Hfx No. 539955

Supreme Court of Nova Scotia

IN THE MATTER OF THE RECEIVERSHIP OF ANNAPOLIS MANAGEMENT, INC. RUBY, LLP, BSL HOLDINGS LIMITED, 3337151 NOVA SCOTIA LIMITED and 4551650 NOVA SCOTIA LIMITED

Between:

DUORO CAPITAL LIMITED, GRAYSBOOK CAPITAL LIMITED, LEAGUE SAVINGS AND MORTGAGE COMPANY, ATLANTIC CREDIT, ASSUMPTION MUTUAL LIFE INSURANCE COMPANY, and 3046475 NOVA SCOTIA LIMITED

Applicants

-and-

ANNAPOLIS MANAGEMENT, INC., RUBY, LLP, BSL HOLDINGS LIMITED, 3337151 NOVA SCOTIA LIMITED and 4551650 NOVA SCOTIA LIMITED

Respondents

BOOK OF AUTHORITIES of the RESPONDENTS

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The Service List

Index of Authorities

1. *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131

2. *Re Convergix*, 2006 NBQB 288

3. *Lundrigan (Re)*, 2012 NSSC 231

4. *Atlantic Sea Cucumber (Re)*, 2023 NSSC 238

5. *Mustang (Re),* 2015 ONSC 6562

6. *Danier Leather Inc.,* 2016 ONSC 1044

7. *Royal Bank of Canada v. Soundair Corp.* [1991] O.J. No. 1137, (1991) 4 O.R. (3d) 1 (ONCA)

8. *Bank of Montreal v. Sportsclick Inc.,* 2009 NSSC 354

1

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131

Date:20200406
Docket: No. 43999
Registry: Halifax
Estate Number: 51-2624515

In the Matter of: The Proposal of Scotian Distribution Services Limited

Judge: Raffi A. Balmanoukian, Registrar

Heard: March 27, 2020, in Halifax, Nova Scotia (via Teleconference)

Counsel: Tim Hill, QC, for the Applicant

Balmanoukian, Registrar:

[1] The word "Bankrupt" is derived from the Italian "*banca rotta*." In times of yore, an insolvent merchant's place of business would be trashed by irate creditors; the result was a "broken bench."

[2] In Nova Scotia, the Bench will not break.

[3] During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

[4] In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

[5] As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

[6] It is not business as usual. Virtually nothing is.

[7] On March 19, 2020, the Supreme Court of Nova Scotia adopted an "essential services" model in response to the Covid-19 pandemic. This has meant that only matters deemed urgent or essential by the presiding jurist will be heard

until further notice; and those, by the method of least direct personal interaction that is consistent with the delivery and administration of justice. This can, in appropriate instances, include written, virtual, electronic, telephone, video, or other modalities, and adaptations of procedures surrounding filing of affidavit and other material.

[8] On March 20, 2020, I issued a memorandum to all Trustees in Nova Scotia reflecting this as it applies to this Court, and underscoring the "urgent or essential" standard. It can be obtained from the Deputy Registrar whose contact coordinates, in turn, are posted on the Court website (courts.ns.ca).

[9] "Essential" means such matters that must be filed, with or without a scheduled hearing, to preserve the rights of the parties – such as those which face a legislative limitation period. "Urgent" means matters that simply cannot wait, in the opinion of the presiding jurist.

[10] Both the Chief Justice of Nova Scotia, the Honourable Chief Justice Michael J. Wood, and the Chief Justice of the Supreme Court of Nova Scotia, the Honourable Chief Justice Deborah K. Smith, have been clear that this does not mean that Courts, being an essential branch of government and the guardian of the

rule of law, cease to function. It means that they operate during this global emergency – and its local manifestation – on an essential services basis.

[11] Accordingly, scheduled matters are deemed to be adjourned *sine die* unless brought to my attention in accordance with the memorandum noted above and I (or a presiding Justice) deem the standard to be met.

[12] Against that backdrop, evolving in real time, I faced the present application. It is a motion for an extension of time to file a proposal, pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). That section reads:

> **(9)** The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), <u>if satisfied on each application that</u>
>
> > <u>**(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;</u>
> >
> > <u>**(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and</u>
> >
> > <u>**(c)** no creditor would be materially prejudiced if the extension being applied for were granted.</u> [emphasis added]

[13] The present motion had been scheduled for March 27, 2020. The applicant's Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The

scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

[14] The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

[15] To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

[16] I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

[17] I have granted the order based on the following factors:

[18] First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be

automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

[19] Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; and that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

[20] The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

[21] It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

[22] No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the <u>extension</u> would be prejudicial, not whether the proposal <u>itself</u> would be.

[23] This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

[24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

[25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish,

and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

[26] This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

Conclusion

[27] The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Balmanoukian, R.

2

Convergix, Re 2006 NBQB 288

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF SAINT JOHN

Court Numbers: 12381, 12382, 12383, 12384 and 12385
Estate Numbers: 51-879293, 879309, 879319, 879326 and 879332

IN THE MATTER of the Proposals of Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., InteliSys Aviation Systems Inc.

BEFORE:	**Justice Peter S. Glennie**
HEARING HELD:	**Saint John**
DATE OF HEARING:	**July 27, 2006**
DATE OF DECISION:	**August 1, 2006**

COUNSEL:

R. Gary Faloon, Q.C., on behalf of the Applicants

DECISION

GLENNIE, J. (Orally)

[1] The issue to be determined on this application is whether related insolvent corporations are permitted to file a joint proposal pursuant to the *Bankruptcy and Insolvency Act*. For the reasons that follow, I conclude that such corporations are permitted to do so.

OVERVIEW

[2] The Applicants, Convergix, Inc., Cynaptec Information Systems Inc., InteliSys Acquisition Inc., InteliSys (NS) Co., and InteliSys Aviation Systems Inc. (the "Insolvent Corporations") are each wholly owned subsidiaries of InteliSys Aviation Systems of America Inc. ("IYSA").

[3] For all intents and purposes, the Insolvent Corporations have operated as one entity since 2001. The Insolvent Corporations have one "directing mind" and have the same directors. The Insolvent Corporations maintain one bank account.

[4] The Insolvent Corporations are considered related companies under the provisions of the *Income Tax Act (Canada).*

[5] Payments to all creditors of the Insolvent Corporations, including some of the major creditors such as Atlantic Canada Opportunities Agency have all been made by one of the Insolvent Corporations, namely, InteliSys Aviation Systems Inc., ("InteliSys"), even though loan agreements may have been made with other of the Insolvent Corporations. Similarly, all employees of all the Insolvent Corporations are paid by InteliSys.

Filing of Notice of Intention to make a Proposal

[6] The Insolvent Corporations attempted to file a joint Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") on June 27th, 2006 in the Office of the Superintendent of Bankruptcy ("OSB"). By letter dated June 28th, 2006 the OSB advised that it would not accept the filing of this joint Proposal.

[7] On June 29th, 2006 each of the Applicants filed in the OSB a Notice of Intention to Make a Proposal. The Insolvent Corporations have each filed in the OSB a Projected Monthly Cash-Flow Summary and Trustee's Report on Cash-Flow Statement.

Extension Pursuant to Subsection 50.4(9) of the BIA

[8] IYSA is required to file quarterly reports with the U.S. Securities and Exchange Commission in Washington, D.C. It is a publicly traded security, over-the-counter, on the NASDAQ. The Applicants say the implications on IYSA created by the financial situation of the Insolvent Corporations must be considered. The Applicants assert that the initial 30 day period of protection under the BIA is not sufficient time for all of the implications on IYSA to be determined and dealt with.

[9] The Applicants say that their insolvency was caused by the unexpected loss of their major client which represented in excess of 25% of their combined revenue. They say that time is needed to assess the market and determine if this revenue can be replaced and over what period of time.

[10] The Insolvent Corporations and Grant Thornton Limited have completed a business plan. It has been presented to investors and/or lenders. The Insolvent Corporations will need more time than the initial period of protection of 30 days under the BIA to have these lenders and investors consider the business plan and make lending and/or investment decisions.

[11] Counsel for the Applicants advise the Court that the OSB does not object to joint proposals being filed by related corporations but requires a Court Order to do so.

[12] The Insolvent Corporations host systems for several Canadian airlines. They provide all aspects of reservation management including booking through call centers and web sites as well as providing the capability to check in and board passengers. The total reservation booking volume is about 1300 reservations per day which results in a revenue stream of $520,000 per day. The applicants say the loss of revenue for even one day would be catastrophic. They assert that serious damage would be caused to the various client airlines. The Applicants also say it would take at least 30 days to bring another reservation system online.

ANALYSIS

[13] There are no reported decisions dealing with the issue of whether a Division I proposal can be made under the BIA on a joint basis by related corporations. There are two decisions, one dealing with partners [***Howe Re,*** [2004] O.J. No. 4257, 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253] and the other dealing with individuals [***Nitsopoulos Re***, [2001] O.J. No. 2181, 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994].

[14] Section 2 of the BIA provides that 'persons' includes corporations.

[15] When interpreting the breadth of the BIA section dealing with proposals, I am mindful of the following comments from ***Bankruptcy and Insolvency Law of Canada*** by Hon. L.W. Houlden and Hon. G. B. Morawetz, Third Edition Revised, (2006, Release 6, pages 1-6 and 1-6.1):

> The *Act* should not be interpreted in an overly narrow, legalistic manner: *A. Marquette & Fils Inc. v. Mercure,* [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; *Re Olympia and York Developments Ltd.* (1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657 (Ont. Gen. Div.); *Sun Life Assurance Co. of Canada v. Revenue Canada (Taxation),* 45 C.B.R. (3d) 1, 47 Alta L.R. (3d) 296, 1997 CarswellAlta 254, [1997] 5 W.W.R. 159, 144 D.L.R. (4th) 653 (C.A.); *Re County Trucking Ltd.* (1999), 10 C.B.R. (4th) 124, 1999 CarswellNS 231 (N.S.S.C.). It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided: *Re Handelman* (1997), 48 C.B.R. (3d) 29, 1997 CarswellOnt 2891 (Ont. Gen. Div.).
>
> The *Act* puts day-to-day administration into the hands of business people - - trustees in bankruptcy and inspectors. It is intended that the administration should be practical not legalistic, and the *Act* should be interpreted to give effect to this intent: *Re Rassell* (1999), 177 D.L.R. (4th) 396, 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).

[16] In ***Howe**, supra,* the debtors brought a motion for an order directing the OSB to accept for filing a joint Division I proposal, together with a joint statement of affairs, joint assessment certificate and joint cash flow statement.

[17] The OSB accepted that the filing of a joint Division I proposal by the debtors was appropriate as the debts were substantially the same and because the joint filing was in the best interests of the debtors and their creditors. However, the OSB attended at the motion to make submissions regarding its policy in relation to the filing of joint Division I proposals. The policy stipulated

that the OSB would refuse the filing of a proposal that did not on its face meet the eligibility criteria set out in the BIA. The policy further provided that the OSB would refuse the filing of a joint Division I proposal where the trustee or the debtors failed to obtain a Court Order authorizing the filing.

[18] Registrar Sproat rejected the OSB's position as expressed in the policy. He held that the OSB had no authority to reject the filing of a proposal, subject to the proposal meeting the requirements of section 50(2) of the BIA, namely the lodging of documents.

[19] The Registrar reviewed case law dealing with the permissibility of joint Division I proposals under the BIA. He found that, while not explicitly authorized, the provisions of the BIA could reasonably be interpreted as permitting a trustee to file with the official receiver a joint Division I proposal. In this regard he quoted from his comments in ***Re Shireen Catharine Bennett***, Court File No. 31-207072T, where he stated:

> It seems to me that the decision of Farley J. in *Re Nitsopoulos* (2001) 25 C.B.R. (4th) 305 (Ont. S.C.) is clear on the issue that the BIA does not prohibit the filing of a joint proposal and. . .does not formally approve/permit a joint proposal to be filed. In my view, it would be consistent with the purpose of the BIA and most efficient and economical to extend the decision in *Re Nitsopoulos* and hold that joint proposals may be filed. . .I am not persuaded that a formal court order is required to permit a joint proposal to be filed. It seems to me that potential abuses can be avoided in the fashion outlined at paragraph 9 of *re Nitsopoulos* i.e. on an application for court approval. . .and determination of abuse (if any) can be dealt with on that application.
>
> Thus to summarize, no order is necessary for a joint Division I proposal to be filed. In the event that the Trustee has difficulty in the said filing the matter may be restored to my list and the OSB shall attend on the date agreed upon.

[20] In the result, the Registrar ordered the OSB to accept for filing the joint proposal. The Court further held that a joint Division I proposal is permitted under the BIA and that the OSB must accept the filing of the joint proposal even in the absence of a Court Order authorizing such filing.

[21] In ***Nitsopoulos****, supra,* a creditor of each of Mr. and Mrs. Notsopoulos brought a motion for an order that a proposal could not be filed on a joint basis.

[22] The joint proposal lumped all unsecured creditors of the Nitsopouloses into one class, whether such creditors were creditors of the husband, the wife, or both. Justice Farley identified the issue as whether the BIA allowed a joint Division I proposal to be made.

[23] He focused on an important distinction between a Division II consumer proposal and a Division I proposal. A Division I proposal must be approved by the Court to be effective. In contrast, a Division II proposal need not be specifically approved by the Court unless the Official Receiver or any other interested party applies within fifteen days of creditor acceptance to have the proposal reviewed. Justice Farley stated that the role of the Superintendent in Bankruptcy, on a directive basis, is not necessary given that there will automatically be a review by the Court to determine whether the terms and conditions of the proposal are fair and reasonable and generally beneficial to the creditors. He concluded that this review would encompass a consideration equivalent to section 66.12(1.1) of the BIA such that it would be able to determine if a joint proposal should be permitted.

[24] Justice Farley concluded that the BIA should not be construed so as to prohibit the filing of a joint Division I proposal.

[25] In my opinion the filing of a joint proposal is permitted under the BIA and with respect to this case, the filing of a joint proposal by the related corporations is permitted. The BIA should not be construed so as to prohibit the filing of a joint proposal. As well, I am not persuaded that a formal court order is required to permit a joint proposal to be filed.

[26] In this particular case, the affidavit evidence reveals various facts which support the view that a joint filing is in the best interest of the Insolvent Corporations and their creditors.

[27] I am satisfied that the Insolvent Corporations have essentially operated as a single entity since 2001. Payments to all creditors have been made by InteliSys, even though the loan agreements may have been made with other of the insolvent corporations. Inter-corporate accounting for the Insolvent Corporations may not reflect these payments or transactions.

[28] In reaching the conclusion that a joint filing is in order in this case, I have taken the following factors into consideration:

(a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

(c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

[29] In addition, certain of the Insolvent Corporations have only related party debt. Pursuant to section 54(3) of the BIA, a related creditor can vote against a proposal, but not in favor of the proposal. As a result, InteliSys (NS) Co. and InteliSys Acquisition Inc. cannot obtain the required votes for the approval of an individual proposal without a court order.

[30] In my opinion, these considerations are consistent only with a finding that a joint proposal is the most efficient, beneficial and appropriate approach in this case.

[31] In view of the reasoning in ***Howe*** and ***Nitsopoulos***,, the interrelatedness of the Insolvent Corporations, the court review inherent in any Division I proposal, and the lack of any prejudice to the creditors of the Insolvent Corporations, I conclude that the Insolvent Corporations ought to be permitted to file a joint proposal.

[32] In ***Re Pateman*** [1991] M.J. No. 221 (Q.B.), Justice Oliphant commented, "I have some serious reservations as to whether a joint proposal can be made save and except in the case of partners, but since I need not determine that issue, I leave it for another day."

[33] In my opinion, the companies in this case are in effect corporate partners because they are so interrelated. They have the same bank account, the same controlling mind and the same location of their offices.

[34] I am of the view that the filing of a joint proposal by related corporations is permitted under the BIA, and that on the facts of this case, an Order should issue authorizing such a filing. Such an Order is consistent with the principles underlying the interpretation of the BIA, and is in the best interests of all stakeholders of the Insolvent Corporations.

Extension of Time for Filing a Proposal

[35] The Applicants also seek an order pursuant to Section 50.4(9) of the BIA that the time for filing a Proposal be extended by 45 days to September 10th, 2006.

[36] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: ***Re Doaktown Lumber Ltd.*** (1996), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[37] An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

(a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;

(b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,

(c) No creditor of the Insolvent Cororations would be materially prejudiced if the extension is granted.

[38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See ***Re Cantrail Coach Lines Ltd.*** (2005), 10 C.B.R. (5th) 164.

[39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

(a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;

(b) The Insolvent Corporations have completed a business plan;

(c) The Insolvent Corporations are diligently working on the Restructuring;

(d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and

(e) Representatives of the Insolvent Corporations have met with outside investors.

[40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well

happen" and "probable" "to be reasonably expected". See also ***Scotia Rainbow Inc. v. Bank of Montreal*** (2000), 18 C.B.R. (4^{th}) 114 (N.S.S.C.).

[41] The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

[42] I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

[43] Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

CONCLUSION AND DISPOSITION

[44] In the result, an Order will issue that the Insolvent Corporations may file a joint proposal pursuant to the provisions of the BIA, and that, pursuant to Section 50.4(9) of the BIA, the time for filing a Proposal is extended by 45 days to September 10th, 2006.

Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick

3

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Lundrigan (Re), 2012 NSSC 231

Date: June 18, 2012
Docket: B 36348
Registry: Halifax

District of Nova Scotia
Division No. 03 - Sydney
Court No. 36348
Estate No. 51-1464188

In the Matter of the Bankruptcy of Daniel George Lundrigan

LIBRARY HEADING

Registrar: Richard W. Cregan, Q.C.

Heard: May 10, 2012

Written Decision: June 18, 2012

Summary: The applicant's student loans were not discharged by his bankruptcy as he made his assignment before seven years had passed since he had ceased to be a student. He applied for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*.

Result: The court was satisfied that he had acted in good faith respecting the loans. As his resources were limited and he had family responsibilities the court was also satisfied that he would continue experiencing financial difficulty so that he would not be able to pay the debt. Relief was granted.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

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In the Matter of the Bankruptcy of Daniel George Lundrigan

DECISION

Registrar: Richard W. Cregan, Q.C.

Heard: May 10, 2012

Present: Joseph R. Wall, representing the Attorney General of Canada.

Rita Anderson, representing the Trustee, PricewaterhouseCoopers.

Daniel George Lundrigan, representing himself.

[1] Background

This is an application by Daniel George Lundrigan for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) with respect to two student loans which have remained outstanding after his discharge from Bankruptcy. It is opposed by the Attorney General of Canada.

[2] Mr. Lundrigan enrolled in a two year course at the Marconi Campus in Sydney in 2003. However after completing one and a half years, his common law relationship ended leaving him responsible for debts totalling $27,000.00, in addition to two student loans, one under Federal sponsorship and the other under Provincial sponsorship, on which were owing on the date of his assignment, February 17, 2011, balances of $14,575.97 and $3,799.49 respectively.

[3] He ceased to be a student in June 2004. This date is 4 months short of seven years from the date of his assignment. Accordingly, because of the provisions of Subsection 178(1)(g) of the *BIA*, the student loans were not discharged with his automatic discharge on November 18, 2011.

[4] There was considerable pressure on him to deal with the indebtedness from his broken relationship. His father agreed to help him. They arranged a loan with the TD Bank for the $27,000.00. His father co-signed the loan on condition that he live at home and thus be able to make $600.00 payments each month against this loan. He had to leave his studies and find work. The loan apparently was paid in a timely manner. He then addressed his student loans. He had an understanding with the collection agency that he would pay $150.00 per month. That was all he could pay as he was no longer living at home. He only made 9 payments.

[5] He has been working throughout as a cashier at the casino in Sydney. He has married. He and his wife, Michelle Lynn Lundrigan, have twins, born July 19, 2010.

[6] His monthly take home pay averages $1,500.00. His wife's monthly take home pay averages $1,084.00. She also receives the Child Tax Benefits of $223.00 and Universal Child Care Benefit of $200.00 each month. The total current household monthly income is now $3,007.00.

[7] He works the evening shift at the casino and she works during the day so that one of them is always able to look after their children. This way they avoid child care expenses.

[8] The claims made in his bankruptcy, in addition to the student loans, consisted of a secured claim by TD Canada Trust for $10,875.47, and an unsecured claims of Capital One Services, LLC for $4,163.76.

[9] Mr. Lundrigan's work at the casino is steady but he does not see any opportunity for advancement. He does not see that there are other opportunities in the region for him which would pay more.

[10] If he had completed the course at the Marconi Campus, he would be qualified for much better paying work. He needed another half year of study to complete it. He doubts that he could now complete the course. He probably would have to start all over again as the technology involved is always changing.

[11] Law

To be relieved of student loans under Subsection 178(1.1) a bankrupt must satisfy the court that:

> (a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and
>
> (b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

[12] I must be satisfied that Mr. Lundrigan has acted in good faith with respect to these debts. The following is a review I have made of cases and commentary on good faith. A number of points are relevant to Mr. Lundrigan's situation.

[13] I shall start by quoting what I wrote in *Hankinson (Re)*, 2009 NSSC 211:

> [17] *Re Minto* (1999), 14 C.B.R. (4th) 235 (Sask., Registrar Herauf) is often referred to for its list of factors relevant to the determination of good faith. In paragraph [62] he says:
>
> > I agree with counsel that in the context of student loans one can look at certain factors considered in determining whether a condition should be imposed on the discharge of a bankrupt with student loan liabilities; namely, whether the money was used for the purpose loaned, whether the applicant completed the education, whether the applicant derived economic benefit from the education (ie: is the applicant employed in an area directly related to the education), whether the applicant has made

> reasonable efforts to pay the debts and whether the applicant has made use of available options such as interest relief, remission, etc.

[18] Registrar Sprout in *Kelly, Re,* 2000 CanL II 22 497 (Ont., S.C.) after referring to these factors added:

> - the timing of the bankruptcy, and
> - whether the student loan forms a significant part of the bankrupt's overall indebtedness as of the date of bankruptcy.

[19] I would add the following:

> - whether the applicant had sufficient work and income to be reasonably expected to make payments on the loan,
> - the lifestyle of the applicant,
> - whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards,
> - what proposals the applicant may have made to the loan administrators and the responses received, and
> - whether the applicant was at any time disabled from working by illness.

[14] Black's Law Dictionary (9th ed): gives the following definition:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to see unconscionable advantage. - Also termed *bona fides.*
>
> > "The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; It excludes a variety of types of conduct

> characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.,

and Barron's Law Dictionary, 3rd edition, the following:

> GOOD FAITH a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations. In the case of a merchant, good faith refers to honest in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. §2-103(1)(b). More generally, the term means "honesty in fact in the conduct or transaction concerned. "U.C.C. §1-201(19).

[15] In Frank Bennett: *Bennett on Bankruptcy,* 14th ed, at page 564 the following factors are suggested:

> ! whether the money was used for the purpose loaned;
>
> ! whether the bankrupt completed the education;
>
> ! whether the bankrupt derived economic benefit from the education, namely whether the bankrupt obtained a job in the area directly related to the education;
>
> ! whether the bankrupt made reasonable efforts to repay the debts;
>
> ! whether the bankrupt had made use of available options such as interest relief, remission, etc.;
>
> ! the timing of the bankruptcy;
>
> ! whether the student loans form a significant part of the bankrupt's overall debts.
>
> ! whether the bankrupt has acquired a significant estate, property, savings, investments or has the bankrupt incurred and discharged other debts for non-necessaries, while continuing in default of the student loan;

> ! whether the bankrupt had sufficient work and income to be reasonably expected to make payments on the loan;
>
> ! the lifestyle of the applicant;
>
> ! whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards;
>
> ! what proposals the applicant may have made to the loan administrators and the responses received; and
>
> ! whether the applicant was at any time disabled from working by illness.

[16] The following is said in Roderick J. Wood: *Bankruptcy & Insolvency Law,* Irwin Law, 2009, at page 295:

> The good faith requirement means that the debtor must have acted honestly both in the bankruptcy and in obtaining the student loan.

[17] *Houlden, Morawetz & Sarra: Bankruptcy and Insolvency Law of Canada,* Fourth Edition, at H§40, page 6-185, says the following:

> "Good faith" implies honesty of intention. Failure to properly disclose the debtor's marital status on the student loan application shows dishonesty of intention: *Re Dustow* (1999), 14 C.B.R. (4th) 186, 1999 Carswell Sask 831, 193 Sask. R. 159 (Sask. Q.B.).
>
> In determining whether the bankrupt acted in good faith, the following factors may be considered:
>
> 1. Was the money used for the purpose

> loaned?
> 2. Did the bankrupt complete the education or make an honest effort to do so?
> 3. Did the bankrupt derive benefit from the education in the sense of gaining employment in an area directly related to the education?
> 4. Did the bankrupt make reasonable efforts to pay the loan or did the bankrupt make an immediate assignment in bankruptcy?
> 5. Did the bankrupt take advantage of other options with respect to the loan such as interest relief or loan remission?
> 6. Was the bankrupt extravagant or irresponsible with his or her finances?
> 7. Did the bankrupt fairly disclose his or her circumstances on the application for the loan in the sense of acting with an honest intention?

[18] In *Duke* v. *Nanaimo* (*Regional District*)(1998), 50 M.P.L.R. (2d) 116 (B.C.S.C.) at paragraph 52 one finds the following:

> Although the phrase "good faith" always contains a component of honesty, it often connotes additional qualities depending on the circumstance in which it is used. In my view, the requirement of good faith mandates genuineness, realism and reasonableness both subjectively and objectively.

[19] *Lowe, Re,* 2004 ABQB 255 (Romaine J.) concerned a modest balance owing on a student loan of a bankrupt, the head of a family of eight. He ran a successful business. The family income was well in excess of $100,000. It was observed they lived very well - two cars, several computers, involvement in sports, the expenses for which were very high. He never

made voluntary payments on the student loan in question. He spent his money on family priorities. The point made in this case is that, although it is important that children be given access to sports, cultural activities etc., good faith requires that one's priorities reasonably reflect community standards. Put another way, a certain life style is necessary to earn a living and be a part of a community, and children should be able to participate in community activities, sports, etc., but the expenditures must be reasonable; extravagance is not acceptable. This observation applies to both the bankrupt's good faith and ability to pay.

[20] In *Cardwell, Re*, 2006 SKQB 164, Registrar Herauf was first concerned with whether Subsection 178(1.1) relief was available to one who had made a consumer proposal. He determined that it did, but questioned whether making such was indicative of good faith. He said:

> 55.To put it bluntly, I have not been convinced that the applicant has satisfied the requirements in subsection 178(1.1) of the *Act*. The applicant made no attempt to make any payment until compelled to do so by enforcement action brought against him. He did not take advantage of any interest relief mechanisms. While I certainly appreciate the effort by the applicant to complete a Consumer Proposal I cannot equate that effort as a show of good faith. It was judgment enforcement that prompted the Consumer Proposal and not a genuine effort by the

> applicant to pay down this debt.
>
> 56. I also agree with the respondent's submission that the applicant is gainfully employed in a profession for which he received a student loan funded education. Furthermore, he will be employed in that area for the foreseeable future. The applicant earns substantial remuneration for this work. To allow the application in the present circumstances would make a farce of this provision.

[21] In *Fournier, Re*, 2009 Carswell Ont. 3522, Registrar Nettie considered the need for the applicant to have acquired a new automobile when it was apparent that she could be well served by public transit, as she lived and worked in central Toronto. He said:

> 14. When what apparently gives in her budget at the same time that the car is leased are the payments to the student loans, I find this not to be acting in good faith in respect of those loans. No evidence was offered of any real exploration of taking public transit, or of keeping the old car, either of which would have permitted continued or increased payments on the student loans, and I draw the adverse inference that either of those options could have resulted in money being paid under the loans, but that the Applicant chose to have a new car for reasons personal to herself, and not in keeping with her obligation to act in good faith to these two loan programs.
>
> 15. Turning to the second part of the test, financial difficulty, I find that while the Applicant certainly appears to be in financial difficulty, her present difficulty is of her own choosing - the car. But for that new car, which increases her regular transit costs from approximately $200.00 per month for bus passes to $800.00 or more, she would be able to

> make her support payments and pay something to
> the student loans.

[22] Analysis - Good Faith

Mr. Lundrigan has not benefitted from the education acquired with the money borrowed. The technology behind it is now stale. The asset he acquired with the loans in now of little, if any, value to him.

[23] One might criticize him for abandoning his studies with only six months left in the course. However, one must consider the situation he was in. In addition to these loans he was confronted with the debts he assumed from his previous relationship. No doubt he was being pursued by creditors more aggressive than the student loan authorities. He was a person with limited qualifications in an acknowledged depressed economic area. His father was willing to help him with the assumed debts. He let him stay at home free, so that from a modest income he was able to repay them, no doubt with his father seeing that such happened as quickly as possible. His father's generosity did not extend to the student loans. He had done his part. It might be argued that he preferred these creditors to his student loan creditors. I do not see this as a strong argument. He managed what he could

with limited income. His father's help was limited.

[24] One can second guess what he did. Maybe he could have made a few more payments, but with his limited income the amount available would not be significant. In the situation he found himself I do not see that he can be accused of acting unreasonably. There is no suggestion of extravagance on his part nor of dishonesty. With the birth of his children and with his limited income I see no basis for suggesting that he should be paying anything on these loans to prove that he has been acting in good faith.

[25] As to the period before his children's birth, there is nothing before me to suggest that he was not acting in good faith. He made some payments. He discharged the other loans, which would not have been possible without his father's help and discipline. There would have been little, if anything, left over.

[26] Although the respondent has suggested bad faith on Mr. Lundrigan's part, and one must be careful in this regard, no real incidents of it have been proved. The question is simply - Has Mr. Lundrigan, considering all the

circumstances and looking at the total picture, acted in good faith?

[27] He found himself in debt because of personal misfortune. He was fortunate that his father offered to help him out. He would not help him with the student loan, but at least he was relieved of the greater part of his indebtedness. There were few options for him. He did what he could, maybe not perfectly. He would not have had any significant surplus income prior to the birth of his children, and certainly has had none since. The most he could find for the student loans would be very little.

[28] Some flexibility and generosity regarding human nature has to be given in determining whether one has acted in good faith. One must look at his actions and ask whether he has he acted in good faith. His resources have been limited. To act in good faith does not require perfection. I think he, on the whole, has acted with honesty and reasonableness. I am thus satisfied that he has acted with the good faith required of him.

[29] <u>Analysis - Financial Difficulty</u>

As to financial difficulty, the household monthly income is approximately

$3,000.00. The Superintendent's Standard for a family of four is currently $3,680.00. There is no reasonable expectation of any significant increase in the family income. He and his wife have two young children to raise on a modest income. Their circumstances are such that I am quite satisfied that they will continue to have financial difficulty and be unable to pay off these loans.

[30] Conclusion

He is entitled to the relief provided by Subsection 178(1.1) of the *BIA*.

R.

Halifax, Nova Scotia
June 18, 2012

4

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Registrar: Raffi A. Balmanoukian, Registrar in Bankruptcy

Heard: July 17, 2023, in Halifax, Nova Scotia

Final Written Submissions: July 17, 2023

Counsel: Darren O'Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited ("ASC" or the "Debtor")
Joshua Santimaw, for the Trustee MSI Spergel Inc. (the "Trustee")
Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH")

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated **July 25, 2023.**

Balmanoukian, Registrar:

[1] On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the *Companies Creditors Arrangement Act* , RSC 1985, c. C-36, as amended (the "CCAA"). This exension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

[2] On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of

Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

[3] On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May 24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

[4] On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13,

2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in "late June" and that it was deemed to be a "no brainer" that the initial CCAA order would be granted, notwithstanding that it was to be contested.

[5] On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

[6] WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal Interpretation Act, not the Civil Procedure Rules, applies and that Saturdays "count" for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

[7] That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA *General Rules* require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

[8] I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

[9] I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including $325,000 in professional fees over four months on $800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

[10] WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth*. It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

[11] Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken* (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not

determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

[12] Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

[13] WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

[14] I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application. In short, the "no brainer" that the Debtor thought it had in

obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

[15] This is not the test under 50.4(9)(b) respecting "proposal viability" although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)'s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

[16] In *Re T&C Steel Ltd. et al*, 2022 SKKB 236, Justice Scherman reviewed the "viability" test, particularly in the context of a second (or subsequent) application, as follows:

> [7] In Enirgi Group Corp. v Andover Mining Corp., 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:
>
>> [66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; "this ignores the possible idiosyncrasies of any specific creditor": Cumberland [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi's views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and "likely" means "such as might well happen." (Baldwin [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi's statement that it has lost faith in Andover is not determinative under s. 50.4(9): Baldwin at para. 3; Cantrail at paras. 13-18).

[17] The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a "first extension" and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

[18] In summary, the test for the likelihood of a viable proposal is an objective one: *Nautican v. Dumont*, 2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in *Re Scotian Rainbow Ltd. et al*, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

> [17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court's attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word 'likely', and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:
>
>> Might well happen or turn out to be the thing specified.
>
> [18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley's determinations as to the meaning of these

> words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

[19] While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken*, I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

[20] That leaves us with 50.4(9)(a) – the due diligence and good faith tests – and with my discretion.

[21] Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism – a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved in the file) became quite agitated when I challenged the timeline leading

up to that initial (and successful) extension application and whether developments to that date passed the "due diligence" test."

[22] The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the "good faith and due diligence" requirement relates to the development of a viable proposal, not to other insolvency options. In *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done "in preparing the proposal." While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward – not other options.

[23] Again, it appears that the Debtor thought a Justice would "rubber stamp" an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension – not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors

and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

[24] Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

[25] I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test – that there is good faith; not the presence or absence of bad faith.

[26] At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to "strong arm" the Court by compressing timelines where the upshot has been "you have to sign this or disaster will result." It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would

follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

[27] I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

[28] Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

[29] In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

> [17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

> [18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.
>
> [19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable. [emphases added]

[30] In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright….about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

[31] In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at

best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

[32] Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I "may" grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

[33] The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see *Re Dynamic Transport* 2016 NBCA 70 at paras. 4 and 9; *Re Entegrity Wind Systems Inc.* 2009 PESC 25 at para. 30; *Re Entegrity Wind Systems Inc.* 2009 PESC 33 at para. 36; *Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC).

[34] Thrice in this insolvency has the Debtor come forward on an "emergency" basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was

concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a "no brainer" and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

[35] It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be "driving the bus" in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) "good faith and due diligence" tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

[36] As I have said, I am aware that my "bottom line" decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

[37] Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

[38] Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Balmanoukian, R.

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

ERRATUM

Registrar:	Raffi A. Balmanoukian, Registrar in Bankruptcy
Heard:	July 17, 2023, in Halifax, Nova Scotia
Final Written Submissions:	July 17, 2023
Erratum Date:	July 25, 2023
Counsel:	Darren O'Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited ("ASC" or the "Debtor") Joshua Santimaw, for the Trustee MSI Spergel Inc. (the "Trustee") Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH")

Erratum:

[1] Meaghan Kells was added as co-counsel for the objecting creditor.
[2] Additional underlining was included in paragraph 29.
[3] The word "Debtor" was added the counsel section on the title page and added to the decision in paragraph 1.

5

CITATION: Mustang GP Ltd. (Re), 2015 ONSC 6562
COURT FILE NOs.: 35-2041153, 35-2041155, 35-2041157
DATE: 2015/10/28

SUPERIOR COURT OF JUSTICE – ONTARIO – IN BANKRUPTCY

RE: IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF MUSTANG GP LTD.

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST ONTARIO PARTNERS LIMITED PARTNERSHIP

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF HARVEST POWER MUSTANG GENERATION LTD.

BEFORE: Justice H. A. Rady

COUNSEL: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.

Joseph Latham for Harvest Power Inc.

Jeremy Forrest for Proposal Trustee, Deloitte Restructuring Inc.

Robert Choi for Badger Daylighting Limited Partnership

Curtis Cleaver for StormFisher Ltd.

No one else appearing.

HEARD: October 19, 2015

ENDORSEMENT

Introduction

[1] This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

[2] As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as

the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

[3] Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

[4] The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

[5] On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

[6] The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

[7] Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

[8] In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

[9] The plant employs twelve part and full time employees.

[10] The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

[11] Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

[12] The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

[13] In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

[14] On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. – 2478223 Ontario Limited – purchased and took an assignment of FCC's debt and security at a substantial discount.

[15] Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

[16] On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the

debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

[17] On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

[18] In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

i. the sale process will be commenced immediately following the date of the order approving it;

ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;

iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;

iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;

v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;

vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;

vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;

viii. the closing of the sale transaction will take place within one business day from the sale approval date;

ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

[19] StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

> A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

[20] The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

[21] StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

[22] The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

[23] Searches of the *PPSA* registry disclosed the following registrations:

(a) Harvest Ontario Partners:

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) Harvest Power Mustang Generation Ltd.

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

[24] There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

[25] The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion

materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Re Electro Sonic Inc.*, 2014 ONSC 942 (S.C.J.).

b) the DIP agreement and charge

[26] S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

> **50.6(1)** ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.
>
> **50.6(3)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

[27] S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

> **50.6(5)** ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the debtor is expected to be subject to proceedings under this Act;
>
> (b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

[28] This case bears some similarity to *Re P.J. Wallbank Manufacturing*, 2011 ONSC 7641 (S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

[29] The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

[30] In *Re Comstock Canada Ltd.*, 2013 ONSC 4756 (S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Sun Indalex Finance, LLC* v. *United Steelworkers*, 2013 SCC 6 as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.

In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> ...
>
> Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
>
> [Emphasis in original]

[31] I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

[32] The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

[33] In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Re Colossus Minerals Inc.*, 2014 ONSC 514 (S.C.J.) and the discussion in it.

d) the D & O charge

[34] The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

> **64.1 (1)** On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge – in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.
>
> (3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> (4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

[35] I am satisfied that such an order is warranted in this case for the following reasons:

- the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;
- it is required only in the event that a sale is not concluded and a wind down of the facility is required;
- there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;
- the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

[36] The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

[37] In *Re Brainhunter* (2009), 62 C.B.R. (5th) 41, Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

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

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

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

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

(d) Is there a better viable alternative?

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

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

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

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

[38] It occurs to me that the Nortel Criteria are of assistance in circumstances such as this – namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

[39] In *CCM Master Qualified Fund Ltd.* v. *blutip Power Technologies* 2012 ONSC 175 (S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

6. Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

(i) the fairness, transparency and integrity of the proposed process;

(ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,

(iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, BIA proposals, and CCAA proceedings.

[40] I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

[41] It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is

necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

[42] For these reasons, the relief sought is granted.

"Justice H.A. Rady"
Justice H.A. Rady

Date: October 28, 2015

6

SUPERIOR COURT OF JUSTICE - ONTARIO

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

BEFORE: Penny J.

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

Sean Zweig for the Proposal Trustee

Harvey Chaiton for the Directors and Officers

Jeffrey Levine for GA Retail Canada

David Bish for Cadillac Fairview

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

Clifton Prophet for CIBC

HEARD: February 8, 2016

ENDORSEMENT

The Motion

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

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

(a) approve a stalking horse agreement and SISP;

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

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

(d) approve an Administration Charge;

(e) approve a D&O Charge;

(f) approve a KERP and KERP Charge; and

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

Background

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

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

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

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

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

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

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

The Stalking Horse Agreement

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

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

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

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

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

The SISP

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

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

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

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

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

(2) Bid deadline: February 22, 2016

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) Is there a better viable alternative?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[34] Section 65.13 of the BIA is also indirectly relevant to approval of the SISP. In deciding whether to grant authorization for a sale, the court is to consider, among other things:

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

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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

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

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

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

<u>The Break Fee</u>

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

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

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

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

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

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

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

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

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

Financial Advisor Success Fee and Charge

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

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

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

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

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

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

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

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

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

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

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

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

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

Administration Charge

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

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

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

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

D&O Charge

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

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

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

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

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

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

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

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

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

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

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

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

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

Key Employee Retention Plan and Charge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sealing Order

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

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

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

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

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

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

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

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

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

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

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

Penny J.

Date: February 10, 2016

7

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. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

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.

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.

Held, the appeal should be dismissed.

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.

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.

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.

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.

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.

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.

Cases referred to

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.)

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 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 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 observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

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

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:

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

2. It should consider the interests of all parties.

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

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

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?

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

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.

The 922 offer provided for $6,000,000 cash to be paid on closing 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 are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

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

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

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

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

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

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 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.

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.

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.

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.:

> 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)

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.

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 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.

Moreover, I am not prepared top 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.

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.

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.

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.

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.

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.

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

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.

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.

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. 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.). 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.), 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 having 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.

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 superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons [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 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 Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer, in effect, supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial 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 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 for court approval for the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246 C.B.R.:

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

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, at pp. 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 situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 C.B.R., p. 314 N.S.R.:

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

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

I agree that the same reasoning may apply to a negotiation process leading to a private sale but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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 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.

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.

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.

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.

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

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

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

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

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

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 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.

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 interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

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 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]:

> 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.

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

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 interlender condition removed.

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.

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

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

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.

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 reasonable to expect that a receiver would be no less knowledgeable in that regard and it is his primary duty to protect the interests of the creditors. In my view it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors who have already been seriously hurt more unnecessary contingencies.

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

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

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

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

8

SUPREME COURT OF NOVA SCOTIA

Citation: Bank of Montreal v. Sportsclick Inc., 2009 NSSC 354

Date: 20091117
Docket: Hfx 314220
Registry: Halifax

Between:

Bank of Montreal

Plaintiff

v.

Sportsclick Inc.

Defendant

Judge: The Honourable Justice Patrick Duncan.

Heard: November 10 and 12, 2009, in Halifax, Nova Scotia
Orally on November 12, 2009

Counsel: Stephen Kingston and Benjamin Durnford, for the Plaintiff
Christopher Robinson, for the Defendant
Dennis Pickup and Jonathan Saulnier, Articled Clerk, For Third Party T &A Venture Properties Inc.

By the Court:

Introduction

[1] This is a motion that seeks an order to approve the sale by the Receiver of Sportsclick Inc. of a certain asset of Sportsclick, being the shares of a company known as Southprint Inc. The application is supported by T & A Venture Properties Inc., the intended purchaser of the asset, who is participating as an interested non party. The motion is opposed by Sportsclick.

Background

[2] Upon application of the plaintiff, Bank of Montréal, an order was issued on July 14, 2009 by the Registrar of Bankruptcy appointing Ernst & Young Inc. as the interim Receiver of Sportsclick Inc. and Sun Vette Racing Inc. pursuant to section 47 (1) of the **Bankruptcy and Insolvency Act** (Canada), R.S. 1985, c. B-3.

[3] Following appointment the Receiver offered the personal assets of the defendant for sale by tender, excepting the Southprint shares, which the Receiver characterizes as a unique asset.

[4] The Receiver learned that the defendant is the parent company of Southprint Inc. a Martinsville, Virginia, USA based company which carries on business selling hats, jackets, shirts, toys and other items with NASCAR logos and designs. It prepares various artwork to customer specifications and silkscreens these designs on apparel and other textile products.

[5] The evidence indicates that Sportsclick completed the purchase of all shares of Southprint on or about May 12, 2009. The CEO and sole director of the company is Jack Ross, who is also the president, CEO and director of the defendant.

[6] During its investigations, the Receiver determined that the plaintiff has a charge on the shares of Sportsclick in Southprint. It does not have direct security or other agreements with Southprint.

[7] The information initially gathered by the Receiver indicated the following:

- Southprint had a net operating loss of $1.4 million in 2008 and $1.04 million in 2007;

- Southprint lacked operating capital, was in default in payments to trade suppliers and licensors, and did not have access to a bank operating line of credit;

- the majority of Southprint's accounts receivable were factored;

- important licensing agreements of its' major products were tied to the personal relationships of a small group of management personnel within Southprint;

- that on the eve of the appointment of the Receiver in July, 2009, $75,000 US was withdrawn from a then balance of $76,000 US that Southprint held in a US bank. This was done on the direction of Mr. Ross. Because of the concern that this may have been done as a preferential payment, the Receiver acted as a catalyst to have the signing authority of Mr. Ross, among others, removed from the Southprint bank accounts.

[8] The Receiver sent a representative to the Virginia plant to do a preliminary review of the business and operations of Southprint. The information indicated that the company was downsizing with declining sales, employees and facilities.

[9] On July 31, 2009 the Receiver was presented with an offer in the amount of $100,000 for the purchase of the Southprint shares. The prospective purchaser included the previous shareholders who had, only months before, sold their interest to Sportsclick. One of these persons was understood to be Butch Hamlet, one of the founders of Southprint, and a key player in the company's operation and management. The offer was reaffirmed in a letter of August 7 from counsel for the purchasers. It set 5 PM on August 12, 2009 as the deadline for acceptance.

[10] The fact of this offer was communicated to Mr. Ross and others associated with Sportsclick by counsel for the Bank of Montréal. He set out various adverse conditions associated with Southprint and states:

> The Bank of Montréal is not prepared to fund a very expensive receivership of Southprint in the United States to take control and operate the company. In light of the real and adverse situation presented by Mr. Hamlet, the receiver has to consider acceptance of the offer.

[11] The Receiver discussed a potential sale of the shares to Green Swan Capital Corporation, a company that held a subordinate security interest against Southprint. It was not in a position to make an offer and so the Receiver entered into negotiations with Mr. Hamlet and others, sometimes referred to as the "US group".

[12] In deciding to attempt a private sale of the shares, the Receiver considered the information identified previously, and also:

- that the assets of Southprint were fully encumbered, including accounts receivable factored to Amerisource Funding;

- the machinery and equipment were secured to River Community Bank. This bank, in view of the default by guarantor Sportsclick (by its being put into receivership), made a demand for repayment of the debt owed to it in the amount of $487,705 as of August 6, 2009;

- a review of the United States UCC filings and of the company financial statements indicated that there were multiple secured and unsecured creditors of the company, which claims against Southprint assets would rank in priority to the plaintiff's security interest.

- that a legal opinion obtained by the Receiver indicated that under the laws of the state of Virginia, a claim by a shareholder to the assets of the company is subject to secured and unsecured creditors, making a shareholder a junior creditor;

- the Bank of Montréal again confirmed that it would not fund an action for the carrying on of the business of Southprint;

- the management team of Southprint was prepared to resign unless a deal was completed to assure the company's viability.

[13] The Receiver concluded that sale as a "going concern" represented the best option.

[14] A Nova Scotia-based group contacted the Receiver in mid-August indicating an interest in the Southprint shares. Believing that it should allow this new

expression of interest to be explored, it advised the US group who, as a result, withdrew their offer of $100,000.

[15] No other offers were forthcoming and so the Receiver proceeded with a public tender of the Southprint shares owned by Sportsclick. This was also in response to pressure being exerted by Sportsclick management who favored a public tender process.

[16] An advertisement of the sale was posted in newspapers in Nova Scotia and in Virginia in four successive weeks commencing September 5, with the deadline for offers by September 30, 2009.

[17] In addition, Ernst & Young developed a direct marketing list of prospective buyers who were contacted and advised of the opportunity to purchase the Southprint shares. Of this listing, 17 groups requested and were provided a copy of the Information Package.

[18] The advertising costs alone are valued at in excess of $24,000.

[19] Mr. Ross was also invited on various occasions to provide a list of names of any potentially interested parties for the purchase of these shares. No suggestions came forward.

[20] At the tender close date there was a single offer in the amount of $25,000US made by T & A Venture Properties Inc. There has been representations by counsel for T & A that this is a company that is separate from the previous shareholders. The evidence provided by Mr. Kinsman, being the only evidence I have on this issue, is that it consists of individuals who currently have a managerial or operational role in Southprint and is the same group that previously made the $100,000 offer.

[21] If the offer is accepted then it will barely cover the cost of the advertising.

[22] On October 13, 2009 Justice McDougall of this court issued an order appointing Ernst & Young Inc. as Receiver of all of the assets, property and undertaking of Sportsclick Inc. with broad powers that included:

> 2 (i) To market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such

terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(j) To apply for any vesting order or other orders necessary to convey the Property or any part of parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such property;

(o) to exercise any shareholder ... rights which the Company may have; and

(p) take any steps reasonably incidental to the exercise of these powers.

[23] The Receiver has recommended to this court that it approve the sale of the Southprint shares for the sum of $25,000US because this is the value which presented itself to the Receiver when the asset was widely exposed to the market for sale, and after Sportsclick's principals and others (such as Green Swan capital Corporation) were consulted for assistance with marketing the asset.

Position of Sportsclick

[24] Jack Ross, in his affidavit, concisely sets out the basis of the defendant's opposition to approval of the sale.

[25] He says that the value of Southprint was, "...after considerable effort and due diligence, determined to be in the region of $4 million as at the date of acquisition by May 12, 2009." He rejects the suggestion that the assets deteriorated to $25,000US.

[26] He says that from the commencement of the receivership until September 2, 2009 the Southprint bank balance "consistently averaged $200,000 +" which challenges the accuracy of the assertions that there were cash flow problems in Southprint.

[27] He questions the effort expended by the Receiver in trying to achieve reasonable value for the asset alleging that the Receiver acted improvidently, without commercial reasonableness, and without regard for the best interests of the shareholders and creditors of Sportsclick. He maintains that the assistance and guidance of members of the Sportsclick management group should have been utilized to achieve reasonable value for the shares.

[28] In his submissions, counsel for the defendant expanded on these points. He argues that there were several failings of the Receiver which led to the current situation:

- that there is no evidence before the court to demonstrate that the Receiver conducted a proper valuation of the asset at any point during the receivership;

- that in eliminating the participation of Sportsclick management from a position where they could oversee the operations of Southprint, and by allowing the previous shareholders and management group of Southprint to have unfettered control of the company, the Receiver created the current situation where those same people are able to inhibit the marketability of the asset by threatening to withdraw or engage in activities that would be detrimental to the value of Southprint;

- that the most current value by which the offer should be measured is the acquisition price paid in May, 2009 which is so substantially more than the amount offered in the tender process as to demonstrate that it is not commercially reasonable to accept it;

- that because of the unique nature of the asset, the marketing attempt of the Receiver was inadequate in that:

1. Newspaper advertising only referred to the "shares of Southprint" as being made available for sale. In Virginia the company operated under a different business name and so the Southprint name would not be meaningful to prospective purchasers;

2. The newspaper advertising in Virginia was confined to one paper with a circulation of 170,000 people;

3. The advertisement should have provided more detail about the nature of the asset in order to generate interest and should have been more widely disseminated through newspapers with larger circulation and broader geographic appeal;

- that the targeted group was not large enough.

Position of the Receiver

[29] The applicant submits that the nature of this asset, with its adverse characteristics for operation as a going concern, was unique and of interest to a very limited class of potential purchasers who it attempted to reach with its marketing efforts. It stands by the tender process as being a commercially reasonable effort to maximize the realization value of the shares.

[30] I have been referred to the principles set out in the decision of *Royal Bank of Canada v. Soundair Corporation* [1991] O.J. 1137 (Ont. C.A.) as addressing the criteria applicable to this court's review of the Receiver's sale of assets. I am urged that all of the criteria contained therein have been met.

[31] In response to the specifics of the allegations of Mr. Ross and Sportsclick the Receiver says:

- that Mr. Kinsman, acting on behalf of Ernst & Young in this matter, is an experienced and savvy Receiver who made adequate inquiries throughout to ensure that he understood the nature and financial characteristics of Southprint;

- that he was prepared to accept the risk in walking away from the $100,000 offer which demonstrates his commitment to achieve the best possible realization value;

- that the advertising of the shares undertaken in the tender process was consistent with the industry-standard;

- that the Receiver generated inquiries from 17 different parties through targeted marketing efforts;

- that due to the position taken by the Bank of Montréal in refusing to undertake the management or control of Southprint there was no direct route to liquidate the assets of Southprint. Further that it would be subject, as a shareholder, to taking a junior position as a creditor;

- that in triggering the removal of Sportsclick's management from signing authority at Southprint it was acting to preserve the value of the asset. The Receiver was concerned that on the direction of Sportsclick management $75,000US was transferred from Southprint to a principle of Sportsclick on the eve of the receivership in July. Fearing a preferential payment the Receiver sought to block future such transactions. The Receiver did not intend to, nor did it communicate to Mr. Ross that he was barred from otherwise taking an operational role in Southprint;

- And finally, that it has consistently invited the assistance of Mr. Ross, but that none has been forthcoming, except to the extent that Mr. Ross indicated he would assist in return for a six month contract paying him his then current salary of approximately $10,000 per month, an offer that the Receiver rejected. Mr. Ross rejected a counter proposal to be paid on an hourly rated basis. He also did not respond to an invitation by the Receiver to present another proposal to assist the Receiver.

Law

[32] In *Royal Bank of Canada v. Soundair Corp., supra,* Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized as follows:

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

[33] Certain principles have been enunciated by the courts in consideration of these points:

- The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation... in any but the most exceptional circumstances... 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." *see,* Anderson J. in *Crown Trust v Rosenberg* (1986), 60 O.R.(2d) 87 at 112;

- the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see, Soundair* at para 40;

- the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. V. Rosenberg, supra,* at page 124, Anderson J. said:

> 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 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.

- a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co., supra.*

ANALYSIS

[34] I agree that the shares of Southprint presented as a unique or unusual asset. Southprint opened in 1991 and began operating under that name in 1992. It developed a customer base of large branded companies that grew to include Adidas, Big Dog Sportswear, J. America (college licensee), and MJ Soffe (U.S. Army exclusive licensee). In 1994 it purchased Checkered Flag Sports and

developed and marketed NASCAR apparel to retail outlets. It was owned and managed privately, with Mr. Hamlet being the president and majority shareholder.

[35] The evidence suggests the company became successful on the strength of the personal relationships of its management team, particularly with the licensors whose business was crucial to the viability of the company.

[36] Sportsclick had a Business Acquisition Plan that was intended to improve profitability in a relatively short time. i.e. within 12 months of acquisition. However, two months after acquisition, Southprint was in receivership and unable to carry out its plan.

[37] While Sportsclick made some initial changes to the operations of Southprint, including financing and some staffing changes, it does not appear from the evidence that it had any major influence on the operations. There is no evidence that Sportsclick provided an infusion of capital for Southprint nor did anything that substantially attacked the problems affecting its financial operating capabilities.

[38] In consequence thereof, the previous management team, that included its founders, remained in place. They have continued to operate the business under the benign oversight of the Receiver who has made it clear that it was never in the Receiver's mandate to operate or manage Southprint. There is no persuasive evidence on which to conclude that the financial situation of Southprint has improved.

[39] The prospective purchaser, I am told, includes members of the current management team. Those persons have threatened to walk away from the business if a purchaser is not in place to guarantee the financial viability of the company. Their participation in the operation of the company at this time is crucial if it is to continue as a going concern.

[40] The defendant complains that this is a situation that should not have been allowed to take place and that it has negatively impacted on the market for the shares of Southprint. The inference I am asked to draw is that either by the continued involvement of the Sportsclick management team, or the more active oversight of the Receiver, the shares of this company would have made a more attractive buying opportunity. It is also suggested that the equity in the assets

alone should attract a substantially greater purchase price. All of this presupposes that there is a person or company who sees that potential as significant enough to offset the problems that acquisition will inevitably entail.

[41] The Receiver says that the market place determines value and that the marketplace has spoken. No one agrees with the defendant's view of the value that this opportunity presents. Only T & A has an interest now.

[42] For its part the Bank of Montreal, a significant secured creditor of Sportsclick, has also accepted that it is not worth pumping more money into selling the shares. They have gauged the marketplace and obviously have come to the same conclusion as the Receiver.

[43] Neither have other creditors stepped up to offer, even a dollar, to acquire these shares in hopes of somehow realizing some greater return, in a break up of the assets of Southprint, or as a going concern.

[44] Unfortunately there is no evidence on which I could conclude that any marketing scheme would attract a better price or more interest. It is speculative to

suggest that it would. It is not sufficient, in my mind, to challenge the business judgment of an experienced Receiver on the basis of speculation.

[45] The underlying assumption of the defendant's argument is that the limited interest in the company is derived from the Receiver's handling of the company and the marketing effort. In support of this view, I have been referred to the valuation put on Southprint by Sportsclick at the time of purchase which closed in May, 2009.

[46] It is suggested that that is the best, if not the only reliable way to measure the value of the shares.

[47] I have examined Southprint's financial statements, the PWC due diligence draft report of January 2009 and the Southclick Inc. Business and Acquisition Plan, also dated January 2009. I have also considered the affidavits of Jack Ross.

[48] The following is a snapshot of what I view as indicators of the relative financial health of Southprint in the years 2004-2008:

	2004	2005	2006	2007	2008
Sales	20.1 M	18.8 M	16.7 M	14.01 M	13.9 M
Operating Loss	601.5 K	221 K	398 K	1.38 M	1.73 M
Net Operating Loss	396 K	242 K	306 K	1.04 M	1.4 M

[49] As can be seen, sales were dropping long before the current economic downturn. Net operating losses climbed to the point where they totaled $2.44 million on sales of $28 million in the last 2 years before Sportsclick made its purchase.

[50] Southprint was reliant for day to day operations on approximately $4.0 million in financing that was dependent on its then shareholders' personal financing backed by a traditional lender. It closed one plant in 2008, cut back shifts, laid off employees and in January 2009 closed completely for a short period of time.

[51] As at January 2009 a number of the 2009 licencing agreements had not been signed, including the contract thought to have the most value. One account that had generated sales of almost $2.0 million in 2007-2008 was not expected to be part of sales in 2009. It is not clear in the business plan how this significant loss of revenue was going to be replaced or how expenses were going to be controlled to off set such a loss.

[52] Notwithstanding its capital and real property assets Southprint is a company that has been in serious financial decline for several years.

[53] According to Mr. Ross's affidavit, Sportsclick acquired all of the outstanding shares of Southprint in exchange for the issuance of 6 million shares of Sportsclick to various of the former Directors and Officers of Southprint . The book value of the shares was $3 million. The value of the Sportsclick shares on the TSX Venture Exchange at the close of business on May 12, 2009 was $.15 per share, or $900,000. In addition, shareholder loans owed by the two previous principals of Southprint were treated as goodwill and taken off the books of the company in a non-cash transaction. While I agree that the purchase price was

approximately $4,000,000 in value, it was not put up in cash, which is the expectation of a Receiver.

[54] Put another way, there are certain methods of effecting a sale that would be available in an unfettered sale between a willing and financially stable vendor and a willing and financially stable purchaser that are not feasible on a liquidation. It is one of the reasons why it is common for assets to be sold off at significantly reduced prices in a Receivership from what might be negotiated in the ordinary course of business. In a liquidation the sale is typically for cash and is to be achieved in an abridged time frame. The longer the time extends, the greater the costs of the Receiver, and the greater the deterioration of the asset values to the creditors.

[55] The Sportsclick business plan for Southprint had the following general features:

- to improve the sales culture
- to reduce salary and benefit commitments by reducing staff and capping compensation

- renegotiating royalties
- reduction of some promotional costs
- to reorganize the financing
- to take advantage of the "synergies between Sportsclick and Southprint."

[56] The result was predicted to reduce overhead by $1 million.

[57] Sportsclick intended to sell 2 pieces of real property for $150,000 and to obtain direct financing of $4.0 million by factoring accounts receivable, mortgage financing, term financing and inventory financing.

[58] These forms of financing would be dependent upon the financial soundness of Sportsclick as the owner and guarantor. At no point does the plan speak to the infusion of capital by Sportsclick to Southprint.

[59] Under its current situation, Sportsclick has no ability to guarantee, nor to otherwise financially support the operations of Southprint. Creditors of Southprint

who stand ahead of the shareholder have seen this and issued demand for payment. Neither is there a prospect for the predicted benefits of the "synergies" between parent and subsidiary.

[60] Southprint can only survive as a going concern with a purchaser that has the financial ability and the will to take on a company that is now losing almost $2 million per year on declining sales, has limited creditworthiness, and is largely dependent on the willingness of the existing management team to continue to use their knowledge of the company and of its existing business relationships to the benefit of Southprint.

[61] The Receiver has no mandate to operate Southprint. The only other option is to simply close Southprint down and liquidate the assets, hoping that the equity will cover the cost of acquisition. That option is not open to the Receiver in this case. None of the creditors of Sportsclick have seen fit to step forward to take on this challenge. Whether that is a good business decision is not relevant to the position of the Receiver, who can only act with the resources that it has available to it. As Mr. Durnford indicated in his submissions, there may be collateral issues to

this matter that arise for resolution in the principal action as between the Bank and Sportsclick, but that is not determinative of the considerations before me.

[62] Finally, I am urged to accept that the accumulated financial acumen of the management of Sportsclick in making this purchase is a reliable indicator of the accuracy of the value they attached to Southprint. With respect, even good business people fail as a result of unexpected conditions, or because of errors, some within their control, some beyond their control. In this case the fate of Sportsclick speaks to a business model that failed. I will not defer to the judgement of those who oversaw that failure over the judgment of the Receiver.

Conclusion

[63] In *Greyvest Leasing Inc.* v. *Merkur* [1994] O.J. 2465, the Ontario Court of Justice held at paragraph 45 as follows:

> Commercial reasonableness depends upon the circumstances of the sale, including a consideration of variables such as the method of sale, the subject matter of the sale, advertising or other methods of exposure to the public, the time and place of the sale, and related expenses. A Receiver is under a particular duty to make a sufficient effort to get the best possible price for the assets. [See *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1

> (C.A.).] This duty is not to obtain the best possible price but to do everything reasonably possible with a view to getting the best possible price.

[64] I am satisfied that the Receiver in this case did that. It is a most disappointing result for the creditors, and the debtor. It will at best cover some of the disbursements on sale. No one benefits greatly from this, except perhaps the principals of T & A, but the evidence suggests that they have significant challenges ahead of them to make this a profitable company, in difficult economic times. They may be the only ones who have the ability to do so.

[65] The decisions made by the Receiver were made in good faith, cognizant of the duties that a Receiver is subject to. It made business judgments that may be easy, with the benefit of hindsight, to criticize, but they were reasonable having regard to the circumstances in existence at the time. No alternatives to the targeted marketing approach have been shown to exist that would provide, beyond speculation, the potential for a greater return.

[66] The tender process, once decided upon, was carried out in a transparent and fair manner, consistent with industry standards.

[67] Having regard to the facts as set out herein, and the duties on a court as enunciated in *Soundair,* I am satisfied that the Receiver's recommendation should be accepted. I am prepared to grant an Order to give effect to the sale of the shares of Southprint to T & A Venture Property Inc for the sum of $25,000 US.

[68] Delivered orally at Halifax, Nova Scotia this 12th day of November 2009.

Duncan J.