

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 SEARS CANADA INC., CORBEIL ÉLECTRIQUE
INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT
SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM
COMMERCE LABS INC., INITIUM TRADING AND SOURCING
CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA
INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711
CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD.,
4201531 CANADA INC., 168886 CANADA INC., AND 3339611
CANADA INC.

APPLICANTS

BOOK OF AUTHORITIES OF THE APPLICANTS

October 3, 2017

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Secondary Sources

18. J. Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd Ed. (Toronto: Carswell, 2013)

TAB 1

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

Clément Gascon, J.C.S.

Heard: April 26, 2010

Judgment: May 3, 2010

Docket: C.S. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Guy P. Martel, Me Joseph Reynaud, for the Debtors
Me Avram Fishman for the Monitor

Me Robert E. Thornton for the Monitor

Me Serge F. Guérette for the Term Lenders

Me Nicolas Gagné for Ville de Beaupré

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

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

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

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

Subject: Insolvency; Civil Practice and Procedure

MOTION by corporation seeking Court's approval of sale.

Clément Gascon, J.C.S:

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

Introduction

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

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

The Motion at Issue

3 Through their Amended Motion for the Issuance of an Order Authorizing the Sale of Certain Assets of the Petitioners (Four Closed Mills)(the "*Motion*"), the Petitioners seek the approval of the sale of four closed mills to American Iron & Metal LP ("*AIM*") and the issuance of two Vesting Orders¹ in connection thereto.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 It claims that its penultimate bid² for the Closed Mills was a proposal for CDN\$22.1 million in cash, an amount more than CDN\$8.3 million greater than the amount proposed by the Petitioners in the Motion.

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

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

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

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

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

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

25 It is worth mentioning as well that even though he did not contest the Motion *per se*, the Ville de Beaupré's Counsel voiced his client's concerns with respect to the amount of unpaid taxes³ currently outstanding in regard to the Beaupré Mill located on its territory.

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

Analysis and Discussion

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

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

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

30 This notwithstanding, it remains that in determining whether or not to approve the sale, the Court had to be satisfied that the applicable criteria were indeed met. Because of that, the complaints raised would have seemingly been looked at, no matter what. As part

of its role as officer of the Court, the Monitor had, in fact, raised and addressed them in its 38th Report in any event.

31 The Court's brief reasons follow.

The Sale Approval

32 In a prior decision rendered in the context of this restructuring⁴, the Court has indicated that, in its view, it had jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale was in the best interest of the stakeholders generally⁵.

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

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

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

35 These principles were established by the Ontario Court of Appeal in the *Royal Bank v. Soundair Corp.*⁶ decision. They are applicable in a CCAA sale situation⁷.

36 The *Soundair* criteria focus first and foremost on the "integrity of the process", which is integral to the administration of statutes like the CCAA. From that standpoint, the Court must be wary of reopening a bidding process, particularly where doing so could doom the transaction that has been achieved⁸.

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

38 The Court agrees with the Monitor's view that, in trying to achieve the best possible result within the best possible time frame, the Petitioners, with the guidance and assistance

of the Monitor, have conducted a fair, reasonable and thorough sale process that proved to be transparent and efficient.

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

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

41 Moreover, Arctic Beluga willingly and actively participated in these phases of the bidding process. The fact that it now seeks to nevertheless challenge this process as being unfair is rather awkward. Its active participation certainly does not assist its position on the contestation of the sale approval⁹.

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

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

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

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

- (a) the purchase price was fair and reasonable and subjected to a thorough canvassing of the market;
- (b) the offer included a sharing formula, based on future gross sale proceeds from the sale of the paper machines located at the Closed Mills, that provided for potential sharing of the proceeds from the sale of any paper machines;
- (c) AIM confirmed that no further due diligence was required;

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

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

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

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

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

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

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

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

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

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

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

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

56 From that perspective, the concerns expressed by the Petitioners and the Monitor over the clauses of Arctic Beluga penultimate bid concerning the exclusion of liability for hazardous material were, arguably, reasonable concerns¹⁰. Mostly in the absence of similar exclusion in the offer of AIM.

57 Similarly, their conclusion that the answers¹¹ provided by that bidder for the funding requirement of their proposal were not satisfactory when compared to the ones given by AIM¹² cannot be set aside by the Court as being improper.

58 In that regard, the solicitation documentation¹³ sent to Arctic Beluga and the other bidders clearly stated that selected bidders would have to provide evidence that they had secured adequate and irrevocable financing to complete the transaction.

59 A reading of clauses 4 and 5 of the "funding commitment" initially provided by Arctic Beluga¹⁴ did raise some question as to its adequate and irrevocable nature. It did not satisfy the Petitioners that Arctic Beluga had the ability to pay the proposed purchase price and did not adequately demonstrate that it had the funds to fulfill, satisfy and fund future environmental obligations.

60 The subsequent letter received from Arctic Beluga's bankers¹⁵ did appear to be somewhat incomplete in that regard as well.

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

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

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

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

65 The dollar amount of Arctic Beluga's offer is irrelevant unless it can be used to demonstrate that the Petitioners, with the assistance of the Monitor, acted improvidently in accepting AIM's offer over theirs¹⁶.

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

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

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

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

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

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

72 In prior decisions rendered in similar context¹⁹, courts in this province have emphasized that they should intervene only where there is clear evidence that the Monitor failed to act properly. A subsequent, albeit higher, bid is not necessarily a valid enough reason to set aside a sale process short of any evidence of unfairness.

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

74 AIM has transferred an amount of \$880,000 to the Petitioners' Counsel as a deposit required under the Purchase Agreement. It has the full financial capacity to consummate the sale within the time period provided for²⁰.

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

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

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

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

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

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

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

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

The Standing Issue

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

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

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

81 Interestingly, the Court notes that in the few reported decisions²¹ of this province's courts dealing with the contestation of sale approval motions, the standing issue of the disgruntled bidder has apparently not been raised or analyzed.

82 In comparison, in a leading case on the subject²², the Ontario Court of Appeal has ruled, a decade ago, that a bitter bidder simply does not have a right that is finally disposed of by an order approving a sale of a debtor's assets. As such, it has no legal interest in a sale approval motion.

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

24 [...] If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

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

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

84 The Ontario Court of Appeal explained as follows the policy reasons underpinning its approach to the lack of standing of an unsuccessful prospective purchaser²³:

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

commercial leverage in the hands of a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

85 Along with what appears to be a strong line of cases²⁴, Morawetz J. recently confirmed the validity of the *Skyepharma* precedent in the context of an opposition to a sale approval filed by a disgruntled bidder in both Canadian proceedings under the CCAA and in US proceedings under Chapter 11²⁵.

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

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

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

For these Reasons, The Court:

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

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

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

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

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

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

- Hypothec dated February 17, 2000 registered under number 140 085 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);
- Hypothec dated April 1, 2008 registered under number 15 079 215 and assigned on January 21, 2010 under number 16 882 450 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;
- Hypothec dated August 18, 2008 registered under number 15 504 248 in the index of immovables with respect to lot 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

- Hypothec dated October 30, 2008 registered under number 15 683 288 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency (legal construction);
- Hypothec dated April 20, 2009 registered under number 16 123 864 in the index of immovables with respect to lot 3 681 454 (legal construction) and Prior notice for sale by judicial authority dated July 23, 2009 registered under number 16 400 646 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and;
- Hypothec dated May 8, 2009 registered under number 16 145 374 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;
- Hypothec dated May 8, 2009 registered under number 16 145 375 and subrogated on January 1, 2010 under number 16 851 224 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency; and
- Hypothec dated December 9, 2009 registered under number 16 789 817 in the index of immovables with respect to lots 3 681 454 and 3 681 089 of the Cadastre of Quebec, Registration of Montmorency;

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

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

- Hypothec dated April 30, 2009 registered under number 16 122 878 and assigned on May 22, 2009 under number 16 184 386 with respect to lots 3 507 098, 3 507 099, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;
- Hypothec dated March 18, 1997 registered under number 482 357 modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf; and
- Hypothec dated November 24, 1998 registered under number 493 417 and modified on August 30, 1999 under registration number 497 828 with respect to lots 3 507 098, 3 507 101 and 3 507 106 of the Cadastre of Quebec, Registration Division of Portneuf;

7 **ORDERS** the Quebec Personal and Movable Real Rights Registrar, upon presentation of the required form with a true copy of this Vesting Order and the First Closing Monitor's Certificate, to reduce the scope of the hypothecs registered under numbers: 06-0308066-0001, 08-0674019-0001, 09-0216695-0002, 09-0481801-0001 and 09-0236637-0016²⁶ in connection with the Donnacona Assets and 08-0163796-0002, 08-0163791-0002, 08-0695718-0002, 09-0481801-0002, 09-0256803-0016²⁷, 09-0256803-0002²⁸ and 09-0762559-0002 in connection with the Beaupré Assets and to cancel, release and discharge all of the First Closing Assets Encumbrances in order to allow the transfer to the Purchaser of the Beaupré Assets and the Donnacona Assets, as described in the Purchase Agreement, free and clear of any and all encumbrances created by those hypothecs;

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

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

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

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

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

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

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

13 **ORDERS** that for the purposes of determining the nature and priority of the First Closing Assets Encumbrances, the Net Proceeds from the sale of the First Closing Assets shall stand in the place and stead of the First Closing Assets, and that upon payment of the First Closing Purchase Price (as defined in the Purchase Agreement) by the Purchaser, all

First Closing Assets Encumbrances except those listed in Schedule E hereto shall attach to the Net Proceeds with the same priority as they had with respect to the First Closing Assets immediately prior to the sale, as if the First Closing Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

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

15 **ORDERS** that notwithstanding:

(i) the proceedings under the CCAA;

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

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

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

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

17 **REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order, including without limitation, the United States Bankruptcy Court for the District of Delaware, and to assist the Monitor and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to

make such orders and to provide such assistance to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order;

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

19 **WITHOUT COSTS.**

Schedule "A" — Abitibi Petitioners

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

18. *SCRAMBLE MINING LTD.*
19. *9150-3383 QUÉBEC INC.*
20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

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

19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

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

Schedule "D" — First Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

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

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

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

CERTIFICATE OF THE MONITOR

Recitals:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "*Court*") issued an order (as subsequently amended and restated, the "*Initial Order*") pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") in respect of (i) Abitibi-Consolidated Inc. ("*ACT*") and subsidiaries thereof (collectively, the "*Abitibi Petitioners*"),²⁹ (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "*Bowater Petitioners*")³⁰ and (iii) certain partnerships³¹. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

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

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

WHEREAS the Purchase Agreement contemplates two distinct closing in order to complete the Sale Transactions, namely a First Closing in respect of the First Closing Purchased Assets

and a Second Closing in respect of the Fort William Purchased Assets (all capitalized terms as defined in the Purchase Agreement).

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

- (a) the Purchase Agreement has been executed and delivered;
- (b) the portion of the First Closing Purchase Price payable upon the First Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);
- (c) all conditions to the First Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

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

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

Name: _____

Title: _____

Schedule "E" — Permitted First Closing Assets Encumbrances

1. Beaupré Mill

- a. Servitudes dated February 10, 1954 registered under numbers 34 173, 34 174, 34 175, 34 176, 34 177, 34 178, 34 179, 34 180 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;
- b. Servitude dated April 4, 1964 registered under number 45 815 in the index of immovables with respect to lot 3 681 454 in the Registration Division of Montmorency, Cadastre of Québec;
- c. Servitudes dated December 17, 1980 registered under numbers 83 049, 83 050, 83 051, 83 052 and 83 053 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

- d. Servitudes dated December 18, 1980 registered under number 83 095, 83 096 and 83 097 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- e. Servitude dated December 23, 1980 registered under number 83 121 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- f. Servitudes dated December 24, 1980 registered under numbers 83 140, 83 141, 83 142, 83 143, 83 144, 83 145, 83 146 and 83 147 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- g. Servitude dated December 30, 1980 registered under number 83 182 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- h. Servitudes dated January 7, 1981 registered under numbers 83 196, 83 197, 83 198 and 83 199 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- i. Servitudes dated January 9, 1981 registered under numbers 83 215 and 83 216 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- j. Servitude dated March 20, 1981 registered under number 83 751 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- k. Servitude dated June 22, 1981 registered under number 84 426 in the index of immovables with respect to lot 3 682 466 in the Registration Division of Montmorency, Cadastre of Québec;
- l. Servitude dated November 13, 1981 registered under number 85 429 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- m. Servitude dated December 4, 1981 registered under number 85 555 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

- n. Servitude dated December 9, 1981 registered under number 85 567 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- o. Servitude dated December 14, 1981 registered under number 85 602 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- p. Servitude dated December 16, 1981 registered under number 85 617 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- q. Servitude dated December 7, 1982 registered under number 87 882 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- r. Servitude dated December 20, 1982 registered under number 88 007 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- s. Servitude dated March 23, 1983 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- t. Servitude dated September 9, 1983 registered under number 90 365 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- u. Servitude dated April 25, 1985 registered under number 91 154 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- v. Servitude dated July 7, 1986 registered under number 98 833 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- w. Servitude dated September 8, 1986 registered under number 99 187 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;

- x. Servitude dated December 23, 1997 registered under number 91 937 in the index of immovables with respect to lot 3 681 089 in the Registration Division of Montmorency, Cadastre of Québec;
- y. Servitude dated December 23, 1997 registered under number 134 993 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec;
- z. Servitude dated December 23, 1997 registered under number 134 994 in the index of immovables with respect to lot 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec; and
- aa. Servitude dated July 25, 2000 registered under number 141 246 in the index of immovables with respect to lots 3 681 089 and 3 681 097 in the Registration Division of Montmorency, Cadastre of Québec.

2. Dalhousie Mill

None

3. Donnacona Mill

- a. Servitude dated November 12, 1920 registered under number 68 747 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- b. Servitude dated October 26, 1931 registered under number 80007 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- c. Servitude dated May 11, 1933 registered under number 87 789 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- d. Servitude dated April 10, 1946 registered under number 109891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- e. Servitude dated October 6, 1951 registered under number 125685 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;

- f. Servitude dated February 16, 1961 registered under number 154 517 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- g. Servitude dated February 1, 1983 registered under number 272521 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- h. Servitude dated April 14, 1986 registered under number 293891 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- i. Servitudes dated March 25, 1987 registered under numbers 301930, 301931 and 302028 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- j. Servitude dated October 30, 1990 registered under number 333377 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- k. Servitude dated April 19, 1996 registered under number 476330 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec;
- l. Servitude dated April 19, 1996 registered under number 476331 in the index of immovables with respect to lots 3 507 098, 3 507 101 and 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec; and
- m. Servitude dated May 20, 2003 registered under number 10 410 139 in the index of immovables with respect to lot 3 507 106 in the Registration Division of Portneuf, Cadastre of Québec.

Schedule "F" — Second Closing Monitor's Certificate

CANADA

PROVINCE OF QUEBEC DISTRICT OF MONTRÉL

No.: 500-11-036133-094

SUPERIOR COURT

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

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

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

CERTIFICATE OF THE MONITOR

Recitals:

WHEREAS on April 17, 2009, the Superior Court of Quebec (the "*Court*") issued an order (as subsequently amended and restated, the "*Initial Order*") pursuant to the *Companies' Creditors Arrangement Act* (the "*CCAA*") in respect of (i) Abitibi-Consolidated Inc. ("*ACI*") and subsidiaries thereof (collectively, the "*Abitibi Petitioners*"),³² (ii) Bowater Canadian Holdings Inc. and subsidiaries and affiliates thereof (collectively, the "*Bowater Petitioners*")³³ and (iii) certain partnerships³⁴. Any undefined capitalized expression used herein has the meaning set forth in the Initial Order and in the Closed Mills Vesting Order (as defined below);

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

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

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

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

- (a) the Purchase Agreement has been executed and delivered;
- (b) the portion of the Second Closing Purchase Price payable upon the Second Closing and all applicable taxes have been paid (all capitalized terms as defined in the Purchase Agreement);
- (c) all conditions to the Second Closing under the Purchase Agreement have been satisfied or waived by the parties thereto.

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

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

Name: _____

Title: _____

Schedule "G" — Permitted Fort William Assets Encumbrances

Section 1 Permitted Fort William Land Titles Assets Encumbrances

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

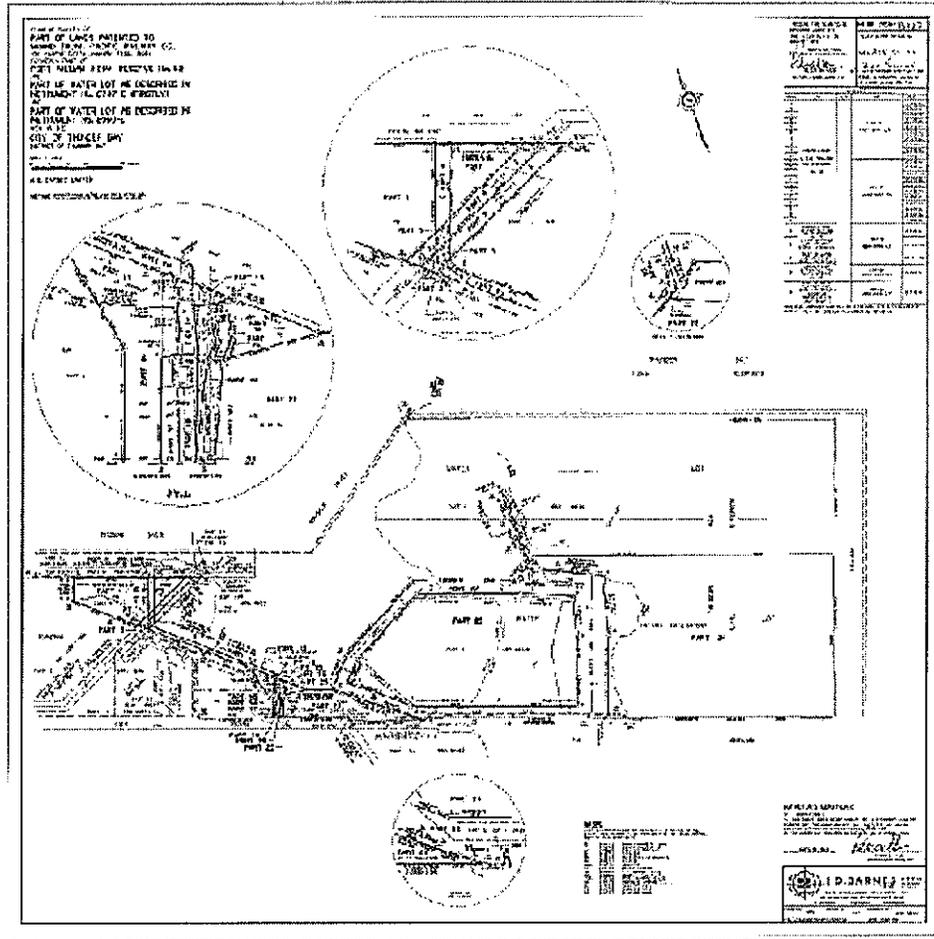
Section 2 Permitted Fort William Registry Assets Encumbrances

3. Notification Agreement in favour of the City of Thunder Bay, Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 11, 12, 13, 14, 15, 16 and 25, 55R-13027
4. Telephone Easement in favour of the City of Thunder Bay registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Part 20, 55R-13027
5. Water Easement in favour of the City of Thunder Bay, registered on Part of PIN 62261-0533, PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 12 and 15, 55R-13027
6. Easement in favour of Union Gas, registered on Part of PIN 62261-0533 , PT Fort William Indian Reserve No. 52 (Grand Trunk Pacific) 1600 acres, being Parts 20 and 25, 55R-13027
7. Agreement registered as Instrument #403730 on July 14, 1999
8. Easement registered as Instrument #403729 on July 14, 1999

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

Motion granted.

Annex A



Graphic 1

Schedule "H" — Dalhousie Assets

Municipal address:

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

Legal description (Property Identifier No.):

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

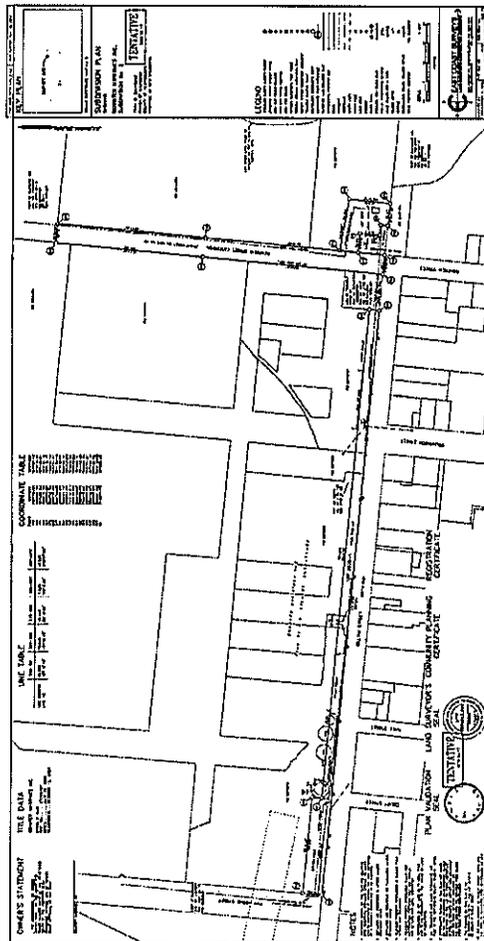
Save and Except for

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

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

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

Annex A — Dalhousie Plan



Graphic 2

Schedule "I" — Fort William Assets

Municipal address:

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

Legal description:

Section 1 Fort William Land Titles Assets

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

Section 2 Fort William Registry Assets

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

Footnotes

- 1 Namely, a first Vesting Order in respect of the Beaupré, Dalhousie, Donnacona and Fort William closed mills assets (Exhibit R-3A) and a second Vesting Order in respect of the corresponding Fort William land swap (Exhibit R-4A).
- 2 Dated March 22, 2010 and included in Exhibit I-1.
- 3 Exhibits VB-1 and I-5.
- 4 *AbitibiBowater Inc., Re*, 2009 QCCS 6460 (C.S. Que.), at para. 36 and 37.
- 5 See, in this respect, *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.), at para. 96 to 99; *Nortel Networks Corp., Re*, 2009 CarswellOnt 4467 (Ont. S.C.J. [Commercial List]), at para. 35; *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.), at para. 91 to 95; *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.), and *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.).
- 6 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 16.
- 7 See, for instance, the decisions cited at Note 5 and *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.); *PSINET Ltd., Re*, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]), at para. 6; and *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, 1998 CarswellOnt 3346 (Ont. S.C.J. [Commercial List]), at para. 47.
- 8 *Grant Forest Products Inc., Re*, 2010 ONSC 1846 (Ont. S.C.J. [Commercial List]), at para. 30-33.
- 9 See, on that point, *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 8, and *Canwest Global Communications Corp., Re*, 2010 ONSC 1176 (Ont. S.C.J. [Commercial List]), at para. 42.

- 10 See Exhibit I-1 and general condition # 5 of the Arctic Beluga penultimate bid.
- 11 See Exhibits I-6, I-8 and I-9.
- 12 See Exhibit I-7.
- 13 See Exhibit I-2.
- 14 See Exhibit I-6.
- 15 See Exhibit I-9.
- 16 *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), at para. 30.
- 17 (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.)
- 18 (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.)
- 19 *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.), at para. 96 to 99, and *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.), at para. 91 to 95.
- 20 Exhibits AIM-1 and AIM-2.
- 21 See, for instance, the judgments rendered in *Rail Power Technologies Corp., Re*, 2009 QCCS 2885 (C.S. Que.); *Boutique Euphoria inc., Re*, 2007 QCCS 7128 (C.S. Que.); and *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.).
- 22 *Skyepharm PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467 (Ont. C.A.), affirming (Ont. S.C.J. [Commercial List]) ("Skyepharm").
- 23 *Id.*, at para. 30. See also, *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 7.
- 24 See *Consumers Packaging Inc., Re* (Ont. C.A.), at para. 7; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 637 (Ont. C.A. [In Chambers]), at para. 20; *BDC Venture Capital Inc. v. Natural Convergence Inc.*, 2009 ONCA 665 (Ont. C.A.), at para. 8.
- 25 *In the Matter of Nortel Networks Corporation*, 2010 ONSC 126, at para. 3.
- 26 Assigned to Law Debenture Trust Company of New York registered under number 09-0288002-0001.
- 27 Assigned to U.S. Bank National Association and Wells Fargo Bank, N.A. under number 10-0018318-0001.
- 28 *Ibid.*
- 29 The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc.,

- Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.
- 30 The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canoxel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.
- 31 The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.
- 32 The Abitibi Petitioners are Abitibi-Consolidated Inc., Abitibi-Consolidated Company of Canada, 3224112 Nova Scotia Limited, Marketing Donohue Inc., Abitibi-Consolidated Canadian Office Products Holdings Inc., 3834328 Canada Inc., 6169678 Canada Incorporated., 4042140 Canada Inc., Donohue Recycling Inc., 1508756 Ontario Inc., 3217925 Nova Scotia Company, La Tuque Forest Products Inc., Abitibi-Consolidated Nova Scotia Incorporated, Saguenay Forest Products Inc., Terra Nova Explorations Ltd., The Jonquière Pulp Company, The International Bridge and Terminal Company, Scramble Mining Ltd., 9150-3383 Québec Inc. and Abitibi-Consolidated (U.K.) Inc.
- 33 The Bowater Petitioners are Bowater Canadian Holdings Incorporated., Bowater Canada Finance Corporation, Bowater Canadian Limited, 3231378 Nova Scotia Company, AbitibiBowater Canada Inc., Bowater Canada Treasury Corporation, Bowater Canadian Forest Products Inc., Bowater Shelburne Corporation, Bowater LaHave Corporation, St. Maurice River Drive Company Limited, Bowater Treated Wood Inc., Canoxel Hardboard Inc., 9068-9050 Québec Inc., Alliance Forest Products (2001) Inc., Bowater Belledune Sawmill Inc., Bowater Maritimes Inc., Bowater Mitis Inc., Bowater Guérette Inc. and Bowater Couturier Inc.
- 34 The partnerships are Bowater Canada Finance Limited Partnership, Bowater Pulp and Paper Canada Holdings Limited Partnership and Abitibi-Consolidated Finance LP.

TAB 2

2009 CarswellOnt 7169
Ontario Superior Court of Justice [Commercial List]

Canwest Global Communications Corp., Re

2009 CarswellOnt 7169, 183 A.C.W.S. (3d) 325

**IN THE MATTER OF THE COMPANIES' CREDITORS
ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED
AND IN THE MATTER OF A PROPOSED PLAN OF
COMPROMISE OR ARRANGEMENT OF CANWEST
GLOBAL COMMUNICATIONS CORP. AND THE
OTHER APPLICANTS LISTED ON SCHEDULE "A"**

Pepall J.

Judgment: November 12, 2009

Docket: CV-09-8241-OOCL

Counsel: Lyndon Barnes, Jeremy Dacks for Applicants

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

APPLICATION by corporations under protection of *Companies' Creditors Arrangement Act* for order approving Transition and Reorganization Agreement.

Pepall J.:

Relief Requested

1 The CMI Entities move for an order approving the Transition and Reorganization Agreement by and among Canwest Global Communications Corporation ("Canwest Global"), Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership"), Canwest Media Inc. ("CMI"), Canwest Publishing Inc./Publications Canwest Inc ("CPI"), Canwest Television Limited Partnership ("CTLP") and The National Post Company/ La Publication National Post (the "National Post Company") dated as of October 26, 2009, and which includes the New Shared Services Agreement and the National Post Transition Agreement.

2 In addition they ask for a vesting order with respect to certain assets of the National Post Company and a stay extension order.

3 At the conclusion of oral argument, I granted the order requested with reasons to follow.

Background Facts

(a) Parties

4 The CMI Entities including Canwest Global, CMI, CTLP, the National Post Company, and certain subsidiaries were granted *Companies' Creditors Arrangement Act* ("CCAA") protection on Oct 6, 2009. Certain others including the Limited Partnership and CPI did not seek such protection. The term Canwest will be used to refer to the entire enterprise.

5 The National Post Company is a general partnership with units held by CMI and National Post Holdings Ltd. (a wholly owned subsidiary of CMI). The National Post Company carries on business publishing the National Post newspaper and operating related on line publications.

(b) History

6 To provide some context, it is helpful to briefly review the history of Canwest. In general terms, the Canwest enterprise has two business lines: newspaper and digital media on the one hand and television on the other. Prior to 2005, all of the businesses that were wholly owned by Canwest Global were operated directly or indirectly by CMI using its former name, Canwest Mediaworks Inc. As one unified business, support services were shared. This included such things as executive services, information technology, human resources and accounting and finance.

7 In October, 2005, as part of a planned income trust spin-off, the Limited Partnership was formed to acquire Canwest Global's newspaper publishing and digital media entities as well as certain of the shared services operations. The National Post Company was excluded from this acquisition due to its lack of profitability and unsuitability for inclusion in an income trust. The Limited Partnership entered into a credit agreement with a syndicate of lenders and the Bank of Nova Scotia as administrative agent. The facility was guaranteed by the Limited Partner's general partner, Canwest (Canada) Inc. ("CCI"), and its subsidiaries, CPI and Canwest Books Inc. (CBI") (collectively with the Limited Partnership, the "LP Entities"). The Limited Partnership and its subsidiaries then operated for a couple of years as an income trust.

8 In spite of the income trust spin off, there was still a need for the different entities to continue to share services. CMI and the Limited Partnership entered into various agreements to govern the provision and cost allocation of certain services between them. The following features characterized these arrangements:

- the service provider, be it CMI or the Limited Partnership, would be entitled to reimbursement for all costs and expenses incurred in the provision of services;
- shared expenses would be allocated on a commercially reasonable basis consistent with past practice; and
- neither the reimbursement of costs and expenses nor the payment of fees was intended to result in any material financial gain or loss to the service provider.

9 The multitude of operations that were provided by the LP Entities for the benefit of the National Post Company rendered the latter dependent on both the shared services arrangements and on the operational synergies that developed between the National Post Company and the newspaper and digital operations of the LP Entities.

10 In 2007, following the Federal Government's announcement on the future of income fund distributions, the Limited Partnership effected a going-private transaction of the income trust. Since July, 2007, the Limited Partnership has been a 100% wholly owned indirect subsidiary of Canwest Global. Although repatriated with the rest of the Canwest enterprise in 2007, the LP Entities have separate credit facilities from CMI and continue to participate in the shared services arrangements. In spite of this mutually beneficial interdependence between the LP Entities and the CMI Entities, given the history, there are misalignments of personnel and services.

(c) Restructuring

11 Both the CMI Entities and the LP Entities are pursuing independent but coordinated restructuring and reorganization plans. The former have proceeded with their *CCAA* filing and prepackaged recapitalization transaction and the latter have entered into a forbearance agreement with certain of their senior lenders. Both the recapitalization transaction and the forbearance agreement contemplate a disentanglement and/or a realignment of the shared services arrangements. In addition, the term sheet relating to the CMI recapitalization transaction requires a transfer of the assets and business of the National Post Company to the Limited Partnership.

12 The CMI Entities and the LP Entities have now entered into the Transition and Reorganization Agreement which addresses a restructuring of these inter-entity arrangements. By agreement, it is subject to court approval. The terms were negotiated amongst the CMI Entities, the LP Entities, their financial and legal advisors, their respective chief restructuring advisors, the Ad Hoc Committee of Noteholders, certain of the Limited Partnership's senior lenders and their respective financial and legal advisors.

13 Schedule A to that agreement is the New Shared Services Agreement. It anticipates a cessation or renegotiation of the provision of certain services and the elimination of certain redundancies. It also addresses a realignment of certain employees who are misaligned and, subject to approval of the relevant regulator, a transfer of certain misaligned pension plan participants to pension plans that are sponsored by the appropriate party. The LP Entities, the CMI Chief Restructuring Advisor and the Monitor have consented to the entering into of the New Shared Services Agreement.

14 Schedule B to the Transition and Reorganization Agreement is the National Post Transition Agreement.

15 The National Post Company has not generated a profit since its inception in 1998 and continues to suffer operating losses. It is projected to suffer a net loss of \$9.3 million in fiscal year ending August 31, 2009 and a net loss of \$0.9 million in September, 2009. For the past seven years these losses have been funded by CMI and as a result, the National Post Company owes CMI approximately \$139.1 million. The members of the Ad Hoc Committee of Noteholders had agreed to the continued funding by CMI of the National Post Company's short-term liquidity needs but advised that they were no longer prepared to do so after October 30, 2009. Absent funding, the National Post, a national newspaper, would shut down and employment would be lost for its 277 non-unionized employees. Three of its employees provide services to the LP Entities and ten of the LP Entities' employees provide services to the National Post Company. The National Post Company maintains a defined benefit pension plan registered under the Ontario Pension Benefits Act. It has a solvency deficiency as of December 31, 2006 of \$1.5 million and a wind up deficiency of \$1.6 million.

16 The National Post Company is also a guarantor of certain of CMI's and Canwest Global's secured and unsecured indebtedness as follows:

Irish Holdco Secured Note- \$187.3 million

CIT Secured Facility- \$10.7 million

CMI Senior Unsecured Subordinated Notes- US\$393.2 million

Irish Holdco Unsecured Note- \$430.6 million

17 Under the National Post Transition Agreement, the assets and business of the National Post Company will be transferred as a going concern to a new wholly-owned subsidiary of CPI (the "Transferee"). Assets excluded from the transfer include the benefit of all insurance policies, corporate charters, minute books and related materials, and amounts owing to the National Post Company by any of the CMI Entities.

18 The Transferee will assume the following liabilities: accounts payable to the extent they have not been due for more than 90 days; accrued expenses to the extent they have not been due for more than 90 days; deferred revenue; and any amounts due to employees. The Transferee will assume all liabilities and/or obligations (including any unfunded liability) under the National Post pension plan and benefit plans and the obligations of the National Post Company under contracts, licences and permits relating to the business of the National Post Company. Liabilities that are not expressly assumed are excluded from the transfer including the debt of approximately \$139.1 million owed to CMI, all liabilities of the National Post Company in respect of borrowed money including any related party or third party debt (but not including approximately \$1,148,365 owed to the LP Entities) and contingent liabilities relating to existing litigation claims.

19 CPI will cause the Transferee to offer employment to all of the National Post Company's employees on terms and conditions substantially similar to those pursuant to which the employees are currently employed.

20 The Transferee is to pay a portion of the price or cost in cash: (i) \$2 million and 50% of the National Post Company's negative cash flow during the month of October, 2009 (to a maximum of \$1 million), less (ii) a reduction equal to the amount, if any, by which the assumed liabilities estimate as defined in the National Post Transition Agreement exceeds \$6.3 million.

21 The CMI Entities were of the view that an agreement relating to the transfer of the National Post could only occur if it was associated with an agreement relating to shared services. In addition, the CMI Entities state that the transfer of the assets and business of the National Post Company to the Transferee is necessary for the survival of the National Post as a going concern. Furthermore, there are synergies between the National Post Company and the LP Entities and there is also the operational benefit of reintegrating the National Post newspaper with the other newspapers. It cannot operate independently of the services it receives from the Limited Partnership. Similarly, the LP Entities estimate that closure of the National Post would increase the LP Entities' cost burden by approximately \$14 million in the fiscal year ending August 31, 2010.

22 In its Fifth Report to the Court, the Monitor reviewed alternatives to transitioning the business of the National Post Company to the LP Entities. RBC Dominion Securities Inc. who was engaged in December, 2008 to assist in considering and evaluating recapitalization alternatives, received no expressions of interest from parties seeking to acquire the National Post Company. Similarly, the Monitor has not been contacted by anyone interested in acquiring the business even though the need to transfer the business of the National Post Company has been in the public domain since October 6, 2009, the date of the Initial Order.

The Ad Hoc Committee of Noteholders will only support the short term liquidity needs until October 30, 2009 and the National Post Company is precluded from borrowing without the Ad Hoc Committee's consent which the latter will not provide. The LP Entities will not advance funds until the transaction closes. Accordingly, failure to transition would likely result in the forced cessation of operations and the commencement of liquidation proceedings. The estimated net recovery from a liquidation range from a negative amount to an amount not materially higher than the transfer price before costs of liquidation. The senior secured creditors of the National Post Company, namely the CIT Facility lenders and Irish Holdco, support the transaction as do the members of the Ad Hoc Committee of Noteholders.

23 The Monitor has concluded that the transaction has the following advantages over a liquidation:

- it facilitates the reorganization and orderly transition and subsequent termination of the shared services arrangements between the CMI Entities and the LP Entities;
- it preserves approximately 277 jobs in an already highly distressed newspaper publishing industry;
- it will help maintain and promote competition in the national daily newspaper market for the benefit of Canadian consumers; and
- the Transferee will assume substantially all of the National Post Company's trade payables (including those owed to various suppliers) and various employment costs associated with the transferred employees.

Issues

24 The issues to consider are whether:

- (a) the transfer of the assets and business of the National Post is subject to the requirements of section 36 of the *CCAA*;
- (b) the Transition and Reorganization Agreement should be approved by the Court; and
- (c) the stay should be extended to January 22, 2010.

Discussion

(A) Section 36 of the CCAA

25 Section 36 of the *CCAA* was added as a result of the amendments which came into force on September 18, 2009. Counsel for the CMI Entities and the Monitor outlined their positions on the impact of the recent amendments to the *CCAA* on the motion before me. As no one challenged the order requested, no opposing arguments were made.

26 Court approval is required under section 36 if:

- (a) a debtor company under *CCAA* protection
- (b) proposes to sell or dispose of assets outside the ordinary course of business.

27 Court approval under this section of the Act¹ is only required if those threshold requirements are met. If they are met, the court is provided with a list of non-exclusive factors to consider in determining whether to approve the sale or disposition. Additionally, certain mandatory criteria must be met for court approval of a sale or disposition of assets to a related party. Notice is to be given to secured creditors likely to be affected by the proposed sale or disposition. The court may only grant authorization if satisfied that the company can and will make certain pension and employee related payments.

28 Specifically, section 36 states:

- (1) Restriction on disposition of business assets - 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.
- (2) Notice to creditors - A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.
- (3) Factors to be considered - 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.
- (4) Additional factors — related persons - If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that
- (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and
 - (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
- (5) Related persons - For the purpose of subsection (4), a person who is related to the company includes
- (a) a director or officer of the company;
 - (b) a person who has or has had, directly or indirectly, control in fact of the company; and
 - (c) a person who is related to a person described in paragraph (a) or (b).
- (6) Assets may be disposed of free and clear - 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.
- (7) Restriction — employers - The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been

required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.²

29 While counsel for the CMI Entities states that the provisions of section 36 have been satisfied, he submits that section 36 is inapplicable to the circumstances of the transfer of the assets and business of the National Post Company because the threshold requirements are not met. As such, the approval requirements are not triggered. The Monitor supports this position.

30 In support, counsel for the CMI Entities and for the Monitor firstly submit that section 36(1) makes it clear that the section only applies to a debtor company. The terms "debtor company" and "company" are defined in section 2(1) of the *CCAA* and do not expressly include a partnership. The National Post Company is a general partnership and therefore does not fall within the definition of debtor company. While I acknowledge these facts, I do not accept this argument in the circumstances of this case. Relying on case law and exercising my inherent jurisdiction, I extended the scope of the Initial Order to encompass the National Post Company and the other partnerships such that they were granted a stay and other relief. In my view, it would be inconsistent and artificial to now exclude the business and assets of those partnerships from the ambit of the protections contained in the statute.

31 The CMI Entities' and the Monitor's second argument is that the Transition and Reorganization Agreement represents an internal corporate reorganization that is not subject to the requirements of section 36. Section 36 provides for court approval where a debtor under *CCAA* protection proposes to sell or otherwise dispose of assets "outside the ordinary course of business". This implies, so the argument goes, that a transaction that is in the ordinary course of business is not captured by section 36. The Transition and Reorganization Agreement is an internal corporate reorganization which is in the ordinary course of business and therefore section 36 is not triggered state counsel for the CMI Entities and for the Monitor. Counsel for the Monitor goes on to submit that the subject transaction is but one aspect of a larger transaction. Given the commitments and agreements entered into with the Ad Hoc Committee of Noteholders and the Bank of Nova Scotia as agent for the senior secured lenders to the LP Entities, the transfer cannot be treated as an independent sale divorced from its rightful context. In these circumstances, it is submitted that section 36 is not engaged.

32 The *CCAA* is remedial legislation designed to enable insolvent companies to restructure. As mentioned by me before in this case, the amendments do not detract from this objective. In discussing section 36, the Industry Canada Briefing Book³ on the amendments states that "The reform is intended to provide the debtor company with greater flexibility in dealing with its property while limiting the possibility of abuse."⁴

33 The term "ordinary course of business" is not defined in the *CCAA* or in the *Bankruptcy and Insolvency Act*⁵. As noted by Cullity J. in *Millgate Financial Corp. v. BCED Holdings Ltd.*⁶, authorities that have considered the use of the term in various statutes have not provided an exhaustive definition. As one author observed in a different context, namely the *Bulk Sales Act*⁷, courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller⁸. In *Pacific Mobile Corp., Re*⁹, the Supreme Court of Canada stated:

It is not wise to attempt to give a comprehensive definition of the term "ordinary course of business" for all transactions. Rather, it is best to consider the circumstances of each case and to take into account the type of business carried on by the debtor and creditor.

We approve of the following passage from Monet J.A.'s reasons discussing the phrase "ordinary course of business"...

'It is apparent from these authorities, it seems to me, that the concept we are concerned with is an abstract one and that it is the function of the courts to consider the circumstances of each case in order to determine how to characterize a given transaction. This in effect reflects the constant interplay between law and fact.'

34 In arguing that section 36 does not apply to an internal corporate reorganization, the CMI Entities rely on the commentary of Industry Canada as being a useful indicator of legislative intent and descriptive of the abuse the section was designed to prevent. That commentary suggests that section 36(4), which deals with dispositions of assets to a related party, was intended to:

...prevent the possible abuse by "phoenix corporations". Prevalent in small business, particularly in the restaurant industry, phoenix corporations are the result of owners who engage in serial bankruptcies. A person incorporates a business and proceeds to cause it to become bankrupt. The person then purchases the assets of the business at a discount out of the estate and incorporates a "new" business using the assets of the previous business. The owner continues their original business basically unaffected while creditors are left unpaid.¹⁰

35 In my view, not every internal corporate reorganization escapes the purview of section 36. Indeed, a phoenix corporation to one may be an internal corporate reorganization to another. As suggested by the decision in *Pacific Mobile Corp.*¹¹, a court should in each case examine the circumstances of the subject transaction within the context of the business carried on by the debtor.

36 In this case, the business of the National Post Company and the CP Entities are highly integrated and interdependent. The Canwest business structure predated the insolvency of the CMI Entities and reflects in part an anomaly that arose as a result of an income trust structure driven by tax considerations. The Transition and Reorganization Agreement is an internal reorganization transaction that is designed to realign shared services and assets within the Canwest corporate family so as to rationalize the business structure and to better reflect the appropriate business model. Furthermore, the realignment of the shared services and transfer of the assets and business of the National Post Company to the publishing side of the business are steps in the larger reorganization of the relationship between the CMI Entities and the LP Entities. There is no ability to proceed with either the Shared Services Agreement or the National Post Transition Agreement alone. The Transition and Reorganization Agreement provides a framework for the CMI Entities and the LP Entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. It would be commercially unreasonable to require the CMI Entities to engage in the sort of third party sales process contemplated by section 36(4) and offer the National Post for sale to third parties before permitting them to realign the shared services arrangements. In these circumstances, I am prepared to accept that section 36 is inapplicable.

(b) Transition and Reorganization Agreement

37 As mentioned, the Transition and Reorganization Agreement is by its terms subject to court approval. The court has a broad jurisdiction to approve agreements that facilitate a restructuring: *Stelco Inc., Re*¹² Even though I have accepted that in this case section 36 is inapplicable, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. At that time, the court will confirm or reject the ordinary course of business characterization. If confirmed, at minimum, the court will determine whether the proposed transaction facilitates the restructuring and is fair. If rejected, the court will determine whether the proposed transaction meets the requirements of section 36. Even if the court confirms that the proposed transaction is in the ordinary course of business and therefore outside the ambit of section 36, the provisions of the section may be considered in assessing fairness.

38 I am satisfied that the proposed transaction does facilitate the restructuring and is fair and that the Transition and Reorganization Agreement should be approved. In this regard, amongst other things, I have considered the provisions of section 36. I note the following. The CMI recapitalization transaction which prompted the Transition and Reorganization Agreement is designed to facilitate the restructuring of CMI into a viable and competitive industry participant and to allow a substantial number of the businesses operated by the CMI Entities to continue as going concerns. This preserves value for stakeholders and maintains

employment for as many employees of the CMI Entities as possible. The Transition and Reorganization Agreement was entered into after extensive negotiation and consultation between the CMI Entities, the LP Entities, their respective financial and legal advisers and restructuring advisers, the Ad Hoc Committee and the LP senior secured lenders and their respective financial and legal advisers. As such, while not every stakeholder was included, significant interests have been represented and in many instances, given the nature of their interest, have served as proxies for unrepresented stakeholders. As noted in the materials filed by the CMI Entities, the National Post Transition Agreement provides for the transfer of assets and certain liabilities to the publishing side of the Canwest business and the assumption of substantially all of the operating liabilities by the Transferee. Although there is no guarantee that the Transferee will ultimately be able to meet its liabilities as they come due, the liabilities are not stranded in an entity that will have materially fewer assets to satisfy them.

39 There is no prejudice to the major creditors of the CMI Entities. Indeed, the senior secured lender, Irish Holdco., supports the Transition and Reorganization Agreement as does the Ad Hoc Committee and the senior secured lenders of the LP Entities. The Monitor supports the Transition and Reorganization Agreement and has concluded that it is in the best interests of a broad range of stakeholders of the CMI Entities, the National Post Company, including its employees, suppliers and customers, and the LP Entities. Notice of this motion has been given to secured creditors likely to be affected by the order.

40 In the absence of the Transition and Reorganization Agreement, it is likely that the National Post Company would be required to shut down resulting in the consequent loss of employment for most or all the National Post Company's employees. Under the National Post Transition Agreement, all of the National Post Company employees will be offered employment and as noted in the affidavit of the moving parties, the National Post Company's obligations and liabilities under the pension plan will be assumed, subject to necessary approvals.

41 No third party has expressed any interest in acquiring the National Post Company. Indeed, at no time did RBC Dominion Securities Inc. who was assisting in evaluating recapitalization alternatives ever receive any expression of interest from parties seeking to acquire it. Similarly, while the need to transfer the National Post has been in the public domain since at least October 6, 2009, the Monitor has not been contacted by any interested party with respect to acquiring the business of the National Post Company. The Monitor has approved the process leading to the sale and also has conducted a liquidation analysis that caused it to conclude that the proposed disposition is the most beneficial outcome. There has been full consultation with creditors and as noted by the Monitor, the Ad Hoc Committee serves as a good proxy for the unsecured creditor group as a whole. I am satisfied that the

consideration is reasonable and fair given the evidence on estimated liquidation value and the fact that there is no other going concern option available.

42 The remaining section 36 factor to consider is section 36(7) which provides that the court should be satisfied that the company can and will make certain pension and employee related payments that would have been required if the court had sanctioned the compromise or arrangement. In oral submissions, counsel for the CMI Entities confirmed that they had met the requirements of section 36. It is agreed that the pension and employee liabilities will be assumed by the Transferee. Although present, the representative of the Superintendent of Financial Services was unopposed to the order requested. If and when a compromise and arrangement is proposed, the Monitor is asked to make the necessary inquiries and report to the court on the status of those payments.

Stay Extension

43 The CMI Entities are continuing to work with their various stakeholders on the preparation and filing of a proposed plan of arrangement and additional time is required. An extension of the stay of proceedings is necessary to provide stability during that time. The cash flow forecast suggests that the CMI Entities have sufficient available cash resources during the requested extension period. The Monitor supports the extension and nobody was opposed. I accept the statements of the CMI Entities and the Monitor that the CMI Entities have acted, and are continuing to act, in good faith and with due diligence. In my view it is appropriate to extend the stay to January 22, 2010 as requested.

Application granted.

Footnotes

- 1 Court approval may nonetheless be required by virtue of the terms of the Initial or other court order or at the request of a stakeholder.
- 2 The reference to paragraph 6(4)a should presumably be 6(6)a.
- 3 Industry Canada "Bill C-55: Clause by Clause Analysis — Bill Clause No. 131 — CCAA Section 36".
- 4 Ibid.
- 5 R.S.C. 1985, c.C-36 as amended.
- 6 (2003), 47 C.B.R. (4th) 278 (Ont. S.C.J. [Commercial List]) at para.52.
- 7 R.S.O. 1990, c. B. 14, as amended.
- 8 D.J. Miller "Remedies under the Bulk Sales Act: (Necessary, or a Nuisance?)", Ontario Bar Association, October, 2007.

9 [1985] 1 S.C.R. 290 (S.C.C.).

10 Supra, note 3.

11 Supra, note 9.

12 (2005), 15 C.B.R. (5th) 288 (Ont. C.A.).

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TAB 3

2010 ONSC 2870

Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc./Publications Canwest Inc., Re

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

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

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

Pepall J.

Judgment: May 21, 2010

Docket: CV-10-8533-00CL

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

Subject: Insolvency; Estates and Trusts

APPLICATION by LP entities for various relief relating to *Companies' Creditors
Arrangement Act* proceedings.

Pepall J.:

Endorsement

Relief Requested

1 The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support Transaction concurrently. They also seek an order authorizing them to call a meeting of unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

AHC Bid

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

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

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

5 The AHC Transaction contemplates that 7535538 Canada Inc. ("Holdco") will effect a transaction through a new limited partnership (Opco LP) in which it will acquire substantially all of the financial and operating assets of the LP Entities and the shares of National Post Inc. and assume certain liabilities including substantially all of the operating liabilities for a purchase price of \$1.1 billion. At closing, Opco LP will offer employment to substantially all of the employees of the LP Entities and will assume all of the pension liabilities and other benefits for employees of the LP Entities who will be employed by Opco LP, as well as for retirees currently covered by registered pension plans or other benefit plans. The materials submitted with the AHC Bid indicated that Opco LP will continue to operate all of the businesses of the LP Entities in substantially the same manner as they are currently operated, with no immediate plans to discontinue operations, sell material assets or make significant changes to current management. The AHC Bid will also allow for a full payout of the debt owed by the LP Entities to the LP Secured Lenders under the LP credit agreement and the Hedging Creditors and provides an additional \$150 million in value which will be available for the unsecured creditors of the LP Entities.

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

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

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

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

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

- the Senior Lenders will received 100 cents on the dollar;
- the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;
- the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;

- the AHC Bid contemplates that the transaction will be implemented through a Plan under which \$150 million in cash or shares will be available for distribution to unsecured creditors;
- unlike the Support Transaction, there is no option *not* to assume certain pension or employee benefits obligations.

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

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

13 The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.*¹ decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the CCAA are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved.

Claims Procedure Order and Meeting Order

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

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

SISP Amendment

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

Dual Track and Sanction of Senior Lenders' CCAA Plan

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

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

18 The LP Entities are seeking the sanction of the Senior Lenders' CCAA Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' CCAA Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior

Lenders' CCAA Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' CCAA Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the CCAA. As such, the three part test set forth in the *Canadian Airlines Corp., Re*² has been met. Additionally, there has been compliance with section 6 of the CCAA. The Crown, employee and pension claims described in section 6 (3),(5), and (6) have been addressed in the Senior Lenders' Plan at sections 5.2, 5.3 and 5.4.

Conclusion

19 In conclusion, it is evident to me that the parties who have been engaged in this CCAA proceeding have worked diligently and cooperatively, rigorously protecting their own interests but at the same time achieving a positive outcome for the LP Entities' stakeholders as a whole. As I indicated in Court, for this they and their professional advisors should be commended. The business of the LP Entities affects many people - creditors, employees, retirees, suppliers, community members and the millions who rely on their publications for their news. This is a good chapter in the LP Entities' CCAA story. Hopefully, it will have a happy ending.

Application granted.

Footnotes

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

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

TAB 4

2017 ONSC 2496
Ontario Superior Court of Justice [Commercial List]

Grafton-Fraser Inc. v. Cadillac Fairview Corp.

2017 CarswellOnt 6473, 2017 ONSC 2496, 279 A.C.W.S. (3d) 18

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

IN THE MATTER OF A PLAN OF COMPROMISE
OR ARRANGEMENT OF GRAFTON-FRASER INC.

GRAFTON-FRASER INC. (Applicant) and CADILLAC
FAIRVIEW CORPORATION LIMITED, ET AL. (Respondents)

L.A. Pattillo J.

Heard: April 20, 2017
Judgment: May 2, 2017
Docket: CV-17-11677-00CL

Counsel: Stuart Brotman, Dylan Chochla, for Applicant
Lily Coodin, for Cadillac Fairview Corporation Limited
J. Dietrich, M. Sassi, for Monitor
Gordon Meiklejohn, for Trade & Global Inc.
N. Renner, for Purchaser and DIP Lender
Linda Galessiere, for Various Landlords
Evan Cobb, for CIBC

Subject: Insolvency

APPLICATION by debtor company for order approving sale of its assets pursuant to
Companies' Creditors Arrangement Act.

L.A. Pattillo J.:

Introduction

1 This is an application by Grafton-Fraser Inc. ("Grafton") for, among other things, an
order approving the sale of its assets as set out in an asset purchase agreement dated January
24, 2017 with 1104307 B.C. Ltd. (now GSO GF Acquisition B.C. Ltd.) (the "Purchaser")

pursuant to the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") (the "Transaction").

2 The application is supported by the Third Report of Richter Advisory Group Inc. in its capacity as monitor for Grafton (the "Monitor").

3 The application is either agreed to or unopposed by all of the stakeholders with notice save and except for Tradex Global Inc. ("Tradex") who is an unsecured creditor and who objects to the Transaction as it affects the unsecured creditors.

4 For the reasons that follow, I approve the Transaction and grant the relief requested by Grafton. Notwithstanding that the Transaction does not treat all of Grafton's unsecured creditors equally, in my view, it meets the principles set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137, 7 C.B.R. (3d) 1 (Ont. C.A.) and s. 36 of the CCAA.

Background

5 On January 25, 2017, Grafton obtained an order from this court granting it protection pursuant to the CCAA (the "Order"). Among other things, the Order appointed the Monitor and granted Grafton the authority to enter into amended and restated forbearance agreements with its two primary and secured lenders, Canadian Imperial Bank of Commerce ("CIBC") and GSO Capital Partners LP ("GSO") as agent for the GSO Lenders.

6 Grafton is a leading retailer of men's clothing which, prior to the Order operated 158 stores in Canada under various names including "Tip Top Tailors" and "George Richards Big and Tall".

7 On January 30, 2017, the court issued a further order approving, among other things, the proposed sale and investment solicitation process for Grafton's business and assets to be carried out with the Monitor's assistance (the "SISP") and authorizing Grafton to enter into the Agreement which was to serve as the minimum bid under the SISP (the "Stalking Horse APA"). The Purchaser is a party related to GSO.

8 To protect confidential information, the SISP contemplated a two stage bidding process. During the first stage, potential bidders were given certain coded information. Bidders who submitted a qualified bid in the first stage would be invited to participate in the second stage with access to confidential information.

9 The Monitor, in consultation with Grafton, compiled a list of 174 potential interested parties who were invited to participate in the SISP. Eight potential interested parties responded. Four signed non-disclosure agreements and were provided access to the data

room. With the exception of the stalking horse bid, no other bids were submitted prior to the stage one bid deadline. The Purchaser was therefore the "successful bidder" under the SISP.

10 The Transaction is a credit-bid transaction. The Purchaser is acquiring, as a going concern, on an "as is, where is" basis substantially all of Grafton's business and assets (the "Purchased Assets"). The Purchaser will acquire 139 retail stores operated by Grafton as well as its head office. Seven days prior to the closing of the Agreement, the Purchaser will offer employment to no fewer than 1,100 Grafton employees on substantially similar terms and conditions to their existing employment with Grafton. The proposed closing date for the Transaction is on or before May 31, 2017.

11 The consideration for the Transaction includes, among other things:

- a) The assumption by the Purchaser of the principal, plus accrued interest and fees owing by Grafton to its operating lender, CIBC;
- b) The assumption by the Purchaser of Grafton's secured indebtedness under the DIP Facility (as defined in the Agreement);
- c) The release by GSO and certain of its affiliates of certain of the secured indebtedness owing by Grafton under the GSO Facility (as defined in the Agreement); and
- d) The assumption by the Purchaser of certain of Grafton's obligations, including Supplier Liabilities (as defined in the Agreement, which are pre-filing amounts owed by Grafton to certain suppliers of goods/services to the extent agreements with such suppliers have been entered into with the Purchaser, on terms acceptable to CIBC and the Purchaser, establishing, among other things, the terms of continued supply).

12 The Purchaser has determined that certain suppliers are critical to the ongoing value and operations of the business and has agreed to assume Grafton's indebtedness to these creditors on terms satisfactory to the Purchaser. At full value, these claims total approximately \$5.2 million.

13 At the date of the Order, Grafton had aggregate known unsecured liabilities of approximately \$8 million together with contingent claims in excess of \$2 million. In addition, Grafton has or will shortly disclaim a number of lease agreements and terminate the employment of a number of employees which it expects will give rise to significant unsecured claims.

Tradex

14 Tradex and its affiliated companies provided procurement and quality control services for Grafton's overseas purchases for a number of years pursuant to written agreements. The most recent agreements were mutually terminated on May 5, 2016. Tradex's evidence is that there was an oral agreement with Tradex that it would continue to supply services at the previously agreed prices, that it did so and it received payment for its services as late as October 7, 2016. It has since not been paid and alleges that to the date of the Order it is owed US \$856,660.00 and Cdn. \$383,316.00.

15 In correspondence between counsel, Grafton has denied that any amounts are owing to Tradex and advised that since the termination of the agreements, it has not engaged Tradex or any of its related parties.

16 Tradex is not among the suppliers and other creditors whose claims the Purchaser has agreed to assume upon closing of the Transaction.

Position of the Parties

17 Tradex submits that the Transaction, as structured, should not be approved. Rather, in order to ensure that all unsecured creditors are treated equally, the Purchaser must be required to make the \$5.2 million and any other amounts it has committed to pay to Grafton's unsecured creditors, not just to a select group of unsecured creditors, but *pari passu* to all unsecured creditors.

18 Grafton has agreed, for the purposes of this motion only, and without admitting any liability, to accept that Tradex has an unsecured claim against it. It submits that the Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of its business and should be approved. Further, there is no requirement under the CCAA that creditors be treated equally.

Analysis

19 Section 36 of the CCAA provides that the court may authorize the disposition of assets of a debtor company outside the ordinary course of business. The factors to be considered by the court in approving such a disposition were first set out by our Court of Appeal in *Soundair* and are now largely set out in s. 36(3) of the CCAA which provides:

s.36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

- b) whether the monitor approved the process leading to the proposed sale or distribution;
- 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.

20 Considering the above factors in respect of the Transaction and the events leading up to it, I find the evidence establishes:

- a) the SISP was reasonable in the circumstances and was approved by the court;
- b) the Monitor approved the SISP and assisted Grafton in carrying out its terms;
- c) the Monitor has confirmed in its Third Report that the Transaction would be substantially more beneficial to Grafton's creditors, as compared to the alternatives, which may result in the liquidation of Grafton's assets;
- d) the Monitor and Grafton's two primary secured creditors, CIBC and GSO, are each supportive of the Transaction;
- e) the Monitor is of the view that the Transaction represents the best opportunity to maximize recoveries for creditors of Grafton and provides the greatest benefit to all stakeholders (including landlords, employees, customers, go-forward suppliers, etc.), as it results in the continuation of Grafton's business;
- f) that further marketing of Grafton's assets would not likely result in greater realizations as the market has been fully canvassed and all likely bidders have already been provided the opportunity to bid on the assets;
- g) the Transaction represents the highest and best offer for the Purchased Assets and the short time-frame to closing will eliminate ongoing costs of the CCAA proceeding; and

h) Grafton's limited liquidity substantially eliminates the opportunity to further market the Purchased Assets for sale without putting the Transaction at risk and impairing recoveries.

21 There is no question that certain of Grafton's liabilities, including some of its unsecured creditors will not be paid, as a result of the Transaction as it is structured. In support of its submission that in the absence of all the unsecured creditors being treated equally, the Transaction should not be approved, Tradex relies on the decision of Newbould J. in *Nortel Networks Corp., Re*, 2015 ONSC 2987, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) and specifically the statement at para. 209 that "It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment."

22 There can be no issue that Newbould J.'s statement is a correct statement of the law. It was made, however, in the context of the issue of how to determine the allocation of liquidation proceeds from *Nortel's* business among its various creditors in multiple jurisdictions. The reasoning in *Nortel* does not apply in this case where the Transaction is a credit bid which gives rise to no proceeds of sale being available for distribution.

23 I am in agreement with Grafton's submission that, in the context of the sale of a company's business under the CCAA, there is no requirement that creditors be treated equally. That is not to say that their interests are to be ignored. Rather, the effects of the proposed sale on the creditors are one of the factors that must be considered. But they are considered in the larger context of the proposed sale and weighted against the other above noted factors, including the interests of the debtor and the stakeholders generally.

24 The above principle was applied in *Nelson Education Ltd., Re*, 2015 ONSC 5557, 29 C.B.R. (6th) 140 (Ont. S.C.J. [Commercial List]) where Newbould J., in approving a sale of substantially all of Nelson's assets pursuant to a credit bid pursuant to the CCAA, noted at para. 39 that while there were some excluded liabilities and a small amount owing to former employees that would not be paid, the monitor indicated there was no reasonable prospect of any alternative solution that would provide recovery for those creditors.

25 The Transaction is beneficial to Grafton's stakeholders as it provides for the continuation of a substantial portion of Grafton's business, thereby assuring a customer for go-forward suppliers, a tenant for the landlords of 139 retail stores, employment for a majority of Grafton's employees and an ongoing business for many of its customers. While the Transaction will result in some of the unsecured creditors, including Tradex, not being paid, when weighted against all the other relevant factors, that provision should not prevent approval of the Transaction, particularly when the likely alternative is liquidation which would result in no recovery for the unsecured creditors generally.

26 For the above reasons, therefore, the Transaction is approved. The relief requested in the Notice of Motion is approved and the draft Approval and Vesting Order at tab 2 of the Motion Record shall issue.

Application granted.

End of Document

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TAB 5

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991

Judgment: July 3, 1991

Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman*, for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

J. T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and *L.E. Ritchie*, for plaintiff/respondent Royal Bank of Canada.

S.F. Dunphy and *G.K. Ketcheson*, for Ernst & Young Inc., receiver of respondent Soundair Corporation.

W.G. Horton, for Ontario Express Limited.

N.J. Spies, for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

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

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One

of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

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

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

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

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

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

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

6 Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the receiver. The offer was not accepted and lapsed. Having

regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

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

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

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

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

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

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

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

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

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

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

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

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

Its decision was made as a matter of business judgment *on the elements then available to it*. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion

that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to

argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

[Emphasis added.]

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

47 Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the receiver could have conducted the process other

than the way which he did. However, the evidence does not convince me that the receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 109 [O.R.]:

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially

viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

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

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

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

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

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

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

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

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

I agree.

60 The receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore,

that the receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

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

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

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

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

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

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would

receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive \$3,375,000 of the \$6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

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

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

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

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

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported.

Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

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

McKinlay J.A. :

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

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

Goodman J.A. (dissenting):

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

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

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

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

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

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

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

results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

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

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

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

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

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

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

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

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

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

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

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

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

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court

from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by

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

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

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

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

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

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

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

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

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

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

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

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price.

The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

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

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

Appeal dismissed.

TAB 6

1985 CarswellAlta 332
Alberta Court of Appeal

Salima Investments Ltd. v. Bank of Montreal

1985 CarswellAlta 332, [1985] A.W.L.D. 1418, [1985] A.W.L.D. 1419, 21 D.L.R. (4th) 473, 33 A.C.W.S. (2d) 257, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242, 65 A.R. 372

**SALIMA INVESTMENTS LTD. v. BANK OF
MONTREAL, MAMMOTH DEVELOPMENTS
LTD. and BOLERO MANAGEMENT LTD.**

Laycraft C.J.A., Harradence and Kerans JJ.A.

Judgment: August 26, 1985

Docket: Calgary Nos. 17697, 17696

Counsel: *R. Dodic*, for appellant.

G. McKibben, for respondent Bank of Montreal.

Q. Smith, for respondents Mammoth Developments Ltd. and Bolero Management Ltd.

D. Barber, for third party, 304987 Alberta Ltd.

Subject: Corporate and Commercial; Insolvency

Appeal from order approving sale of property in receivership.

Memorandum of judgment delivered from the bench by *Kerans J.A.*:

1 This is an appeal from an order approving the sale of property in receivership.

2 A Queen's Bench order made 16th April 1985 named the respondent Cooper-Lybrand as receiver-manager of the property of Mammoth Developments Ltd. and Bolero Management Ltd. on the application of a secured creditor, the Bank of Montreal. The order granted to the receiver the power, among other things, to "sell ... any ... property" including the 168-room hotel complex and a 76-unit motel.

3 The receiver advertised the property widely, and called for tenders. The tender notice indicated that the receiver considered the tenders as only a first step and that it was prepared to negotiate the sale.

4 Seven tenders were received. The highest was from the appellant, Salima Investments Ltd., at \$4,400,000. The others were much lower. The tender of 304987 Alberta Ltd. also

involved \$300,000 less cash. The appraised value of the property for forced sale on terms was \$4,593,000.

5 The receiver decided to negotiate further with Salima and opened negotiations on 24th July, six days after tenders were opened. A bargain was made the next day, and the receiver at once notified the other tenderers that their tenders were rejected and that the receiver was dealing with somebody else. When asked before us why the receiver did not approach other tenderers for further negotiations, counsel for the receiver replied that the receiver was of the view that the Salima tender was substantially better than all of the others and, in any event, that it was not appropriate to negotiate with more than one prospective purchaser at the same time.

6 The bargain with Salima involved an increase of \$50,000 from the tendered price, and an increase in the deposit from \$150,000 to \$400,000. Further, the negotiated sale was made subject to court approval.

7 The receiver then issued a motion on 1st August, returnable 8th August, for an order approving the sale. On the morning of 8th August, before court opened, 304987 Alberta Ltd. made a new offer of \$4,533,000 through the clerk. We infer that this offer was made with knowledge of the Salima bargain, because that information was in the materials filed in support of the application.

8 Apprised of this development, and of the fact that seasonal market fluctuations made an immediate sale of great importance, the learned chambers judge adjourned the matter for one day and said that he would consider new bids. Three were received: the highest was from 2884701 Alberta Ltd., at \$4,800,000. The next highest was from 304987 Alberta Ltd. in the amount of \$4,756,000, and the third, for \$4,700,000 was from Salima. The learned chambers judge decided that, because it had the earliest completion date and offered the prospect of unbroken chain of management, the bid of 304987 Alberta Ltd. was the best offer. He directed the receiver to complete a sale. Salima appeals.

9 The first ground raises the question of jurisdiction. It is said that the learned chambers judge had no application before him to approve the sale to 304987 Alberta Ltd. It is also said that he improperly considered the other offers and other materials. The existence of the other offers was relevant on the question whether to approve the Salima sale and we see no merit to that argument. Further, we understand the events before him in this way: he first refused to approve the sale to Salima; then he decided, on his own motion and because of the urgency of the matter, to conduct summarily a court sale. He dispensed with notice of motion or other formalities. He had jurisdiction to do that which he did and there is no merit to this ground of appeal.

10 The second ground of appeal raised for Salima is that the decision of the learned chambers judge gave an unfair advantage to 304987 Alberta Ltd. over Salima. Salima has no complaint. It agreed to buy the property subject to court approval, and its contract left it exposed to the risk of something like this happening. I agree with what was said by Hart J.A. in this respect in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1 at 9-10, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.):

It is obvious that the receiver did in fact have the power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval...

This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval.

11 The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In *Can. Permanent Trust Co. v. King Art Dev. Ltd.*, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

12 We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many

factors which the court may consider. As Macdonald J.A. said in the *Cameron* case at pp. 11-12:

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

13 This is not a total catalogue of those factors which might lead a court to refuse to approve a sale.

14 The principal argument before us turned on the question why the receiver did not approach 304987 Alberta Ltd. to negotiate at the same time as it approached Salima.

15 We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver — while always in good faith — had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 We dismiss the appeal.

Appeal dismissed.

TAB 7

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D.
2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

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

In the Matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

APPLICATION by debtor companies for orders approving sales of assets generated through Sales and Investment Solicitation Process; APPLICATION by trustee of the bonds for order dismissing debtors' application, allowing bondholders to propose plan of arrangement, and other relief.

B.E. Romaine J.:

I. Introduction

1 The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

2 The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

3 After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

II. Facts

4 On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.

5 Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the *Alberta Business Corporations Act* in 1980, and its principal executive and registered office is located in Calgary. Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

6 The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

7 Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately \$415.5 million. The Syndicate has perfected security interests over substantially all of the assets of the Sanjel Group, and is the principal secured creditor of the Sanjel Group in these CCAA proceedings.

8 On June 18, 2014, Sanjel Corporation issued US \$300 million 7.5% Callable Bonds due June 19, 2019. Interest is payable on the Bonds semi-annually on June 19 and December 19.

The Bonds are unsecured. Nordic Trust ASA (the "Trustee") is the trustee under the Bond Agreement.

9 The Sanjel Group has been severely impacted by the catastrophic drop in global oil and gas prices since mid-2014. Over the last 18 months, the Sanjel Group has taken aggressive steps to cut costs, including by reducing staffing levels by more than half. However, by late October, 2015, Sanjel Corporation was in breach of certain covenants under the Bank Credit Facility. By late December, 2016, the Syndicate was in a position to exercise enforcement rights. In addition, an interest payment of USD \$11,250,000 was due on the Bonds on December 19, 2015. Since late 2015, the Sanjel Group has been in negotiations with both the Syndicate and two bondholders, Ascribe Capital LLC and Clearlake Capital Group L.P., (the "Ad Hoc Bondholders"). The Ad Hoc Bondholders hold over 45% of the Bonds.

10 In the fall of 2015, Sanjel Corporation engaged Bank of America Merrill Lynch ("BAML") to identify strategic partners and attempt to raise additional capital for the Sanjel Group. BAML contacted 28 private equity firms; 19 non-disclosure agreements were executed and 9 management presentations were made. However, the BAML process did not result in a successful transaction.

11 In December, 2015, the Ad Hoc Bondholders retained a New York law firm, Fried Frank, as their legal advisor and Moelis & Company as their financial advisor.

12 On December 10, 2015, Fried Frank conveyed a proposal from the Ad Hoc Bondholders to Sanjel. Under this proposal, Sanjel would be required to pay the USD \$11,250,000 interest payment. Provided that the interest payment was made, the bondholders would agree to a standstill agreement for the same period as may be agreed with the Syndicate. In return, the Ad Hoc Bondholders would lend back their pro rata share of that interest payment to Sanjel in return for secured notes ranking *pari passu* with the Bank Credit Facility, bearing interest at the same rate as the Bank Credit Facility plus 2%. The new notes would not be repaid until the Bank Credit Facility was repaid.

13 The Ad Hoc Bondholders indicated that they would consider acting as standby lenders to Sanjel for the remainder of the interest payment and would offer the other bondholders the option of lending back their pro-rata share to Sanjel on the same basis. If they agreed to be standby lenders, the Ad Hoc Bondholders would receive a commitment fee equal to 10% of their standby commitment, payable in new notes.

14 The proposal letter indicated that the Ad Hoc Bondholders were aware that Sanjel had been engaged in a process to address liquidity and leverage issues over the past few months, including attempting to raise equity to sell assets. In their view, Sanjel had exhausted those efforts, and the only remaining option was a deal negotiated with the bondholders. However,

the Ad Hoc Bondholders would only embark on such a process if the December 19, 2015 interest payment was made.

15 Sanjel rejected the proposal on December 14, 2015. It is noteworthy that the Bank Credit Facility includes a negative covenant prohibiting Sanjel from granting a security interest over its assets. The Syndicate advised Sanjel that the Ad Hoc Bondholders' proposal to have their existing unsecured position elevated to rank *pari passu* with the Bank Credit Facility was unacceptable, and that it would not provide its consent.

16 On December 15, 2015, the Ad Hoc Bondholders advised counsel to the Syndicate that they wished to work towards a restructuring, which they envisaged would involve paying down a portion of the Syndicate's debt "in an amount to be mutually agreed on". They also suggested that Sanjel would implement a rights offering to holders of Bonds and then to existing equity, with a conversion of the Bonds into new debt and equity.

17 On or about December 15, 2015, the Ad Hoc Bondholders sent Sanjel a draft waiver and standstill agreement, which required the payment of part of the December 19 interest payment by December 23, 2015 and the payment of the fees and disbursements of Fried Frank and Moelis in return for arranging for a bondholder meeting to be called to consider a period of forbearance to March 31, 2016.

18 Fried Frank and Moelis executed Non-Disclosure Agreements ("NDAs") on December 24, 2015, but the Ad Hoc Bondholders did not, thus not restricting their right to trade the Bonds. Fried Frank and Moelis were granted access to a Sanjel virtual database ("VDR") on January 9, 2016.

19 By January, 2016, given the prolonged downturn in oil and gas prices, Sanjel's liquidity was limited. Events of default under the Bank Credit Facility that had occurred as of October 31, 2015 were exacerbated by a cross-default based on the non-payment of interest under the Bond Agreement. As of January 31, 2016, the Sanjel Group had total consolidated liabilities of approximately \$1.064 billion.

20 Sanjel was facing very significant negative cash flow projections over the next few months. As of early January, 2016, Sanjel's projected cash flows showed that its cash position would deteriorate by more than half as of the first week of April, 2016, and would be further reduced by anticipated forbearance payments.

21 In the circumstances, Sanjel agreed with the Syndicate to implement a Sales and Investment Solicitation Process ("SISP"). Sanjel states that it hoped that if a SISP was implemented, it might find a transaction that preserved the business as a going concern, which would maximize stakeholder value and preserve goodwill and jobs.

22 In mid-January, 2016, Sanjel engaged PWC as a proposed Monitor in the event it would become necessary to file under the CCAA.

23 The SISP was commenced on behalf of Sanjel by its financial advisors, PJT Partners Inc. ("PJT") and Credit Suisse Securities (CANADA), Inc. ("CS") on January 17, 2016. The advisors contacted prospective bidders, many of whom had already been identified through the BAML process of late 2015.

24 The process of soliciting non-bidding indications of interest ran from January 17, 2016 to February 22, 2016. On January 26, 2016, the advisers updated and opened a VDR available to anyone who had signed a NDA. A teaser letter was distributed and meetings and conference calls were held with bidders. A process letter was distributed on January 28, 2016. Nine indications of interest were submitted on or about February 22, 2016.

25 Before and during the SISP process, Sanjel was negotiating with both the Syndicate and the Ad Hoc Bondholders with respect to separate forbearance agreements, and with the Ad Hoc Bondholders with respect to NDAs to be signed by the Ad Hoc Bondholders. The Ad Hoc Bondholders complain that there was a delay of almost a month before Sanjel's counsel responded to a mark-up of a NDA provided by Fried Frank, but negotiations were stymied by the Ad Hoc Bondholders' insistence that the December interest payment be paid. Until this issue was settled, there was no reason to finalize the NDAs. In addition, it was not until January 29, 2016 that representatives of the Ad Hoc Bondholders advised Sanjel that they were prepared to be restricted from trading and therefore able to receive confidential information. During this period of time, the Ad Hoc Bondholders refused to meet with Sanjel management when they travelled to New York on January 20, 2016.

26 On February 1, 2016, counsel to Sanjel sent counsel to the Ad Hoc Bondholders a copy of the draft forbearance agreement between the Syndicate and Sanjel, which set out the key dates of the SISP, including the completion of definitive purchase and sales agreements by March 24, 2016. It would have been clear to the Ad Hoc Bondholders from this draft that Sanjel was proceeding on a dual track basis, considering both a potential stand-alone restructuring of the company and a sales process.

27 The Ad Hoc Bondholders made a second proposal to Sanjel on February 2, 2016, very shortly after the NDAs were signed. This proposal involved the Syndicate recovering a portion of its loan from Sanjel's existing cash reserves and a rights offering backstopped by the Ad Hoc Bondholders. A portion of the Bonds would be converted into equity. The December interest payment would have to be paid. Sanjel's management team met with the Ad Hoc Bondholders and their advisors in New York on February 3, 2016 and Sanjel's team, the Syndicate and its advisors and the Ad Hoc Bondholders met on February 8, 2016.

28 Sanjel delivered an indicative restructuring term sheet to the Ad Hoc Bondholders on February 12, 2016, as required by the forbearance agreement that the parties were negotiating. The restructuring term sheet emphasized that a bondholder-led restructuring would require significant new money, a significant capital commitment and ongoing capital, with a significant pay-down of the Syndicate's debt.

29 Commencing on February 15, 2016, Sanjel allowed representatives of Alvarez and Marsal ("A&M"), advisors to the Ad Hoc Bondholders, to attend in Calgary and conduct due diligence.

30 On February 18, 2016, Sanjel uploaded to its VDR the final, unsigned versions of the Syndicate Amending and Forbearance Agreement and the Bondholders Forbearance Agreement.

31 Under the SISP, preliminary, non-binding indications of interest were delivered to the advisors and the company by February 22, 2016. Six such indications of interest were received, all of which were materially superior to the Ad Hoc Bondholders proposal of February 2, 2016. The Ad Hoc Bondholders have admitted that they were aware of the milestones under the SISP and the Bank Forbearance Agreement by mid-February, 2016, although it is clear that their advisors would have been aware of these milestones from February 1, 2016.

32 As part of finalizing the form of Bond Forbearance Agreement, counsel for Sanjel and for the Ad Hoc Bondholders had negotiated a form of summons that would be used to call a bondholder meeting to consider the agreement. The only item for consideration to be considered at the meeting was to be the Bond Forbearance Agreement. The plan was to have 2/3 of the bondholders approve and execute the Bond Forbearance Agreement, and then to hold a bondholders meeting.

33 Instead, on February 25, 2016, the Ad Hoc Bondholders caused the Trustee to issue a summons for a meeting on March 10, 2016 to consider and vote on a) whether to declare the Bonds in default, accelerate them and exercise remedies, including commencing involuntary bankruptcy proceedings against Sanjel under Chapter 11 of the *United States Bankruptcy Code*, including claims against the MacDonald family and MacBain Properties Ltd., which owns the business premises that are leased by the Sanjel Group or b) approve the Bond Forbearance Agreement.

34 On March 2, 2016, the Ad Hoc Bondholders submitted a restructuring proposal to Sanjel. This proposal provided no cash recovery to the Syndicate. Instead, a portion of the debt owed to the Syndicate would be converted to a new loan and the remainder extinguished, with the Syndicate receiving warrants in a reorganized company. There would be a Chapter

11 filing and the bondholders would provide a debtor-in-possession ("DIP") facility to rank *pari passu* with the Syndicate debt. Bondholders who contributed to the DIP would receive new 2nd lien notes for part of their previous notes, the remainder being extinguished. The DIP facility would be converted into 100% of the equity of the reorganized company. Sanjel would be required to appoint a Chief Restructuring Officer ("CRO") designated by the Ad Hoc Bondholders.

35 On March 4, 2016, in a follow-up letter to a telephone meeting on March 3, 2016, US counsel to the Syndicate wrote to Fried Frank requesting that the March 10 bondholders meeting be adjourned to March 31, 2016. Canadian counsel to Sanjel made the same request of the Trustee.

36 Also on March 4, 2016, a template Asset Purchase Agreement ("APA") for SISP bidders was posted on the VDRs, which disclosed a CCAA/Chapter 15 filing with PWC as designated Monitor. This template agreement was available to the Ad Hoc Bondholders and their advisors.

37 Counsel for the Ad Hoc Bondholders replied on March 5, 2016 that they would advise the Trustee to postpone the March 10 meeting subject to:

- a) a response to their March 2 proposal by March 10, 2016;
- b) full disclosure of company records for A&M's representative, "so that [that representative] is ready and best positioned to commence his duties as Chief Restructuring Officer for the Company".
- c) payment by March 7, 2016 of roughly USD \$2.2 million in fees and disbursements for the Ad Hoc Bondholders' legal and financial advisors.

38 After some negotiation, Sanjel agreed to these terms for an adjournment, other than with respect to a small deduction in fees and disbursements. Sanjel made it clear that it reserved all rights with respect to the appointment of a CRO and a filing under Chapter 11, which it would not agree to at that time. On March 8, 2016 the Trustee confirmed that the meeting would be postponed to March 31.

39 On March 9, 2016, second round bids under the SISP were received. Five bids were received, all of which were materially superior to the Ad Hoc Bondholders' March 2, 2016 proposal in terms of cash recovery for the Syndicate.

40 An information update conference for bondholders was scheduled to be held on March 11, 2016, at which Sanjel, the Trustee and the Ad Hoc Bondholders would provide an update

to any bondholder that wished to call in. This was rescheduled by the Trustee to March 31, 2016.

41 On March 11, 2016, the Syndicate sent the counter-offer required by the postponement of meeting agreement to the Ad Hoc Bondholders. This counter-proposal made it clear that there would be a CCAA/Chapter 15 process, rather than a Chapter 11 process. While this counter-proposal is confidential, it is fair to say that the parties were far apart in their negotiations, particularly with respect to treatment of the Syndicate indebtedness.

42 Also on March 11, 2016, a representative of Sanjel met with A&M's representative and discussed Sanjel's intention to disclaim certain leases in the anticipated CCAA proceedings.

43 Following receipt of the second round bids, Sanjel and its advisors identified the top three bidders and began negotiations with them with the goal of finalizing due diligence and being in a position to execute final APAs on March 24, 2016, as indicated in the Bank Forbearance Agreement.

44 In the meantime, Sanjel continued meetings with the A&M representative, who asked for, and was provided with:

a) access to the newly created VDR for second stage bidders/investors in the SISP on March 12, 2016.

b) draft materials relating to the CCAA filing, including current drafts of cash flow projections and drafts of stakeholder communication regarding the CCAA, on March 21, 2016.

45 On March 20, 2016, the Ad Hoc Bondholders provided Sanjel and the Syndicate with a third restructuring proposal. This one provided for some paydown of the Syndicate's debt, but involved less than half of that recovery in new money, about the same amount in debt secured by accounts receivable and a substantial amount of bank debt rolled over into a new loan. It also provided for a DIP facility to rank *pari passu* with a new bank credit facility in the event of a liquidation and the conversion of some bondholder debt into secured notes.

46 On March 23, 2016, counsel for Sanjel requested that the Trustee postpone the bondholder meeting scheduled for March 31, 2016 to April 14, 2016. He also proposed to set up the requested informational update on March 31, 2016. On March 25, 2016, counsel for the Trustee consented to this request.

47 In the SISP, final bids were received from the three top bidders on March 24, 2016, with negotiations to continue on final APAs. On the same day, Sanjel and its advisors hosted a call with A&M and Moelis, during which they walked through a 13 week cash forecast.

48 On March 31, 2016 the Syndicate and the Ad Hoc Bondholders had discussions with respect to the Ad Hoc Bondholders' March 20 proposal. In previous correspondence, the Syndicate's counsel had questioned the adequacy of the proposed DIP financing in the proposal and noted Sanjel's significant cash needs following exit from an insolvency proceeding, as opposed to the proposal's assumption that there would be better cash flow. At the conclusion of the call, the Ad Hoc Bondholders indicated that they would provide further modelling with respect to their proposal.

49 On April 3, 2016, Sanjel entered into final APAs with the proposed purchasers, STEP and Liberty. On April 4, 2016, the Sanjel Group filed for CCAA protection. Counsel for Sanjel Group disclosed that the application was made without notice to the Ad Hoc Bondholders. He submitted that notice would imperil the CCAA proceedings as the bondholders may, with notice, have pre-empted the CCAA filing by an involuntary filing under Chapter 11. There is no requirement to give notice to unsecured creditors of a CCAA filing. There are circumstances, and this was one of them, where it is appropriate to seek an initial order on an ex parte basis:

This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("Rescue!"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7

50 On April 11, 2016, the Ad Hoc Bondholders presented their fourth proposal for restructuring, not to Sanjel but to the Syndicate. This proposal increases the amount the bondholders would contribute to Sanjel for new equity, which would be used to repay a portion of the Syndicate's loan.

51 According to Fried Frank, the Syndicate's counsel responded on April 13, 2016 advising that while they appreciated the work done by the Ad Hoc Bondholders, the Syndicate preferred the sale route. The Syndicate proposed alternatives that it might consider involving a higher pay-out of the Syndicate's debt than offered by the April 11, 2016 proposal. The Ad Hoc Bondholders have not responded.

52 The Sanjel Group apply for an order approving the sales transactions generated through the SISP, being a sales agreement between Sanjel and STEP Energy Services Ltd., including an assignment of the sale of the debtor's cementing assets in favour of 1961531 Alberta Ltd., and a sales agreement between Sanjel and Liberty.

53 The Trustee applied for an order dismissing the application for approval of these transactions, allowing the Ad Hoc Bondholders to propose a plan of arrangement, lifting

the stay to allow the Trustee to commence a Chapter 11 filing and directing a new Court-monitored SISP, among other applications

III. Applicable Law

54 Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

- (a) whether the process leading to the proposed sale was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale;
- (c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to 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 on 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.

55 In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

56 Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

- a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?
- b) Were the interests of all parties considered?
- c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?
- d) Was there unfairness in the working out of the process?

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (Ont. C.A.) at para 20.

57 Gascon, J. (as he then was) suggested in *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and

b) the weight to be given to the recommendation of the monitor.

58 As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

IV. Analysis

59 The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

A. The Trustee submits that the CCAA can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the CCAA provides scope for greater recoveries than would be available on a bankruptcy.

60 Most of the cases relied upon by the Trustee with respect to this submission predate the 2009 enactment of section 36 of the CCAA. While prior to this change to the CCAA, there was some authority that questioned whether the CCAA should be used to carry out a liquidation of a debtors' assets, there was also authority that accepted this as a proper use of the statute.

61 An analysis of the pre-section 36 state of the law on this issue, and support for the latter view, is well summarized in *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]). As noted by Morawetz, J. at para 28 of that decision, the CCAA is a flexible statute, particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests. This is such a case.

62 Section 36 now provides that a CCAA court may authorize the sale or disposition of assets outside the ordinary course of business if authorized to do so by court order. There is thus no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement.

63 Morawetz, J in *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) at paras 32 and 33, describes the change brought about by section 36:

Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

See also *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 at para 15.

64 Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

65 What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISF process preceded the CCAA filing, and I will address that factor later in this decision.

66 As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

67 The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A

CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

68 In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

69 It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

70 A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

71 Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

72 Similar issues were considered in *Nelson Education Ltd., Re*, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List]) at paras 31-32, and in *Bloom Lake, g.p.l., Re*, 2015 QCCS 1920 (C.S. Que.) at para 21.

73 The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor

was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

74 While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

75 The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

76 Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

77 While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

78 I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

79 Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

81 These are serious allegations, but they are not supported by the evidence.

82 As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

83 These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

85 The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

86 The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate.

It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

87 In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defensible justifications.

88 The Ad Hoc Bondholders describe their proposal as a "germ" of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISF.

89 The Trustee also submits that the Court should not be deterred by the Syndicate's rejection of the proposal, insisting on its value and citing cases where a creditor's stated intention not to accept a plan did not prevent a CCAA filing from proceeding. This is a different situation: the Ad Hoc Bondholder's proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate's rejection of such a plan, even if inclined to do so.

90 The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the "Demand Acceleration and NOI") on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

91 This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

92 The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group's revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure

and the integration of its business in its initial filing, including the fact that the Sanjel Group's "nerve centre", management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group's COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

93 The Trustee's most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders' meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA.

94 Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

95 The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of "prospective enforcement action as proposed for consideration at the scheduled bondholders meeting," as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

96 The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

97 The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate "to the serious and material prejudice of the Bondholders" and other unsecured creditors.

98 The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured

creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

99 The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471 (Ont. S.C.J. [Commercial List]) at para 43.

100 Section 6 of the CCAA requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective "veto" over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co., Re*, 2009 ABQB 490 (Alta. Q.B.) at para 22.

101 As noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no, agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

102 The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder's proposals would even provide sufficient operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

103 The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the *United States Bankruptcy Code*, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

104 While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

(a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;

(b) Sanjel could confirm a plan without the consent of the Syndicate; and

(c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

105 Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

106 This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

107 The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

108 What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

109 The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

110 The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

111 The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

112 I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbable that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

113 On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

114 The letter asserts the following:

- a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;
- b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;
- c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;
- d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";
- e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the

MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

115 The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients hereby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

c) "... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts."

116 The letter comments that "(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order."

117 The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

118 On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

119 The Monitor was satisfied by its rapid but thorough investigations that:

- a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;
- b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC's fundraising efforts or fund deployment and he has no ownership interest in ARC;
- c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;
- d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;
- e) The senior Mr. MacDonald has not had an active role in Sanjel's management for years, was not involved in the SISP and does not own shares in STEP or ARC;
- f) Mr. Hooker's involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;
- g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;
- h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;
- i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

120 This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

121 When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

122 The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

123 The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

124 This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

125 Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

126 With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP

to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

127 Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

128 I accept the Monitor's advice on this issue.

129 With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

130 The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

131 A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

132 There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

133 Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

134 In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

135 The issue of who should bear the cost of the investigation into these allegations is reserved.

Debtors' application granted; trustee's application dismissed.

TAB 8

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note)

(Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1^{re} inst.)), qui avait accueilli en partie la demande.

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEEA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEEA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence

of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998, SOR/98-106*

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and

that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of

openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale

underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders

in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

- (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
- (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick, supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

- (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
- (b) the judge must consider whether the order is limited as much as possible; and
- (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than

legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve *any* important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

A publication ban should only be ordered when:

- (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only be granted when:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck, supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company

could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields "where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB*

Hassle v. Canada (Minister of National Health & Welfare) (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used

by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) *The Proportionality Stage*

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear

installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will

not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings

to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEEA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be

viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra, supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal, supra*, at pp. 1353-1354:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the

proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression.

As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

TAB 9

1997 CarswellOnt 1914
Ontario Court of Justice, General Division

T. Eaton Co., Re

1997 CarswellOnt 1914, [1997] O.J. No. 6411, 46 C.B.R. (3d) 293

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

And in the Matter of the Courts of Justice Act, R.S.O. 1990, c. C.43

And in the Matter of a Plan of Compromise or Arrangement of the T.
Eaton Company Limited and All other Companies Set out in Schedule "A"

The T. Eaton Company Limited, et al., Applicants

Houlden J.A.

Oral reasons: May 8, 1997

Docket: RE 7483/97

Counsel: *Jonathan Stainsby* and *Kenneth D. Kraft*, for moving parties.
Lyndon Barnes, *R.G. Marantz* and *John MacDonald*, for The T. Eaton Company Limited.
J.A. Carfagnini and *Robert J. Chadwick*, for The Cadillac Fairview Corporation Limited.
Robert Arcand, for Cambridge Leaseholds Limited and other landlords.
Jeff Carhart, for Ontario Pension Board Subsidiary Corporations.
R. Thornton, for 2725354 Canada Inc.
Kevin Zych, for Hammerson Canada Inc.
Hilary Clarke, for G.E. Capital Heard.

Subject: Insolvency; Property; Civil Practice and Procedure

MOTION to vary the order to allow D to exercise its rights under co-tenancy clauses in its leases.

Houlden J.A. (orally):

1 On February 27, 1997, I made an order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, (the "CCAA") to permit the T. Eaton Company Limited ("Eaton's") to present a plan of compromise and arrangement to its creditors. The order contained a clause preventing tenants at retail shopping centres in which Eaton's was

an anchor tenant from terminating their leases during the restructuring period. When the clause was put in the order, counsel for Eaton's explained the purpose of the clause and the necessity for it being part of the plan. However, as Mr. Stainsby has pointed out, Dylex (and for convenience I will refer to the moving parties by that name) was not served with notice of the application nor was it represented. Accordingly, I believe that Dylex has the status to request the variation of my order.

2 As part of its restructuring plan, Eaton's must close uneconomic stores. To carry out a successful restructuring, Eaton's will have to terminate the leases of those stores and obtain the support of its former landlords for its plan of compromise and arrangement.

3 Dylex operates retail stores in regional shopping centres of which Eaton's is one of the anchor stores. The Dylex leases contain co-tenancy clauses. While the clauses vary, generally they permit Dylex to terminate or otherwise alter the terms of their leases if Eaton's ceases to operate its store in a shopping centre. When Eaton's closes a store, Dylex will suffer a loss of traffic flow and this will have a deleterious affect on Dylex's sales and profitability.

4 In this motion, Dylex is seeking an order amending my order of February 27, 1997 to permit Dylex to exercise its rights under the co-tenancy clauses in its leases. Co-tenancy clauses in shopping centre leases are not uncommon. If I were to grant the order requested by Dylex, I would have to grant the same relief to other tenants in a similar position. There is material before me that indicates that if this were to happen, Eaton's restructuring plan would be seriously jeopardized and might prove to be impossible. As Mr. Carhart pointed out, if tenants are permitted by the exercise of co-tenancy clauses to reduce rents or terminate leases, the claims of the landlords against Eaton's will be greatly increased and this will have a serious impact on a restructuring plan.

5 Although I have considerable sympathy for the problem facing Dylex as a result of the closing of anchor stores by Eaton's, I must do all in my power to bring about a successful plan of compromise and arrangement. Eaton's has more than 15,000 full and part-time employees. It has sales of about \$1,500,000,000 a year and the continuation of that source of business is of great importance to Eaton's suppliers.

6 Two grounds are advanced for varying my order of February 27th. First, it is submitted that I had no jurisdiction to make the order since Dylex is not a creditor of Eaton's. With respect, I believe that s. 11 of the *CCAA* and the inherent jurisdiction of the court are sufficiently wide to permit the making of orders against third parties who are not creditors where their actions would potentially prejudice the success of a plan: *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]) and *Norcen Energy Resources Ltd. v. Oakwood Petroleum Ltd.* (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.).

7 Secondly, it is submitted that, even if I had jurisdiction to make the order, the prejudice to the moving parties outweighs the benefits of maintaining the stay. Again, with respect, I do not agree. In the factum filed by the Cadillac Fairview Corporation Limited and a number of other landlords, the following reasons, which I find to be accurate, are given for maintaining the stay:

- (a) no Plan has been filed and it is unclear at this time how the claims of all the stakeholders will be addressed;
- (b) the exercise of rights of the Moving Parties and others in similar circumstances at this time would have a negative impact on Eaton's ability to restructure, potentially jeopardizing the success of the plan and thereby the continuance of the company;
- (c) if Eaton's were prevented from concluding a successful restructuring with its landlords, the economic harm would be far-reaching and devastating;
- (d) the exodus of tenants could result in malls being forced to close; this could have a significant ripple effect throughout the local economies and cause further job loss;
- (e) Eaton's bankruptcy would have an even more devastating impact on all of Eaton's stakeholders, including its employees, suppliers, shareholders, creditors and landlords.

In connection with (a), Mr. Stainsby acknowledges that, as yet, no stores have been closed so that Dylex has in fact suffered no prejudice. In my opinion, the benefits of maintaining the stay, far outweigh the prejudice to Dylex.

8 For these reasons, the motion will be dismissed. There will, in the circumstances, be no order for costs. Mr. Stainsby requested that if I dismissed the motion, I should do so without prejudice to Dylex raising the same objections when the plan is presented for approval. I do not believe that it is appropriate to make such an order at this time. Dylex will, of course, have the right to oppose the sanctioning of the plan, and to raise such grounds as it sees fit. How the court will deal with those grounds is a matter to be decided when, and if, the issue arises on the application for approval.

Motion dismissed.

TAB 10

2015 ONSC 303
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 620, 2015 ONSC 303, [2015] O.J.
No. 247, 22 C.B.R. (6th) 323, 248 A.C.W.S. (3d) 753

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

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

Morawetz R.S.J.

Heard: January 15, 2015
Judgment: January 16, 2015
Docket: CV-15-10832-00CL

Counsel: Tracy Sandler, Jeremy Dacks for Applicants, Target Canada Co., Target Canada
Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target
Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada
Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz for Target Corporation

Alan Mark, Melaney Wagner, Jesse Mighton for Proposed Monitor, Alvarez and Marsal
Canada ULC ("Alvarez")

Terry O'Sullivan for Honourable J. Ground, Trustee of the Proposed Employee Trust

Susan Philpott for Proposed Employee Representative Counsel, for Employees of the
Applicants

Subject: Insolvency; Property

APPLICATION for relief under *Companies' Creditors Arrangement Act*.

Morawetz R.S.J.:

1 Target Canada Co. ("TCC") and the other applicants listed above (the "Applicants") seek
relief under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended

(the "CCAA"). While the limited partnerships listed in Schedule "A" to the draft Order (the "Partnerships") are not applicants in this proceeding, the Applicants seek to have a stay of proceedings and other benefits of an initial order under the CCAA extended to the Partnerships, which are related to or carry on operations that are integral to the business of the Applicants.

2 TCC is a large Canadian retailer. It is the Canadian operating subsidiary of Target Corporation, one of the largest retailers in the United States. The other Applicants are either corporations or partners of the Partnerships formed to carry on specific aspects of TCC's Canadian retail business (such as the Canadian pharmacy operations) or finance leasehold improvements in leased Canadian stores operated by TCC. The Applicants, therefore, do not represent the entire Target enterprise; the Applicants consist solely of entities that are integral to the Canadian retail operations. Together, they are referred as the "Target Canada Entities".

3 In early 2011, Target Corporation determined to expand its retail operations into Canada, undertaking a significant investment (in the form of both debt and equity) in TCC and certain of its affiliates in order to permit TCC to establish and operate Canadian retail stores. As of today, TCC operates 133 stores, with at least one store in every province of Canada. All but three of these stores are leased.

4 Due to a number of factors, the expansion into Canada has proven to be substantially less successful than expected. Canadian operations have shown significant losses in every quarter since stores opened. Projections demonstrate little or no prospect of improvement within a reasonable time.

5 After exploring multiple solutions over a number of months and engaging in extensive consultations with its professional advisors, Target Corporation concluded that, in the interest of all of its stakeholders, the responsible course of action is to cease funding the Canadian operations.

6 Without ongoing investment from Target Corporation, TCC and the other Target Canada Entities cannot continue to operate and are clearly insolvent. Due to the magnitude and complexity of the operations of the Target Canada Entities, the Applicants are seeking a stay of proceedings under the CCAA in order to accomplish a fair, orderly and controlled wind-down of their operations. The Target Canada Entities have indicated that they intend to treat all of their stakeholders as fairly and equitably as the circumstances allow, particularly the approximately 17,600 employees of the Target Canada Entities.

7 The Applicants are of the view that an orderly wind-down under Court supervision, with the benefit of inherent jurisdiction of the CCAA, and the oversight of the proposed monitor, provides a framework in which the Target Canada Entities can, among other things:

- a) Pursue initiatives such as the sale of real estate portfolios and the sale of inventory;
- b) Develop and implement support mechanisms for employees as vulnerable stakeholders affected by the wind-down, particularly (i) an employee trust (the "Employee Trust") funded by Target Corporation; (ii) an employee representative counsel to safeguard employee interests; and (iii) a key employee retention plan (the "KERP") to provide essential employees who agree to continue their employment and to contribute their services and expertise to the Target Canada Entities during the orderly wind-down;
- c) Create a level playing field to ensure that all affected stakeholders are treated as fairly and equitably as the circumstances allow; and
- d) Avoid the significant maneuvering among creditors and other stakeholders that could be detrimental to all stakeholders, in the absence of a court-supervised proceeding.

8 The Applicants are of the view that these factors are entirely consistent with the well-established purpose of a CCAA stay: to give a debtor the "breathing room" required to restructure with a view to maximizing recoveries, whether the restructuring takes place as a going concern or as an orderly liquidation or wind-down.

9 TCC is an indirect, wholly-owned subsidiary of Target Corporation and is the operating company through which the Canadian retail operations are carried out. TCC is a Nova Scotia unlimited liability company. It is directly owned by Nicollet Enterprise I S. à r.l. ("NE1"), an entity organized under the laws of Luxembourg. Target Corporation (which is incorporated under the laws of the State of Minnesota) owns NE1 through several other entities.

10 TCC operates from a corporate headquarters in Mississauga, Ontario. As of January 12, 2015, TCC employed approximately 17,600 people, almost all of whom work in Canada. TCC's employees are not represented by a union, and there is no registered pension plan for employees.

11 The other Target Canada Entities are all either: (i) direct or indirect subsidiaries of TCC with responsibilities for specific aspects of the Canadian retail operation; or (ii) affiliates of TCC that have been involved in the financing of certain leasehold improvements.

12 A typical TCC store has a footprint in the range of 80,000 to 125,000 total retail square feet and is located in a shopping mall or large strip mall. TCC is usually the anchor tenant. Each TCC store typically contains an in-store Target brand pharmacy, Target Mobile kiosk

and a Starbucks café. Each store typically employs approximately 100 - 150 people, described as "Team Members" and "Team Leaders", with a total of approximately 16,700 employed at the "store level" of TCC's retail operations.

13 TCC owns three distribution centres (two in Ontario and one in Alberta) to support its retail operations. These centres are operated by a third party service provider. TCC also leases a variety of warehouse and office spaces.

14 In every quarter since TCC opened its first store, TCC has faced lower than expected sales and greater than expected losses. As reported in Target Corporation's Consolidated Financial Statements, the Canadian segment of the Target business has suffered a significant loss in every quarter since TCC opened stores in Canada.

15 TCC is completely operationally funded by its ultimate parent, Target Corporation, and related entities. It is projected that TCC's cumulative pre-tax losses from the date of its entry into the Canadian market to the end of the 2014 fiscal year (ending January 31, 2015) will be more than \$2.5 billion. In his affidavit, Mr. Mark Wong, General Counsel and Secretary of TCC, states that this is more than triple the loss originally expected for this period. Further, if TCC's operations are not wound down, it is projected that they would remain unprofitable for at least 5 years and would require significant and continued funding from Target Corporation during that period.

16 TCC attributes its failure to achieve expected profitability to a number of principal factors, including: issues of scale; supply chain difficulties; pricing and product mix issues; and the absence of a Canadian online retail presence.

17 Following a detailed review of TCC's operations, the Board of Directors of Target Corporation decided that it is in the best interests of the business of Target Corporation and its subsidiaries to discontinue Canadian operations.

18 Based on the stand-alone financial statements prepared for TCC as of November 1, 2014 (which consolidated financial results of TCC and its subsidiaries), TCC had total assets of approximately \$5.408 billion and total liabilities of approximately \$5.118 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC's financial situation.

19 Mr. Wong states that TCC's operational funding is provided by Target Corporation. As of November 1, 2014, NE1 (TCC's direct parent) had provided equity capital to TCC in the amount of approximately \$2.5 billion. As a result of continuing and significant losses in TCC's operations, NE1 has been required to make an additional equity investment of \$62 million since November 1, 2014.

20 NE1 has also lent funds to TCC under a Loan Facility with a maximum amount of \$4 billion. TCC owed NE1 approximately \$3.1 billion under this Facility as of January 2, 2015. The Loan Facility is unsecured. On January 14, 2015, NE1 agreed to subordinate all amounts owing by TCC to NE1 under this Loan Facility to payment in full of proven claims against TCC.

21 As at November 1, 2014, Target Canada Property LLC ("TCC Propco") had assets of approximately \$1.632 billion and total liabilities of approximately \$1.643 billion. Mr. Wong states that this does not reflect a significant impairment charge that will likely be incurred at fiscal year end due to TCC Propco's financial situation. TCC Propco has also borrowed approximately \$1.5 billion from Target Canada Property LP and TCC Propco also owes U.S. \$89 million to Target Corporation under a Demand Promissory Note.

22 TCC has subleased almost all the retail store leases to TCC Propco, which then made real estate improvements and sub-sub leased the properties back to TCC. Under this arrangement, upon termination of any of these sub-leases, a "make whole" payment becomes owing from TCC to TCC Propco.

23 Mr. Wong states that without further funding and financial support from Target Corporation, the Target Canada Entities are unable to meet their liabilities as they become due, including TCC's next payroll (due January 16, 2015). The Target Canada Entities, therefore state that they are insolvent.

24 Mr. Wong also states that given the size and complexity of TCC's operations and the numerous stakeholders involved in the business, including employees, suppliers, landlords, franchisees and others, the Target Canada Entities have determined that a controlled wind-down of their operations and liquidation under the protection of the CCAA, under Court supervision and with the assistance of the proposed monitor, is the only practical method available to ensure a fair and orderly process for all stakeholders. Further, Mr. Wong states that TCC and Target Corporation seek to benefit from the framework and the flexibility provided by the CCAA in effecting a controlled and orderly wind-down of the Canadian operations, in a manner that treats stakeholders as fairly and as equitably as the circumstances allow.

25 On this initial hearing, the issues are as follows:

a) Does this court have jurisdiction to grant the CCAA relief requested?

a) Should the stay be extended to the Partnerships?

- b) Should the stay be extended to "Co-tenants" and rights of third party tenants?
- c) Should the stay extend to Target Corporation and its U.S. subsidiaries in relation to claims that are derivative of claims against the Target Canada Entities?
- d) Should the Court approve protections for employees?
- e) Is it appropriate to allow payment of certain pre-filing amounts?
- f) Does this court have the jurisdiction to authorize pre-filing claims to "critical" suppliers;
- g) Should the court should exercise its discretion to authorize the Applicants to seek proposals from liquidators and approve the financial advisor and real estate advisor engagement?
- h) Should the court exercise its discretion to approve the Court-ordered charges?

26 "Insolvent" is not expressly defined in the CCAA. However, for the purposes of the CCAA, a debtor is insolvent if it meets the definition of an "insolvent person" in section 2 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 ("BIA") or if it is "insolvent" as described in *Stelco Inc., Re*, [2004] O.J. No. 1257 (Ont. S.C.J. [Commercial List]), [*Stelco*], leave to appeal refused, [2004] O.J. No. 1903 (Ont. C.A.), leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336 (S.C.C.), where Farley, J. found that "insolvency" includes a corporation "reasonably expected to run out of liquidity within [a] reasonable proximity of time as compared with the time reasonably required to implement a restructuring" (at para 26). The decision of Farley, J. in *Stelco* was followed in *Prizm Income Fund, Re*, [2011] O.J. No. 1491 (Ont. S.C.J.), 2011 and *Canwest Global Communications Corp., Re*, [2009] O.J. No. 4286 (Ont. S.C.J. [Commercial List]) [*Canwest*].

27 Having reviewed the record and hearing submissions, I am satisfied that the Target Canada Entities are all insolvent and are debtor companies to which the CCAA applies, either by reference to the definition of "insolvent person" under the *Bankruptcy and Insolvency Act* (the "BIA") or under the test developed by Farley J. in *Stelco*.

28 I also accept the submission of counsel to the Applicants that without the continued financial support of Target Corporation, the Target Canada Entities face too many legal and business impediments and too much uncertainty to wind-down their operations without the "breathing space" afforded by a stay of proceedings or other available relief under the CCAA.

29 I am also satisfied that this Court has jurisdiction over the proceeding. Section 9(1) of the CCAA provides that an application may be made to the court that has jurisdiction in (a) the province in which the head office or chief place of business of the company in Canada is situated; or (b) any province in which the company's assets are situated, if there is no place of business in Canada.

30 In this case, the head office and corporate headquarters of TCC is located in Mississauga, Ontario, where approximately 800 employees work. Moreover, the chief place of business of the Target Canada Entities is Ontario. A number of office locations are in Ontario; 2 of TCC's 3 primary distribution centres are located in Ontario; 55 of the TCC retail stores operate in Ontario; and almost half the employees that support TCC's operations work in Ontario.

31 The Target Canada Entities state that the purpose for seeking the proposed initial order in these proceedings is to effect a fair, controlled and orderly wind-down of their Canadian retail business with a view to developing a plan of compromise or arrangement to present to their creditors as part of these proceedings. I accept the submissions of counsel to the Applicants that although there is no prospect that a restructured "going concern" solution involving the Target Canada Entities will result, the use of the protections and flexibility afforded by the CCAA is entirely appropriate in these circumstances. In arriving at this conclusion, I have noted the comments of the Supreme Court of Canada in *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) ("*Century Services*") that "courts frequently observe that the CCAA is skeletal in nature", and does not "contain a comprehensive code that lays out all that is permitted or barred". The flexibility of the CCAA, particularly in the context of large and complex restructurings, allows for innovation and creativity, in contrast to the more "rules-based" approach of the BIA.

32 Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

33 The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

34 In this case, the sheer magnitude and complexity of the Target Canada Entities business, including the number of stakeholders whose interests are affected, are, in my view, suited to the flexible framework and scope for innovation offered by this "skeletal" legislation.

35 The required audited financial statements are contained in the record.

36 The required cash flow statements are contained in the record.

37 Pursuant to s. 11.02 of the CCAA, the court may make an order staying proceedings, restraining further proceedings, or prohibiting the commencement of proceedings, "on any terms that it may impose" and "effective for the period that the court considers necessary" provided the stay is no longer than 30 days. The Target Canada Entities, in this case, seek a stay of proceedings up to and including February 13, 2015.

38 Certain of the corporate Target Canada Entities (TCC, TCC Health and TCC Mobile) act as general or limited partners in the partnerships. The Applicants submit that it is appropriate to extend the stay of proceedings to the Partnerships on the basis that each performs key functions in relation to the Target Canada Entities' businesses.

39 The Applicants also seek to extend the stay to Target Canada Property LP which was formerly the sub-leasee/sub-sub lessor under the sub-sub lease back arrangement entered into by TCC to finance the leasehold improvements in its leased stores. The Applicants contend that the extension of the stay to Target Canada Property LP is necessary in order to safeguard it against any residual claims that may be asserted against it as a result of TCC Propco's insolvency and filing under the CCAA.

40 I am satisfied that it is appropriate that an initial order extending the protection of a CCAA stay of proceedings under section 11.02(1) of the CCAA should be granted.

41 Pursuant to section 11.7(1) of the CCAA, Alvarez & Marsal Inc. is appointed as Monitor.

42 It is well established that the court has the jurisdiction to extend the protection of the stay of proceedings to Partnerships in order to ensure that the purposes of the CCAA can be achieved (see: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *Prizm Income Fund, Re*, 2011 ONSC 2061 (Ont. S.C.J.); *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]) ("*Canwest Publishing*") and *Canwest Global Communications Corp., Re*, 2009 CarswellOnt 6184 (Ont. S.C.J. [Commercial List]) ("*Canwest Global*").

43 In these circumstances, I am also satisfied that it is appropriate to extend the stay to the Partnerships as requested.

44 The Applicants also seek landlord protection in relation to third party tenants. Many retail leases of non-anchored tenants provide that tenants have certain rights against their landlords if the anchor tenant in a particular shopping mall or centre becomes insolvent or ceases operations. In order to alleviate the prejudice to TCC's landlords if any such non-anchored tenants attempt to exercise these rights, the Applicants request an extension of the stay of proceedings (the "Co-Tenancy Stay") to all rights of these third party tenants against the landlords that arise out of the insolvency of the Target Canada Entities or as a result of any steps taken by the Target Canada Entities pursuant to the Initial Order.

45 The Applicants contend that the authority to grant the Co-Tenancy Stay derives from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on any terms that the court may impose. Counsel references *T. Eaton Co., Re*, 1997 CarswellOnt 1914 (Ont. Gen. Div.) as a precedent where a stay of proceedings of the same nature as the Co-Tenancy Stay was granted by the court in Eaton's second CCAA proceeding. The Court noted that, if tenants were permitted to exercise these "co-tenancy" rights during the stay, the claims of the landlord against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company.

46 In these proceedings, the Target Canada Entities propose, as part of the orderly wind-down of their businesses, to engage a financial advisor and a real estate advisor with a view to implementing a sales process for some or all of its real estate portfolio. The Applicants submit that it is premature to determine whether this process will be successful, whether any leases will be conveyed to third party purchasers for value and whether the Target Canada Entities can successfully develop and implement a plan that their stakeholders, including their landlords, will accept. The Applicants further contend that while this process is being resolved and the orderly wind-down is underway, the Co-Tenancy Stay is required to postpone the contractual rights of these tenants for a finite period. The Applicants contend that any prejudice to the third party tenants' clients is significantly outweighed by the benefits of the Co-Tenancy Stay to all of the stakeholders of the Target Canada Entities during the wind-down period.

47 The Applicants therefore submit that it is both necessary and appropriate to grant the Co-Tenancy Stay in these circumstances.

48 I am satisfied the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time. To the extent that the affected parties wish to challenge the broad nature of this stay, the same can be addressed at the "comeback hearing".

49 The Applicants also request that the benefit of the stay of proceedings be extended (subject to certain exceptions related to the cash management system) to Target Corporation

and its U.S. subsidiaries in relation to claims against these entities that are derivative of the primary liability of the Target Canada Entities.

50 I am satisfied that the Court has the jurisdiction to grant such a stay. In my view, it is appropriate to preserve the status quo at this time and the stay is granted, again, subject to the proviso that affected parties can challenge the broad nature of the stay at a comeback hearing directed to this issue.

51 With respect to the protection of employees, it is noted that TCC employs approximately 17,600 individuals.

52 Mr. Wong contends that TCC and Target Corporation have always considered their employees to be integral to the Target brand and business. However, the orderly wind-down of the Target Canada Entities' business means that the vast majority of TCC employees will receive a notice immediately after the CCAA filing that their employment is to be terminated as part of the wind-down process.

53 In order to provide a measure of financial security during the orderly wind-down and to diminish financial hardship that TCC employees may suffer, Target Corporation has agreed to fund an Employee Trust to a maximum of \$70 million.

54 The Applicants seek court approval of the Employee Trust which provides for payment to eligible employees of certain amounts, such as the balance of working notice following termination. Counsel contends that the Employee Trust was developed in consultation with the proposed monitor, who is the administrator of the trust, and is supported by the proposed Representative Counsel. The proposed trustee is The Honourable J. Ground. The Employee Trust is exclusively funded by Target Corporation and the costs associated with administering the Employee Trust will be borne by the Employee Trust, not the estate of Target Canada Entities. Target Corporation has agreed not to seek to recover from the Target Canada Entities estates any amounts paid out to employee beneficiaries under the Employee Trust.

55 In my view, it is questionable as to whether court authorization is required to implement the provisions of the Employee Trust. It is the third party, Target Corporation, that is funding the expenses for the Employee Trust and not one of the debtor Applicants. However, I do recognize that the implementation of the Employee Trust is intertwined with this proceeding and is beneficial to the employees of the Applicants. To the extent that Target Corporation requires a court order authorizing the implementation of the employee trust, the same is granted.

56 The Applicants seek the approval of a KERP and the granting of a court ordered charge up to the aggregate amount of \$6.5 million as security for payments under the KERP.

It is proposed that the KERP Charge will rank after the Administration Charge but before the Directors' Charge.

57 The approval of a KERP and related KERP Charge is in the discretion of the Court. KERPs have been approved in numerous CCAA proceedings, including *Nortel Networks Corp., Re*, 2009 CarswellOnt 1330 (Ont. S.C.J. [Commercial List]) [*Nortel Networks (KERP)*], and *Grant Forest Products Inc., Re*, 2009 CarswellOnt 4699 (Ont. S.C.J. [Commercial List]). In *U.S. Steel Canada Inc., Re*, 2014 ONSC 6145 (Ont. S.C.J.), I recently approved the KERP for employees whose continued services were critical to the stability of the business and for the implementation of the marketing process and whose services could not easily be replaced due, in part, to the significant integration between the debtor company and its U.S. parent.

58 In this case, the KERP was developed by the Target Canada Entities in consultation with the proposed monitor. The proposed KERP and KERP Charge benefits between 21 and 26 key management employees and approximately 520 store-level management employees.

59 Having reviewed the record, I am of the view that it is appropriate to approve the KERP and the KERP Charge. In arriving at this conclusion, I have taken into account the submissions of counsel to the Applicants as to the importance of having stability among the key employees in the liquidation process that lies ahead.

60 The Applicants also request the Court to appoint Koskie Minsky LLP as employee representative counsel (the "Employee Representative Counsel"), with Ms. Susan Philpott acting as senior counsel. The Applicants contend that the Employee Representative Counsel will ensure that employee interests are adequately protected throughout the proceeding, including by assisting with the Employee Trust. The Applicants contend that at this stage of the proceeding, the employees have a common interest in the CCAA proceedings and there appears to be no material conflict existing between individual or groups of employees. Moreover, employees will be entitled to opt out, if desired.

61 I am satisfied that section 11 of the CCAA and the *Rules of Civil Procedure* confer broad jurisdiction on the court to appoint Representative Counsel for vulnerable stakeholder groups such as employee or investors (see *Nortel Networks Corp., Re*, 2009 CarswellOnt 3028 (Ont. S.C.J. [Commercial List]) (*Nortel Networks Representative Counsel*)). In my view, it is appropriate to approve the appointment of Employee Representative Counsel and to provide for the payment of fees for such counsel by the Applicants. In arriving at this conclusion, I have taken into account:

- (i) the vulnerability and resources of the groups sought to be represented;
- (ii) the social benefit to be derived from the representation of the groups;

(iii) the avoidance of multiplicity of legal retainers; and

(iv) the balance of convenience and whether it is fair and just to creditors of the estate.

62 The Applicants also seek authorization, if necessary, and with the consent of the Monitor, to make payments for pre-filing amounts owing and arrears to certain critical third parties that provide services integral to TCC's ability to operate during and implement its controlled and orderly wind-down process.

63 Although the objective of the CCAA is to maintain the status quo while an insolvent company attempts to negotiate a plan of arrangement with its creditors, the courts have expressly acknowledged that preservation of the status quo does not necessarily entail the preservation of the relative pre-stay debt status of each creditor.

64 The Target Canada Entities seek authorization to pay pre-filing amounts to certain specific categories of suppliers, if necessary and with the consent of the Monitor. These include:

a) Logistics and supply chain providers;

b) Providers of credit, debt and gift card processing related services; and

c) Other suppliers up to a maximum aggregate amount of \$10 million, if, in the opinion of the Target Canada Entities, the supplier is critical to the orderly wind-down of the business.

65 In my view, having reviewed the record, I am satisfied that it is appropriate to grant this requested relief in respect of critical suppliers.

66 In order to maximize recovery for all stakeholders, TCC indicates that it intends to liquidate its inventory and attempt to sell the real estate portfolio, either en bloc, in groups, or on an individual property basis. The Applicants therefore seek authorization to solicit proposals from liquidators with a view to entering into an agreement for the liquidation of the Target Canada Entities inventory in a liquidation process.

67 TCC's liquidity position continues to deteriorate. According to Mr. Wong, TCC and its subsidiaries have an immediate need for funding in order to satisfy obligations that are coming due, including payroll obligations that are due on January 16, 2015. Mr. Wong states that Target Corporation and its subsidiaries are no longer willing to provide continued funding to TCC and its subsidiaries outside of a CCAA proceeding. Target Corporation (the "DIP Lender") has agreed to provide TCC and its subsidiaries (collectively,

the "Borrower") with an interim financing facility (the "DIP Facility") on terms advantageous to the Applicants in the form of a revolving credit facility in an amount up to U.S. \$175 million. Counsel points out that no fees are payable under the DIP Facility and interest is to be charged at what they consider to be the favourable rate of 5%. Mr. Wong also states that it is anticipated that the amount of the DIP Facility will be sufficient to accommodate the anticipated liquidity requirements of the Borrower during the orderly wind-down process.

68 The DIP Facility is to be secured by a security interest on all of the real and personal property owned, leased or hereafter acquired by the Borrower. The Applicants request a court-ordered charge on the property of the Borrower to secure the amount actually borrowed under the DIP Facility (the "DIP Lenders Charge"). The DIP Lenders Charge will rank in priority to all unsecured claims, but subordinate to the Administration Charge, the KERP Charge and the Directors' Charge.

69 The authority to grant an interim financing charge is set out at section 11.2 of the CCAA. Section 11.2(4) sets out certain factors to be considered by the court in deciding whether to grant the DIP Financing Charge.

70 The Target Canada Entities did not seek alternative DIP Financing proposals based on their belief that the DIP Facility was being offered on more favourable terms than any other potentially available third party financing. The Target Canada Entities are of the view that the DIP Facility is in the best interests of the Target Canada Entities and their stakeholders. I accept this submission and grant the relief as requested.

71 Accordingly, the DIP Lenders' Charge is granted in the amount up to U.S. \$175 million and the DIP Facility is approved.

72 Section 11 of the CCAA provides the court with the authority to allow the debtor company to enter into arrangements to facilitate a restructuring under the CCAA. The Target Canada Entities wish to retain Lazard and Northwest to assist them during the CCAA proceeding. Both the Target Canada Entities and the Monitor believe that the quantum and nature of the remuneration to be paid to Lazard and Northwest is fair and reasonable. In these circumstances, I am satisfied that it is appropriate to approve the engagement of Lazard and Northwest.

73 With respect to the Administration Charge, the Applicants are requesting that the Monitor, along with its counsel, counsel to the Target Canada Entities, independent counsel to the Directors, the Employee Representative Counsel, Lazard and Northwest be protected by a court ordered charge and all the property of the Target Canada Entities up to a maximum amount of \$6.75 million as security for their respective fees and disbursements (the "Administration Charge"). Certain fees that may be payable to Lazard are proposed to be protected by a Financial Advisor Subordinated Charge.

74 In *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 222 (Ont. S.C.J. [Commercial List]), Pepall J. (as she then was) provided a non-exhaustive list of factors to be considered in approving an administration charge, including:

- a. The size and complexity of the business being restructured;
- b. The proposed role of the beneficiaries of the charge;
- c. Whether there is an unwarranted duplication of roles;
- d. Whether the quantum of the proposed Charge appears to be fair and reasonable;
- e. The position of the secured creditors likely to be affected by the Charge; and
- f. The position of the Monitor.

75 Having reviewed the record, I am satisfied, that it is appropriate to approve the Administration Charge and the Financial Advisor Subordinated Charge.

76 The Applicants seek a Directors' and Officers' charge in the amount of up to \$64 million. The Directors Charge is proposed to be secured by the property of the Target Canada Entities and to rank behind the Administration Charge and the KERP Charge, but ahead of the DIP Lenders' Charge.

77 Pursuant to section 11.51 of the CCAA, the court has specific authority to grant a "super priority" charge to the directors and officers of a company as security for the indemnity provided by the company in respect of certain obligations.

78 I accept the submissions of counsel to the Applicants that the requested Directors' Charge is reasonable given the nature of the Target Canada Entities retail business, the number of employees in Canada and the corresponding potential exposure of the directors and officers to personal liability. Accordingly, the Directors' Charge is granted.

79 In the result, I am satisfied that it is appropriate to grant the Initial Order in these proceedings.

80 The stay of proceedings is in effect until February 13, 2015.

81 A comeback hearing is to be scheduled on or prior to February 13, 2015. I recognize that there are many aspects of the Initial Order that go beyond the usual first day provisions. I have determined that it is appropriate to grant this broad relief at this time so as to ensure that the status quo is maintained.

82 The comeback hearing is to be a "true" comeback hearing. In moving to set aside or vary any provisions of this order, moving parties do not have to overcome any onus of demonstrating that the order should be set aside or varied.

83 Finally, a copy of Lazard's engagement letter (the "Lazard Engagement Letter") is attached as Confidential Appendix "A" to the Monitor's pre-filing report. The Applicants request that the Lazard Engagement Letter be sealed, as the fee structure contemplated in the Lazard Engagement Letter could potentially influence the structure of bids received in the sales process.

84 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate in the circumstances to seal Confidential Appendix "A" to the Monitor's pre-filing report.

85 The Initial Order has been signed in the form presented.

Application granted.

TAB 11

2015 ONSC 1028
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 3274, 2015 ONSC 1028, 23 C.B.R. (6th) 303, 252 A.C.W.S. (3d) 11

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

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

Geoffrey Morawetz R.S.J.

Heard: February 11, 2015
Judgment: February 18, 2015
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, John MacDonald, Shawn Irving for Applicants, Target Canada Co.,
Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC)
Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target
Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz for Target Corporation

William Sasso, Sharon Strosberg, Jacqueline Horvat for Pharmacy Franchisee Association
of Canada

Susan Philpott for employees of the Applicants

Alan Mark, Melaney Wagner, Graham Smith, Francy Kussner for Monitor, Alvarez &
Marsal Inc.

J. Dietrich for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A.
Retail Canada ULC

Andrew Hodhod for Bell Canada

Harvey Chaiton for Directors and Officers

Subject: Insolvency

MOTION by pharmacists for order under s. 32(2) of *Companies' Creditors Arrangement Act*
that franchise agreements not be disclaimed, and other relief.

Geoffrey Morawetz R.S.J.:

1 The Pharmacy Franchisee Association of Canada ("PFAC") brought this motion for the following relief:

- a. appointing PFAC as the representative of the Pharmacists and Franchisees (collectively, the "Pharmacists") under the Pharmacy Franchise Agreements ("Franchise Agreements");
- b. appointing Sutts, Strosberg LLP as the Pharmacists' Representative Counsel (the "Representative Counsel");
- c. appointing BDO Canada ("BDO") as the Pharmacists' financial advisor;
- d. directing that the Pharmacists' reasonable legal and other professional expenses be paid from the estate of the Target Canada Entities with appropriate administrative charges to secure payment;
- e. directing that the "Disclaimer of Franchise Agreements" dated January 26, 2015 by the Franchisor, Target Pharmacy Franchising LP ("Target Pharmacy") be set aside;
- f. declaring that the Franchise Agreements and/or related agreements may not be disclaimed without court order; and
- g. directing that Target Pharmacy cannot deny the Pharmacists access to premises, discontinue supplies or otherwise interfere with a Pharmacist's operations without that Pharmacist's consent or a court order.

2 On January 26, 2015, Target Pharmacy delivered Disclaimers of Franchise Agreements and related agreements to each of the Pharmacists operating the pharmacies at 93 locations across Canada (outside Quebec), seeking to shut down these pharmacies in the Target Canada store locations within 30 days.

3 The Pharmacists ask the court to deny Target Pharmacy's Disclaimer of the Franchise Agreements because (i) the Disclaimers will not enhance the prospects of a viable arrangement being made; and (ii) the Pharmacists will suffer significant financial hardship as a consequence of the disclaimer, with insolvency and/or bankruptcy awaiting many of them.

4 Under the proposed wind-down, Target Pharmacy is not responsible for pharmacy shut-down costs. Instead, the Pharmacists are responsible for (i) the payment of salaries, severance pay and other obligations to their own employees, suppliers and contractors; (ii)

the relocation costs of their pharmacies; and (iii) the continuation of services to their patients in accordance with professional standards.

5 The Pharmacists recognize that they face numerous challenges as a result of Target store closures. In relocating, or winding-down pharmacy operations, the Pharmacists are required to comply with applicable legislation, regulations and standards governing the conduct of pharmacists in Canada, including such matters as: notice of pharmacy closure; notice of intention to open a new pharmacy; the safe-guarding of personal health records; providing notice to patients respecting their personal health information; and safeguarding and disposing of narcotics and controlled substances.

6 The Pharmacists seem to accept that when a Target store closes, the pharmacy within that store will also close. They state that they require "breathing space" that may be afforded to them by an order that the Franchise Agreements are not to be disclaimed at this time. They ask the court to direct Target Pharmacy and its Affiliates not to deny them access to their licenced space or otherwise interfere with the Pharmacist's operations without the consent of or on terms directed by the court. Practically speaking, the Pharmacists want to postpone the effect of the disclaimer in the hope of obtaining a continuation of support payments from Target Canada for an unspecified time.

7 There is no doubt that the closure or pending closure of Target Canada is causing and will cause significant dislocation for a number of parties. For the most part, Target Employees will lose their jobs. Representative Counsel have been appointed to assist employees in a process that includes an Employee Trust.

8 The closure of Target Canada also impacts suppliers to Target, especially sole suppliers. The insolvency of Target Canada and its filing under the *Companies' Creditors Arrangement Act* (CCAA) has no doubt resulted in Target defaulting on a number of contractual relationships. These suppliers will have claims against Target Canada that will be filed in due course.

9 The closure of Target Canada also affects the Pharmacists. The insolvency of Target and its filing under the CCAA has resulted in Target defaulting on its contractual relationships with the Pharmacists. Target wishes to disclaim the Franchise Agreements. The Monitor approved the proposed disclaimer and, as noted, disclaimer notices were sent on January 26, 2015.

10 The Pharmacists are challenging the disclaimer and seek an order under s. 32(2) of the CCAA that the Franchise Agreements not be disclaimed. Section 32(4) of the CCAA references a section 32(2) order and provides:

Factors to be considered — In deciding whether to make the order, the court is to consider, among other things,

- (a) whether the monitor approved the proposed disclaimer or resiliation;
- (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
- (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

11 The reality that the Target stores will be closing provides, in my view, the starting point to analyze the issue being brought forward by the Pharmacists.

12 Following the closing of a particular Target Store, it is unrealistic for the Pharmacist to carry on the operation of the pharmacy. As noted by counsel to the Applicants, as soon as operations cease at a particular location, the store will "go dark" and there will no longer be employee or security support that would permit the Franchisees to continue to operate. Further, counsel to the Applicants submits it would not be either commercially reasonable or practical for the Franchisees to continue to operate in a closed store, nor would it be reasonable or in the interests of stakeholders to require these locations to remain open in order to serve the interests of the Franchisees.

13 It is in this context that the issue of the disclaimer has to be considered.

14 Counsel to the Pharmacists seem to appreciate the reality of the situation, as reflected in the following references in their factum.

49. It is cold comfort for the Pharmacists to be advised that their losses in relation to the disclaimer of the Franchise Agreement are provable claims in the CCAA proceedings. The Pharmacists must pay their employees now. It is problematic that a provable claim may result in the possible recovery of some part of those payments, at a future uncertain date, if the funds are available in the Target Pharmacy Estate.

50. Evidence that simply provides that a debtor company will be more profitable with the disclaimer contracts is insufficient. Setting aside the disclaimers in this case will provide the Pharmacists with flexibility and time to make informed decisions and carry out their own relocation and/or wind-down in a manner that causes the least amount of damages to themselves and those who depend on them. ...

53. Respectfully, such disclaimer should not be permitted until the court receives an independent report of the circumstances of each of the Pharmacists and directs the

orderly wind-down and/or relocation of such operations on terms that are fair and reasonable. ...

55. In no respect is the 30-day termination of the Franchise Agreements fair, reasonable and equitable to the Pharmacists, their employees and the public they serve. For many Pharmacists, it minimizes their capacity to relocate, [and] will leave them without funds to pay their employees, or the capacity to meet their ongoing obligations to their patients.

15 It seems to me, having considered these submissions, that the Pharmacists recognize that it is inevitable that the pharmacies will be shut down.

16 With respect to the factors to be considered as set out in s. 32(4), the disclaimer notices were approved by the Monitor. The Pharmacists complain that no reasons were provided in the notice approved by the Monitor. However, there is no requirement in s. 32(1) for the Monitor to provide reasons for its approval. This is reflected in Form 4 — Notice by Debtor Company to Disclaim or Resiliate an Agreement.

17 However, the absence of reasons does not lead necessarily to the conclusion that the Monitor did not consider certain factors prior to providing its approval.

18 The Monitor has made reference to the issues affecting the pharmacies in its Reports.

19 The pharmacies were specifically the subject of comment in the Monitor's First Report at sections 8.2 - 8.5, and in the Second Report at section 6. Section 6.1 (h) of the Second Report specifically comments on the disclaimer notices. A summary of the reasons is provided at section 6.2.

20 The information contained in the Monitor's reports establishes that there was communication as between Target Canada, the Monitor and the Franchisees such that it was clear that the stores were being closed. Specific reference to the communication is set out in the Monitor's Report at section 6.1(f), which in turn references the second Wong affidavit, filed by the Applicants.

21 I am satisfied that the Monitor considered a number of relevant factors prior to approving the disclaimer notices.

22 With respect to the second factor to be considered, namely whether the disclaimer would enhance the prospects of a viable compromise or arrangement being made in respect of the company, the Applicants have indicated they may be filing a plan of arrangement. I note that a plan may be required to ensure an orderly distribution of assets to the creditors.

23 The Applicants seek to achieve an orderly wind-down and maximization of realizations to the benefit of all unsecured creditors. It seems to me that if the disclaimers are set aside it would delay this process because it would extend the time period for Target Canada to make payments to one group of creditors (the Pharmacists) to the detriment of the creditors generally. Further, in the absence of an effective disclaimer, the Target Entities will continue to incur significant ongoing administrative costs which would be detrimental to the estate and all stakeholders.

24 The interests of all creditors must be taken into account. In this case, store closures and liquidation are inevitable. The Applicants should focus on an asset realization and a maximization of return to creditors on a timely basis. Setting aside the disclaimer might provide limited assistance to the Pharmacists, but it would come at the expense of other creditors. This is not a desirable outcome. I expressed similar views in *Timminco Ltd., Re*, 2012 ONSC 4471 (Ont. S.C.J. [Commercial List]) at paragraph 62 as follows:

[62] I have also taken into account that the effect of acceding to the argument put forth by counsel to Mr. Timmins would result in an improvement to his position relative to, and at the expense of, the unsecured creditors and other stakeholders of the Timminco Entities. If the Agreement is disclaimed, however, the monthly amounts that would otherwise be paid to Mr. Timmins would be available for distribution to all of Timminco's unsecured creditors, including Mr. Timmins. This equitable result is dictated by the guiding principles of the CCAA.

25 I am satisfied that the disclaimer will be beneficial to the creditors generally because it will enable the Applicants to move forward with their liquidation plan without a further delay to accommodate the Pharmacists.

26 The third factor is whether the disclaimer would likely cause significant financial hardship to a party to the agreement. This factor is addressed by Counsel to the Monitor at paragraph 27 of its factum.

27. On its own terms the CCAA effectively imposes a high threshold, beyond economic or financial loss, for the consideration under section 32(4): there must be evidence of financial *hardship*, it must be *significant* financial hardship, and it must be *likely* to be caused by the disclaimer. Financial loss or damage, without more, is not sufficient, in the Monitor's submission. It appears that Section 32 itself recognizes the distinction, providing expressly in ss. 32(7) that where a party suffers "a loss" in relation to the disclaimer the consequence is that such party "is considered to have a provable claim."

(emphasis in original)

27 In these circumstances, the pharmacies will inevitably close in the very near future whether or not the Franchise Agreements are disclaimed. I accept the submission of counsel to the Monitor to the effect that no Franchisee has adduced evidence that disallowing the Disclaimer and continuing to operate in otherwise dark, vacated premises would improve its financial circumstances.

28 The situation facing the Pharmacists is not pleasant. However, in my view, setting aside the disclaimer will not improve their situation. Extending the time before the disclaimers take effect has the consequence of requiring Target Canada to allocate additional assets to the Pharmacists in priority to other unsecured creditors. This is not a desirable outcome.

29 The Target Canada Entities, in consultation and with the support of the Monitor, have offered a degree of accommodation to the Pharmacists. The details are set out at paragraphs 64-66 of the affidavit of Mark Wong sworn February 16, 2015:

64. As outlined above, in consultation with and with the support of the Monitor, on February 9, 2015 the Target Canada Entities' legal advisors delivered an accommodation to PFAC's counsel intended to address the primary concern expressed by PFAC, namely that franchisees require additional time to transfer patient files and drug inventory and to relocate their respective pharmacy businesses. Under the terms of the accommodation, TCC will permit the pharmacists to continue to operate at their respective existing TCC locations until the earlier of March 30, 2015 and three days following written notice by TCC to the pharmacist of the anticipated store closure at such pharmacist's location. The accommodation provides that the Notices of Disclaimer will continue in effect and the franchise agreements will be disclaimed on February 25, 2015, but the pharmacists will be entitled to remain on the premises for an additional period of time.

64. Under the terms of the accommodation, pharmacists will be able to continue operating in TCC stores for longer than the 30-day period contemplated. Depending on the date the Agent decides to vacate certain TCC stores, many pharmacists may be able to continue operating for 60 days or more following delivery of the Notices of Disclaimer and approximately 75 days following the date of the Initial Order. As I described above, at any time after the third anniversary of the opening date of the pharmacy, TCC Pharmacy would have the right to terminate the franchise agreement for any reason on 60 days' notice.

66. The March 30, 2015 date indicated in the accommodation made by Target Canada Entities is intended to be a reasonable compromise whereby pharmacist franchisees will get additional time to transfer patient files and inventory and relocate their businesses, while at the same time permitting the Target Canada Entities to undertake the orderly

wind down of TCC pharmacy operations and the TCC retail stores as a whole. As I described above, in order to accommodate the continued operations of the pharmacies during the wind down process, TCC Pharmacy and TCC have not yet delivered notices of disclaimer to a number of third-party providers such as McKesson, Kroll and others, which TCC Pharmacy has maintained at considerable cost. The March 30, 2015 outside date for the operation of all TCC pharmacies will allow TCC Pharmacy to time the delivery of disclaimer notices to these third-party providers so as to avoid incurring additional unnecessary costs. The certainty provided by the firm outside date is also to the benefit of the pharmacies themselves, each of whom will be required to wind down their operations and make alternate arrangements in the very short term as a result of the imminent closures of TCC retail stores.

30 In the circumstances of this case, this accommodation represents, in my view, a constructive, practical and equitable approach to address a difficult issue.

31 Having considered the factors set out in section 32(4) of the CCAA, the motion of PFAC for a direction that the disclaimer of the Franchise Agreements be set aside is dismissed, together with ancillary relief related to the disclaimers. It is not necessary to address the standing issue raised by the Monitor.

32 I turn now to the request of PFAC that it be appointed representative of the Franchisees and that Sutts, Strosberg LLP be appointed as the Pharmacists' Representative Counsel, and BDO as the Pharmacists' financial advisor.

33 In view of my decision relating to the disclaimers, the scope of legal and financial services required by the Pharmacists may be limited. However, there are many transitional issues that remain to be addressed. First and foremost is dealing with the patient records and ensuring uninterrupted delivery of prescription drugs to all such patients. There is also interaction required between Target Pharmacy, the Franchisees, and the regulators, concerning the relocation or shut down of pharmacies and the return of certain products to suppliers. This is not a simple case where the Franchisee receiving the disclaimer notice can simply walk away from the scene. From a professional and regulatory standpoint, they still have to participate in the process.

34 In addressing these transition issues and recognizing that similar circumstances exist for the Franchisees, there would appear to be some benefit in having a limited form of representation for the Franchisees. This would assist in ensuring that a consistent approach is followed not only in the wind-down or relocation aspect of the process, but also in the claims process. In my view, the estate could benefit if this process was coordinated.

35 The Monitor and the Applicants would have a single point of contact which would likely result in a reduction in administrative time and costs during the liquidation and the

claims process. I am satisfied that PFAC has the support of the majority of franchisees. PFAC is appointed as the Representative of the Pharmacists. Sutts, Strosberg LLP is appointed Representative Counsel and BDO is appointed as the Pharmacists financial advisor.

36 The funding of this representational role is to be limited. The Applicants are to make available up to \$100,000, inclusive of disbursements and HST, to PFAC to be used for legal and financial advisory services to be provided by Sutts, Strosberg, as Representative Counsel and BDO as financial advisor in these proceedings. PFAC can provide copies of invoices to the Monitor, who can arrange for payment of same. Any surplus funds at the conclusion of the representation are to be returned to the Applicants. The contribution to PFAC can be used only to cover legal and financial advisory services provided to date in these proceedings as well as to assist on the going forward matters, subject to the following parameters.

37 Such assistance is to be limited to:

- a. corresponding with the regulators concerning the wind-down process and the relocation process;
- b. return of inventory; and
- c. participating in the claims process.

38 If the individual franchisees decide not to participate in PFAC, they should not expect any further accommodation in a financial sense.

39 In arriving at this accommodation, I have taken into account that this limited funding will provide benefits to the Applicants under CCAA protection insofar as the legal and financial advisory services provided by Representative Counsel and BDO should reduce the overall administrative cost to the estate and will avoid a multiplicity of legal retainers. The representation and funding will also benefit the franchisees so that they can effectively shut-down or relocate their business and prepare any resulting claim in the CCAA proceedings.

40 Given the limited nature of the Applicants' financial contribution, an administrative charge is not, in my view, required.

41 In the result, PFAC's motion for representation status is granted, with limitations set out above. The motion in respect of the disclaimers is dismissed.

Motion granted in part.

TAB 12

2015 ONSC 1487
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 3261, 2015 ONSC 1487, 23 C.B.R. (6th) 314, 252 A.C.W.S. (3d) 9

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

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

G.B. Morawetz R.S.J.

Heard: March 5, 2015
Judgment: March 5, 2015
Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, Tracy Sandler, Shawn Irving for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz for Target Corporation

D.J. Miller for Oxford Properties Group Inc.

Jeff Carhart for Hamilton Beach Corp. et al.

Alan Mark, Melaney Wagner for Monitor, Alvarez & Marsal Inc.

Leonard Loewith for Solutions 2 Go et al.

Aubrey Kauffman for Ivanhoe Cambridge Inc.

Ruzbeh Hosseini for Amskor Corporation

Sean Zweig for RioCan Management Inc. and Kingsett Capital Inc.

Lou Brzezinski, Alexandra Teoderescu for Thyssenkrupp Elevator (Canada) Limited, Advitek, Universal Studios Canada Inc., Nintendo of Canada, Ltd., and Bentall Kennedy (Canada) LP Group

Melvyn L. Solmon for ISSI Inc.

Subject: Insolvency; Property

MOTION to approve sale agreement in proceedings under Companies' Creditors Arrangement Act.

G.B. Morawetz R.S.J.:

1 On February 11, 2015, Target Canada Co. ("TCC") received Court approval to conduct a real estate sales process (the "Real Property Portfolio Sales Process") to seek qualified purchasers for TCC's leases and other real property, to be conducted by the Target Canada Entities in consultation with their financial advisor, Lazard Frères & Co., LLC (the "Financial Advisor") and their real estate advisor, Northwest Atlantic (Canada) Co. (the "Broker"), with the supervision and oversight of the Monitor.

2 The Applicants bring this motion to approve a lease transaction agreement (the "Lease Transaction Agreement") that has been negotiated in response to an unsolicited bid by certain landlords (Oxford Properties Corporation ("Oxford") and Ivanhoe Cambridge Inc. ("IC") and certain others, together the "Landlord Entities").

3 Under the Lease Transaction Agreement, TCC will surrender its interest in eleven leases (the "Eleven Leases") to the Landlord Entities in consideration for the purchase price and certain other benefits.

4 The Target Entities decided, after considering the likely benefits and risks associated with the unsolicited offer by the Landlord Entities, to exercise their right under the terms of the Real Property Portfolio Sales Process to withdraw the applicable leases from the bidding and auction phases of the process. The Target Canada Entities contend that the decision to exercise this right was made based on the informed business judgment of the Target Canada Entities with advice from the Financial Advisor and the Broker, in consultation and with the approval of the Monitor.

5 The Applicants submit that the process by which the decision was made to pursue a potential transaction with the Landlord Entities, and withdraw the Eleven Leases from the bidding and auction phases of the Real Property Portfolio Sales Process, was fair and reasonable in light of the facts and circumstances. Further, they submit that the process by which the benefits of the Lease Transaction Agreement were evaluated, and the Lease Transaction Agreement was negotiated, was reasonable in the circumstances.

6 The Applicants contend that the purchase price being offered by the Landlord Entities is in the high-range of value for the Eleven Leases. As such, the Applicants contend that the price is reasonable, taking into account the market value of the assets. Moreover, the Applicants submit that the estate of the Target Canada Entities will benefit not only from the value represented by the purchase price, but from the release of claims. That includes the

potentially material claims that the Landlord Entities may otherwise have been entitled to assert against the estate of the Target Canada Entities, if some or all of the Eleven Leases had been purchased by a third party or disclaimed by the Target Canada Entities.

7 The Target Canada Entities submit that it is in their best interests and that of their stakeholders to enter into the Lease Transaction Agreement. They also rely on the Monitor's approval of and consent to the Target Canada Entities entering into the Lease Transaction Agreement.

8 The Target Canada Entities are of the view that the Lease Transaction Agreement secures premium pricing for the Eleven Leases in a manner that is both certain and efficient, while allowing the Target Canada Entities to continue the Inventory Liquidation Process for the benefit of all stakeholders and to honour their commitments to the pharmacy franchisees.

9 The terms of the Lease Transaction Agreement are set out in the affidavit of Mark J. Wong, sworn February 27, 2015, and are also summarized in the Third Report of the Monitor. The Lease Transaction Agreement is also summarized in the factum submitted by the Applicants.

10 If approved, the closing of the Lease Transaction Agreement is scheduled for March 6, 2015.

11 One aspect of the Lease Transaction Agreement requires specific mention. Almost all of TCC's retail store leases were subleased to TCC Propco. The Premises were then subleased back to TCC. The Applicants contend that these arrangements were reflected in certain agreements between the parties (the "TCC Propco Agreements"). Mr. Wong states in his affidavit that it is a condition of the Lease Transaction Agreement that TCC terminate any subleases prior to closing. TCC will also wind-down other arrangements with TCC Propco.

12 The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms and an early termination payment is now owing as a result of this wind-down by TCC to TCC Propco, which, they contend, will be addressed within a claims process to be approved in due course by the Court. The claim of TCC Propco is not insignificant. This intercompany claim is expected to be in the range of \$1.9 billion.

13 The relief requested by the Target Canada Entities was not opposed.

14 Section 36 of the CCAA sets out the applicable legal test for obtaining court approval where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

15 In deciding whether to grant authorization, pursuant to section 36(3), 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 its 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 asset is reasonable and fair, taking into account its market value.

16 The factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check list that must be followed in every sale transaction under the CCAA (see: *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.); leave to appeal refused 2010 QCCA 1950 (C.A. Que.)).

17 The factors overlap, to a certain degree, with the *Soundair* factors that were applied in approving sale transactions under pre-amendment CCAA case law (see: *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]), citing *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("Soundair")).

18 I am satisfied, having reviewed the record and hearing submissions, that — taking into account the factors listed in s. 36(3) of the CCAA — the Lease Transaction Agreement should be approved. In arriving at this conclusion, I have taken the following into account: in the absence of any indication that the Target Canada Entities have acted improvidently, the informed business judgment of the Target Canada Entities (as supported by the advice of the Financial Advisor and the consent of the Monitor) that the Lease Transaction Agreement is in the best interests of the Target Canada Entities and their stakeholders is entitled to deference by this Court.

19 I am also satisfied that the process for achieving the Sale Transaction was fair and reasonable in the circumstances. It is also noted that the Monitor concurs with the assessment of the Target Canada Entities.

20 The Target Canada Entities, the Monitor and the Financial Advisor are all of the view that the consideration to be received by TCC is reasonable, taking into account the market value of the Eleven Leases.

21 I am also satisfied that the Transaction is in the best interest of the stakeholders.

22 The Applicants also submit that all of the other statutory requirements for obtaining relief under section 36 of the CCAA have been satisfied. Having reviewed the factum and, in particular, paragraphs 46 and 47, I accept this submission of the Applicants.

23 As referenced above, the relief requested by the Applicants was not opposed. However, it is necessary to consider this non-opposition in the context of the TCC Propco Agreements. The Applicants contend that the TCC Propco Agreements have been terminated in accordance with their terms, and that the early termination payment now owing as a result of this wind-down by TCC to TCC Propco will be addressed within a claims process to be approved in due course as part of the CCAA proceedings.

24 The Monitor's consent to the entering into of the Termination Agreement, and the filing of the Third Report, do not constitute approval by the Monitor as to the validity, ranking or quantum of the intercompany claim. Further, when the intercompany claims are submitted in the claims process to be approved the Court, the Monitor will prepare a report thereon and make it available to the Court and all creditors. The creditors will have an opportunity to seek any remedy or relief with respect to the intercompany claim in the claims process.

25 In my view, it is necessary to stress the importance of the role of the Monitor in any assessment of the intercompany claim. It is appropriate for the Monitor to take an active and independent role in the review process, such that all creditors are satisfied with respect to the transparency of the process.

26 Finally, it is noted that the actual consideration is not disclosed in the public record.

27 The Applicants are of the view that the specific information relating to the consideration to be paid by the Landlord Entities and the valuation analysis of the Eleven Leases is sensitive commercial information, the disclosure of which could be harmful to stakeholders.

28 The Applicants have requested that Confidential Appendices "A" and "B" be sealed. Confidential Appendix "A" contains an unredacted version of the Lease Transaction Agreement. The Applicants request that this document be sealed until the closing of the

transaction. The Applicants request that the transaction and valuation analysis as contained in Appendix "B" be sealed pending further order.

29 No party objected to the sealing requests.

30 Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I am satisfied that it is appropriate, in the circumstances, to grant the sealing relief as requested by the Applicants.

31 In the result, the motion is granted. The approval and vesting order in respect of the Lease Transaction Agreement has been signed.

Motion granted.

TAB 13

2015 ONSC 2066
Ontario Superior Court of Justice [Commercial List]

Target Canada Co., Re

2015 CarswellOnt 5211, 2015 ONSC 2066, 251 A.C.W.S. (3d) 377, 30 C.B.R. (6th) 335

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

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

Morawetz R.S.J.

Heard: March 30, 2015

Judgment: April 2, 2015

Docket: CV-15-10832-00CL

Proceedings: full reasons to *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745, Morawetz R.S.J. (Ont. S.C.J. [Commercial List])

Counsel: Shawn Irving, Robert Carson, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz, for Target Corporation

Harvey Chaiton, for Directors and Officers

Alan Mark, Melaney Wagner, for Monitor, Alvarez & Marsal Inc.

Lad Kucis (Agent), for Pharmacy Franchisee Association Canada

Subject: Insolvency

FULL REASONS to judgment reported at *Target Canada Co., Re* (2015), 2015 CarswellOnt 4745 (Ont. S.C.J. [Commercial List]), concerning motion for approval of asset purchase agreement.

Morawetz R.S.J.:

1 The Applicants bring this motion for approval of the Asset Purchase Agreement (the "APA") among Target Canada Co. ("TCC"), Target Brands, Inc. ("Target Brands") and Target Corporation, and vesting TCC's right, title and interest in and to the Purchased Assets (as defined in the APA) in Target Corporation.

2 The requested relief was not opposed.

3 The Purchased Assets consist of certain goods bearing the Target logos, trademarks and other proprietary elements. The Applicants take the position that the Purchased Assets cannot be sold by the Agent in the Inventory Liquidation Process unless expressly designated by TCC, because of the rights of Target Brands (a subsidiary of Target Corporation) to control the use of the intellectual property (the "Target IP").

4 The criteria for approval of the Purchased Assets to Target Corporation, a related party, is set out in sections 36(3) and (4) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (CCAA).

36(3) Factors to be considered — In deciding whether to grant 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.

36(4) Additional Factors — related persons — If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

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

5 All of the Purchased Assets represent various categories of Target Branded items, such as shopping carts, shopping baskets and the exterior signage on TCC stores. The Purchased Assets are unique in that they incorporate logos, trademarks or other indicia of TCC or its affiliates.

6 Target Brands views the Purchased Assets as using or displaying IP that is proprietary to Target Brands. Target Brands has not agreed to allow the Purchased Assets to be sold by the Agent. The Applicants are of the view that Target Brands would also likely contest any sale of the Purchased Assets to a third party purchaser.

7 The record establishes that the Applicants requested bids for the Purchased Assets from the liquidation firms which applied to be selected as agent. By following this process, the Applicants submit they sought good faith offers by which TCC could sell the assets to an unrelated third party. Only one bidder included some of the items in its bid.

8 Separately from the auction process, Target Corporation submitted an offer to purchase a number of the assets.

9 The Applicants and the Monitor formed the view that if a third party purchaser for the items could be found, such purchaser would likely discount its price to take into account the impact of the IP. That impact included the cost to remove brand or other IP elements and/or the litigation risks associated with a potential challenge by Target Brands to any unauthorized use of its IP.

10 The Applicants and the Monitor submit that it would not be beneficial to stakeholders as a whole to incur additional costs in seeking to market these unique assets. Instead, the Applicants and the Monitor sought to establish objective benchmarks to ensure that the price offered by Target Corporation was reasonable and fair, and exceeded any third party offer that might be made.

11 The Applicants have established that the price offered by Target Corporation, viewed in isolation, exceeds all three independent valuations of the Purchased Assets obtained by the Applicants and the Monitor. In addition, Target Corporation will assume the substantial costs associated with removing the exterior signage on TCC stores.

12 TCC, Target Brands and Target Corporation entered into the APA as of March 23, 2015. Under the Agreement, Target Corporation has agreed to purchase the Purchased Assets for U.S. \$2,215,020.

13 The Applicants are of the view that Target Corporation is effectively the only logical purchaser for the Purchased Assets due to their unique nature.

14 The Applicants submit that, taking into account the factors listed in section 36(3) of the CCAA, the test set out in section 36(4) of the CCAA, and the general interpretative principles underlying the CCAA, the Court should grant the approval and vesting order. Further, the Applicants submit that in the absence of any indication that the Applicants have acted improvidently, the informed business judgment of the Applicants — which is supported by the advice and the consent of the Monitor, that the APA is in the best interests of the Applicants and their stakeholders and is entitled to deference by the Court.

15 I note that the factors listed in section 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the CCAA. Further, I also note that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) ("*Soundair*"). The *Soundair* factors were applied in approving sale transactions under pre-amendment CCAA case law. Under section 36(4) of the CCAA, the Court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interests of the stakeholders of the Applicants and that the risk to the estate associated with a related party transaction have been mitigated.

16 I am satisfied that the risk theoretically associated with a related party transaction has been satisfactorily addressed through the efforts of the Applicants and the Monitor to evaluate the salability of the Purchased Assets to an unrelated party.

17 I am also satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge by Target Brands would ultimately be successful, the litigation risks would, in my view, be expected to materially affect the value of the Purchased Assets to an unrelated third party. Further, the uniqueness of the Purchased Assets makes Target Corporation the only realistic purchaser. Only Hilco Global ("*Hilco*") submitted a bid with respect to some, but not all, of the assets included in the Initial Offer. None of the remaining bidders elected to submit an offer. Given that only one of the liquidation firms submitted a bid, the Applicants and the Monitor considered whether the proposed sale to Target Corporation was fair and reasonable. They came to the conclusion that the likely price to be obtained by an unrelated third party did not support the sale of the Purchased Assets to an unrelated third party.

18 As required by section 36 of the CCAA, the Monitor has been involved throughout the proposed transaction. The Monitor's Seventh Report comments at length on the transaction, and specifically whether it would be fair and reasonable to accept the offer from Target Corporation. The Monitor supports the conclusion that the purchase price offered by Target Corporation far exceeds the estimated liquidation values obtained. The Monitor is of the opinion that the APA benefits the creditors of the Applicants. The Monitor supports the motion for approval of the APA.

19 I am satisfied that the transaction is in the best interests of stakeholders. The transaction does provide some enhanced economic value to the estate. Further, the APA Agreement allows the Monitor, TCC and Target Corporation to agree upon the timetable for delivery of the Purchased Assets. This flexibility is of assistance to TCC and its Inventory Liquidation Process. In addition, there are no fees or commission payable on the transaction and the Agreement does provide certain guaranteed value to TCC.

20 The Applicants submit that all of the other statutory requirements for obtaining relief under section 36 have been satisfied. In particular, no parties have registered security interests against the Purchased Assets.

21 I am also satisfied that the requirements of section 36(7) have been satisfied. This section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *Bankruptcy and Insolvency Act*, in addition to amounts that are owing for post-filing services to a debtor company. I also accept the Applicants' submissions that because they have been paying employees for all post-filing services and the Employee Trust will satisfy claims arising from any early termination of eligible employees, the requirements of section 36(7) have been satisfied.

22 For the foregoing reasons, the Asset Purchase Agreement is approved and the Approval and Vesting Order is granted.

Order accordingly.

TAB 14

2015 CarswellOnt 7633
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 7633, 254 A.C.W.S. (3d) 16

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

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

Morawetz R.S.J.

Judgment: May 21, 2015
Docket: CV-15-10832-00CL

Counsel: Counsel — not provided

Subject: Insolvency

MOTION by applicants for approval of sale transaction under Companies Creditors' Arrangement Act.

Morawetz R.S.J.:

1 THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "*CCAA*") for an order, *inter alia*, approving: the lease surrender and resiliation transaction (the "*Transaction*") contemplated by a Lease Surrender Agreement among Target Canada Co. ("*TCC*"), as Tenant, and CF/Realty Holdings Inc., Ontrea Inc., Market Mall Leaseholds Inc., Les Promenades St-Bruno Leaseholds Inc., Les Galeries d'Anjou Leaseholds Inc., and Chinook (2014) Inc. (collectively, the "*Landlord Entities*") dated May 4, 2015 (said agreement, as amended, extended, supplemented, restated and/or amended and restated from time to time being collectively, the "*Lease Surrender Agreement*"), and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

2 ON READING the Notice of Motion of the Applicants, the Affidavit of Mark Wong sworn on May 4, 2015 including the exhibits thereto (the "*Wong Affidavit*"), and the Tenth Report (the "*Monitor's Tenth Report*") of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "*Monitor*"), filed, and on hearing the submissions of respective counsel for the Applicants and the Partnerships listed on Schedule "A" hereto, the Monitor, Target Corporation, the Landlord Entities, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Robert Carson sworn May 4, 2015, filed:

Service and Definitions

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

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

Approval of the Lease Surrender Agreement

5 3. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved and ratified and that the execution of the Lease Surrender Agreement by TCC is hereby approved and ratified with such minor amendments as TCC (with the consent of the Monitor) and the Landlord Entities may agree to in writing. TCC is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction, including the surrender by TCC of its right, title and interest in and to the Surrendered Leases, the Surrendered Real Property Interests and the Surrendered Premises (collectively, the "*Surrendered Assets*") to the applicable Landlord Entities and the Monitor shall be authorized to take such additional steps in furtherance of its responsibilities under the Lease Surrender Agreement. The legal descriptions and applicable land registry offices with respect to the Surrendered Assets are as set out on Schedule "C" hereto.

6 4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Landlord Entities substantially in the form attached as Schedule "B" hereto (the "*Monitor's Certificate*"), all of TCC's right, title and interest in and to the Surrendered Assets and the right, title and interest, if any, of any predecessor in interest of TCC in and to the Surrendered Assets, to the extent same was assigned or otherwise transferred to TCC, shall be surrendered to the applicable Landlord Entities (with the Surrendered

Leases being resiliated) free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, leases, notices of lease, subleases, licenses, levies, restrictions, rights of retention, judgments, notices of sale, contractual rights, options, liabilities (direct, indirect, absolute or contingent), obligations, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise in respect of the Surrendered Assets (collectively, the "*Claims*"), including, without limiting the generality of the foregoing:

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

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

(c) those Claims listed on Schedule "C" hereto;

(all of which are collectively referred to as the "*Encumbrances*", which term shall not include the Permitted Encumbrances listed on Schedule "D" hereto) and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Surrendered Assets are hereby expunged and discharged as against the Surrendered Assets and the real or immovable property described in Schedule "C".

7 5. THIS COURT ORDERS that upon the registration in the applicable land registry office of a certified copy of this Order in the manner prescribed by the applicable land registry office, the applicable Land Registrar is hereby directed to specifically discharge, cancel, delete and expunge from title to the applicable real or immovable property described in Schedule "C" all of the Encumbrances listed in Schedule "C" hereto.

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

9 7. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in accordance with the terms of the Lease Surrender Agreement.

10 8. THIS COURT ORDERS that subject to the terms of the Lease Surrender Agreement nothing herein affects:

- (a) the rights and obligations of TCC and the Agent under the Agency Agreement dated January 29, 2015, as amended; and
- (b) the terms of the Approval Order — Agency Agreement granted, February 4, 2015 including the Sales Guidelines attached as Schedule "B" thereto.

11 9. THIS COURT ORDERS that notwithstanding anything contained in the Lease Surrender Agreement, or the Closing of the Transaction, the Landlord Entities shall be bound by and benefit from the Initial Order until the earlier of (a) six months from the date of this Order, and (b) the duration of the period during which any other owners, operators, managers or landlords of commercial shopping centres or other commercial properties in which there is a store, office or warehouse owned or operated by TCC or Target, is bound by or obtains any benefit from same. Without limiting the generality of the foregoing, during such period, the Landlord Entities shall benefit from the stay of proceedings provision provided for at paragraph 18 of the Initial Order.

General Provisions

12 10. THIS COURT ORDERS that, notwithstanding:

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

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

13 11. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent legislation in any other

jurisdiction in which any of the Surrendered Premises are located and that this Order shall be registered notwithstanding the requirements of section 191(1) of the *Land Titles Act*, R.S.A. 2000, c. L-4 and any equivalent provisions in equivalent legislation in any other jurisdiction in which any of the Surrendered Premises are located.

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

Schedule "A" — Partnerships

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

Schedule "B"

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

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

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

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

Monitor's Certificate

Recitals

A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Order of the Court dated [May 19], 2015 (the "*Approval Order*") approving the Lease Surrender Agreement entered into among Target Canada Co. ("*TCC*") and CF/

Realty Holdings Inc., Ontrea Inc., Market Mall Leaseholds Inc., Les Promenades St-Bruno Leaseholds Inc., Les Galeries d'Anjou Leaseholds Inc., and Chinook (2014) Inc. (collectively, the "*Landlord Entities*") dated May 4, 2015 (said agreement, as amended, extended, supplemented, restated and/or amended and restated from time to time being collectively, the "*Lease Surrender Agreement*"), a copy of which is attached as Exhibit B to the Affidavit of Mark Wong dated May 4, 2015.

B. Pursuant to the Approval Order, the Court approved the Lease Surrender Agreement and provided for the surrender to the Landlord Entities of TCC's right, title and interest in and to the Surrendered Leases, Surrendered Real Property Interests and the Surrendered Premises, which surrender is to be effective with respect to the Surrendered Leases, Surrendered Real Property Interests and the Surrendered Premises upon the delivery by the Monitor to the Landlord Entities and TCC of a certificate confirming (i) the conditions to Closing as set out in sections 7.1, 7.2 and 7.3 of the Lease Surrender Agreement have been satisfied or waived by the Landlord Entities and TCC, as applicable; and (ii) the Transaction has been completed to the satisfaction of the Monitor.

THE MONITOR CERTIFIES the following:

1. The conditions to Closing as set out in section 7.1, 7.2 and 7.3 of the Lease Surrender Agreement have been satisfied or waived by the Landlord Entities and TCC, as applicable; and
2. The Transaction has been completed to the satisfaction of the Monitor.

This Monitor's Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

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

By: _____

Name:

Title:

Schedule "C"

| <i>No.</i> | <i>Location/ Address</i> | <i>City/ Province</i> | <i>Land Registry Office</i> | <i>Legal Description</i> | <i>Encumbrances to be Expunged/ Deleted</i> |
|------------|------------------------------|---------------------------|-------------------------------------|--------------------------|---|
| 1. | Masonville Place 1680 | London, Ontario | Middlesex (No. 33) | RIN 08083-1820 LT | (a) Notice of Lease registered December |

Richmond
Street North

Parcel 1-1, Section
33M206 Block "1"
Plan 33M206; subject
to LT81692 London/
London Township

21, 2005 as
Instrument
ER403900
(b) Notice of
Assignment
of Lessee's
Interest in Lease
registered May
31, 2011 as
Instrument
ER767018

PIN 08083-1821 LT
Parcel 2-1, Section
33M206 Block "2"
Plan 33M206; subject
to LT81692 London/
London Township

(c) Application
(General)
re Notice of
Amendment of
Lease registered
June 3, 2011
as Instrument
ER767936

PIN 08083-1822 LT
Parcel 3-1, Section
33M206 Block "3"
Plan 33M206; subject
to LT81692 London/
London Township
PIN 08083-1823 LT
Parcel 4-1, Section
33M206 Block "4"
Plan 33M206; subject
to LT81692 London/
London Township
PIN 08083-2233 LT
Block 1 Plan 33M-103
except Part 1, 33R-14445;
subject to LT64230,
LT93920; London
PIN 08083-2235 LT
Block 2 Plan 33M-103
except Part 2, 33R-14445;
subject to LT108246,
London
PIN 08083-0003 LT
Part Lot 16, concession
4 as in 670586, 674408,
London/London
Township
*[Note: Target Lease is
not registered against this
PIN]*

2. Chinook Centre Calgary, Calgary
6455 Macleod Alberta Land
Trail SW Title
Office

Title No. 101116164

(a) Caveat re
Lease, etc.
registered
February
5, 1999 as
Instrument
991 034 162,
as updated

- | | | | | | |
|----|--|-----------------------------------|--|--|--|
| | | | | by Transfer of Caveat registered as Instrument 111 132 663) | |
| | | | Plan 101 1638 Block 1 Lot 2 Excepting thereout all mines and minerals Area: 21.671 hectares (53.55 acres) more or less | | |
| 3. | Market Mall 3625 Shaganappi Trail NW | Calgary, Alberta | Calgary Land Title Office | Title No. 021 189 736 | (b) Caveat re Amending Agreement, etc. registered June 6, 2011 as Instrument 111 139 187 Caveat re Lease etc. registered March 14, 2000 as Instrument 001 068 195, as updated by Transfer of Caveat registered as Instrument 111 132 395) |
| | | | Descriptive Plan 0211955 Block 1 Lot 1 Excepting thereout all mines and minerals Area: 22.69 hectares (56.07 acres) more or less | | |
| 4. | Les Promenades Saint-Bruno 1, boul. des Promenades | Saint-Bruno-de-Montarville Quebec | Land Registry Office, the Registration Division of Chambly | An immovable located in the City of Saint-Bruno-d-Montarville, the Province of Quebec, known and described as being composed of Lot 2 110 816 and Lot 2 110 821, Registration Division of Chambly. | (b) Caveat re Lease Interest registered June 7, 2011 as Instrument 111 141 266 (c) Builder's Lien in favour of Kone Inc. registered February 6, 2015 as Instrument 151 039 519. (a) Notice for Registration of the Rights Resulting from a Commercial Lease registered November 27, 2001 under number 1 120446 |

| | | | | | |
|----|---|------------------|--|--|---|
| 5. | Les Galeries d'Anjou 7999, boul. des-Galeries-d'Anjou | Montreal, Quebec | Land Registry Office for the Registration Division of Montreal | An immovable located in the City of Montreal, Province of Quebec, known and described as being composed of Lots 1 006 195 and 1 006 273 of the Cadastre of Quebec, Registration Division of Montreal | <p>(b) Notice of Amendment to Commercial Lease registered June 3, 2011 under number 18 188 183</p> <p>(a) Notice for Registration of the Rights Resulting from a Commercial Lease registered August 15, 2003 under number 10 644 948</p> <p>(b) Notice of Amendment to Commercial Lease registered June 3, 2011 under number 18 188 567</p> |
|----|---|------------------|--|--|---|

Schedule "D" — Permitted Encumbrances

"Permitted Encumbrances" means, collectively: (a) any Encumbrances (as defined in the Lease Surrender Agreement) encumbering the freehold or other ownership interest in the Properties (as defined in the Lease Surrender Agreement) or any other Landlord Entity's interest in the Properties, but excludes any Encumbrances solely encumbering the Tenant's leasehold interest in and to any Properties situated outside of the Province of Québec on which any Surrendered Premises (as defined in the Lease Surrender Agreement) are located; (b) Encumbrances resulting from any Landlord Entity's actions or omissions; and (c) the items identified in Schedule "L" of the Lease Surrender Agreement.

Morawetz R.S.J.:

15 THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "CCAA") for an order, *inter alia*, approving: the lease transfer (the "*Transaction*") contemplated by a Lease Transfer Agreement (the "*Lease Transfer Agreement*") among Target Canada Co. ("*TCC*"), as Assignor, and Canadian Tire Real Estate Limited, as Assignee (the "*Assignee*"), dated May 5, 2015 and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

16 ON READING the Notice of Motion of the Applicants, the Affidavit of Mark Wong sworn on May 8, 2015 including the exhibits thereto (the "*Wong Affidavit*"), and the Twelfth

Report of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "*Monitor*"), filed, and on hearing the submissions of respective counsel for the Applicants and the Partnerships listed on Schedule "A" hereto, the Monitor, Target Corporation, the Assignee, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Geoffrey Grove sworn May 8, 2015, filed:

Service and Definitions

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

18 2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Amended and Restated Initial Order in these proceedings dated January 15, 2015 (the "*Initial Order*"), or in the Lease Transfer Agreement, as applicable.

Approval of the Lease Transfer Agreement

19 3. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved and ratified and that the execution of the Lease Transfer Agreement by TCC is hereby approved and ratified with such minor amendments as TCC (with the consent of the Monitor) and the Assignee may agree to in writing. TCC is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction in accordance with the terms of the Lease Transfer Agreement and this Order, including the sale, assignment and transfer by TCC of its right, title and interest in and to the Subject Assets to the Assignee and the Monitor shall be authorized to take such additional steps in furtherance of its responsibilities under the Lease Transfer Agreement. The legal descriptions and applicable land registry offices with respect to the Subject Assets are as set out on Schedule "C" hereto.

20 4. THIS COURT ORDERS that TCC shall pay all Cure Costs on Closing.

21 5. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Assignee substantially in the form attached as Schedule "B" hereto (the "*Monitor's Certificate*") all of TCC's right, title and interest in and to the Subject Assets (which for greater certainty do not include any Lease deleted from the Lease Transfer Agreement in accordance with Section 5.3(f) thereof) and the right, title and interest, if any, of any predecessor in interest of TCC in and to the Subject Assets, to the extent same was assigned or otherwise transferred to TCC, shall vest absolutely in and shall be sold, assigned and transferred to the Assignee free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages,

trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, leases, licenses, levies, restrictions, rights of retention, judgments, notices of sale, contractual rights, options, liabilities (direct, indirect, absolute or contingent), obligations, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise in respect of the Subject Assets (collectively, the "*Claims*"), including, without limiting the generality of the foregoing:

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

(b) all charges, security interests or claims evidenced by registrations pursuant to the Ontario *Personal Property Security Act*, the *Civil Code of Québec*, the Alberta *Personal Property Security Act*, the British Columbia *Personal Property Security Act*, the Nova Scotia *Personal Property Security Act*, the New Brunswick *Personal Property Security Act*, the Manitoba *Personal Property Security Act* or any other personal property registry system; and

(c) those Claims listed under the heading "Encumbrances to be Expunged/Deleted" on Schedule "C" hereto;

(all of which are collectively referred to as the "*Encumbrances*") other than the Permitted Encumbrances listed on Schedule "D" hereto and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Subject Assets other than the Permitted Encumbrances are hereby expunged and discharged as against the Subject Assets and the real or immovable property described in Schedule "C", other than any registrations made at the applicable land registry of the Leases forming part of the Subject Assets and any memorials of lease, summaries of lease, notices of lease, assignments of lease and any amendments or other registrations pertaining to the Leases forming part of the Subject Assets, provided however that: (i) except as may otherwise be agreed to by the applicable Landlord and the Assignee, nothing herein shall affect the rights and remedies of such Landlord against the Assignee that may exist or arise under or in respect of any Lease that is ultimately assigned to the Assignee in connection with the Transaction, and (ii) except as may otherwise be agreed to by the applicable Landlord and any predecessor in interest of TCC, nothing herein shall affect the rights and remedies of such Landlord against any such predecessor in interest of TCC that may exist or arise under or in respect of any Lease that is ultimately assigned to the Assignee in connection with the Transaction, and in each case all such rights are expressly reserved and continued.

22 6. THIS COURT ORDERS that: (a) nothing in this Order shall amend or vary, or be deemed to amend or vary, the terms of a Lease; and (b) none of the Leases shall be transferred conveyed, assigned or vested in the Assignee by operation of this Order.

23 7. THIS COURT ORDERS that upon the registration in the applicable land registry office of a certified copy of this Order in the manner prescribed by the applicable land registry office, the applicable Land Registrar is hereby directed to specifically discharge, cancel, delete and expunge from title to the applicable real or immovable property described in Schedule "C" all of the Encumbrances listed in Schedule "C" hereto.

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

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

26 10. THIS COURT ORDERS that subject to the terms of the Lease Transfer Agreement nothing herein affects:

(a) the rights and obligations of TCC and the Agent under the Agency Agreement dated January 29, 2015, as amended; and

(b) the terms of the Approval Order — Agency Agreement granted, February 4, 2015 including the Sales Guidelines attached as Schedule "B" thereto.

27 11. THIS COURT ORDERS that notwithstanding anything contained in the Lease Transfer Agreement, or the Closing of the Transaction, the Landlords shall be bound by and benefit from the Initial Order until the earlier of (a) six months from the date of this Order, and (b) the duration of the period during which any other owners, operators, managers or landlords of commercial shopping centres or other commercial properties in which there is a store, office or warehouse owned or operated by TCC or Target Corporation, is bound by or obtains any benefit from same. Without limiting the generality of the foregoing, during such period, the Landlords shall benefit from the stay of proceedings provision provided for at paragraph 18 of the Initial Order.

General Provisions

28 12. THIS COURT ORDERS that, notwithstanding:

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

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

29 13. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of the *Bulk Sales Act* (Ontario) and any equivalent legislation in any other jurisdiction in which all or any part of the Subject Assets are located and that this Order may be registered notwithstanding the requirements of section 191(1) of the *Land Titles Act*, R.S.A. 2000, c L-4 and equivalent provisions in equivalent legislation in any other jurisdiction in which all or any part of the premises relating to the Subject Assets are located.

30 14. THIS COURT ORDERS that nothing in the Lease Transfer Agreement or this Order shall in any way prejudice or affect any indemnity or guarantee obligation, if any, of Target Corporation to any Landlord in respect of any Leases included in the Subject Assets (the "*Guarantee Obligations*"), or any defences to or rights of Target Corporation, if any, to or in respect of such Guarantee Obligations. For greater certainty, nothing in the Lease Transfer Agreement or this Order shall in any way prejudice or affect the right of any Landlord to file a claim against TCC or in the estate of TCC for any losses suffered by the Landlord in respect of any Leases included in the Subject Assets.

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

foreign proceeding, or to assist TCC and the Monitor and their respective agents in carrying out the terms of this Order.

Schedule "A" — Partnerships

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

Schedule "B"

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

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

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

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

Monitor's Certificate

Recitals

A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Order of the Court dated [May 19], 2015 (the "*Approval Order*") approving the Lease Transfer Agreement entered into among Target Canada Co. ("*TCC*") and Canadian Tire Real Estate Limited (the "*Assignee*") dated May 5, 2015 (the "*Lease Transfer Agreement*"), a copy of which is attached as Exhibit B to the Affidavit of Mark Wong dated May 8, 2015.

B. Pursuant to the Approval Order, the Court approved the Lease Transfer Agreement and provided for the vesting in and sale, assignment and transfer to Assignee of TCC's right, title and interest in and to the Subject Assets, which vesting, sale, assignment and transfer is to be effective with respect to the Subject Assets upon the delivery by the Monitor to the Assignee and TCC of a certificate confirming (i) the conditions to Closing as set out in sections 8.1, 8.2 and 8.3 of the Lease Transfer Agreement have been satisfied or waived by the Assignee and TCC, as applicable; and (ii) the Transaction has been completed to the satisfaction of the Monitor.

THE MONITOR CERTIFIES the following:

1. The conditions to Closing as set out in section 8.1, 8.2 and 8.3 of the Lease Transfer Agreement have been satisfied or waived by the Assignee and TCC, as applicable; and
2. The Transaction has been completed to the satisfaction of the Monitor.

This Monitor's Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

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

Per: _____

Name:

Title:

Schedule "C"

| <i>No.</i> | <i>Location/ Province Address</i> | <i>Land Registry Office</i> | <i>Legal Description</i> | <i>Encumbrances to be Expunged/ Deleted</i> |
|------------|--|--|--|---|
| 1. | Aurora ON Shopping Centre 15400 Bayview Ave., Aurora | LRO #65 | <i>PIN 03641-2938 (LT)</i> BLKS 2 & 3, PL 65M3074, EXCEPT PT BLK 3, PL 65M3074, PTS 3, 4, 5, 6, 7, 8, 9 & 10, 65R25487; T/W PT LT 82 CON 1, PT 4, 65R14423 AS IN R494293; T/W PT LT 28, PL 231, PTS 7 & 8, 65R14423 AS IN R494293; S/T RT IN LT1083412; S/T LT1080927, LT1080929, LT1080933, LT1082531; TOWN OF AURORA | NIL |
| 2. | Sudbury ON Supermall 1485 Lasalle Boulevard, Sudbury | LRO #53 | <i>PIN 73571-0029 (LT)</i> PCL 51771 SEC SES; PT LT 12 CON 5 NEELON PARTS 1 TO 5, 11, 12, 15 TO 17 ON 53R16376 EXCEPT PARTS 5 TO 14 ON 53R17343; T/W LT478393; S/T PT 4 & 16 53R16373 AS IN LT874216; S/T LT488448, LT488449, LT490014, LT490015; GREATER SUDBURY | NIL |
| 3. | Northwest NB Centre | New Brunswick Land Registry Office | <i>PID: 70562822</i> | NIL |

1380
Mountain
Road,
Moncton

Place Name: Moncton

Parish/County: Moncton/Westmorland
Designation of Parcel on Plan: Lot 12-2
Title of Plan: Grep Properties Limited
Subdivision (amending plan 202455)
Registration County: Westmorland
Registration Number of Plan: 31803555
Registration Date of Plan: 2012-08-07
11:29:54

Together with the benefit of an Easement
described in Easement 31932347 registered
in Land Titles Office on New Brunswick on
September 11, 2012

PID: 70562814

Place Name: Moncton

Parish/County: Moncton/Westmorland
Designation of Parcel on Plan: Lot 12-1
Title of Plan: Grep Properties Limited
Subdivision (amending plan 202455)
Registration County: Westmorland
Registration Number of Plan: 31803555
Registration Date of Plan: 2012-08-07
11:29:54

Together with the benefit of an Easement
described in Easement 31932347 registered
in Land Titles Office on New Brunswick on
September 11, 2012

PID: 41072034

4. Bayers Lake Power Centre NS

Nova Scotia Land Registry Office

NIL

194
Chain
Lake
Drive.,
Halifax

ALL that certain lot, piece or parcel of
land, situate, lying and being on the eastern
side of Chain Lake Drive, at Halifax
Business Park, Bayers Lake, Halifax.
Province of Nova Scotia, and. shown as
Lot S3-B2A on a plan of survey Lot S3-32A
and Lot S3-B2B, subdivision of Lot S3-B2,
lands acquired by 3584747 Canada Inc.,
dated the 16th day of April, 2002, prepared
by Thompson Conn Limited, certified by
Allan J. Owen, NSLS, approved by Halifax
Regional Municipality on the 1st day of
May, 2002. and being more particularly
described as follows:
BEGINNING at the intersection of eastern
boundary of Chain Lake Drive with the
southeastern boundary of Lot S3-B1;
THENCE along the southeastern boundary
of Lot S3-B1 on a bearing of north 60
degrees, 05 minutes, 49 seconds east
for a distance of 296.374 meters to a
southwestern boundary of Bi-Centennial
Drive;

THENCE in a southeasterly direction along the southwestern boundary of Bi-Centennial Drive following a curve to the left having a radius of 1807.360 meters for an arc distance of 117.318 meters to the northwestern boundary of Lot S3-B3BA; THENCE along a northwestern boundary of Lot S3-B3BA on a bearing of south 60 degrees, 05 minutes, 49 seconds west for a distance of 237.695 meters to the eastern corner of Lot S3-B2B; THENCE along the northeastern boundary of Lot S3-B2B on a bearing of north 29 degrees, 54 minutes, 11 seconds west for a distance of 58.306 meters to the northern corner thereof; THENCE along the northwestern boundary of Lot S3-B2B on a bearing of south 60 degrees, 05 minutes, 49 seconds west for a distance of 75.736 meters to the eastern boundary of Chain Lake Drive; THENCE along the eastern boundary of Chain Lake Drive on a bearing of north 14 degrees, 06 minutes, 00 seconds west for a distance of 61.308 meters to the point of beginning; CONTAINING an area of 31,760.5 square meters; BEARINGS are grid referred to the line between N.S.C.M. 10159 and N.S.C.M. 10158 having a bearing of north 63 degrees, 32 minutes, 40 seconds east and based on the 3 degree M.T.M. projection, central meridian 60 degrees, 30 minutes west longitude (1979 adjustment); BEING and intended to be a portion of the lands acquired by 3584747 Canada Inc. by deed recorded at the Registry of Deeds for Halifax County in Book 6019 at Page 1185.

BENEFITS:
TOGETHER WITH certain easements and rights with respect to Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 5503 at Page 686, and in Assumption Agreement in Book 7646 at Page 137;
ALSO TOGETHER WITH certain easements and rights with respect to Easement and Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 6211 at Page 873, and in Assumption Agreement in Book 7646 at Page 163;
ALSO TOGETHER WITH certain rights and benefits with respect to Restrictive Covenant Agreement recorded at the Registry of Deeds for Halifax County in Book 6353 at Page 1027;

BURDENS:

SUBJECT TO the Protective Covenants and Guidelines described in the Deed in Book 5503 at Page 616;
ALSO SUBJECT TO certain easements and rights with respect to Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 5503 at Page 686, and in Assumption Agreement in Book 7646 at Page 137;
ALSO SUBJECT TO certain easements and rights with respect to Easement and Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 6211 at Page 873, and in Assumption Agreement in Book 7646 at Page 163;

ALSO SUBJECT TO a 9.144 meters wide easement to Nova Scotia Power Inc. as recorded at the Registry of Deeds for Halifax County in Book 5737 at Page 450;
ALSO SUBJECT TO a 10.000 meters wide Drainage Easement, DE-3, as recorded at the Registry of Deeds for Halifax County in Book 6019 at Page 1185 shown on plan number 35121, drawer 385;

ALSO SUBJECT TO an easement in favour of Heritage Gas Limited registered on August 2, 2013 in the Halifax County Land Registration Office as Document No. 103533015;

MGA: The parcel originates with an approved plan of subdivision that has been filed under the Registry Act or registered under the Land Registration Act at the Land Registration Office for the registration district of Halifax as plan or document number 35121, drawer 385.

PID: 41072083

ALL that certain lot, piece or parcel of land, situate, lying and being on the eastern side of Chain Lake Drive, at Halifax Business Park, Bayers Lake, Halifax, Province of Nova Scotia, and shown as Lot S3-B2B on a plan of survey Lot S3-B2A. and Lot S3-B2B, subdivision of Lot S3-B2, lands acquired by 3584741 Canada Inc., dated the 16th day of April, 2002, prepared by Thompson Conn Limited, certified by Allan J. Owen, NSLS, approved by Halifax Regional Municipality on the 1st day of May, 2002, and being more particularly described as follows:

BEGINNING at the intersection of eastern boundary of Chain Lake Drive with the northwestern boundary of Lot S3-B3BA;
THENCE along the northwestern boundary of Lot S3-B3BA on a bearing of north 60 degrees, 05 minutes, 49 seconds

east for a distance of 92.238 meters to a southwestern boundary of Lot S3-B2A; THENCE along a southwestern boundary of Lot S3-B2A on a bearing of north 29 degrees, 54 minutes, 11 seconds west for a distance of 58.306 meters to an angle therein;

THENCE along a southeastern boundary of Lot S3-B2A on a bearing of south 60 degrees, 05 minutes, 49 seconds west for a distance of 75.736 meters to the eastern boundary of Chain Lake Drive;

THENCE along the eastern boundary of Chain Lake Drive on a bearing of south 14 degrees, 06 minutes, 00 seconds east for a distance of 60.596 meters to the point of beginning;

CONTAINING an area of 4,896.9 square meters;

BEARINGS are grid referred to the line between N.S.C.M. 10159 and N.S.C.M. 10158 having a bearing of north 63 degrees, 32 minutes, 40 seconds east and based on the 3 degree M.T.M. projection, central meridian 60 degrees, 30 minutes west longitude (1979 adjustment);

BEING and intended to be a portion of the lands acquired by 3584747 Canada Inc. by deed recorded at the Registry of Deeds for Halifax County in Book 6019 at Page 1185.

BENEFITS:

TOGETHER WITH certain easements and rights with respect to Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 5503 at Page 686, and in Assumption Agreement in Book 7646 at Page 137;

ALSO TOGETHER WITH certain easements and rights with respect to Easement and Reciprocal Operating Agreement recorded at the Registry of Book 6211 at Page 873, and in Assumption Agreement in Book 7646 at Page 163;

ALSO TOGETHER WITH certain rights and benefits with respect to Restrictive Covenant Agreement recorded at the Registry of Deeds for Halifax County in Book 6353 at Page 1027;

ALSO TOGETHER WITH a 6 meters wide easement over Lot S3-CD1, for storm water drainage services as referenced in the Deed recorded at the Registry of Deeds for Halifax County in Book 7329 at Page 760.

BURDENS:

SUBJECT TO the Protective Covenants and Guidelines described in the Deed in Book 5503 at Page 616;

| | | | | |
|----|---|---|---|-----|
| | | | ALSO SUBJECT TO certain easements and rights with respect to Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 5503 at Page 686, and in Assumption Agreement in Book 7646 at Page 137; | |
| | | | ALSO SUBJECT TO certain easements and rights with respect to Easement and Reciprocal Operating Agreement recorded at the Registry of Deeds for Halifax County in Book 6211 at Page 873, and in Assumption Agreement in Book 7646 at Page 163; | |
| | | | MGA: The parcel originates with an approved plan of subdivision that has been filed under the Registry Act or registered under the Land Registration Act at the Land Registration Office for the registration district of Halifax as plan or document number 35121, drawer 385. | |
| 5. | Le QC Carrefour Rimouski | Registration numbers 3 183 085 and 3 183 092 of the Division Cadastre of Québec, Registration Division of Rimouski. | | NIL |
| | 419 boul. Jessop, Rimouski | | | |
| 6. | Place QC Alexis Nihon | Registration numbers 1 064 397 and 2 626 434 of the Division Cadastre of Québec, Registration Division of Montreal | | NIL |
| | 1500 av. Atwater, Westmount | | | |
| 7. | Place QC Versailles Shopping Centre | Registration number 4 636 559 of the Cadastre of Division Québec, Registration Division of Montreal | | NIL |
| | 7275 rue Sherbrooke East, Montreal | | | |
| 8. | Driftwood BC Mall | Victoria Parcel Identifier: 006-595-367 Land Title Office | | NIL |
| | 2701 — 2751 Cliffe Avenue, Courtenay | | LOT A, SECTION 66 & 67, COMOX DISTRICT, PLAN 44811 EXCEPT PARTS IN PLANS 49234, VIP66865 AND VIP68598 | |
| 9. | Tamarac BC Mall | Nelson Parcel Identifier: 006-058-400 Land | | NIL |

| | | Title Office | | |
|-----|---|-------------------------------------|--|-----|
| 10. | 1500 Cranbrook Street North, Cranbrook Village BC Green Mall | Kamloops Land Title Office | LOT A DISTRICT LOTS 4, 24, 25 AND 28 KOOTENAY DISTRICT PLAN 10373 <i>Parcel Identifier: 025-447-041</i> | NIL |
| 11. | 4900 27 th Street, Vernon Hillside BC Mall | Victoria Land Title Office | LOT A SECTION 10 TOWNSHIP 8 AND DISTRICT LOT 38 OSOYOOS DIVISION YALE DISTRICT PLAN KAP71544 <i>Parcel Identifier: 027-698-793</i> | NIL |
| 12. | 1610 Hillside Avenue, Victoria Grant MB Park Shopping Centre 1080 Grant Avenue, Winnipeg | MB Land Registry Office | LOT A SECTION 8A AND 29-30 VICTORIA DISTRICT PLAN VIP85871 <i>Title No. 2750784</i> ALL THAT PORTION OF LOT 3 BLOCK 1 PLAN 7678 WLTO WHICH LIES EAST OF A LINE DRAWN SLY AT RIGHT ANGLES TO THE NORTHERN LIMIT OF SAID LOT, FROM A POINT IN THE SAME, DISTANT WLY DISTANT WLY THEREON 198.1 FEET FROM THE EASTERN LIMIT OF SAID LOT IN RL 26 TO 28 PARISH OF ST BONIFACE <i>Title No. 275078711</i> BLOCK 2 PLAN 7678 WLTO IN RL 26 TO 28 PARISH OF ST BONIFACE <i>Title No. 275078311</i> LOTS 1, 2 AND 3 BLOCK 1 PLAN 7678 WLTO EXC OUT OF LOT 3: ALL THAT PORTION WHICH LIES EAST OF A LINE DRAWN SLY AT RIGHT ANGLES TO THE NORTHERN LIMIT OF SAID LOT 3, FROM A POINT IN THE SAME, DISTANT WLY THEREON 198.1 FEET FROM THE EASTERN LIMIT OF SAID LOT 3, IN RL 26 TO 28 PARISH OF ST BONIFACE | NIL |

Schedule "D" — Permitted Encumbrances

"*Permitted Encumbrances*" means, collectively: (a) any Encumbrances (as defined in the Lease Transfer Agreement) encumbering the freehold or other ownership interest in the Property (as defined in the Lease Transfer Agreement) or any other Landlord's interest in the Property, but excludes any Encumbrances solely encumbering the Assignor's leasehold interest in and to any Property on which the Premises (as defined in the Lease Transfer Agreement) are located; (b) Encumbrances resulting from the Assignee's actions or omissions; and (c) the items identified in Schedule "K" of the Lease Transfer Agreement.

Morawetz R.S.J.:

32 THIS MOTION, made by the Applicants, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, as amended (the "*CCAA*") for an order approving: the sale of lands and buildings located at 875 St. James St., Winnipeg, Manitoba, together with certain ancillary assets (the "*Transaction*") contemplated by an Agreement of Purchase and Sale (the "*APA*") among Target Canada Co. ("*TCC*"), as Vendor, and The Cadillac Fairview Corporation Limited as Purchaser ("*Cadillac Fairview*") dated May 4, 2015, as assigned by Cadillac Fairview to Polo Park Holdings L.P. (the "*Purchaser*") and certain related relief, was heard this day at 330 University Avenue, Toronto, Ontario.

33 ON READING the Notice of Motion of the Applicants, the Affidavit of Mark Wong sworn on May 4, 2015 including the exhibits thereto (the "*Wong Affidavit*"), and the Tenth Report (the "*Monitor's Tenth Report*") of Alvarez & Marsal Canada Inc., in its capacity as Monitor (the "*Monitor*"), filed, and on hearing the submissions of respective counsel for the Applicants and the Partnerships listed on Schedule "A" hereto, the Monitor, Target Corporation, the Purchaser, and such other counsel as were present, no one else appearing although duly served as appears from the Affidavit of Service of Robert Carson sworn May 4, 2015, filed:

Service and Definitions

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

35 2. THIS COURT ORDERS that any capitalized term used and not defined herein shall have the meaning ascribed thereto in the Amended and Restated Initial Order in these proceedings dated January 15, 2015 (the "*Initial Order*"), or in the APA, as applicable.

Approval of the APA

36 3. THIS COURT ORDERS AND DECLARES that the Transaction is hereby approved and ratified and that the execution of the APA by TCC is hereby approved and ratified with such minor amendments as TCC (with the consent of the Monitor) and the Purchaser may agree to in writing. TCC is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction, including the sale, assignment and transfer by TCC of its beneficial right, title and interest in and to the Subject Assets (as defined in the APA) to Cadillac Fairview and Shindico Realty Inc. ("*Shindico*"), each as to an undivided 50% interest, in their capacity as general partners of the Purchaser, and the sale, assignment and transfer by TCC of its registered legal right, title and interest in and to the Subject Assets to 7113196 Manitoba Ltd. on behalf of the Purchaser and the Monitor shall be authorized to take such additional steps in furtherance of its responsibilities under the APA. The legal descriptions and applicable land registry offices with respect to the Subject Assets are as set out on Schedule "C" hereto.

37 4. THIS COURT ORDERS AND DECLARES that upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "B" hereto (the "*Monitor's Certificate*"), all of TCC's beneficial right, title and interest in and to the Subject Assets shall be sold, assigned and transferred to and vested in Cadillac Fairview and Shindico, each as to an undivided 50% interest, in their capacity as general partners of the Purchaser, and all of TCC's registered legal right, title and interest in and to the Subject Assets shall be sold, assigned and transferred to and vested in 7113196 Manitoba Ltd. on behalf of the Purchaser, in each case, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, leases, notices of lease, subleases, licenses, levies, restrictions, rights of retention, judgments, notices of sale, contractual rights, options, liabilities (direct, indirect, absolute or contingent), obligations, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise in respect of the Subject Assets (collectively, the "*Claims*"), including, without limiting the generality of the foregoing:

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

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

(c) those Claims listed on Schedule "C" hereto;

(all of which are collectively referred to as the "*Encumbrances*", which term shall not include the Permitted Encumbrances listed on Schedule "D" hereto), and, for greater certainty, this Court orders that all of the Claims and Encumbrances affecting or relating to the Subject Assets are hereby expunged and discharged as against the Subject Assets and the real or immovable property described in Schedule "C".

38 5. THIS COURT ORDERS and directs that upon the registration of a Certified Copy of this Order in the Winnipeg Land Titles Office in the manner prescribed by the Winnipeg Land Titles Office, the District Registrar thereof shall immediately cancel Certificate of Title No. 2677330/1 now standing in the name of Target Canada Co. and shall immediately thereafter issue a new Certificate of Title for the subject property in the name of 7113196 Manitoba Ltd. free and clear of any and all Encumbrances except for the Encumbrances listed in Schedule "D" hereto, notwithstanding that the time for appeal of this Approval and Vesting Order has not expired.

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

40 7. THIS COURT ORDERS AND DIRECTS the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof in accordance with the terms of the APA.

41 8. THIS COURT ORDERS that subject to the terms of the APA nothing herein affects:

(a) the rights and obligations of TCC and the Agent under the Agency Agreement dated January 29, 2015, as amended; and

(b) the terms of the Approval Order — Agency Agreement granted, February 4, 2015 including the Sales Guidelines attached as Schedule "B" thereto.

General Provisions

42 9. THIS COURT ORDERS that, notwithstanding:

(a) the pendency of these proceedings;

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

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

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

43 10. THIS COURT ORDERS AND DECLARES that the Transaction is exempt from the application of section 45 of the *Tax Administration and Miscellaneous Taxes Act* (Manitoba) and any equivalent legislation in any other jurisdiction in which all or any part of the Subject Assets are located.

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

Schedule "A" — Partnerships

Target Canada Pharmacy Franchising LP

Target Canada Mobile LP

Target Canada Property LP

Schedule "B"

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

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

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

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

Monitor's Certificate

Recitals

A. All undefined terms in this Monitor's Certificate have the meanings ascribed to them in the Order of the Court dated [May 19], 2015 (the "*Approval and Vesting Order*") approving the Agreement of Purchase and Sale (the "*APA*") entered into among Target Canada Co. ("*TCC*"), as Vendor, and The Cadillac Fairview Corporation Limited as Purchaser ("*Cadillac Fairview*") dated May 4, 2015, as assigned by Cadillac Fairview to Polo Park Holdings L.P. (the "*Purchaser*"), a copy of which is attached as Exhibit C to the Affidavit of Mark Wong dated May 4, 2015.

B. Pursuant to the Approval and Vesting Order the Court approved the APA and provided for the sale, assignment and transfer to Cadillac Fairview and Shindico Realty Inc. ("*Shindico*"), each as to an undivided 50% interest, in their capacity as general partners of the Purchaser, and 7113196 Manitoba Ltd., of TCC's right, title and interest in and to the Subject Assets, which sale, assignment and transfer is to be effective with respect to the Subject Assets upon the delivery by the Monitor to the Purchaser and TCC of a certificate confirming (i) the conditions to Closing as set out in sections 7.1, 7.2 and 7.3 of the APA have been satisfied or waived by the Purchaser and TCC, as applicable; and (ii) the Transaction has been completed to the satisfaction of the Monitor.

THE MONITOR CERTIFIES the following:

1. The conditions to Closing as set out in sections 7.1, 7.2 and 7.3 of the APA have been satisfied or waived by the Purchaser and TCC, as applicable; and
2. The Transaction has been completed to the satisfaction of the Monitor.
3. This Monitor's Certificate was delivered by the Monitor at _____ [TIME] on _____ [DATE].

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

By: _____

Name:

Title:

Schedule "C"

| <i>No</i> | <i>Location/ Address</i> | <i>Province</i> | <i>Land Registry Office</i> | <i>Legal Description</i> | <i>Encumbrances to be Expunged/ Deleted</i> |
|-----------|--|-----------------|--------------------------------------|---|--|
| 7012 | 875 St. James St. Winnipeg R3G 0V9 | Manitoba | Winnipeg Land Titles Office | LOT 1 PLAN 54622 WLTO IN RL 42 PARISH OF ST JAMES | Claim For Lien in favour of 8239959 Canada Inc. in the amount of \$2,209,712.40 (Registration# 4569615) |

Schedule "D" — Permitted Encumbrances

(a) Caveat No. 3662064/1 registered August 20, 2008 in respect of an easement for utilities in favour of MTS ALLSTREAM INC.

(a) Caveat No. 3662065/1 registered August 20, 2008 in respect of an easement for utilities in favour of MTS ALLSTREAM INC.

(b) Caveat No. 3662066/1 registered August 20, 2008 in respect of an easement for utilities in favour of MTS ALLSTREAM INC.

(c) Caveat No. 4365381/1 registered June 13, 2013 in respect of a statutory easement in favour of THE CITY OF WINNIPEG.

(d) Caveat No. 4386890/1 registered August 6, 2013 in respect of an easement and restrictive covenant in favour of 8239959 CANADA INC.

(e) Caveat No. 4386891/1 registered August 6, 2013 in respect of an easement and restrictive covenant in favour of TARGET CANADA CO.

Motion granted.

TAB 15

2016 ONSC 3651
Ontario Superior Court of Justice

Target Canada Co., Re

2016 CarswellOnt 21083, 2016 ONSC 3651, 274 A.C.W.S. (3d) 259, 42 C.B.R. (6th) 330

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

In the Matter of a plan of compromise or arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Morawetz J.

Heard: June 2, 2016

Judgment: June 2, 2016

Docket: CV-15-10832-00CL

Counsel: Jeremy Dacks, John MacDonald, Shawn Irving, for Applicants, Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp., and Target Canada Property LLC

Jay Swartz, for Target Corporation

William Sasso, Sharon Strosberg, Jacqueline Horvat, for Pharmacy Franchisee Association of Canada

Susan Philpott, for Employees of Applicants

Alan Mark, Melaney Wagner, Graham Smith, Franci Kussner, for Monitor, Alvarez & Marsal Inc.

Jane Dietrich, for Merchant Retail Solutions ULC, Gordon Brothers Canada ULC and G.A. Retail Canada ULC

Andrew Hodhod, for Bell Canada

Harvey Chaiton, for Directors and Officers

Subject: Insolvency

MOTION by applicant companies for approval of amended plan of arrangement under *Companies' Creditors Arrangement Act* and for extension of stay.

Morawetz J. (orally):

1 Target Canada Co. ("TCC"), the other applicants listed above and certain related partnerships, (collectively, the "Target Canada Entities"), obtained relief under the *Companies' Creditors Arrangement Act*, (the "CCAA") by an Initial Order dated January 15, 2015, (the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed in the Initial Order to act as the Monitor in this proceeding (the "Monitor"). The reasons which gave rise to the Initial Order are reported as *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) . Those reasons set out the factual background giving rise to the CCAA filing. The Initial Order granted a stay of proceedings until February 13, 2015, which was later extended eight times, most recently to June 6, 2016.

2 Today the Applicants bring this motion for Court sanction of their Second Amended and Restated Joint Plan of Compromise and Arrangement dated May 19, 2016 (the "Amended Plan") and to obtain an order extending the Stay Period until September 23, 2016 to allow for the implementation of the Amended Plan and the continuation of the Claims Process for the benefit of all stakeholders.

3 The facts with respect to this motion are set out in the Sanction Affidavit of Mark J. Wong. Additional facts, including the background to, and mechanics of, the Amended Plan are described in the Meeting Order Affidavit of Mark J. Wong. In addition, factual information is also contained in the 28th Report of the Monitor.

4 Counsel for the Applicants submits that the Amended Plan is the product of extensive negotiations and consultations with key stakeholders, including Landlord Guarantee Creditors, Landlord Non-Guarantee Creditors, Target Corporation and the Consultative Committee, all with the assistance of the Monitor.

5 Noteworthy, each of the Monitor, the Landlords and the Consultative Committee of creditors support the Amended Plan.

6 The Amended Plan has been designed to isolate and address Claims against Propco and Property LP, on one hand, and TCC and the remaining Target Canada Entities on a consolidated basis, on the other. The Amended Plan provides for the consolidation for Plan purposes of the Target Canada Entities other than Propco and Property LP. The Monitor has commented on the impact of the substantive consolidation of the estates of the Target Canada Entities for the purposes of this proceeding. Such commentary contained in Monitor's 27th report.

7 I note that there is no opposition to the proposed consolidation, which has been brought to the attention of the affected creditors and I am satisfied that the effect of such consolidation is not prejudicial to the position of any creditor or creditor group.

8 The primary features of the Amended Plan are summarized in Meeting Order Affidavit, the Sanction Affidavit and the Monitor's Report. Some of the more significant features include:

- a. Affected Creditors voted on the Amended Plan as a single class.
- b. Affected Creditors with Proven Claims that are less than or equal to \$25,000 (the "Convenience Class Creditors") will be paid in full. Affected Creditors with Proven Claims in excess of \$25,000 had the option to elect to be treated for all purposes as Convenience Class Creditors.
- c. Landlord Guarantee Creditors will be paid the full amount of their Proven Claims on the Initial Distribution Date.
- d. Landlord Non-Guarantee Creditors will be paid, in addition to their Pro Rata Share of their Proven Claims, a Landlord Non-Guaranteed Creditor Equalization Amount.
- e. Other Affected Creditors with Proven Claims will receive their Pro Rata Share of the remaining TCC Cash Pool.
- f. All CCAA Charges will be discharged, except the Directors' Charge and the Administrative Charge.
- g. The Target Canada Entities will transfer their remaining IP assets to Target Coporation's designees and the Pharmacy Shares to the Pharmacy Purchaser.
- h. The Employee Trust will be terminated in accordance with the Amended Plan and any surplus funds returned to Target Corporation.

9 On November, 27, 2015 the Target Canada Entities brought a motion to file their original Plan of Compromise and Arrangement, ("the Original Plan"), and an Order authorizing the Target Canada Entities to call and hold a creditors' meeting to vote on it. I dismissed the motion on January 13, 2016, for reasons released on January 15, 2016 (the "January 15 Endorsement"). The reasons are reported as *Target Canada Co., Re* (2015), 2016 ONSC 316 (Ont. S.C.J.). Among other things, the Applicants' motion was dismissed as the Original Plan violated paragraph 19A of the Initial Order by seeking to compromise the Landlord Guarantee Claims without the consent of such affected Landlords.

10 After the January 15 Endorsement was issued, the Target Canada Entities continued their negotiations with the Landlords to develop framework for a consensual resolution that would preserve Target Corporation's agreement to maintain the subordination contained in the Original Plan, while the same time addressing certain Landlords' concerns and complying with the January 15th Endorsement.

11 On March 4, 2016 the Target Canada Entities announced that agreements had been entered into with all of the Landlord Guarantee Creditors and all of the Landlord Non-Guarantee Creditors.

12 The terms of these Agreements were disclosed and explained to Affected Creditors and to this Court prior to Creditors' Meeting.

13 The Landlord Guarantee Creditor Settlement Agreement and the Landlord Non-Guarantee Creditor Consent and Support Agreements are conditional upon (a) the Amended Plan's approval by the Affected Creditors; (b) sanction by this Court; and (c) Plan Implementation.

14 On April 13, 2016 an order was issued permitting the Applicants to put the Amended Plan before the Affected Creditors for approval at the Creditors' Meeting.

15 On April 14, 2016 the Monitor published the Meeting Materials on its website. The Meeting Materials were sent to Affected Creditors on April 19, 2016. In addition, notices were published in major national and US newspapers at the end of April.

16 The Creditors' Meeting was held on May 25, 2016. The required quorum was present and the meeting was properly constituted.

17 According to the Monitor's tabulation, 100% in number representing 100% in value of the Affected Creditors holding Proven Claims that were present in person or by proxy and voting at the Meeting, voted (or were deemed to vote) to approve the Resolution in favour of the Amended Plan. According to the Monitor's tabulation, 1246 Affected Creditors representing approximately \$554 million in value voted (or were deemed to vote pursuant to the Meeting Order) at the Creditors' Meeting.

18 Based on the most up-to-date information from the Monitor, the Target Canada Entities expect that, subject to certain exceptions, Affected Creditors will be paid in a range from 71% to 80% of their Proven Claims.

19 The issue on this motion is:

- a. Should this Court approve the Amended Plan as fair and reasonable?

20 Pursuant to section 6(1) of the CCAA, the court has the discretion to sanction a plan of compromise or arrangement where the requisite double-majority of creditors has approved the plan.

21 The general requirements for court approval of the CCAA Plan are well-established:

- a. there must be strict compliance with all statutory requirements;
- b. all materials filed and procedures carried out must be examined to determine if there has been anything done or purported to have been done, which is not authorized by the CCAA; and
- c. the plan must be fair and reasonable.

22 See *SkyLink Aviation Inc., Re*, 2013 ONSC 2519 (Ont. S.C.J. [Commercial List]).

23 Having reviewed the record and hearing the submissions, I am satisfied that the foregoing test for approval has been met. In arriving at this conclusion, I have taken into account the following:

- (a) In granting the Initial Order, it was determined that the Applicants qualified as debtor companies under section 2 of the CCAA and that the Applicants were insolvent;
- (b) Affected Creditors were classified for the purposes of voting and receiving distributions under the Amended Plan and they voted on the Amended Plan as a single class; and
- (c) The Monitor published the required notices and provided copies of the Meeting Materials to Affected Creditors;
- (d) Affected Creditors were provided with Target Canada's letter to creditors containing an overview of the terms of the Amended Plan, as well as a letter from the Consultative Committee of creditors communicating the Consultative Committee's support of the Amended Plan and recommendation that Affected Creditors vote in favour of the Amended Plan;
- (e) the Creditors' Meeting was properly-constituted;
- (f) 100% in number representing 100% in value voted in favour of the Plan. Such unanimous approval of the Amended Plan far exceeds the required statutory majority under section 6(1).

24 Sections 6(2), 6(5) and 6(6) of the CCAA provide that the Court may not sanction the plan unless the plan contains specified provisions concerning crown claims, employee claims and pension claims. I am satisfied that all of these requirements have been met.

25 The claims of Affected Creditors are not being paid in full. In compliance with section 6(8) of the CCAA, the Amended Plan does not provide for any recovery for equity holders. In addition, Target Corporation, the indirect shareholder of TCC and the largest single creditor of TCC, has agreed to subordinate the majority of its Intercompany Claims.

26 I also note that the Monitor is of the view that the Amended Plan complies with the requirements of the CCAA, including the requirements under section 6 of the CCAA.

27 Having reviewed the record, I am satisfied that the statutory prerequisites to sanction the Amended Plan have been satisfied. I am also satisfied that no unauthorized steps have been taken in placing the Amended Plan before the Court to be sanctioned.

28 In assessing whether a proposed plan is fair and reasonable, the Court will consider the following:

- a. whether the claims have been properly classified and whether the requisite majority of creditors approved the plan;
- b. what creditors would receive on bankruptcy or liquidation as compared to the plan;
- c. alternatives available to the plan;
- d. oppression of the rights of creditors;
- e. unfairness to shareholders; and
- f. the public interest.

29 (See to *Sino-Forest Corp., Re*, 2012 ONSC 7050 (Ont. S.C.J. [Commercial List]) ("Sino-Forest").

30 I am satisfied that each of these factors supports approval of the Amended Plan.

31 In arriving at this conclusion, I have taken into account the following:

- a. Classification and Creditor Approval: The Amended Plan was unanimously approved.

b. Recovery on Bankruptcy: The Monitor has expressed the view that recoveries under the Amended Plan are well in excess of those that would have been received on a bankruptcy of the Target Canada Entities. Recoveries against TCC in a bankruptcy would be 30%, as compared to the expected range of 71 to 80% under the Amended Plan.

c. Alternatives to the Amended Plan: The Amended Plan is the only alternative to bankruptcy.

d. No Oppression of Creditors: I am satisfied that the pre-insolvency rights and priorities of Affected Creditors are respected under the Amended Plan.

e. No Unfairness to Shareholders: Given that Affected Creditors are not being paid in full, there is no unfairness to shareholders in receiving no recovery.

f. Public interest: The Amended Plan resolves the Proven Claims against Target Canada Entities in a manner that is efficient and timely, and which avoids costly litigation.

32 Article 7.1 of the Amended Plan provides for full and final releases in favour of:

a. The Target Canada Released Parties;

b. The Third-Party Released Parties (which includes the Monitor and its affiliates, their directors, officers, employees, legal counsel, agents and advisors, as well as the Pharmacists' Representative Counsel and members of the Consultative Committee and their advisors;

c. It also provides a released in favour of the Plan Sponsor Released Parties, (Target Corporation and its subsidiaries other than the Target Canada Entities and the NEI, the HBC Entities and their respective directors, officers, employees, legal counsel agents and advisors), except in respect of the Landlord Guarantee Claims.

33 Finally, there is also release of the Employee Trust Released Parties.

34 It is accepted that Canadian courts have jurisdiction to sanction plans that containing releases in favour of third parties. In *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (Ont. C.A.) the Court of Appeal held that the CCAA Court has the jurisdiction to approve a plan of compromise or arrangement that includes third-party releases, stating that a release negotiated in favour of a third-party as part of the "compromise" or "arrangement" that reasonably relates to the proposed restructuring falls within the objectives and flexible framework of the CCAA.

35 There must be a reasonable connection between the third-party claim being compromised in the plan and the restructuring achieved by the plan to warrant inclusion of the third-party release in the plan.

36 In considering whether to approve releases in favour of third parties, the factors to be considered by the court include:

- a. Whether the parties to be released from claims were necessary and essential to the restructuring of the debtor;
- b. Whether the claims to be released were rationally connected to the purpose of the plan and necessary for it;
- c. Whether the plan could succeed without the releases;
- d. Whether the parties being released were contributing to the plan;
- e. Whether the release benefitted the debtors as well as the creditors generally;
- f. Whether the creditors voting on the plan had knowledge of the nature and the effect of the releases or;
- g. Whether the releases were fair and reasonable and not overly broad.

37 (See *Metcalfe, Cline Mining Corp.*, 2015 ONSC 662; and *Kitchener Frame Ltd., Re*, 2012 ONSC 234 (Ont. S.C.J. [Commercial List]).)

38 In determining whether to approve a third-party release, the Court will take into account the particular circumstances of the case and the objectives of the CCAA. No single factor set out above will be determinative.

39 (See *Skylink and Cline Mining.*)

40 Courts have approved releases that benefit affiliates of the debtor corporation where the *Metcalfe* criteria is satisfied. In *Sino-Forest*, the subsidiaries of the debtor company were entitled to the benefit from the release under the plan as they were contributing their assets to satisfy the obligations of the debtor company for the benefit of affected creditors. It is not uncommon for CCAA courts to approve third-party releases in favour of person, such as directors or officers or other third parties, who could assert contribution and indemnity claims against the debtor company.

41 (See *Skylink and Cline Mining.*)

42 In my view, each of the Released Parties has contributed in tangible and material ways to the orderly wind down the Target Canada Entities' businesses. I accept that without the Releases, it is unlikely that all of the Released Parties would have been prepared to support the Amended Plan. The Releases are a significant part of the various compromises that were required to achieve the Amended Plan. They are a necessary element of the global, consensual resolution of this CCAA proceeding.

43 In particular, the economic contributions by Target Corporation, as Plan Sponsor, have demonstrably increased the available recoveries for Affected Creditors, as attested by the Monitor. Target Corporation's material direct and indirect contributions as Plan Sponsor include:

- a. subordinating a number of Intercompany Claims against TCC;
- b. partially subordinating various other Intercompany Claims;
- c. a cash contribution of approximately \$25.45 million towards the aggregate Landlord Guaranteed Enhancement;
- d. a net cash contribution of approximately \$4.1 million to fund the Landlord Non-Guaranteed Creditor Equalization;
- e. a cash contribution of \$700,000 towards costs of certain Landlord Guaranteed Creditors;
- f. funding the Employee Trust in the amount of \$95 million.

44 I am satisfied that the Releases are appropriately narrow and rationally connected to the overall purposes of the Amended Plan. The Plan Sponsor Released Parties are not released from the Landlord Guarantee Claims, which are separately resolved in the Landlord Guarantee Creditors Settlement Agreement. Nor will Target Corporation be released under the Amended Plan from any indemnity or guarantee in favour of any Director, Officer or employee.

45 I am also satisfied that the Releases apply to the extent permitted by law and expressly do not apply to liability for criminal, fraudulent or other willful misconduct, or to other claims that are not permitted to be compromised or released under the CCAA.

46 Full disclosure of the Releases was made to the Affected Creditors in the Meeting Order Affidavit, in the Amended Plan and in the Letter to Creditors. The terms of the Release were also disclosed to creditors in the Original Plan. No party has objected to the scope of the Releases as contained in the Amended Plan.

47 Having considered the Record and the applicable law, I am satisfied that the Amended Plan represents an equitable balancing of the interests of all Stakeholders in accordance with the provisions and obligations of the CCAA and I find that the Amended Plan is both fair and reasonable to all Stakeholders. The Amended Plan is sanctioned and approved.

48 The Applicants have also requested an extension of the stay period to September 23, 2016. It is clear that the CCAA proceedings have to be extended so as to permit Plan Implementation to occur and to provide sufficient time to complete post implementation details. I am satisfied the parties are working in good faith and with due diligence in this matter and that there are sufficient resources available to fund the Applicants during the proposed extension period. The extension of the stay period is approved. In order to accommodate my schedule, the stay period is extended to September 26, 2016, being three days longer than the requested period. The Applicants also request an extension of the Notice of Objection Bar Date to the Plan Implementation Date. This request is reasonable in the circumstances and it is ordered that the Notice of Objection Bar Date expire on the Plan Implementation Date.

49 The motion is therefore granted and the Sanction Order has been signed by me.

50 In closing, I would like to thank all parties and their representatives for the manner in which this proceeding has been conducted. All parties and their counsel, by working in a constructive and cooperative manner, have made a contribution to the Amended Plan. It is very rare to have a CCAA plan of this magnitude supported by 100 percent of the affected creditors who voted at the creditors' meetings. This Sanctioned Amended Plan represents the best outcome from this unfortunate commercial venture.

Motion granted.

TAB 16

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

Terrace Bay Pulp Inc., Re

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

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

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

Morawetz J.

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

Counsel: Pamela Huff, Marc Flynn, Kristina Desimini for Applicant, Terrace Bay Pulp Inc.
Alec Zimmerman, James Szumski for Birchwood Trading, Inc.
M. Starnino for United Steelworkers
Alan Merksey for Tangshan Sanyu Group Xingda Chemical Fiberco Limited
Alex Ilchenko for Monitor, Ernst & Young Inc
Jacqueline L. Wall for Her Majesty The Queen in Right of Ontario as represented by the
Ministry of Northern Development and Mines
Janice Quigg for Skyway Canada Ltd.
Fred Myers for Township of Terrace Bay
Peter Forestell, Q.C. for Aditya Birla Group and AV Terrace Bay Inc.

Subject: Insolvency; Public; Property; Municipal

MOTION by T Inc. for approval of sales transaction and other relief.

Morawetz J.:

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

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

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

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

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

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

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

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

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

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

11 Birchwood submits that the Applicant and the Monitor have taken the position that a competing offer from Tangshan for a purchase price of \$35 million should not be considered,

notwithstanding that the Tangshan offer (i) is subject to terms and conditions which are as good or better than the Transaction; (ii) would provide dramatically greater recovery to the creditors of the Applicant, and (iii) offers significant benefits to other stakeholders, including the employees of the Applicant's mill.

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

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

- (a) an increase in the purchase price for the mill assets, from an effective purchase price of \$27 million to a cash purchase price of \$35 million;
- (b) the potential for the Province of Ontario to be repaid in full or, if the Province is prepared to offer the same debt forgiveness concession under the Tangshan offer that it is providing to the Purchaser, the potential to increase the "effective" purchase price of the Tangshan offer to \$60 million;
- (c) as a consequence of (a) and (b), additional proceeds available for distribution to creditors subordinate to the Province of Ontario of between \$8 million and \$33 million;
- (d) employment of approximately 75 additional employees, plus the existing management of the mill;
- (e) conversion of the mill into a dissolving pulp mill in 18 months, rather than 4 years, with a higher expected yield once the conversion is complete and a business plan which calls for the production of a more lucrative interim product during the conversion process.

14 Counsel to Birchwood submits that the substantial increase in the consideration offered by the Tangshan offer, which is a binding offer with terms and conditions that are at least as favourable as the Transaction, is sufficient to call into question the integrity and efficacy of the Sales Process (defined below). Counsel suggests that the market for the mill assets was not sufficiently canvassed, and provides evidence to support a finding that the criteria for

approval of the sale as set out in s. 36 (3) of the CCAA and *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.) has not been met.

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

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

Facts

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

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

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

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

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

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

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

- (a) the value of the consideration proposed in the Transaction;
- (b) the level of due diligence required to be completed prior to closing;
- (c) the conditions precedent to closing of a sale transaction;
- (d) the impact on the Corporation of the Township of Terrace Bay (the "Township"), the community and other stakeholders;
- (e) the bidder's intended use for the mill site including any future capital investment into the mill; and
- (f) the ability to close the Transaction as soon as possible, given the company's limited cash flow.

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

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

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

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

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

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

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

- (a) the Applicant, in consultation with the Province, had entered into a binding purchase agreement with the Purchaser, which does not permit termination by Terrace Bay to entertain a new offer;
- (b) the fairness and integrity of the Sales Process is paramount to these proceedings and to alter the terms of the court-approved Sales Process Terms at this point would be unfair to the Purchaser and all of the other parties who participated in the Sales Process in compliance with the Sales Process Terms;
- (c) the Sales Process terms have been widely known by all bidders and interested parties since the outset of the Sales Process in January 2012;
- (d) the Sales Process Terms provide no bid protections for the potential Purchaser;
- (e) the Purchaser had incurred, and continues to incur, significant expenses in negotiating and fulfilling conditions under the Purchase Agreement. The Applicant has advised the Monitor that there is a significant risk that the Purchaser would drop out of the Sales Process if there were an attempt to amend the Sales Process Terms to pursue an open auction at this stage;
- (f) to consider any new bids might result in a delay in the timing of the sale of the assets of the mill which, in the view of the Monitor, poses a risk due to the Applicant's minimal cash position;
- (g) the Province, with whom the Applicant is required to consult, and which has entered into an agreement with the Purchaser, supports the completion of the Transaction;
- (h) the Purchaser has made progress satisfying the conditions to closing, including meeting with the Applicant's employees and negotiating collective bargaining agreements with the unions.

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

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

33 The obligation of the Applicant to complete the Transaction is conditional upon, among other things, all amounts owing by the Applicant to the Province pursuant to a Loan

agreement dated September 15, 2010 (the "Province Loan Agreement") being forgiven by the Province and all related security being discharged (the "Province Loan Forgiveness").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Law and Analysis

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

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

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

44 I agree with the submission of counsel on behalf of the Applicant that the list of factors set out in s. 36(3) largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) [*Soundair*]. *Soundair* summarized the factors the court should consider when assessing whether to approve a transaction to sell assets:

- (a) whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which offers are obtained; and
- (d) whether there has been unfairness in the working out of the process.

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

When deciding whether a receiver has acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trustco v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 112 [*Crown Trustco*]:

Its decision was made as a matter of business judgment on the elements then available to it. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

46 In this case, the offer was accepted on July 5, 2012. At that point in time, the offer from Tangshan was of a non-binding nature. The consideration proposed to be offered by Tangshan appears to be in excess of the amount of the Purchaser's offer. The Tangshan offer is for \$35 million, compared with the Purchaser's offer of \$27 million.

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

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

this respect, I accept that reasonable attempts were made through IBDR to market the opportunity in international markets, including China.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

60 At paragraph 47, Galligan J.A. referenced the comments of Anderson J. in *Crown Trust Co. v. Rosenberg* [1986 CarswellOnt 235 (Ont. H.C.)], at p. 109:

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

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

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

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

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

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

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

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

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

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

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

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

72 For the purposes of this motion, I accept the reasoning of *Lama* and conclude that the granting of a vesting order is not, for the purposes of s. 50(3) of the *Planning Act*, a conveyance by way of deed or transfer. However, I do not think that it is necessary to comment on or to issue a specific declaration that the subdivision control provisions contained in the *Planning Act* do not apply to the vesting of title.

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

Disposition

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

Motion granted.

TAB 17

2010 QCCS 4915
Cour supérieure du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 10954, 2010 QCCS 4915, [2010] Q.J. No. 10469, 193
A.C.W.S. (3d) 1067, 72 C.B.R. (5th) 49, J.E. 2010-2002, EYB 2010-180748

**In the Matter of the Plan of Arrangement and Compromise
of : White Birch Paper Holding Company, White Birch
Paper Company, Stadacona General Partner Inc., Black
Spruce Paper Inc., F. F. Soucy General Partner Inc., 3120772
Nova Scotia Company, Arrimage de gros Cacouna inc.
and Papier Masson Itée (Petitioners) v. Ernst & Young
Inc. (Monitor) and Stadacona Limited Partnership, F.
F. Soucy Limited Partnership and F. F. Soucy Inc. &
Partners, Limited Partnership (Mises en cause) and
Service d'impartition Industriel Inc., KSH Solutions Inc.
and BD White Birch Investement LLC (Intervenant) and
Sixth Avenue Investment Co. LLC, Dune Capital LLC
and Dune Capital International Ltd. (Opposing parties)**

Robert Mongeon, J.C.S.

Heard: 24 september 2010

Oral reasons: 24 september 2010 *

Written reasons: 15 october 2010

Docket: C.S. Montréal 500-11-038474-108

Proceedings: refused leave to appeal *White Birch Paper Holding Co., Re* (2010), 2010 QCCA 1950 (C.A. Que.)

Counsel: None given.

Subject: Insolvency; Corporate and Commercial

MOTION by corporation seeking court's approval of sale.

Robert Mongeon, J.C.S.:

BACKGROUND

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

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

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

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

- a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);
- b) pay US\$90 million in cash;
- c) pay the Reserve Payment Amount (as defined);
- d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and
- e) deliver the Wind Down Amount (as defined).

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

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

- a) the ASA
- b) BDWB as the stalking horse bidder
- c) The Bidding Procedures

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

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

8 My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010¹.

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

10 On September 17, 2010, Sixth Avenue Investment Co. LLC (« Sixth Avenue ») submitted a qualified bid.

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

12 BDWB's bid consists of:

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

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

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

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

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

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

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

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

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

18 Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not « Majority Lenders » and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process².

19 The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder³ (Sixth Avenue).

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

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

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

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

REASONS (delivered orally on September 24, 2010)

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

25 I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever by any of the interested stakeholders except for the two construction lien holders KSH⁴ and SIII⁵ who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.

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

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

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

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

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

24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the « DIP Agent ») and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent »), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law.

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

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

13. « Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.

33 I draw from these excerpts that when the « Stalking Horse » bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid⁷

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

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

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

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

38 Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that, at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

39 Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument.

Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

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

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

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

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

44 I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than the fact that the Monitor will dispose of US \$500,000.00 less than it will if the winning bid is allowed to stand.

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

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

47 Section 36 CCAA reads as follows:

36. (1) A debtor company in respect of which an order has been made under this Act 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.

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

(3) In deciding whether to grant the authorization, the court is to 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.

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

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

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

(a) a director or officer of the company;

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

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

(6) The court may authorize a sale or 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.

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

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

(added underlining)

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

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

50 Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]), and she writes at paragraph 13:

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

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

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

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

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

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

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

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

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

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

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

Attorney:

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

The Court:

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

Attorney:

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

The Court:

Very well.

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

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

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

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

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

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

Motion granted.

Footnotes

* Leave to appeal refused at *White Birch Paper Holding Co., Re* (2010), 2010 CarswellQue 11534, 2010 QCCA 1950 (C.A. Que.).

1 See my Order of September 10, 2010.

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

3 Sometimes referred to as the « bitter bidder » or « disgruntled bidder » See *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) (Gascon J.)

4 KSH Solutions Inc.

5 Service d'Impartition Industriel Inc.

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

689. The purchase price must be paid within five days, at the expiry of which time interest begins to run.

Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.

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

When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.

See also Denis Ferland and Benoit Emery, 4^{ème} édition, volume 2 (Éditions Yvon Blais (2003)):

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

See, finally, *Cie Montréal Trust c. Jori Investments Inc.*, J.E. 80-220 (C.S. Que.) [1980 CarswellQue 85 (C.S. Que.)], *Eugène Marcoux Inc. c. Côté*, [1990] R.J.Q. 1221 (C.A. Que.)

7 The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.

See paragraphs 24, 25 and 26 of BDWB's Intervention.

As for the right to credit bid in a sale by auction under the CCAA, see *Maax Corporation, Re* (July 10, 2008), Doc. 500-11-033561-081 (C.S. Que.) (Buffoni J.)

See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

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2010 QCCA 1950
Cour d'appel du Québec

White Birch Paper Holding Co., Re

2010 CarswellQue 11534, 2010 QCCA 1950, 195 A.C.W.S. (3d)
618, 72 C.B.R. (5th) 74, J.E. 2010-2047, EYB 2010-181272

**In the Matter of the Plan of Compromise and Arrangement
Proposed by: White Birch Paper Holding Company,
its subsidiaries and affiliated companies (Debtors) c.
Bluemountain Long/Short Credit Master Fund L.P.,
Bluemountain Credit Alternatives Master Fund L.P.,
Bluemountain Timberline Ltd., Bluemountain Distressed
Master Fund L.P., Lombard General Insurance Company of
Canada, MacQuarie Americas Corp., MFP Partners L.P. and
Steelhead Navigators Master L.P. (Applicants-Interveners)
et White Birch Paper Holding Company, White Birch Paper
Company, Stadacona General Partner Inc., Black Spruce
Paper Inc., F.F. Soucy General Partner Inc., 3120772 Nova
Scotia Company, Arrimage de Gros Cacouna Inc. and Papier
Masson Ltée (Respondents-debtors) et Ernst & Young Inc.
(Impleaded party-Monitor) et BD White Birch Investment
LLC and Sixth Ave. Investments Co. LLC (Impleaded
Parties-Interveners) et Stadacona Limited Partnership, F.F.
Soucy Limited Partnership and F.F. Soucy Inc. & Partners
Limited Partnership (Impleaded parties-Impleaded parties)**

Pierre J. Dalphond, J.C.A.

Audience: 25 octobre 2010

Motifs oraux: 25 octobre 2010

Motifs écrits: 1 novembre 2010

Dossier: C.A. Montréal 500-09-021082-102

Avocat: Mtre Alain Riendeau, Mtre Luc Morin for Applicants

Mtre Jean Fontaine, Mtre Matthew Liben for Respondents

Mtre Louis Joseph Gouin, Mtre Philippe -Gérard Giraldeau, Mtre Jean-Yves Simard, Mtre

Jonathan Warin, Me Joe Latham for Impleaded Parties

Sujet: Insolvency; Corporate and Commercial

MOTION by group of lenders seeking leave to appeal from decision reported at *White Birch Paper Holding Co., Re* (2010), 2010 CarswellQue 10954, 2010 QCCS 4915 (C.S. Que.), approving sale of debtor's assets to another group of lenders following stalking horse bidding process allowing credit bidding.

Pierre J. Dalphond, J.C.A.:

1 On October 25, 2010, at the conclusion of a long hearing, I dismissed from the bench the Applicants' motion for leave to appeal of a judgment rendered by the Honourable Robert Mongeon of the Quebec Superior Court, Commercial Division, 2010 QCCS 4915 (C.S. Que.), approving the sale of substantially all of the Debtors' assets to BDWhite Birch Investment Co., LLC (BDWBI). I provided orally only the essence of my reasons. What follows is my formal judgment.

CONTEXT

2 Both the Canadian and American bankruptcy courts have approved a Sale and Investor Solicitation Process (SISP) for the sale of the Debtors' assets.

3 After a thorough canvass of the market, a Stalking Horse Bid process was initiated through BDWBI, a corporation organized by members of a syndicated loan holding about 65% of the US\$480,000,000.00 debt secured by a first ranking security on the fixed assets of the Debtors (First Lien Loan). Current assets (inventories and account receivables) are free of liens. However a DIP financing lender, to be repaid shortly, has security over all assets of the Debtors.

4 The applicants are minority members of this syndicate holding about 10% of the First Lien Loan (US\$48 million). For the purpose of participating in the sale by auction of the Debtors' assets, they incorporated Sixth Ave. Investment Co., LLC. (Sixth Ave) which submitted a qualifying offer and became a qualified bidder.

5 The auction was held on September 21, 2010 in New York City. Only BDWBI and Sixth Ave were entitled to participate. Under the terms of the bidding procedures approved by the Superior Court and the US Bankruptcy Court, a secured creditor could bid up to the full amount of the secured debt for the purchase of property secured in its favour. In the case of a syndicated loan, such as the First Lien Loan, the bidder must act as an agent of the syndicate to be entitled to use such credit.

6 BDWBI won with a bid of US\$236,052,825.00, exceeding by US\$500,000 Sixth Ave's bid. Its bid included an amount of US\$78,000,000.00 credit for the purchase of the fixed assets, following an authorization from the agent of the syndicate. Sixth Ave's bid was in cash only.

7 Despite the applicants' opposition, the Quebec Superior Court approved the sale of the assets to BDWBI on September 24, 2010 and the US Bankruptcy Court recently did the same. Closing of the transaction is scheduled on November 29, 2010.

ARGUMENTS OF THE APPLICANTS

8 The applicants argued that the bids were asymmetrical and should not have been compared by looking at the nominal aggregate price indicated in each. Instead, the Superior Court should have considered the benefits arising from each bid for each class of creditors, especially for the unsecured creditors, a class of which the lenders are a part for the unsecured portion of the syndicated loan. The applicants contend that the trial judge, while paying lip service to s. 36 of the *Companies' Creditors Arrangement Act*, R.S., 1985, ch. C-36, (*CCAA*), erred in law by omitting to take into account the fact that the fixed assets are worthless and that the BDWBI's bid allows it to use a worthless claim as currency to acquire current assets (inventories and account receivables) at a reduced price, all to the detriment of the unsecured creditors.

9 According to the applicants, the trial judge also erred in law in his application of ss. 36(3) (e) *CCAA*. He failed to exercise his discretion properly by ignoring the fact that BDWBI had blatantly placed themselves in a position to prefer their own interests to those of the other First Lien Lenders for which they were mandataries. By receiving the U.S. fixed assets for their exclusive benefit and to the prejudice of the other First Lien Lenders, BDWBI breached their fiduciary duties as sub-agent for the agent of all the First Lien Lenders.

10 The applicants explained that if the appeal is authorized and later is allowed, they want the Court to declare that Sixth Ave's bid is the winning one.

DECISION

11 As correctly stated by the trial judge, the factors that he had to consider in deciding whether to approve the sale to BDWBI are found at ss. 36(3) *CCAA*:

(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.

12 As far as I am concerned, the four factors to be considered when deciding to grant leave to appeal are well known:

- (1) whether the point on appeal is of significance to the practice;
- (2) whether the point raised is of significance to the action itself;
- (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
- (4) whether the appeal will unduly hinder the progress of the action.

13 For the reasons that follow, I am of the view that this appeal is not *prima facie* meritorious and will unduly hinder the progress of the reorganization of the debtors as a going concern.

14 Firstly, the use of credit was part of the process approved by the parties, the monitor and the courts; it cannot be described now as unreasonable in the circumstances (ss. 36(3)(a)). To hold that before approving a winning bid the Superior Court should have considered the impact of the use of credit on the value of the bids is tantamount to changing the rules of the game once it has been played. The approved process allowed for the use of credit by a bidder duly authorized and at no time was it said or hinted that a credit bid should be considered differently from a cash bid.

15 Secondly, to assert that the fixed assets are worthless is rather surprising considering that Sixth Ave offered US\$35,300,000.00 in cash for them. There is no indication in the file that this amount corresponds to the real value of the fixed assets as part of an ongoing business or

that the US\$82,500,000 BDWBI attributed to them is unreasonable (US\$78,000,000 in credit and US\$4,500,000 in cash). The use of credit entails an allocation of value to the fixed assets. Unless such allocation is proven to be unreasonable and unfair taking into account their market value (ss. 36(3)(f)), it should not be disturbed when the monitor's report states that in their opinion the winning bid represents the highest and best offer when gauged against total overall value returned to the Debtors.

16 Thirdly, the applicants are not the class of unsecured creditors the interest of which Parliament wanted to protect at ss. 33(3)(e) *CCAA*. Their belonging to that class is largely dependant upon the amount of credit used as authorized by the agent of the syndicate; if the whole amount of the loan had been used as credit, the applicants would not qualify as unsecured creditors for the excess part of the loan. In the case at bar, no ordinary unsecured creditor has opposed the proposed sale to BDWBI.

17 Fourthly, to refuse to approve BDWBI's bid would mean that a new bid process or at least a new auction would need to be held since I do not see how Sixth Ave's bid could be declared the winning one. If the rules are changed, a new process under the new rules must decide the winner and the closing date will most likely be missed. Would the Stalking Horse accept to participate again? What kind of delay would this mean? Overall, this may well compromise the reorganization of the Debtors (ss. 36(3)(e)).

18 Fifthly, with regard to the allegation that BDWBI breached its fiduciary duties as sub-agent of the lenders by bidding the claim against only the Canadian assets, it is a matter that should be decided by the forum designated under the lenders' agreement. In my opinion this is not a bankruptcy issue to be dealt with under the *CCAA*.

19 Sixthly, the applicants' opposition to the sale of the assets to BDWBI can be summarized as a desire to receive a bit more cash upfront, as unsecured creditors, rather than a minority equity interest (shares) (I understand that First Lien lenders will end up being equity holders). They may be right but they hold a minority view amongst the group of lenders and according to the lenders' agreement, majority shall prevail. Moreover, the fact that they may end with equity can hardly be considered a serious problem for them since they were quite willing to get the whole equity if their bid had won.

20 For these reasons, the petition was dismissed with costs.

Motion dismissed.

TAB 18

OSLER, HOSKIN & HARCOURT LLP
LIBRARY

Rescue!

The Companies' Creditors Arrangement Act

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Peter Wall Institute for Advanced Studies

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expanded, and eventually, the monitor was appointed as interim receiver to replace management. In the *Air Canada* proceedings, where management did not have the confidence of the parties, the monitor was transformed into a type of "super-monitor" with extensive responsibilities.

4. Deference to the Monitor

The courts accord a high level of deference to decisions of the monitor. For example, in *Re Tiger Brand Knitting Co.*, the Ontario Superior Court of Justice held that a monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since it would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party, the new prospective purchaser or the union representing the employees, over others.⁴¹

The British Columbia Supreme Court held that, in determining the validity and quantum of a claim in a CCAA proceeding, the opinion of the monitor should be considered, but the monitor is not entitled to deference in the sense that it would alter the burden of proof ordinarily imposed on the claimant.⁴² Here, the CCAA application did not disclose an inter-company debt; all financial reporting was done on a consolidated basis and only when the monitor requested unconsolidated statements was the inter-company debt revealed.⁴³ The Court held that the function of the monitor was to determine the validity and amount of a claim on the basis of the evidence submitted. However, the creditor has the burden of proving its claims.⁴⁴ In supplementary reasons, the British Columbia Supreme Court also discussed the question of the admissibility of a monitor's report.⁴⁵ In this case, the report was found to be admissible for the purposes of the trial, but the conclusion as to the characterization of the payments as debts or equity were not admissible as expert opinion.⁴⁶ The Court held that it would be guided by the following principles: 1) presumptively, a monitor's report is admissible in evidence at a hearing concerning the subject matter of the report; 2) in unusual circumstances, an officer of the court, such as the monitor, may be cross-examined on its report; 3) the monitor must remain neutral as between the various stakeholders

⁴¹ *Re Tiger Brand Knitting Co.*, 2005 CarswellOnt 1240 (Ont. S.C.J.), leave to appeal refused (2005), 19 C.B.R. (5th) 53 (Ont. C.A.).

⁴² *Re Pine Valley Mining Corp.*, 2008 CarswellBC 579 (B.C.S.C.), additional reasons 2008 CarswellBC 712 (B.C.S.C.).

⁴³ *Ibid.* at para. 4.

⁴⁴ *Ibid.* at para. 13.

⁴⁵ *Re Pine Valley Mining Corp.*, 2008 CarswellBC 712 (B.C.S.C.).

⁴⁶ *Ibid.* at para. 17.

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

Court File No: CV-17-11846-00CL

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., CORBEIL ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

Applicants

Ontario
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF THE APPLICANTS

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