreclose and granted a Forbearance Agreement to see if the Florida Assets can be sold. The Monitor concurs. In this regard, I am reminded of the

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observation in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222, 63 C.B.R. (5th) 115, at para. 5, that "insolvency proceedings typically involve what is feasible, not what is flawless".

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[44] I will now turn to the complaints Mr. Horvitz makes concerning the SISP and the Stalking Horse Agreement.

The SISP

[45] Mr. Horvitz makes a number of complaints concerning the SISP and I will deal with each in turn.

[46] First, Mr. Horvitz complains that the SISP does not include the retention of an investment banker to market the assets of GGB. A separate investment banker is not required. It is certainly not unusual for the Court-appointed Monitor to run a SISP. The Monitor has the necessary experience and has acted in this capacity as Monitor in at least one other cannabis case before this court, AgMedica Bioscience Inc. As set out at para. 28 of the Second Report, the Monitor is well-qualified to run the SISP in this case.

[47] Second, Mr. Horvitz complains that the SISP does not include the preparation of a "teaser" or other short description of the proposed acquisition opportunity. As noted by the Monitor in para. 29 of the Second Report, it is, in fact, in the process of forming such a document which will be made available along with other information included in a data room. It is virtually complete at this time.

[48] Third, Mr. Horvitz complains that the Monitor has failed to develop a list of likely strategic and financial buyers. This has, in fact, been done, with 243 potential parties being identified. This includes all of the typical types of businesses one would expect in the cannabis space.

[49] Fourth, Mr. Horvitz complains about the lack of Non-disclosure Agreements, telephone calls, "transparent and market-based compensation arrangements", preliminary indications of interest and management presentations. In my view, all of these complaints are unfounded and the Second Report, once again, deals with these complaints comprehensively in paras. 29-34.

The Stalking Horse Agreement

[50] Mr. Horvitz raises a number of issues with respect to the Stalking Horse Agreement.

[51] First, he complains of a number of features that are typical in Stalking Horse Agreements. Particularly, he objects to the US $2 million Break Fee; the US $150,000 Expense Reimbursement to All Js; the overbid increment of US $250,000; and a refundable 5 percent deposit that has to be paid by bidders. In my view, none of these provisions in the Stalking Horse Agreement are problematic.

[52] While the Break Fee and Expense Reimbursement are not itemized, they represent approximately 1.9 percent of the purchase price that is set out in the Stalking Horse Agreement. This is well within the range of payments that have been approved by this court on numerous occasions. The fees, in addition to compensating Stalking Horse purchasers for the time, resources and risk taken in developing the agreement, also represent the price of stability. Therefore, some premium over simply providing for expenses may be expected: *Danier Leather Inc. (Re)*, 2016 ONSC 1044, 33 C.B.R. (6th) 221, at paras. 40-42; *CCM Master Qualified Fund v. blutip Power Technologies*, 2012 ONSC 1750, 90 C.B.R. (5th) 74. This *CCAA* process, given the nature, size and location of GGB's operations, has been and will continue to be significant.

[53] Similarly, the overbid increment, which is typical in a large auction, is well within the range of reasonableness. Insofar as the 5 percent deposit is concerned, Mr. Horvitz complains that such an obligation is not placed upon the Stalking Horse Bidder. This is not surprising since the Stalking Horse Agreement provides for a credit bid of the secured debt held by All Js and the holders of the May Debentures and the Backstop Debentures, as well as some certain assumed liabilities. It does not involve cash consideration and therefore it is not necessary to seek a deposit.

[54] Second, Mr. Horvitz further complains that a third-party bidder can impose no conditions which are not in the Stalking Horse Agreement and that overall the DIP Financing and Stalking Horse Agreement make it impractical, if not impossible, for any arm's-length party to make a bid that would properly reflect the market value of the cannabis licence that GGB holds through its subsidiaries. Mr. Horvitz further complains that an outside bidder must pay off the GAOC Note in full, whereas the Stalking Horse Bidder can assume the obligation for later payment.

[55] With respect to the complaint concerning the inability to impose conditions, I do not read the SISP in this way. There is nothing in the SISP that prevents an alternative transaction from containing conditions that are not in the Stalking Horse Agreement. The SISP provides for a range of different transaction structures and it is designed to find the highest and/or best offer for a restructuring or refinancing of GGB. The wording of the SISP does not prevent a bidder from attempting to propose different terms or conditions than those found in the Stalking Horse Agreement. The Monitor has opined that the conditions in the SISP dealing with alternative transactions are standard in SISPs to protect the debtor's estate and ensure that the outside buyer has limited exit rights from the deal, all of which is reasonable. I accept this view.

[56] I also do not accept Mr. Horvitz' allegation that the DIP Financing and the Stalking Horse Agreement make it impractical, if not impossible, to reflect the market value of the cannabis licences and in particular the valuable Nevada licences. The Stalking Horse Agreement is structured in such a way that the successful purchaser would obtain the shares of GGB and the relevant licences, including the Nevada licences. This assists in the sale price process since it would help facilitate the transfer of the cannabis licences, which is difficult to do, and help facilitate a sale. Further, the value of the Nevada licences (and indeed all licences) are subject to a fluctuating market. The best way to determine the value is to run the SISP and determine if there is interest in the marketplace. In any event, a credit bid need not be limited to the fair market value of the corresponding encumbered assets; otherwise it would require an evaluation

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of such encumbered assets which is a difficult, complex and costly exercise which can also result in unwarranted delay: see *Whitebirch Paper Holding Co., Re*, 2010 QCCS 4915, 72 C.B.R. (5th) 49, at para. 34. In order to facilitate this process, the Monitor has included, in its First Report, a table entitled "Illustrative Value of the Stalking Horse Agreement" to assist bidders in understanding the value of the consideration contained in the Stalking Horse Agreement.

[57] Further, in response to Mr. Horvitz' complaint that the SISP treats the Stalking Horse Bidder and Qualified Bidders differently with respect to the GAOC Note, GGB has revised the proposed SISP, which now allows Qualified Bidders to negotiate an agreement with Green Ops, which holds the GAOC Note. Now, both the Stalking Horse Bidder and Qualified Bidders may assume the GAOC Note while at the same time not precluding a Qualified Bidder from proposing to pay off the GAOC Note. Mr. Horvitz complains that Green Ops would be more likely to strike a deal with the Stalking Horse Bidder. This may prove to be the case but, of course, much depends on the offer put forth by the Qualified Bidder. The structure proposed by GGB, however, presents a level playing field.

[58] Similarly, I do not see any difficulty with the proposed DIP Financing. It is not unique to this case and the amount proposed is reasonable. It will help support the SISP process which, in my view, provides the best possible chance for a sale and the potential retention of approximately 170 employees. Further, insofar as the DIP Financing is concerned, Mr. Horvitz also complains that it is being used, in part, to pay for prefiling GGB debt contrary to s. 11.2 of the *CCAA*. When one looks closely at GGB's operations, however, it is clear that GGB has not paid any of the prefiling expenses in Canada. The DIP Financing has been used to pay some relatively modest prefiling expenses for the operating companies in the United States of America that cannot avail themselves of relief given the nature of the cannabis industry in that country. Further, in any event, it is in everyone's best interest that these expenses be paid since the value of GGB exists in these licences and, obviously, in keeping those licences current for the purposes of the SISP.

[59] Last, Mr. Horvitz makes a number of what I would consider to be lesser, additional complaints including a vague closing date, a requirement that Qualified Bidders hold cannabis licences (since removed from the SISP), "bad faith inclusive arrangements" and other related arguments. I have considered each and every one of these arguments and do not find them to be persuasive.

[60] Clearly, Mr. Horvitz does not like the way he has been treated with respect to his ownership of the May Debentures. He is particularly upset with the provisions of the Term Sheet. At the same time, Mr. Horvitz proposes no alternative to the existing process. It bears noting that the Monitor has been significantly involved in the process and agrees that there is no better, viable alternative. As I have noted, Mr. Horvitz' complaints largely involve inter-creditor disputes and only become relevant if the Stalking Horse Bidder is the successful bidder. Mr. Horvitz, presumably, retains his legal rights and can bring an action against those whom he believes have caused him legal harm.

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[61] In the interim, in my view, the SISP and the Stalking Horse Agreement satisfy the criteria set out in s. 36(3) of the *CCAA* and the factors set out by this court in *Nortel Networks Corporation (Re)*, 55 C.B.R. (5th) 229 (Ont. S.C.), at para. 49. The process is supported by the Monitor and no other creditor, aside from Mr. Horvitz, objects. For all of the reasons above, I believe Mr. Horvitz' complaints are misplaced.

DISPOSITION

[62] For these reasons I granted the Amended and Restated Initial Order and the SISP Order approving the SISP and the Stalking Horse Agreement on June 2, 2020 and dismissed Mr. Horvitz' motion.

____

McEwen J.

Released: June 17, 2020

2020 ONSC 3565 (CanLII)

CITATION: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GREEN GROWTH BRANDS INC., 2020 ONSC 3565
COURT FILE NO.: CV-20-00641220-00CL
DATE: 20200617

2020 ONSC 3565 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

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 GREEN GROWTH BRANDS INC., GGB CANADA INC., GREEN GROWTH BRANDS REALTY LTD. AND XANTHIC BIOPHARMA LIMITED

Applicants

ENDORSEMENT

McEwen J.

Released: June 17, 2020

2011 WL 2671254
United States District Court,
E.D. Wisconsin.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS, Appellant,
v.
INTERFORUM HOLDING LLC, et al., Appellees.

No. 11–CV–219.
|
July 7, 2011.

Attorneys and Law Firms

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ORDER

J.P. STADTMUELLER, District Judge.

***1** On March 1, 2011, appellant Official Committee of Unsecured Creditors (the "Committee") appealed from an order of the United States Bankruptcy Court for the Eastern District of Wisconsin ("bankruptcy court") approving the sale of substantially all of debtor's assets free and clear of liens, claims, encumbrances, and interests to Amalgamated Bank, as Trustee of Longview Ultra Construction Loan Investment Fund f/k/a Longview Ultra 1 Construction Loan Investment Fund ("Amalgamated Bank" or the "Bank") and authorizing the debtor to assume and assign executory contracts and unexpired leases to Amalgamated Bank. In response to the appeal, Amalgamated Bank has filed a motion to dismiss the appeal as moot. In support of its motion, Amalgamated Bank argues that the sale has already been consummated, that it qualifies as a good-faith purchaser pursuant to 11 U.S.C. § 363(m), and, therefore, the Committee's failure to obtain a stay pending appeal renders its current appeal moot. For the reasons set forth below, the court affirms the bankruptcy court's finding of good faith, and holds that this appeal is moot under § 363(m) of the Bankruptcy Code because no effective relief can be granted. The Court will, therefore, dismiss this appeal.

BACKGROUND

On December 23, 2009, the debtor filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Bankruptcy Code. (Voluntary Pet.) (Docket # 1–6). The debtor's primary asset was real estate located in Milwaukee, Wisconsin. (*Id.*). Amalgamated Bank is a secured creditor of the debtor with a properly perfected pre-petition lien on substantially all of the debtor's assets, including the property and debtor's cash. (Appellee's Br. in Supp. at 2). On October 22, 2010, the debtor filed an Amended Sale Procedures Motion, seeking the entry of an order establishing certain procedures to be followed in connection with the auction and sale of debtor's assets pursuant to 11 U.S.C. §§ 105(A) and 363. (Sale Procedure Mot.) (Docket # 1–20). As described in the motion, Amalgamated Bank agreed to act as a stalking horse bidder[1] in an auction of the debtor's assets with a credit bid of $55,000,000 pursuant to an Asset Purchase Agreement. (*Id.*). Several parties filed various objections to the Amended Sales Procedure Motion. Following hearings on October 27, 2010, and November 8, 2010, to resolve these objections, the bankruptcy court entered an order establishing sale procedures and approving the Asset Purchase Agreement, among other things. (Sale Procedures Order) (Docket # 1–58). No party appealed the Sale Procedures Order.

The Sale Procedures Order established extensive procedures governing the sale of the debtor's assets, including requirements for Qualified Bidders and Qualified Bids. (*Id.*). Qualified Bids were required to propose a purchase price for the debtor's assets consisting of cash or non-cash consideration with a value determined by Houlihan Lokey ("Houlihan"), a consultant hired to assist with the marketing of the debtor's assets, to be equal to $55,000,000 plus additional cash at closing in an amount not less than $1,000,000. (*Id.* at 5–6).

***2** Subsequent to the entry of the Sale Procedures Order, the debtor's assets were marketed by Houlihan in accordance with the procedures set forth in the Order. (*See generally* Dec. 23, 2010 Hearing Tr.) (Docket # 1–78). Houlihan ultimately received bids from five bidders other than Amalgamated Bank, but none of the bids constituted a Qualified Bid pursuant to the Sale Procedures Order—none of the bids met the $55,000,000 plus $1,000,000 minimum threshold. (*Id.* at 106–07). The highest bid submitted by a bidder other than Amalgamated Bank was $48,000,000. (*Id.*). Because no Qualified Bids were received, no auction of the debtor's assets was held, and the debtor then sought court approval for the sale to Amalgamated Bank as the stalking horse bidder, all in accordance with the Sale Procedures Order.

On December 23, 2010, the bankruptcy court held a hearing on approval of the sale of debtor's assets to the Bank per the Bank's bid of $55,000,000. At the hearing, the bankruptcy court determined that the sale of the debtor's assets was conducted in good faith and that the debtor had exercised good business judgment in connection with the sale. (*Id.* at 122). On December 27, 2010, Amalgamated Bank submitted a proposed order approving the sale. (Proposed Order) (Docket # 1–68). On January 2, 2011, the Committee filed its objections to the proposed Sale Order, challenging many aspects of the Sale Order. (Docket # 1–73). On January 5, 2011, the bankruptcy court held a hearing on the objections, reaffirmed its finding of good faith, overruled a majority of the Committee's objections, and approved the proposed form of the Sale Order with only a few minor revisions not relevant to this appeal. (Jan. 5. Hearing Tr.) (Docket # 1–83). On January 7, 2011, the bankruptcy court entered the Sale Order approving the sale of substantially all of the assets of the debtor to Amalgamated Bank and certifying that Amalgamated Bank was a good faith purchaser. (Sale Order) (Docket # 1–75). As part of the sale, Amalgamated Bank agreed to provide a carve-out from its collateral of up to $600,000, including an estimated payment of approximately 10% for the holders of unsecured claims. (*Id.* at 14).

On January 17, 2011, the Committee filed this appeal of the Sale Order but did not seek a stay pending appeal pursuant to Fed. R. Bankr.P. 8005. (Docket # 1). Because the Sale Order was not stayed, Amalgamated Bank's assignee, Park Lafayette Property Holdings, LLC, closed the sale transaction on January 27, 2011. (Appellee's Br. in Supp. at 8).

DISCUSSION

In support of its motion to dismiss, Amalgamated Bank argues that the Committee's appeal of the bankruptcy court's sale order is moot because the Committee failed to obtain a stay pending appeal and the sale to the Bank as a good faith purchaser already occurred. On the other hand, the Committee argues that its appeal is not moot for failure to obtain a stay because the Committee is challenging the good faith of the purchaser on appeal. In this case, there is no dispute that the bankruptcy court's order approving sale was not stayed pending appeal to this court.

***3** According to 11 U.S.C. § 363(m):

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Id. Pursuant to § 363(m), the Seventh Circuit has consistently held that where an appellant fails to obtain a stay pending appeal of an order authorizing the sale of estate property to a good faith purchaser, the appeal is rendered moot by the occurrence of the sale. *In re Vetter Corp.,* 724 F.2d 52, 55 (7th Cir.1983) ("In the case of a bankruptcy sale, the failure to obtain a stay of the sale, pending appeal, allows the sale to be completed, thus preventing an appellate court from granting relief and thereby rendering the appeal moot."); *In re Sax,* 96 F.2d 994, 997–98 (7th Cir.1986) (finding that " § 363(m) and the cases interpreting it have clearly held that a stay is necessary to challenge" a court-approved sale of property of a debtor to a good faith purchaser); *In re CGI Industries, Inc.,* 27 F.3d 296, 299 (7th Cir.1994) ("[W]e have repeatedly held that when a party challenges the bankruptcy court's order approving the sale of estate property to a good faith purchaser, it must obtain a stay of that order pending appeal, lest the sale proceed and the appeal become moot.").

However, it is also true that a stay is not necessary when an appeal challenges whether the purchaser is a good faith purchaser pursuant to § 363(m). *See In re Sax,* 796 F.2d at 997 n. 4 ("a stay is not required to challenge a sale on the grounds that an entity did not purchase in good faith."); *In re Andy Frain Servs., Inc.,* 798 F.2d 1113 (7th Cir.1986) (considering the issue of good faith on appeal instead of summarily dismissing the appeal for mootness even though no stay had been obtained by the appellant because appellant had challenged the good faith of the purchaser on appeal); *Petroleum & Franchise Funding, LLC v. Bulk Petroleum Corp .,* 435 B.R. 589 (E.D.Wis.2010) (finding that failure to obtain stay pending appeal did not render appeal from the sale order moot where appellant challenged bankruptcy court's certification as to purchaser's good faith). Accordingly, the fact that the Committee is challenging the good faith of Amalgamated Bank in purchasing the debtor's property means the Committee's failure to obtain a stay is not automatically grounds for dismissal.

The Committee argues that the simple fact that it challenges the good faith of the purchaser on appeal allows it to survive Amalgamated Bank's motion to dismiss. The Committee cites to this court's decision in *Bulk Petroleum,* 435 B.R. 589, as support for this proposition. In *Bulk Petroleum,* the court considered only the question of whether a challenge to the good faith of a purchaser pursuant to § 363(m) obviates the necessity that the appellant obtain a stay pending appeal. *Id.* at 591–93. However, in its ruling, the court

also noted that, at the motion to dismiss stage, it was not necessary to evaluate the merits of whether the purchaser acted in good faith. *Id.* at 591. Instead, the court found it sufficient that the appeal challenged the good faith purchaser status of the appellee and that the appellant had proffered evidence in support of its contention. *Id.* While the court's delay of consideration of the issue of good faith may have been warranted in the context of that case, *Bulk Petroleum* does not stand for the proposition that the issue of good faith can never be considered at the motion to dismiss stage. Indeed, courts routinely consider the issue of good faith in the context of a motion to dismiss. *See e.g., In re Tempo Tech. Corp.,* 202 B.R. 363, 367 (D.Del.1996) ("Thus, where the good faith of the purchaser is at issue, the district court is required to review the bankruptcy court's finding of good faith before dismissing any subsequent appeal as moot under section 363(m)."); *Raskin v. Malloy,* 231 B.R. 809 (N.D.Okla.1997) (considering a motion to dismiss pursuant to § 363(m) and concluding that additional briefing was required on the issue of good faith *only* because the court did not have the complete record from the bankruptcy court); *In re Second Grand Traverse School,* 100 Fed.Appx. 430, 433 (6th Cir.2004) (finding "[i]t was not error for the district court to consider the issue of good faith in the context of a motion to dismiss under § 363(m)"); *In re HNRC Dissolution Co.,* 2005 WL 1972592, at *5 (E.D.Ky. Aug. 16, 2005) (determining the issue of good faith at the motion to dismiss stage). While the Seventh Circuit has not squarely addressed this issue, the court finds that consideration of whether Amalgamated Bank was a good faith purchaser pursuant to § 363(m) is proper at this stage of the proceedings because a determination can be made on the record of the bankruptcy court, and the appellant had an opportunity to contest the bad faith of Amalgamated Bank in response to the Bank's motion to dismiss. Accordingly, the court turns to the question of whether the bankruptcy court's determination of good faith was in error.

***4** Good faith is a factual finding reviewed for clear error. *Hower v. Molding Systems Engineering Corp.,* 445 F.3d 935, 938 (7th Cir.2006) (citing *In re Smith,* 286 F.3d 461, 464 (7th Cir.2002)). The burden of proof is placed on the party alleging bad faith or seeking reconsideration of a good faith finding. *Id.* While the Bankruptcy Code does not define good faith nor state how it is to be established, the Seventh Circuit has said that " 'the requirement that a purchaser act in good faith ... speaks to the integrity of his conduct in the course of the sale proceedings.' " *In re Andy Frain Servs., Inc.,* 798 F.2d at 1125 (quoting *In re Rock Industries Machinery Corp.,* 572 F.2d 1195, 1198 (7th Cir.1978)). Typically, "fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders" will destroy a purchaser's good faith status. *Id.*

Appellant contends that the bankruptcy court's finding of good faith is erroneous. The Committee's argument that Amalgamated was not a good faith purchaser is predicated on the Committee's view that "the sale constituted an improper sub rosa plan of reorganization which short-circuited the purpose and protections afforded to all interested parties under the Bankruptcy Code." (Appellant's Resp. Mot. Dismiss at 6). The Committee asserts that the Bank's lack of good faith is evidenced by the following: the debtor failed to show that the assets will substantially diminish in value; the debtor and the Bank received significant benefits throughout the bankruptcy without filing a plan of reorganization and a disclosure statement; the failure to file a plan and disclosure statement prevented sufficient notice, opportunity to object, and opportunity to vote on the Plan; the property was sold to the Bank after approximately one year, which was sufficient time to file a plan and disclosure statement; the sale was predicated upon multiple compromises of potential claims by the estate which were not supported by sufficient justification; the sale and carve-out benefitted one set of creditors over another set of similarly situated creditors without evidencing a distinction between them; the sale resulted in payments to management which, under a plan, would violate the absolute priority rule; details of the settlement reached with certain creditors were not disclosed; neither the debtor nor the Bank made any showing as to why the sale, absent a plan, is necessary or in the best interests of the estate; the sale dictates the entire outcome of the Chapter 11 case; neither the debtor nor the bank had a basis for an expedited sale as the property was sold back to the bank similar to a foreclosure sale; the bank refused to hold the auction when the auction could have increased bids as was testified to at the hearing by Patrick Gillan; and the carve-out for unsecured creditors is not reasonable considering the costs and expenses. (Appellant's Resp. Mot. Dismiss at 6–7).

***5** However, the majority of these contentions do not actually speak to Amalgamated Bank's alleged bad

faith within the meaning of § 363. As the Seventh Circuit has made clear, bad faith in the § 363 context refers to bad faith in the conduct of negotiations, something that the Committee has not demonstrated. *In re Rock Industries Machinery Corp.,* 572 F.2d at 1198. To the contrary, the record is rife with evidence of the Bank's good faith effort to find bidders for the debtor's property. For instance, the record reflects that Amalgamated Bank made substantial efforts to find bids for the highest reasonable value. Most notably, the Bank hired Houlihan as a consultant to assist with the marketing of the debtor's assets. The testimony of Patrick Gillan ("Mr.Gillan"), Senior Vice President of Houlihan, reflects that Houlihan, at the direction of Amalgamated Bank, worked diligently to find Qualified Bids. For example, Mr. Gillan testified that the agreement between Amalgamated Bank and Houlihan was typical of other engagements in that the Bank wanted to get the highest and best price for the property. (Dec. 23, 2010 Hearing Tr. at 102) (Docket # 1–78). Mr. Gillan also testified that it was his impression that Amalgamated Bank wanted Houlihan to find a bidder for the property that would ultimately buy it. (*Id.* at 106). Mr. Gillan testified that the terms of the agreement between the Bank and Houlihan provided Houlihan with an incentive to pursue the highest and best price for the property. (*Id.* at 103). Mr. Gillan testified that to market the property, Houlihan did the following: (1) prepared a 60–100 page package describing the investment; (2) prepared an extensive investor list, including 50–100 targets to actively call and e-mail; (3) broadly marketed the property by e-mail through a real estate distribution system; (4) contacted over 2,600 investors by e-mail and 185 investors by telephone and follow up e-mail; (5) obtained 38 signed confidentiality agreements from individuals interested in accessing the online data room for the property; and (6) conducted site visits for potential investors to visit the property. (*Id.* at 103–05). Despite these efforts, no party other than Amalgamated Bank submitted a qualified bid by the bid deadline. (*Id.* at 106–07).

Furthermore, the bankruptcy court heard testimony from James Freel ("Mr.Freel"), Senior Vice President and Chief Real Estate Officer of the Asset Management and Trust Division of Amalgamated Bank. Mr. Freel testified that the Bank offered $55,000,000 as its stalking horse credit bid because it felt that amount represented a fair value for the property. (*Id.* at 81). Mr. Freel also testified that if a party had submitted a Qualified Bid in an amount acceptable to Amalgamated Bank, the Bank would have consented to the sale to that party. (*Id.* at 82–83). Indeed, Mr. Freel averred that a sale to a party other than the Bank was Amalgamated Bank's objective when it engaged Houlihan to market the property. (*Id.*) Mr. Freel testified that the Bank acted in good faith, did not act in contravention of law, did not collude with any party, did not discourage any party from bidding on the property, did not instruct Houlihan to refrain from speaking to bidders, and had not entered into any agreements with third parties to sell the property after the transfer of title to the Bank. (*Id.* at 83–84).

***6** Moreover, there is no evidence indicating that the debtor and Amalgamated Bank failed to comply with the bidding and auction procedures as set forth in the Sale Procedures Order. Indeed, no party, not least of all the Committee, filed an appeal of that Order. Thus, the Committee's contention that the Bank's failure to conduct an auction evidences the Bank's bad faith is without merit. Pursuant to the Sale Procedures Order, an auction of the debtor's assets was only to occur if the debtor received one or more Qualified Bids in addition to Amalgamated Bank's Qualified Bid. (Sale Procedures Order at 9) (Docket # 1–58). No Qualified Bids other than Amalgamated Bank's bid were received and, thus, no auction was required.

On the other hand, at the hearing before the bankruptcy court, though the Committee cross-examined both Mr. Gillan and Mr. Freel, it did not elicit any testimony indicating that the Bank purchased the property in bad faith, nor did it offer any other evidence demonstrating that Amalgamated was not a good faith purchaser. The only evidence the Committee points to as support for its challenge to the Bank's good faith status is the testimony of Mr. Gillan in which he states that after the formal submission of all bids, some bidders informed Houlihan that they may have been able to submit a higher bid. (Dec. 23, 2010 Hearing Tr. at 109). However, Mr. Gillan categorized these statements as "soft comments" and further noted that no bidder actually submitted a higher bid and no bidder ever indicated that they could reach or even come close to bidding at the Qualified Bid level. (*Id.*).

Based on this evidence, the bankruptcy court determined that the sale was conducted in good faith and that the debtor had exercised good business judgment in connection with the sale. (*Id.* at 122). The bankruptcy

court explicitly found that there was no evidence of collusion or of any attempt to discourage bidders from participating in the auction. (*Id.* at 126). Specifically, the bankruptcy court stated: "I think looking at the sale as a whole, there is simply not any evidence that there has been anything other than a good faith effort to conduct the sale in a way that would maximize the benefit for all creditors, not the least of whom of course is Amalgamated." (*Id.* at 128).[2] The court also noted that simply because the bidding process did not "pan out" in the way the Committee wanted, this was not "an after the fact demonstrator of bad faith." (*Id.* at 127).

Furthermore, the court found that the sale was not an attempt to subvert the plan process. (*Id.* at 124). Significantly, it addressed the Committee's concerns over a confidential settlement agreement that occurred between Amalgamated Bank and another creditor, Hunzinger Construction Company ("Hunzinger"). At the bankruptcy court hearing and now on appeal, the Committee argues that the terms of that settlement agreement should have been disclosed and also that the carve-out given to the unsecured creditors as a part of the asset sale did not benefit the unsecured creditors to the same degree as Hunzinger benefitted from the settlement with Amalgamated Bank. Accordingly, the Committee argues that the carve-out and the sale are not fair and that the sale was not conducted in good faith. The bankruptcy court responded to this argument by noting that Hunzinger decided to file an adversary proceeding, not against the debtor, but against Amalgamated Bank, another creditor. (*Id.* at 124–25). These two parties resolved their dispute and the debtor was not a party to the settlement. (*Id.*) Therefore, there was no requirement that the terms of that settlement be disclosed. (*Id.*). Moreover, the bankruptcy court found that Amalgamated Bank's settlement with Hunzinger, even if it resulted in disparate treatment among creditors, was not evidence that the sale of assets was conducted in bad faith. Specifically, the bankruptcy court found that the other creditors had the same opportunity as Hunzinger to file an adversary proceeding against Amalgamated Bank, but chose, for whatever reason, not to do so. (*Id.*). In light of this fact, the bankruptcy court noted it was unreasonable for the Committee to now argue that the sale of assets was unfair and conducted in bad faith. (*Id.*)

***7** The bankruptcy court's findings are not clearly erroneous. They are well supported by substantial evidence in the record. There was no evidence on the record of collusion, fraud, or an attempt to take grossly unfair advantage of other bidders. In fact, there is only evidence to the contrary—that Houlihan made extensive efforts to market the debtor's property. And, while there is evidence of some communication and cooperation between Amalgamated Bank and the debtor, the Committee has not shown that the communication and cooperation amounted to anything other than a good faith attempt to maximize the recovery of value of the property for the benefit of the bankruptcy estate. Furthermore, the fact that Hunzinger may be benefitting differently than other creditors due to its decision to file a lawsuit against Amalgamated Bank, and the fact that the settlement terms have not been disclosed to the Committee, is not evidence of bad faith, especially because the debtor was not a party to this separate proceeding and all the creditors had the same opportunity as Hunzinger did to file an adversary proceeding against Amalgamated Bank. Accordingly, this court is satisfied that the bankruptcy court's conclusion that the sale was made in good faith is correct.

Because the appellant did not obtain a stay of the sale order and because the sale was made in good faith, Amalgamated Bank's motion to dismiss pursuant to 11 U.S.C. § 363(m) will be granted and this appeal will be dismissed.

Accordingly,

IT IS ORDERED that the bankruptcy court's finding of good faith be and the same is hereby **AFFIRMED;**

IT IS FURTHER ORDERED that appellee Amalgamated Bank's Motion to Dismiss the Appeal as Moot (Docket # 3) be and the same is hereby **GRANTED;** and

IT IS FURTHER ORDERED that this appeal be and the same is hereby **DISMISSED** as moot pursuant to 11 U.S.C. § 363(m).

The clerk of court is ordered to enter judgment accordingly.

All Citations

Not Reported in F.Supp.2d, 2011 WL 2671254, Bankr. L. Rep. P 82,037

Footnotes

1 The goal of an asset sale in the bankruptcy context is to maximize the recovery of value for the bankruptcy estate. To that end, the purpose of a “stalking horse” bid or offer is to establish a framework for competitive bidding and to facilitate a realization of that value. 2 L. Distressed Real Est. § 28B:9. For example, a stalking horse bidder will reach an agreement with the debtor to purchase assets prior to a court-supervised auction of those assets. *Id.* Because typically the bid will be exposed to higher and better bids at auction, the agreement often provides for a “break-up fee” to compensate the stalking horse bidder for “setting the floor at auction, exposing its bid to competing bidders, and providing other bidders with access to the due diligence necessary to enter into an asset purchase agreement.” *Id.*

2 The Committee objected to many aspects of the Sale Order and, in light of these objections, another hearing was held on January 5, 2011. At this hearing, the bankruptcy court reaffirmed its finding of good faith and stated yet again that it did “not hear one iota of evidence that the bank did not comply with the procedures that were outlined in the Sale Order.” (Jan. 5, 2011 Hearing Tr. at 15) (Docket # 1–83).

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[3]

COURT FILE NO.: 03-CL-5145

DATE: 20040610

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

*AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "*A"

BEFORE: CUMMING J.

COUNSEL: ***M. P. Gottlieb,* for the Applicants**
Michael E. Barrack and ***Geoff R. Hall***, for QIT
E. Lamek, for the National Bank of Canada
Peter Howard, for the Monitor, Ernst & Young Inc.
D. V. MacDonald, for Bank of Nova Scotia
J. T. Porter, for UBS
Ken Rosenberg, for United Steel Workers of Canada

Heard: **June 9, 2004**

E N D O R S E M E N T

The Motion

[1] The moving party Applicants, Ivaco Rolling Mills Limited Partnership, comprising some eight affiliated corporations ("IRM"), seek directions from the Court in respect of the sales process for its business under the *Companies' Creditors Arrangement Act* ("*CCAA*"). The motion raises an important issue relating to the respective roles of the Monitor and Chief Restructuring Officer in that process. The Court provided a decision at the conclusion of the hearing, with reasons to follow.

Background

[2] IRM is engaged in the steel manufacturing and processing business in Canada. QIT-Fer Et Titane Inc. ("QIT") is a major supplier to IRM of steel billets pursuant to a long-standing supply agreement. QIT is also a major unsecured creditor of IRM, being owed some $62 million.
[3] The Applicants obtained an Initial Order under the *CCAA* September 16, 2003. A Chief Restructuring Officer ("CRO") was appointed October 24, 2003.

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[4] On December 11, 2003 this Court authorized IRM to pursue a dual-track restructuring process: one track is a stand-alone restructuring plan; the second track is the pursuit of a sales process.

[5] The Monitor, the CRO and the unsecured creditors of IRM have a concern that QIT seeks a way whereby it will be paid the monies owing to it by IRM outside the parameter of the *CCAA* proceeding. The record gives some force to this concern.

[6] A Court Order dated March 22, 2004 authorized a limited number of prospective purchasers to submit offers for the assets of one or more of the Applicants. Some four bidders have now submitted proposals in this regard. Understandably, it is a condition of the proposals that the bidders be able to satisfy themselves as to the nature and status of the historical and existing relationship between QIT and IRM and the nature of any relationship for the future between a buyer of IRM's business and QIT.

[7] The concern that has been raised by the Monitor, CRO and a number of IRM's creditors is that QIT may seek to enter into a relationship with a bidder whereby QIT could achieve some recovery of IRM's pre-filing debt of $62 million at the expense of other unsecured creditors.

[8] Any purchaser of IRM requires a supply contract with QIT as there are no apparent competitors for its product sold to IRM. The concern is that QIT could insist upon a supply arrangement with the bidder at an unreasonably high price with the bidder offering an unreasonably low price for the assets of IRM. The creditors, Monitor, and the Applicants are concerned that QIT might enter into a supply arrangement with a bidder at the expense of IRM by virtue of the price for IRM's assets being lower than would otherwise be the case in a normal market transaction.

[9] Meetings have been set up to take place between the bidders, the Applicants through the CRO, the Monitor and QIT with a view to determining whether any one or more bidder can achieve a supply agreement with QIT within a context of a satisfactory unconditional bid by that bidder for the assets of one or more of the Applicants.

The Issue

[10] Several issues raised at the outset of the motion were settled by agreement as discussions progressed. It is not necessary to discuss these settled issues. The settled position provides that the Monitor can observe the negotiations to take place between QIT and each bidder. The settled position also provides that disclosure can be made to bidders of the existing supply agreement between IRM and QIT.

[11] A single issue remained for determination by the Court at the conclusion of the hearing, being whether or not the CRO was to be part of the sales process. QIT took the position that the CRO should not be part of the process. The Applicants, the Monitor and the other major

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unsecured creditors all took the position that the CRO should be part of the sales process. Only QIT, supported by the United Steel Workers of Canada, took the contrary view.

[12] The only support for QIT came from the United Steel Workers of Canada, being the Union representing the workers of IRM through a collective bargaining agreement. The position expressed by counsel for the Union was that the continuity of IRM's business is critical to the direct welfare of its employees and is of indirect benefit to the community at large. There is a clear public interest in the welfare of the workers. Undoubtedly, that is a correct, and important observation.

[13] Thus, counsel for the Union argued further, the Court should accede to the position of QIT even though it might result in a failure to maximize the value of the IRM assets through the *CAA* proceeding. In my view, the Union's quite proper concern for the welfare of the workers cannot justify trumping the concern of creditors that they be treated fairly. Nor would it ever be in the broader notion of the public interest to allow a sales process perceived to be unfair to go forward. The public policy underlying the *CCAA* and its objectives would be undermined. Indeed, it might well be that any proposed sale would not then garner the requisite support of creditors required for approval under the *CCAA*. It might be that the business of IRM is more likely to fail, to the ultimate disadvantage of its workers, through a compromise to the integrity of the sales process. In any event, the Court could not sanction a proposed plan of compromise that was the result of an unfair process.

[14] QIT professes that if the CRO takes part in the negotiations between the bidders and QIT that this will necessarily inhibit the sales process. QIT claims this will be so because bidders will be reluctant to provide confidential information to QIT, and vice-versa, while recognizing that the CRO may then use that information to enhance an alternative stand-alone restructuring plan and consequentially advise against acceptance of the bidder's proposal.

Disposition

[15] There are certain fundamentals to a *CCAA* proceeding relevant to a determination of the issue at hand. First, there cannot be a sales process whereby one unsecured creditor secures a secret benefit or advantage over the other unsecured creditors. Such a result would be the equivalent of providing a preference for that creditor. Fairness to all the creditors is a prerequisite to a satisfactory sales process. Second, the sales process must be seen to be fair. That is, there must be transparency.

[16] Third, the sales process is to be determined by the Court after considering the advice of the Monitor and the position of the Applicants and their creditors. The sales process is not dictated by a supplier *qua* supplier. It may be the supplier does not wish to participate in the sales process given the nature of the process. That is for the supplier to determine in its own self-interest. In the situation at hand, QIT conceivably might say that it would rather lose its supplier relationship with IRM or a successor, to its apparent significant economic detriment, than proceed in the sales process.

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[17] The CRO's attendance and participation in the sales process is critical because he is the independent party who must understand all the various bids and weigh each against the possibility of a stand-alone restructuring. He must ultimately make recommendations that engender confidence as being advanced on the best information and advice possible. The CRO is an active part of the negotiations in the sales process. He is not involved as a relatively passive observer in the manner of the Monitor.

[18] The sales process has been determined by the Applicants with the approval of the Court. The CRO represents the Applicants in that process. The intended sales process is one of trilateral negotiations. If QIT, IRM or any bidder wishes to discontinue such negotiations at any time that is, of course, that party's right. It is in the obvious self-interest of IRM, QIT, and any bidder to maintain the existing QIT to IRM (or successor) supply relationship. It would seem to be a win - win - win situation to come to a tripartite agreement. While no one can be ordered to enter into any new agreement every participant is required to engage in a sales process that is fair and is seen to be fair. The CRO is involved with the purpose of achieving the best result for the Applicants and a result which will be approved by the requisite number of creditors.

[19] Turning to the instant situation, there are a number of Applicants with different unsecured creditors for different Applicants. It is necessary that any negotiated sale (or restructuring) take into account such complexities so that fairness is achieved for all the creditors (and is seen to be achieved.)

[20] QIT proposed that the CRO would be excluded from the negotiations unless his presence was requested by either a bidder or by QIT. I disagree. In my view, the CRO has the right to attend and participate throughout the entirety of the negotiations in the sales process. In the event that a discrete issue arises in the context of a particular bidder's negotiations with QIT, such that there is disagreement as to whether the Monitor or CRO should be absent, then the further direction of the Court can be sought in the context of that specific issue. This will allow for QIT's expressed concerns for bidders in the negotiation process to be taken into account, should this be necessary. It is noted incidentally that no bidder has come forward in the hearing at hand to support QIT in respect of its expressed concerns about the sales process.

[21] Absent some compelling, exceptional factor to the contrary (not seen here), in my view, the Court should accept an applicant's proposed sales process under the *CCAA*, when it has been recommended by the Monitor and is supported by the disinterested major creditors. The Court has the discretion to stipulate a variation to such a proposed sales process plan. However, the exercising of such discretion would seem appropriate in only very exceptional circumstances.

[22] An Order will issue in the form attached hereto as Annex "A". There are no costs granted to any party.

CUMMING J.

June 10, 2004

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ANNEX "A"

Court File No. 03-CL-5145

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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	**WEDNESDAY, THE 9th**
	)	
MR. JUSTICE CUMMING	)	**DAY OF JUNE, 2004**

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 IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

ORDER

THIS MOTION, made by the Applicants for directions with respect to the sales process in respect of discussions involving QIT Fer et Titane Inc. ("QIT"), was heard this day at 393 University, Toronto.

ON READING the Notice of Motion, the Tenth Report of the Monitor, Ernst & Young Inc., the Affidavit of Randall C. Benson, the Affidavit of Gary A. O'Brien, and the Supplementary Affidavit of Randall C. Benson, and on hearing the submissions of counsel for the Applicants, the Monitor, QIT, the Informal Committee of Noteholders, the United Steelworkers of America, the Bank of Nova Scotia, the National Bank of Canada and UBS Securities LLC:

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record herein is abridged so that the motion is properly returnable today, and that any requirement for service of the Notice of Motion and of the Motion Record upon any party not served is dispensed with.

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2. **THIS COURT ORDERS** that the sales process in respect of discussions involving QIT shall be governed by the following procedure:

(a) QIT shall have seven days from the date of this Order to meet with the bidders who have submitted final proposals in the second round of the sales process authorized by order of this court dated March 22, 2004. The Monitor and CRO shall have the right to attend and participate in all such meetings. At the conclusion of the seven day period, QIT shall inform the Monitor of those bidders with whom it is prepared to conduct further negotiations. After considering the views of QIT and the Applicants, the Monitor shall identify to the Applicants and QIT the bidders with whom further negotiations shall occur (the “Bidders”). If either QIT or the Applicants disagree with the Monitor then they may apply to the court for directions.

(b) After the Bidders have been identified, QIT shall disclose relevant portions of the long-term supply agreement dated April 15, 1999 between QIT and Ivaco Rolling Mills Limited Partnership (“IRM”) which QIT claims has been terminated and which the Applicants claim has not been terminated (the “Agreement”) to the Bidders, under appropriate confidentiality arrangements. QIT and the Monitor shall have discussions to determine what portions of the Agreement are relevant and to determine appropriate confidentiality arrangements. If they cannot agree,

they shall seek further directions from the court. Further, if the Applicants do not agree with the determination of QIT and the Monitor as to what portions of the Agreement are relevant, they shall be at liberty to apply to the court for further directions regarding the disclosure of the Agreement. This order shall be without prejudice to the Applicants' position that the Agreement is not confidential and that it may disclose the entire Agreement.

(c) QIT shall then undertake negotiations with the Bidders. The Monitor and CRO shall be entitled to attend and participate in these negotiations so as to be in a position to report to the court on the outcome of them. No other parties shall participate in the negotiations, except that at the request of either QIT or a Bidder technical personnel from the Applicants will be entitled to participate in order to give necessary technical assistance. If the parties cannot agree on the appropriate participation of additional persons they shall seek further directions from the court. At the request of QIT and a Bidder, the Monitor may in its discretion absent itself from parts of negotiations which it considers best to proceed privately. If the Monitor refuses such request, QIT or the Bidder may apply to the court for directions. At the request of QIT or a Bidder, the CRO may in his discretion absent himself from parts of negotiations which he considers best to proceed privately. If the CRO refuses such request, QIT or the Bidder may apply to the court for directions.

(d) The negotiations and meetings referred to shall be conducted under appropriate confidentiality arrangements.

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SCHEDULE “A”

APPLICANTS FILING FOR CCAA

1. Ivaco Inc.
2. Ivaco Rolling Mills Inc.
3. Ifastgroupe Inc.
4. IFC (Fasteners) Inc.
5. Ifastgroupe Realty Inc.
6. Docap (1985) Corporation
7. Florida Sub One Holdings, Inc.
8. 3632610 Canada Inc.

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[3]

B E T W E E N :

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 IVACO INC. AND TH APPLICANTS LISTED IN SCHEDULE "A"

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

Court File No. CV-21-00658423-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF JUST ENERGY GROUP INC. *et al.*

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

BOOK OF AUTHORITIES OF THE DIP LENDERS

MOTION FOR SALE PROCESS APPROVAL ORDER
RETURNABLE AUGUST 17, 2022

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