

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

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

AND IN THE MATTER OF A PLAN  
OF COMPROMISE OR ARRANGEMENT OF  
CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS  
LISTED ON SCHEDULE "A" (collectively the "APPLICANTS" or "Canwest")

**BRIEF OF AUTHORITIES OF  
GS Capital Partners VI Fund L.P.,  
GSCP VI AA One Holding S.ar.l and  
GS VI AA One Parallel Holding S.ar.l  
(collectively "GSCP")**

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REPORTS OF CASES  
DETERMINED IN  
ONTARIO COURTS

**Royal Bank of Canada v. Soundair Corp., Canadian Pension  
Capital Ltd. and Canadian Insurers Capital Corp.**

[Indexed as: Royal Bank of Canada v. Soundair Corp.]  
*Court of Appeal for Ontario, Goodman, McKinlay and Galligan J.J.A.*  
July 3, 1991

**d** Debtor and creditor — Receivers — Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors — Receiver acting properly and prudently — Wishes of creditors not determinative — Court approval of sale confirmed on appeal.

**e** Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

**g** Held, the appeal should be dismissed.

**h** *Per* Galligan J.A.: 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, and 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. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended

by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident. a

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. 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. b

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no 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. c

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) 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 by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative. d

*Per McKinlay J. A.* (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales. e

*Per Goodman J. A.* (dissenting): 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. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned. f

#### Cases referred to g

*Beauty Counsellors of Canada Ltd. (Re)* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); *British Columbia Development Corp. v. Spun Cast Industries Inc.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); *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.); *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); *Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); *Selkirk (Re)* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); *Selkirk (Re)* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.) h

## Statutes referred to

*Employment Standards Act*, R.S.O. 1980, c. 137*Environmental Protection Act*, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

*J.B. Berkow and Steven H. Goldman*, for appellants.

*John T. Morin*, Q.C., for Air Canada.

*L.A.J. Barnes and Lawrence E. Ritchie*, for Royal Bank of Canada.

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

*W.G. Horton*, for Ontario Express Ltd.

*Nancy J. Spies*, for Frontier Air Ltd.

GALLIGAN J.A.:—This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). 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.

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.

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 \$65,000,000. 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 \$50,000,000 on the winding-up of Soundair.

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

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2, 21 D.L.R. (4th)  
scy.); *Selkirk (Re)*

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.

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.

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.

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.

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, 1991. On March 6, 1991, the

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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.

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.

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.

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.

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?

I will deal with the two issues separately.

#### I. DID THE RECEIVER ACT PROPERLY IN AGREEING TO SELL TO OEL?

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 obser-

vation 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. a

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. b

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, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.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: c

1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently. d
2. It should consider the interests of all parties. e
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. f

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?* g

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 h



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.

When the receiver got the OEL offer on March 6, 1991, it was over ten 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.

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.

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 v. Rosenberg, supra*, at p. 112 O.R., p. 551 D.L.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)

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 (C.A.), at p. 11 C.B.R., p. 314 N.S.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)

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 to 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.

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 ten 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.

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.

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 v. Rosenberg, supra*, Anderson J., at p. 113 O.R., p. 551 D.L.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.

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. Bkcy.), 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.

The second is *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), 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.

In *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), 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)

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.

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.

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.

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.

a The 922 offer provided for \$6,000,000 cash to be paid on closing  
a with a royalty based upon a percentage of Air Toronto profits over  
a period of five years up to a maximum of \$3,000,000. The OEL  
offer provided for a payment of \$2,000,000 on closing with a  
royalty paid on gross revenues over a five-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  
b are substantially greater in the OEL offer because royalties are  
b 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.

c The receiver studied the two offers. It compared them and took  
c 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  
d 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.

e The court appointed the receiver to conduct the sale of Air  
e 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  
f receiver was wrong when he made that assessment. I am,  
f therefore, of the opinion that the 922 offer does not demonstrate  
any failure upon the part of the receiver to act properly and provi-  
dently.

g It follows that if Rosenberg J. was correct when he found that  
g 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.

h I am, therefore, of the opinion that the receiver made a  
h sufficient effort to get the best price and has not acted improvi-  
dently.

## 2. *Consideration of the interests of all parties*

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* (1986, Saunders J.), *supra*. 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".

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, Saunders J.), *supra*, *Re Beauty Counsellors, supra*, *Re Selkirk* (1987, McRae J.), *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.

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*

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.

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* (1986), *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

a 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 finding 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.

b 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.

c In *Salima Investments Ltd. v. Bank of Montreal* (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., 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.

d Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg, supra*, at p. 124 O.R., pp. 562-63 D.L.R.:

e 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)

f 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.

g 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., p. 548 D.L.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.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the 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?*

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.

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.

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.

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.

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



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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.

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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.

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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 seven 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, it would have told the court that it needed more information before it would be able to make a bid.

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.

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.

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., p. 548 D.L.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., p. 550 D.L.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.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

They created a situation as of March 8, 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.

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

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.

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.

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.

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 debtors' assets. a

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 interlender 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 interlender 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 \$6,000,000 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. b  
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On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only \$1,000,000 and the Royal Bank would receive \$5,000,000 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. e

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 interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight. f

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. g

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 h

a in insolvencies. In those circumstances, I think that creditors who  
ask for court-appointed receivers and business people who choose  
b 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.

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d 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.

e 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-and-client  
scale. I would make no order as to the costs of any of the other  
parties or interveners.

f MCKINLAY J.A. (concurring in the result):—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.  
g 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), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.).  
h 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.

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

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 Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively 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 (the Bank). 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.

In *British Columbia Development Corp. v. Spun Cast Industries Inc.* (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.),  
a Berger J. said at p. 95 B.C.L.R., 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.

b I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately \$50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, that the offer of 922 is  
c 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  
d superior, I cannot agree. He said in his reasons [pp. 17-18]:

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  
e 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.

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 \$3,000,000 to \$4,000,000. The  
f 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  
g the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of  
h the court, said at p. 10 C.B.R., p. 312 N.S.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 the 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.

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.

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.

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.

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. Bkcy.) 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.

I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application



a for court approval for the sale by the sheriff of real property in  
a bankruptcy proceedings. The sheriff had been previously ordered  
a to list the property for sale subject to approval of the court.  
Saunders J. said at p. 246 C.B.R.:

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

c I am in agreement with that statement as a matter of general  
c principle. Saunders J. further stated that he adopted the  
principles stated by Macdonald J.A. in *Cameron, supra*, at pp.  
c 92-94 O.R., pp. 531-33 D.L.R., quoted by Galligan J.A. in his  
reasons. In *Cameron*, the remarks of Macdonald J.A. related to  
c 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  
d the court in such process might have a deleterious effect on the  
efficacy of receivership proceedings in other cases. But Macdonald  
d J.A. recognized that even in bid or tender cases where the offeror  
for whose bid approval is sought has complied with all require-  
ments a court might not approve the agreement of purchase and  
e sale entered into by the receiver. He said at pp. 11-12 C.B.R., p.  
314 N.S.R.:

f There are, of course, many reasons why a court might not approve an  
f 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 circum-  
stances 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  
f 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.

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

h I agree that the same reasoning may apply to a negotiation  
h 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.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

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 1. 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.

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 this 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 "hard ball" 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.

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.

To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in

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bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

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.

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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.

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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 \$18,000,000. 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.

d

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being \$4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June 29, 1990.

e

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,

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allowed the Air Canada offer to lapse. On July 20, 1990 Air Canada served a notice of termination of the April 30, 1990 agreement.

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.

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 \$10,000,000 and \$12,000,000.

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 \$3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

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.

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.

During the period December 1990 to the end of January 1991,

a the receiver advised CCFL that the offering memorandum was in  
a the process of being prepared and would be ready soon for distri-  
bution. He further advised CCFL that it should await the receipt  
of the memorandum before submitting a formal offer to purchase  
the Air Toronto assets.

b By late January CCFL had become aware that the receiver was  
b 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.

c By letter dated February 25, 1991, the solicitors for CCFL  
c 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 exclu-  
sivity provision of the letter of intent expired on February 20,  
d 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  
e 922.

e 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  
f 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 any 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  
g 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  
h information requested.

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.

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 interlender 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.

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 three 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.

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.

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

a a 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.

b b 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 three 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 inter-  
c c ested 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.

d d 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 three 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  
e e structure or nature of an offer which might be acceptable to it.

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 [p. 31]:

f f They created a situation as of March 8, 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.

g g 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  
h h acceptable in this regard as it contained a condition with respect  
to financing terms and conditions "*acceptable to them*".

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. a

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 approximately 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 \$3,000,000 to \$4,000,000. b  
c

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

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. e

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. f

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 a fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is g  
h



a reasonable to expect that a receiver would be no less knowl-  
edgeable in that regard and it is his primary duty to protect the  
a 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  
b already been seriously hurt more unnecessary contingencies.

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  
c should so order.

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  
d procedure adopted by the receiver.

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  
e 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  
f 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  
g and is not the type of refusal which will have a tendency to  
undermine the future confidence of business persons in dealing  
with receivers.

Rosenberg J. stated that the Royal Bank was aware of the  
process used and tacitly approved it. He said it knew the terms of  
h 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, it knew that CCFL was interested in purchasing Air Toronto.

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.

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.

For the above reasons I would allow the appeal with 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-and-client basis. I would make no order as to costs of any of the other parties or interveners.

*Appeal dismissed.*



# Intertan Canada Ltd. (Re), 2009 CanLII 12115 (ON S.C.)

Print: PDF Format  
Date: 2009-03-09  
Docket: 08-CL-7841  
URL: <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii12115/2009canlii12115.html>  
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

**COURT FILE NO.: 08-CL-7841**  
**DATE: 20090319**

## SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF  
INTERTAN CANADA LTD. AND TOURMALET CORPORATION**

### APPLICANTS

**BEFORE:           MORAWETZ J.**

**COUNSEL:       Jeremy Dacks and Gillian Scott, for the Applicants**

**Fred Myers and L. Joseph Latham, for Alvarez & Marsal Canada ULC, Monitor**

**Ashley John Taylor, for 4458729 Canada Inc. and Bell Canada**

**Kevin McElcheran, for the Cadillac Fairview Corporation Limited**

**Natalie Renner, for Star Choice Communications**

**Rahool Agarwal, for Bank of America**

**Harvey Garman, for Garmin International, Inc. and Rogers Communications**

**David Foulds, for Foto Source Canada Inc.**

**Linda Gallessiere, for OMERS Realty Management Corporation, Ivanhoe Cambridge 1 Inc., Morguard Investments Limited and 20 VIC management Inc. on behalf of OPB Realty Inc., Retrocom Limited Partnership and 920076 Ontario Limited o/a The Southridge Mall**

**HEARD  
& RELEASED:   MARCH 9, 2009**

### ENDORSEMENT

[1] The Applicants move for approval of the sale transaction contemplated by the Asset Purchase Agreement (“APA”) with 4458729 Canada Inc. (the “Purchaser”) and Bell Canada (the “Sale Transaction”).

[2] The Sale Transaction is a going concern sale. The Sale Transaction covers the entire footprint of The Source. If completed, it will preserve the jobs of the employees as well as the operating locations of The Source. The Monitor believes that, subject to the outcome of the Pre-Filing Claims Process and any process related to the adjudication of any restructuring claims which may arise in connection with the Sale Transaction, it appears likely at this time that the Applicants’ unsecured creditors will be paid in full, following closing of the Sale Transaction.

[3] The motion was not opposed.

[4] The sale process has been outlined in previous court motions. I am satisfied that the process has been conducted in accordance with the Sale Process Order which was granted December 5, 2008.

[5] The record details the involvement of N. M. Rothschild and Sons Canada Securities Limited who were engaged to assist the Applicants in conducting a going concern sale process.

[6] The record also details that there were eleven Indicative Bids which were subsequently followed by four proposals from bidders.

[7] Ultimately after discussions among the Applicants, the Monitor and Rothschild, it became apparent to these three parties that the offer of the Purchaser was superior to the other bids in price and other criteria.

[8] The Affidavit of Mr. Wong, filed in support of this motion details the efforts of the Applicants and Rothschild to market the InterTAN business. The Monitor has reviewed the efforts undertaken by the Applicants and Rothschild and is of the view that the assets have had significant exposure to a substantial number of prospective purchasers, and that there has been sufficient marketing of the business to conclude that the APA represents the best value that can be reasonably realized for InterTAN’s business in the circumstances.

[9] I accept the views of the Monitor. I am satisfied that the sales process was carried out fairly and appropriately at all stages, with efficacy and integrity. I agree with the Monitor’s assessment that the APA considers the interests of all stakeholders, including the Applicants’ shareholder and that the APA represents the best option available.

[10] The principles set forth by the Court of Appeal in *Royal Bank v. Soundair Corp*, 1991 CanLII 2727 (ON C.A.), (1991) 4 O.R. (3d) 1 (C.A.) for the sale of assets in a receivership have been accepted as appropriate principles to consider in a sale of assets in a CCAA proceeding (see *PSINet Ltd., Re* 2001 CanLII 28266 (ON S.C.), (2001) 28 C.B.R. (4<sup>th</sup>) 95 (S.C.J.) and *Tiger Brand Knitting Co., Re* 2005 CanLII 9680 (ON S.C.), (2005) 9 C.B.R. (5<sup>th</sup>) 315 (S.C.J.)).

[11] I am satisfied that the principles have been adhered to in this case such that it is appropriate to approve the APA. The sale is in my view commercially reasonable in the circumstances. In addition, I am satisfied that the Intercompany Agreement and the Foto Source Settlement Agreements should be approved as they are, in my view, necessary and reasonable adjuncts to the APA.

[12] The Monitor filed a Confidential Supplement to the Sixth Report. Having reviewed the document I have reached the conclusion that this document contains sensitive commercial information, the disclosure of which could be prejudicial to the interests of the stakeholders of InterTAN. In my view, it is appropriate to grant a sealing order in respect of this document, which relief was requested by the Applicants and the Monitor.

[13] The closing of the APA is not expected to take place for a few months. The current Stay Period expires March 31, 2009. I am satisfied that the Applicants continue to work in good faith and with due diligence such that an extension of the stay to the requested date of July 3, 2009 is appropriate. An order to this effect is granted.

[14] The expected result of this CCAA proceeding is most beneficial to InterTAN's stakeholders and the Court extends its appreciation to those involved who have contributed to the result today.



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**MORAWETZ J.**

**DATE:**      **Typed Version Released March 19, 2009**


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by  for the  Federation of Law Societies of Canada



## Nortel Networks Corporation (Re), 2009 CanLII 39492 (ON S.C.)

Print:  PDF Format  
Date: 2009-07-23  
Docket: 09-CL-7950  
Parallel citations: 55 C.B.R. (5th) 229  
URL: <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii39492/2009canlii39492.html>  
Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

COURT FILE NO.: 09-CL-7950

DATE: 20090723

### SUPERIOR COURT OF JUSTICE – ONTARIO (COMMERCIAL LIST)

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

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

#### APPLICANTS

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

**BEFORE:** **MORAWETZ J.**

**COUNSEL:** **Derrick Tay and Jennifer Stam, for Nortel Networks Corporation, et al**

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

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

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

**S. Philpott, for the Former Employees**

**K. Zych, for Noteholders**

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

**David Ward, for UK Pension Protection Fund**

**Leanne Williams, for Flextronics Inc.**

**Alex MacFarlane, for the Official Committee of Unsecured Creditors**

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

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

**A. Kauffman, for Export Development Canada**

**D. Ullman, for Verizon Communications Inc.**

**G. Benchetrit, for IBM**

**HEARD &  
DECIDED: JUNE 29, 2009**

## ENDORSEMENT

### INTRODUCTION

[1] On June 29, 2009, I granted the motion of the Applicants and approved the bidding procedures (the "Bidding Procedures") described in the affidavit of Mr. Riedel sworn June 23, 2009 (the "Riedel Affidavit") and the Fourteenth Report of Ernst & Young, Inc., in its capacity as Monitor (the "Monitor") (the "Fourteenth Report"). The order was granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") approved the Bidding Procedures in the Chapter 11 proceedings.

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

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

[4] The following are my reasons for granting these orders.

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

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

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

price under the Sale Agreement is \$650 million.

## BACKGROUND

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

[9] At the time the proceedings were commenced, Nortel's business operated through 143 subsidiaries, with approximately 30,000 employees globally. As of January 2009, Nortel employed approximately 6,000 people in Canada alone.

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

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

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

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

- (a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and
- (b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

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

- (a) the Business operates in a highly competitive environment;
- (b) full value cannot be realized by continuing to operate the Business through a restructuring; and
- (c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

[15] Mr. Riedel concluded that the proposed process for the sale of the Business pursuant to an auction process provided the best way to preserve the Business as a going concern and to maximize value and preserve the jobs of Nortel employees.

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

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

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



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

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

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

[22] Objections to the motion were filed in the U.S. Court and this court by MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P. and Matlin Patterson Opportunities Partners (Cayman) III L.P. (collectively, "MatlinPatterson") as well the UCC.

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

## ISSUES AND DISCUSSION

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

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

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

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

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

[29] The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* 2008 ONCA 587 (CanLII), (2008), 45 C.B.R. (5<sup>th</sup>) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] SCCA 337. ("ATB Financial").

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

- (a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;
- (b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and
- (c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Re Canadian Red Cross Society* 1998 CanLII 14907 (ON S.C.), (1998), 5 C.B.R. (4<sup>th</sup>) 299 (Ont. Gen. Div.) at para. 43; *Re PSINet Ltd.* 2001 CanLII 28266 (ON S.C.), (2001), 28 C.B.R. (4<sup>th</sup>) 95 (Ont. S.C.J.) at para. 5, *ATB Financial, supra*, at paras. 43-52.

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

Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. *Re Stelco Inc.* 2005 CanLII 8671 (ON C.A.), (2005), 9 C.B.R. (5<sup>th</sup>) 135 (Ont. C.A.) at para. 44.

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

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

The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5 C.B.R. (3<sup>rd</sup>) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* 2001 CanLII 6708 (ON C.A.), (2001) 27 C.B.R. (4<sup>th</sup>) 197 (Ont. C.A.) at para. 5.

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

[35] Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Re Canadian Red Cross Society, supra, Re PSINet, supra, Re Consumers Packaging, supra, Re Stelco Inc.* 2004 CanLII 33019 (ON S.C.), (2004), 6 C.B.R. (5<sup>th</sup>) 316 (Ont. S.C.J.) at para. 1, *Re Tiger Brand Knitting Co.* 2005 CanLII 9680 (ON S.C.), (2005) 9 C.B.R. (5<sup>th</sup>) 315, *Re Caterpillar Financial Services Ltd. v. Hardrock Paving Co.* 2008 CanLII 34274 (ON S.C.), (2008), 45 C.B.R. (5<sup>th</sup>) 87 and *Re Lehndorff General Partner Ltd.* reflex, (1993), 17 C.B.R. (3<sup>rd</sup>) 24 (Ont. Gen. Div.).

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

The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.

...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

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

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

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

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

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

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

[41] Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court’s jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Re Boutique San Francisco Inc.* reflex, (2004), 7 C.B.R. (5<sup>th</sup>) 189 (Quebec S. C.), *Re Winnipeg Motor Express Inc.* 2008 MBQB 297 (CanLII), (2008), 49 C.B.R. (5<sup>th</sup>) 302 (Man. Q.B.) at paras. 41, 44, and *Re Calpine Canada Energy Limited* (2007), 35 C.B.R. (5<sup>th</sup>) (Alta. Q.B.) at para. 75.

[42] Counsel to the Applicants also directed the court’s attention to a recent decision of the British Columbia Court of Appeal which questioned whether the court should authorize the sale of substantially all of the debtor’s assets where the debtor’s plan “will simply propose that the net proceeds from the sale...be distributed to its creditors”. In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327 (CanLII), (2008), 46 C.B.R. (5<sup>th</sup>) 7 (B.C.C.A.) (“*Cliffs Over Maple Bay*”), the court was faced with a debtor who had no active business but who nonetheless sought to stave off its secured creditor indefinitely. The case did not involve any type of sale transaction but the Court of Appeal questioned whether a court should authorize the sale under the CCAA without requiring the matter to be voted upon by creditors.

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

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

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

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

24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to “secure sufficient funds” to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that

although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is “not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a “restructuring”...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA’s fundamental purpose”. That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* reflex, (1984) 11 D.L.R. (4<sup>th</sup>) 576 (Alta. Q.B.):

The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

25. The Court was not satisfied in *Cliffs Over Maple Bay* that the “restructuring” contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal – thus it could not be said the purposes of the statute would be engaged...

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

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

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

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

- (a) is a sale transaction warranted at this time?
- (b) will the sale benefit the whole “economic community”?
- (c) do any of the debtors’ creditors have a *bona fide* reason to object to a sale of the business?
- (d) is there a better viable alternative?

I accept this submission.

[50] It is the position of the Applicants that Nortel’s proposed sale of the Business should be approved as this decision is to the benefit of stakeholders and no creditor is prejudiced. Further, counsel submits that in the absence of a sale, the prospects for the Business are a loss of competitiveness, a loss of value and a loss of jobs.

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

- (a) Nortel has been working diligently for many months on a plan to reorganize its business;
- (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
- (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;
- (d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;
- (e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;
- (f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and
- (g) the value of the Business is likely to decline over time.

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

[53] Counsel to the Applicants also emphasize that Nortel will return to court to seek approval of the most favourable transaction to emerge from the auction process and will aim to satisfy the elements established by the court for approval as set out in *Royal Bank v. Soundair* 1991 CanLII 2727 (ON C.A.), (1991), 7 C.B.R. (3<sup>rd</sup>) 1 (Ont. C.A.) at para. 16.

## DISPOSITION

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

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

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

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

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

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

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**MORAWETZ J.**

**Heard and Decided: June 29, 2009**

**Reasons Released: July 23, 2009**

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## Eddie Bauer of Canada, Inc. (Re), 2009 CanLII 48527 (ON S.C.)

Print:  PDF Format

Date: 2009-07-30

Docket: CV-09-8240-00CL

URL: <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii48527/2009canlii48527.html>

Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

Court File No. CV-09-8240-00CL

Date: 20090730

### 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**

)  
)  
) *Fred Myers, L. Joseph Latham,  
Christopher G. Armstrong* for the  
) Applicants

**AND IN THE MATTER OF A PLAN OF  
COMPROMISE OR ARRANGEMENT OF  
EDDIE BAUER OF CANADA, INC. AND  
EDDIE BAUER CUSTOMER SERVICES  
INC.**

)  
) *Jay Swartz* for RSM Richter  
)  
) *Linda Galessiere* for the Landlords  
)  
) *Maria Konyukhova* for Everest  
) Holdings  
) Applicants  
) *Alexander Cobb* for Bank of America

Heard: July 22, 2009

**C. CAMPBELL J.:**

### REASONS FOR DECISION

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

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

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

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

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

approved sale process.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. It should consider the interests of all parties.
2. It should consider the efficacy and integrity of the process by which offers are obtained.
3. It should consider whether there has been unfairness in the working out of the process.

[20] Galligan J.A. for the majority in the Court of Appeal in Ontario in *Royal Bank of Canada v. Soundair Corp.* 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1 at p. 8 further accepted and adopted the further statement of Anderson J. in *Crown Trust* at p. 551 that "its decision was made as a matter of business judgement on the elements then available to it. It is the very essence of a receiver's function to make such judgments and in the making of them, to act seriously and responsibly, so as to be prepared to stand behind them."

[21] What have come to be known as the *Soundair* principles have been accepted in a number of Ontario cases,



including *Bakemates International Inc. v. Mormac Holdings* 2004 CanLII 59994 (ON C.A.), 2004 CanLII 59994 (ON. C.A.) The same principles have been accepted to approval of Asset Purchase Agreements and Vesting Orders. See *Ivaco Inc. (Re)* 2004 CanLII 21547 (ON S.C.), 2004 CanLII 21547 (ON. S.C.) In *Tiger Brand Knitting Co. (Re)* 2005 CanLII 9680 (ON S.C.), 2005 CanLII 9680 (ON. SC), I declined to extend the time for a bid and directed the Monitor not to accept a bid it had received and to negotiate with another party.

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

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

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

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

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**C. CAMPBELL J.**

**Released:**

Court File No. CV-09-8240-00CL

Date: 20090730

**SUPERIOR COURT OF JUSTICE  
ONTARIO  
(Commercial List)**

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

**AND IN THE MATTER OF A PLAN OF  
COMPROMISE OR ARRANGEMENT OF  
EDDIE BAUER OF CANADA, INC. AND  
EDDIE BAUER CUSTOMER SERVICES INC.**

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**REASONS FOR DECISION**



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**C. CAMPBELL J.**

**RELEASED: July 30, 2009**

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## Canwest Global Communications Corp. (Re), 2009 CanLII 70508 (ON S.C.)

Print: PDF Format  
 Date: 2009-12-15  
 Docket: CV-09-8241-OOCL  
 URL: <http://www.canlii.org/en/on/onsc/doc/2009/2009canlii70508/2009canlii70508.html>  
 Noteup: Search for decisions citing this decision

Reflex Record (related decisions, legislation cited and decisions cited)

**COURT FILE NO.:** CV-09-8241-OOCL  
**DATE:** 20091215

**ONTARIO  
 SUPERIOR COURT OF JUSTICE  
 COMMERCIAL LIST**

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"

**COUNSEL:** *Lyndon Barnes, Alex Cobb and Shawn Irving* for the CMI Entities  
*Alan Mark and Alan Merskey* for the Special Committee of the Board of Directors of Canwest  
*David Byers and Maria Konyukhova* for the Monitor, FTI Consulting Canada Inc.  
*Benjamin Zarnett and Robert Chadwick* for the Ad Hoc Committee of Noteholders  
*K. McElcheran and G. Gray* for GS Parties  
*Hugh O'Reilly and Amanda Darrach* for Canwest Retirees and the Canadian Media Guild  
*Hilary Clarke* for Senior Secured Lenders to LP Entities  
*Steve Weisz* for CIT Business Credit Canada Inc.

**DATE HEARD:** December 8, 2009

**REASONS FOR DECISION**

**PEPALL J.**

**Relief Requested**

[1] The CCAA applicants and partnerships (the "CMI Entities") request an order declaring that the relief sought by GS Capital Partners VI Fund L.P., GSCP VI AA One Holding S.ar.1 and GS VI AA One Parallel

Holding S.ar.1 (the "GS Parties") is subject to the stay of proceedings granted in my Initial Order dated October 6, 2009. The GS Parties bring a cross-motion for an order that the stay be lifted so that they may pursue their motion which, among other things, challenges pre-filing conduct of the CMI Entities. The Ad Hoc Committee of Noteholders and the Special Committee of the Board of Directors support the position of the CMI Entities. All of these stakeholders are highly sophisticated. Put differently, no one is a commercial novice. Such is the context of this dispute.

#### Background Facts

[2] Canwest's television broadcast business consists of the CTLP TV business which is comprised of 12 free-to-air television stations and a portfolio of subscription based specialty television channels on the one hand and the Specialty TV Business on the other. The latter consists of 13 specialty television channels that are operated by CMI for the account of CW Investments Co. and its subsidiaries and 4 other specialty television channels in which the CW Investments Co. ownership interest is less than 50%.

[3] The Specialty TV Business was acquired jointly with Goldman Sachs from Alliance Atlantis in August, 2007. In January of that year, CMI and Goldman Sachs agreed to acquire the business of Alliance Atlantis through a jointly owned acquisition company which later became CW Investments Co. It is a Nova Scotia Unlimited Liability Corporation ("NSULC").

[4] CMI held its shares in CW Investments Co. through its wholly owned subsidiary, 4414616 Canada Inc. ("441"). According to the CMI Entities, the sole purpose of 441 was to insulate CMI from any liabilities of CW Investments Co. As a NSULC, its shareholders may face exposure if the NSULC is liquidated or becomes bankrupt. As such, 441 served as a "blocker" to potential liability. The CMI Entities state that similarly the GS parties served as "blockers" for Goldman Sachs' part of the transaction.

[5] According to the GS Parties, the essential elements of the deal were as follows:

- (i) GS would acquire at its own expense and at its own risk, the slower growth businesses;
- (ii) CW Investments Co. would acquire the Specialty TV Business and that company would be owned by 441 and the GS Parties under the terms of a Shareholders Agreement;
- (iii) GS would assist CW Investments Co. in obtaining separate financing for the Specialty TV Business;
- (iv) Eventually Canwest would contribute its conventional TV business on a debt free basis to CW Investments Co. in return for an increased ownership stake in CW Investments Co.

[6] The GS Parties also state that but for this arrangement, Canwest had no chance of acquiring control of the Specialty TV Business. That business is subject to regulation by the CRTC. Consistent with policy objectives, the CRTC had to satisfy itself that CW Investments Co. was not controlled either at law or in fact by a non-Canadian.

[7] A Shareholders Agreement was entered into by the GS parties, CMI, 441, and CW Investments Co. The GS Parties state that 441 was a critical party to this Agreement. The Agreement reflects the share ownership of each of the parties to it: 64.67% held by the GS Parties and 35.33% held by 441. It also provides for control of CW Investments Co. by distribution of voting shares: 33.33% held by the GS Parties and 66.67% held by 441. The Agreement limits certain activities of CW Investments Co. without the affirmative vote of a director nominated to its Board by the GS Parties. The Agreement provides for call and put options that are designed to allow the GS parties to exit from the investment in CW Investments Co. in 2011, 2012, and 2013. Furthermore, in the event of an insolvency of CMI, the GS parties have the ability to effect a sale of their interest in CW Investments Co. and require as well a sale of CMI's interest. This is referred to as the drag-along provision. Specifically, Article 6.10(a) of the Shareholders Agreement states:

Notwithstanding the other provisions of this Article 6, if an Insolvency Event occurs in respect of CanWest and is continuing, the GS Parties shall be entitled to sell all of their Shares to any *bona fide* Arm's Length third party or parties at a price and on other terms and conditions negotiated by GSCP in its discretion provided that such third party or parties acquires all of the Shares held by the CanWest Parties at the

same price and on the same terms and conditions, and in such event, the CanWest Parties shall sell their Shares to such third party or parties at such price and on such terms and conditions. The Corporation and the CanWest Parties each agree to cooperate with and assist GSCP with the sale process (including by providing protected purchasers designated by GSCP with confidential information regarding the Corporation (subject to a customary confidentiality agreement) and with access to management).

[8] The Agreement also provided that 441 as shareholder could transfer its CW Investments Co. shares to its parent, CMI, at any time, by gift, assignment or otherwise, whether or not for value. While another specified entity could not be dissolved, no prohibition was placed on the dissolution of 441. 441 had certain voting obligations that were to be carried out at the direction of CMI. Furthermore, CMI was responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

[9] On October 5, 2009, pursuant to a Dissolution Agreement between 441 and CMI and as part of the winding-up and distribution of its property, 441 transferred all of its property, namely its 352,986 Class A shares and 666 Class B preferred shares of CW Investments Co., to CMI. CMI undertook to pay and discharge all of 441's liabilities and obligations. The material obligations were those contained in the Shareholders Agreement. At the time, 441 and CW Investments Co. were both solvent and CMI was insolvent. 441 was subsequently dissolved.

[10] For the purposes of these two motions only, the parties have agreed that the court should assume that the transfer and dissolution of 441 was intended by CMI to provide it with the benefit of all the provisions of the CCAA proceedings in relation to contractual obligations pertaining to those shares. This would presumably include both the stay provisions found in section 11 of the CCAA and the disclaimer provisions in section 32 .

[11] The CMI Entities state that CMI's interest in the Specialty TV Business is critical to the restructuring and recapitalization prospects of the CMI Entities and that if the GS parties were able to effect a sale of CW Investments Co. at this time, and on terms that suit them, it would be disastrous to the CMI Entities and their stakeholders. Even the overhanging threat of such a sale is adversely affecting the negotiation of a successful restructuring or recapitalization of the CMI Entities.

[12] On October 6, 2009, I granted an Initial Order in these proceedings. CW Investments Co. was not an applicant. The CMI Entities requested a stay of proceedings to allow them to proceed to develop a plan of arrangement or compromise to implement a consensual "pre-packaged" recapitalization transaction. The CMI Entities and the Ad Hoc Committee of 8% Noteholders had agreed on terms of such a transaction that were reflected in a support agreement and term sheet. Those noteholders who support the term sheet have agreed to vote in favour of the plan subject to certain conditions one of which is a requirement that the Shareholders Agreement be amended.

[13] The Initial Order included the typical stay of proceedings provisions that are found in the standard form order promulgated by the Commercial List Users Committee. Specifically, the order stated:

15. THIS COURT ORDERS that until and including November 5, 2009, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the CMI Entities, the Monitor or the CMI CRA or affecting the CMI Business or the CMI Property, except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI Entities, the CMI property or the CMI Business), the CMI CRA (in respect of Proceedings affecting the CMI CRA), or with leave of this Court, and any and all Proceedings currently under way against or in respect of the CMI Entities or the CMI CRA or affecting the CMI Business or the CMI Property are hereby stayed and suspended pending further Order of this Court. In the case of the CMI CRA, no Proceeding shall be commenced against the CMI CRA or its directors and officers without prior leave of this Court on seven (7) days notice to Stonecrest Capital Inc.

16. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person") against or in respect of the CMI Entities, the Monitor and/or the CMI CRA, or affecting the CMI Business or the CMI Property, are hereby stayed and suspended except with the written consent of the applicable CMI Entity, the Monitor and the CMI CRA (in respect of rights and remedies affecting the CMI Entities, the CMI Property or the CMI Business), the CMI CRA (in respect of rights or remedies affecting the CMI CRA), or leave of this Court, provided that nothing in this Order shall (i) empower the CMI Entities to carry on any business which the CMI Entities are not lawfully entitled to carry on, (ii) exempt the CMI Entities from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

[14] The GS parties were not given notice of the CCAA application. On November 2, 2009, they brought a motion that, among other things, seeks to set aside the transfer of the shares from 441 to CMI or, in the alternative, require CMI to perform and not disclaim the Shareholders Agreement as if the shares had not been transferred. On November 10, 2009 the GS parties purported to revive 441 by filing Articles of Revival with the Director of the CBCA. The CMI Entities were not notified nor was any leave of the court sought in this regard. In an amended notice of motion dated November 19, 2009 (the "main motion"), the GS Parties request an order:

- (a) Setting aside and declaring void the transfer of the shares from 441 to CMI;
- (b) declaring that the rights and remedies of the GS Parties in respect of the obligations of 441 under the Shareholders Agreement are not affected by these CCAA proceedings in any way whatsoever;
- (c) in the alternative to (a) and (b), an order directing CMI to perform all of the obligations that bound 441 immediately prior to the transfer;
- (d) in the alternative to (a) and (b), an order declaring that the obligations that bound 441 immediately prior to the transfer, may not be disclaimed by CMI pursuant to section 32 of the CCAA or otherwise; and
- (e) if necessary, a trial of the issues arising from the foregoing.

[15] They also requested an order amending paragraph 59 of the Initial Order but that issue has now been resolved and I am satisfied with the amendment proposed.

[16] The CMI Entities then brought a motion on November 24, 2009 for an order that the GS motion is stayed. As in a game of chess, on December 3, 2009, the GS Parties served a cross-motion in which, if required, they seek leave to proceed with their motion.

[17] In furtherance of their main motion, the GS Parties have expressed a desire to examine 4 of the 5 members of the Special Committee of the Board of Directors of Canwest. That Committee was constituted, among other things, to oversee the restructuring. The GS Parties have also demanded an extensive list of documentary production. They also seek to impose significant discovery demands upon the senior management of CanWest.

#### Issues

[18] The issues to be determined on these motions are whether the relief requested by the GS Parties in their main motion is stayed based on the Initial Order and if so, whether the stay should be lifted. In addition, should the relief sought in paragraph 1(e) of the main motion be struck.

#### Positions of Parties

[19] In brief, the parties' positions are as follows. The CMI Entities submit that the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order. In addition, the relief sought by

them involves “the exercise of any right or remedy affecting the CMI Business or the CMI Property” which is stayed under paragraph 16 of the Initial Order. The stay is consistent with the purpose of the CCAA. They submit that the subject matter of the motion should be caught so as to prevent the GS parties from gaining an unfair advantage over other stakeholders of the CMI Entities and to ensure that the resources of the CMI Entities are devoted to developing a viable restructuring plan for the benefit of all stakeholders. They also state that CMI’s interest in CW Investments Co. is a significant portion of its enterprise value. They state further that their actions were not in breach of the Shareholders Agreement and in any event, debtor companies are able to organize their affairs in order to benefit from the CCAA stay. Furthermore, any loss suffered by the GS Parties can be quantified.

[20] In paragraph 1(e) of the main motion, the GS parties seek to prevent CMI from disclaiming the obligations of 441 that existed immediately prior to the transfer of the shares to CMI. If this relief is not stayed, the CMI Entities submit that it should be struck out pursuant to Rule 25.11(b) and (c) as premature and improper. They also argue that section 32 of the CCAA provides a procedure for disclaimer of agreements which the GS Parties improperly seek to circumvent.

[21] Lastly, the CMI Entities state that the bases on which a CCAA stay should be lifted are very limited. Most of the grounds set forth in *Re Canadian Airlines Corp.*[1] which support the lifting of a stay are manifestly inapplicable. As to prejudice, the GS parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise on an insolvency default. In contrast, the prejudice to the CMI Entities would be debilitating and their resources need to be devoted to their restructuring. The GS Parties’ rights would not be lost by the passage of time. The GS Parties’ motion is all about leverage and a desire to improve the GS Parties’ negotiating position submits counsel for the CMI Entities.

[22] The Ad Hoc Committee of Noteholders, as mentioned, supports the CMI Entities’ position. In examining the context of the dispute, they submit that the Shareholders Agreement permitted and did not prohibit the transfer of 441’s shares. Furthermore, the operative obligations in that agreement are obligations of CMI, not 441. It is the substance of the GS Parties’ claims and not the form that should govern their ability to pursue them and it is clearly encompassed by the stay. The Committee relies on *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* [2] in support of their position on timing.

[23] The Special Committee also supports the CMI Entities. It submits that the primary relief sought by the GS parties is a declaration that their contracts to and with CW Investments cannot or should not be disclaimed. The debate as to whether 441 could properly be assimilated into CMI is no more than an alternate argument as to why such disclaimer can or cannot occur. They state that the subject matter of the GS Parties’ motion is premature.

[24] The GS Parties submit that the stay does not prevent parties affected by the CCAA proceedings from bringing motions within the CCAA proceedings themselves. The use of CCAA powers and the scope of the stay provided in the Initial Order and whether it applies to the GS Parties’ motion are proper questions for the court charged with supervising the CCAA process. They also argue that the motion would facilitate negotiation between key parties, raises the important preliminary issue of the proper scope and application of section 32 of the CCAA, and avoids putting the Monitor in the impossible position of having to draw legal conclusions as to the scope of CMI’s power to disclaim. The court should be concerned with pre-filing conduct including the reason for the share transfer, the timing, and CMI’s intentions.

[25] Even if the stay is applicable, the GS parties submit that it should be lifted. In this regard, the court should consider the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action. The court should also consider whether the debtor company has acted and is acting in good faith. The GS Parties were the medium by which the Specialty TV Business became part of Canwest. Here, all that is being sought is a reversal of the false and highly prejudicial start to these restructuring proceedings. It is necessary to take steps now to protect a right that could be lost by the passage of time. The transfer of the shares exhibited bad faith on the part of Canwest. 441 insulated CW Investments Co. and the Specialty TV Business from the insolvency of CMI and thereby protected the contractual rights of the GS Parties. The manifest harm to the GS Parties that invited the motion should be given weight in the court’s balancing of prejudices. Concerns as to disruption of the restructuring process could be met by imposing conditions on the lifting of a stay as, for example, the establishment of a timetable.

#### Discussion



(a) Legal Principles

[26] First I will address the legal principles applicable to the granting and lifting of a CCAA stay.

[27] The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

[28] The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc* [3] and the key element of the CCAA process: *Re Canadian Airlines Corp.*[4] The power to grant the stay is to be interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*[5], the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,

"It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed....The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors." [6] (Citations omitted)

[29] The all encompassing scope of the CCAA is underscored by section 8 of the Act which precludes parties from contracting out of the statute. See *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*[7] in this regard.

[30] Two cases dealing with stays merit specific attention. *Campeau v. Olympia & York Developments Ltd.* [8]

was a decision granted in the early stages of the evolution of the CCAA. In that case, the plaintiffs brought an action for damages including the loss of share value and loss of opportunity both against a company under CCAA protection and a bank. The statement of claim had been served before the company's CCAA filing. The plaintiff sought to lift the stay to proceed with its action. The bank sought an order staying the action against it pending the disposition of the CCAA proceedings. Blair J. examined the stay power described in the CCAA, section 106 of the Courts of Justice Act[9] and the court's inherent jurisdiction. He refused to lift the stay and granted the stay in favour of the bank until the expiration of the CCAA stay period. Blair J. stated that the plaintiff's claims may be addressed more expeditiously in the CCAA proceeding itself.[10] Presumably this meant through a claims process and a compromise of claims. The CCAA stay precludes the litigating of claims comparable to the plaintiff's in *Campeau*. If it were otherwise, the stay would have no meaningful impact.

[31] The decision of *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* is also germane to the case before me. There, the Bank demanded payment from the debtor company and thereafter the debtor company issued instant trust deeds to qualify for protection under the CCAA. The bank commenced proceedings on debenture security and the next day the company sought relief under the CCAA. The court stayed the bank's enforcement proceedings. The bank appealed the order and asked the appellate court to set aside the stay order insofar as it restrained the bank from exercising its rights under its security. The B.C. Court of Appeal refused to do so having regard to the broad public policy objectives of the CCAA.

[32] As with the imposition of a stay, the lifting of a stay is discretionary. There are no statutory guidelines contained in the Act. According to Professor R.H. McLaren in his book "Canadian Commercial Reorganization: Preventing Bankruptcy"[11], an opposing party faces a very heavy onus if it wishes to apply to the court for an order lifting the stay. In determining whether to lift the stay, the court should consider whether there are sound reasons for doing so consistent with the objectives of the CCAA, including a consideration of the balance of convenience, the relative prejudice to parties, and where relevant, the merits of the proposed action: *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*[12]. That decision also indicated that the judge should consider the good faith and due diligence of the debtor company.[13]

[33] Professor McLaren enumerates situations in which courts will lift a stay order. The first six were cited by Paperny J. in 2000 in *Re Canadian Airlines Corp.*[14] and Professor McLaren has added three more since then. They are:

1. When the plan is likely to fail.
2. The applicant shows hardship (the hardship must be caused by the stay itself and be independent of any pre-existing condition of the applicant creditor).
3. The applicant shows necessity for payment (where the creditors' financial problems are created by the order or where the failure to pay the creditor would cause it to close and thus jeopardize the debtor's company's existence).
4. The applicant would be significantly prejudiced by refusal to lift the stay and there would be no resulting prejudice to the debtor company or the positions of creditors.
5. It is necessary to permit the applicant to take steps to protect a right which could be lost by the passing of time.
6. After the lapse of a significant time period, the insolvent is no closer to a proposal than at the commencement of the stay period.
7. There is a real risk that a creditor's loan will become unsecured during the stay period.
8. It is necessary to allow the applicant to perfect a right that existed prior to the commencement of the stay period.

9. It is in the interests of justice to do so.

(b) Application

[34] Turning then to an application of all of these legal principles to the facts of the case before me, I will first consider whether the subject matter of the main motion of the GS Parties is captured by the stay and then will address whether the stay should be lifted.

[35] In analyzing the applicability of the stay, I must examine the substance of the main motion of the GS Parties and the language of the stay found in paragraphs 15 and 16 of my Initial Order.

[36] In essence, the GS Parties' motion seeks to:

- (i) undo the transfer of the CW Investments Co. shares from 441 to CMI  
or
- (ii) require CMI to perform and not disclaim the Shareholders Agreement as though the shares had not been transferred.

[37] It seems to me that the first issue is caught by the stay of proceedings and the second issue is properly addressed if and when CMI seeks to disclaim the Shareholders Agreement.

[38] The substance of the GS Parties' motion is a "proceeding" that is subject to the stay under paragraph 15 of the Initial Order which prohibits the commencement of all proceedings against or in respect of the CMI Entities, or affecting the CMI Business or the CMI Property. The relief sought would also involve "the exercise of any right or remedy affecting the CMI Business or the CMI Property" which is stayed under paragraph 16 of the Initial Order.

[39] When one examines the relief requested in detail, the application of the stay is clear. The GS Parties ask first for an order setting aside and declaring void the transfer of the shares from 441. As the shares have been transferred to the CMI Entities presumably pursuant to section 6.5(a) of the Shareholders Agreement, this is relief "affecting the CMI Property". Secondly, the GS Parties ask for a declaration that the rights and remedies of the GS Parties in respect of the obligations of 441 are not affected by the CCAA proceedings. This relief would permit the GS Parties to require CMI to tender the shares for sale pursuant to section 6.10 of the Shareholders Agreement. This too is relief affecting the CMI Entities and the CMI Property. Thirdly, they ask for an order directing CMI to perform all of the obligations that bound 441 prior to the transfer. This represents the exercise of a right or remedy against CMI and would affect the CMI Business and CMI Property in violation of paragraph 16 of the Initial Order. This is also stayed by virtue of paragraph 15. Fourthly, the GS Parties seek an order declaring that the obligations that bound 441 prior to the transfer may not be disclaimed. This both violates paragraph 16 of the Initial Order and also seeks to avoid the express provisions contained in the recent amendments to the CCAA that address disclaimer.

[40] Accordingly, the substance and subject matter of the GS Parties' motion are certainly encompassed by the stay. As Mr. Barnes for the CMI Entities submitted, had CMI taken the steps it did six months ago and the GS Parties commenced a lawsuit, the action would have been stayed. Certainly to the extent that the GS Parties are seeking the freedom to exercise their drag along rights, these rights should be captured by the stay.

[41] The real question, it seems to me, is whether the stay should be lifted in this case. In considering the request to lift the stay, it is helpful to consider the context and the provisions of the Shareholders Agreement. In his affidavit sworn November 24, 2009, Mr. Strike, the President of Corporate Development & Strategy Implementation of Canwest Global and its Recapitalization Officer, states that the joint acquisition from Alliance Atlantis was intensely and very carefully negotiated by the parties and that the negotiation was extremely complex and difficult. "Every aspect of the deal was carefully scrutinized, including the form, substance and precise terms of the Initial Shareholders Agreement." The Shareholders Agreement was finalized following the CRTC approval hearing. Among other things:

- Article 2.2 (b) provides that CMI is responsible for ensuring the performance by 441 of its obligations under the Shareholders Agreement.

- Article 6.1 contains a restriction on the transfer of shares.
- Article 6.5 addresses permitted transfers. Subsection (a) expressly permits each shareholder to transfer shares to a parent of the shareholder. CMI was the parent of the shareholder, 441.
- Article 6.10 provides that notwithstanding the other provisions of Article 6, if an insolvency event occurs (which includes the commencement of a CCAA proceeding), the GS Parties may sell their shares and cause the Canwest parties to sell their shares on the same terms. This is the drag along provision.
- Article 6.13 prohibits the liquidation or dissolution of another company[15] without the prior written consent of one of the GS Parties[16].

[42] The recital of these provisions and the absence of any prohibition against the dissolution of 441 indicate that there is a good arguable case that the Shareholders Agreement, which would inform the reasonable expectations of the parties, permitted the transfer and dissolution.

[43] The GS Parties are in no worse position than any other stakeholder who is precluded from relying on rights that arise upon an insolvency default. As stated in *San Francisco Gifts Ltd.*[17]:

“The Initial Order enjoined all of San Francisco’s landlords from enforcing contractual insolvency clauses. This is a common prohibition designed, at least in part, to avoid a creditor frustrating the restructuring by relying on a contractual breach occasioned by the very insolvency that gave rise to proceedings in the first place.”[18]

[44] Similarly, in *Norcen Energy Resources Ltd.*[19], one of the debtor’s joint venture partners in certain petroleum operations was unable to rely on an insolvency clause in an agreement that provided for the immediate replacement of the operator if it became bankrupt or insolvent.

[45] If the stay were lifted, the prejudice to CMI would be great and the proceedings contemplated by the GS Parties would be extraordinarily disruptive. The GS Parties have asked to examine 4 of the 5 members of the Special Committee. The Special Committee is a committee of the Board of Directors of Canwest. Its mandate includes, among other things, responsibility for overseeing the implementation of a restructuring with respect to all, or part of the business and/or capital structure of Canwest. The GS Parties have also requested an extensive list of documentary production including all documents considered by the Special Committee and any member of that Committee relating to the matters at issue; all documents considered by the Board of Directors and any member of the Board of Directors relating to the matters at issue; all documents evidencing the deliberations, discussions and decisions of the Special Committee and the Board of Directors relating to the matters at issue; all documents relating to the matters at issue sent to or received by Leonard Asper, Derek Burney, David Drybrough, David Kerr, Richard Leipsic, John Maguire, Margot Micillef, Thomas Strike, and Hap Stephen, the Chief Restructuring Advisor appointed by the court. As stated by Mr. Strike in his affidavit sworn November 24, 2009,

“The witnesses that the GS Parties propose to examine include the most senior executives of the CMI Entities; those who are most intensely involved in the enormously complex process of achieving a successful going concern restructuring or recapitalization of the CMI Entities. Myself, Mr. Stephen, Mr. Maguire and the others are all working flat out on trying to achieve a successful restructuring or recapitalization of the CMI Entities. Frankly, the last thing we should be doing at this point is preparing for a forensic examination, in minute detail, over events that have taken place over the past several months. At this point in the restructuring/recapitalization process, the proposed examination would be an enormous distraction and would significantly prejudice the CMI Entities’ restructuring and recapitalization efforts.”

[46] While Mr. McElcheran for the GS Parties submits that the examinations and the scope of the examinations could be managed, in my view, the litigating of the subject matter of the motion would undermine the objective of

protecting the CMI Entities while they attempt to restructure. The GS Parties continue to own their shares in CW Investments Co. as does CMI. CMI continues to operate the Specialty TV Business. Furthermore, CMI cannot sell the shares without the involvement of the Monitor and the court. None of these facts have changed. The drag along rights are stayed (although as Mr. McElcheran said, it is the cancellation of those rights that the GS Parties are concerned about.)

[47] A key issue will be whether the CMI Parties can then disclaim that Agreement or whether they should be required to perform the obligations which previously bound 441. This issue will no doubt arise if and when the CMI Entities seek to disclaim the Shareholders Agreement. It is premature to address that issue now. Furthermore, section 32 of the CCAA now provides a detailed process for disclaimer. It states:

32.(1) Subject to subsections (2) and (3), a debtor company may — on notice given in the prescribed form and manner to the other parties to the agreement and the monitor — disclaim or resiliate any agreement to which the company is a party on the day on which proceedings commence under this Act. The company may not give notice unless the monitor approves the proposed disclaimer or resiliation.

(2) Within 15 days after the day on which the company gives notice under subsection (1), a party to the agreement may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement is not to be disclaimed or resiliated.

(3) If the monitor does not approve the proposed disclaimer or resiliation, the company may, on notice to the other parties to the agreement and the monitor, apply to a court for an order that the agreement be disclaimed or resiliated.

(4) 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.

[48] Section 32, therefore, provides the scheme and machinery for the disclaimer of an agreement. If the monitor approves the disclaimer, another party may contest it. If the monitor does not approve the disclaimer, permission of the court must be obtained. It seems to me that the issues surrounding any attempt at disclaimer in this case should be canvassed on the basis mandated by Parliament in section 32 of the amended Act.

[49] In my view, the balance of convenience, the assessment of relative prejudice and the relevant merits favour the position of the CMI Entities on this lift stay motion. As to the issue of good faith, the question is whether, absent more, one can infer a lack of good faith based on the facts outlined in the materials filed including the agreed upon admission by the CMI Entities. The onus to lift the stay is on the moving party. I decline to exercise my discretion to lift the stay on this basis.

[50] Turning then to the factors listed by Professor McLaren, again I am not persuaded that based on the current state of affairs, any of the factors are such that the stay should be lifted. In light of this determination, there is no need to address the motion to strike paragraph 1(e) of the GS Parties' main motion.

[51] The stay of proceedings in this case is performing the essential function of keeping stakeholders at bay in order to give the CMI Entities a reasonable opportunity to develop a restructuring plan. The motions of the GS Parties are dismissed (with the exception of that portion dealing with paragraph 59 of the Initial Order which is on consent) and the motion of the CMI Entities is granted with the exception of the strike portion which is moot.

[52] The Monitor, reasonably in my view, did not take a position on these motions. Its counsel, Mr. Byers,

advised the court that the Monitor was of the view that a commercial resolution was the best way to resolve the GS Parties' issues. It is difficult to disagree with that assessment.

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Pepall J.

**DATE:** December 15, 2009

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- [1] reflex, (2000), 19 C.B.R. (4<sup>th</sup>) 1.  
[2] [1990] B.C.J. No. 2385 (C.A.) at p. 4.  
[3] 2005 CanLII 8671 (ON C.A.), (2005), 75 O.R. (3d) 5 (C.A.) at para. 36.  
[4] reflex, (2000), 19 C.B.R. (4<sup>th</sup>) 1.  
[5] (1993), 17 C.B.R. (e3d) 24.  
[6] Ibid, at p. 32.  
[7] Supra, note 2  
[8] reflex, (1992) 14 C.B.R. (3d) 303.  
[9] R.S.O. 1990, c.C.43.  
[10] Supra, note 6 at paras. 24 and 25.  
[11] (Aurora: Canada Law Book, looseleaf) at para. 3.3400.  
[12] 2007 SKCA 72 (CanLII), (2007), 33 C.B.R. (5<sup>th</sup>) 50 (Sask. C.A.) at para. 68.  
[13] Ibid, at para. 68.  
[14] Supra, note 3.  
[15] This was 4414641 Canada Inc. but not 4414616 Canada Inc., the company in issue before me.  
[16] Specifically, GS Capital Partners VI Fund, L.P.  
[17] 5 C.B.R. (5<sup>th</sup>) 92 at para.37.  
[18] Ibid, at para. 37.  
[19] (1988), 72 C.B.R. (N.S.) 1.

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

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

Court File No. CV-09-8396-00 CL

**ONTARIO**

**SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

Proceeding Commenced at Toronto

**BRIEF OF AUTHORITIES OF  
GS Capital Partners VI Fund L.P.,  
GSCP VI AA One Holding S.ar.l and  
GS VI AA One Parallel Holding S.ar.l  
(collectively "GSCP")**

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