

2020 01G 2883

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
IN BANKRUPTCY AND INSOLVENCY

BETWEEN

SPROTT PRIVATE RESOURCE LENDING (COLLECTOR), LP

APPLICANT

AND:

THE KAMI MINE LIMITED PARTNERSHIP

FIRST RESPONDENT

AND:

KAMI GENERAL PARTNER LIMITED

SECOND RESPONDENT

AND:

ALDERON IRON ORE CORP.

THIRD RESPONDENT

MEMORANDUM OF FACT AND LAW OF THE RECEIVER

SUMMARY OF CURRENT DOCUMENT	
Court File Number(s):	2020 01G 2883
Date of Filing Document:	October 30, 2020
Name of Party Filing or Person:	Deloitte Restructuring Inc., in its capacity as court-appointed receiver (the <b>Receiver</b> ) of the First, Second and Third Respondents (the <b>Companies</b> )
Applications to which Document being filed relates:	Interlocutory Application of the Receiver for an Order, <i>inter alia</i> , approving the sale of the property of the Companies on the terms and conditions as set out in the First Report of the Receiver
Statement of Purpose in Filing:	Memorandum of Fact & Law in support of the Receiver's Application
Court Sub-File Number, if any:	N/A

## FACTS

1. On June 17, 2020 (the "**Date of Receivership**") the Receiver was appointed by Order of this Court (the "**Receivership Order**") as the receiver of all of the assets, undertakings, and property (the "**Property**") of Alderon Iron Ore Corp. ("**Alderon**"), The Kami Mine Limited Partnership ("**Kami LP**"), and Kami General Partner Limited ("**Kami GP**") (collectively the "**Companies**") acquired for, or used in relation to the business carried on by the Companies.
2. After reviewing the Prior Sales Process conducted by the financial advisors to the Companies, and after conducting its own sales process, the Receiver accepted an offer (subject to Court approval) from affiliated companies of a public company (collectively the "**Purchaser**") for the purchase of the property (the "**Purchased Assets**") more particularly set out in the Asset Purchase Agreement between the Purchaser and the Receiver dated October 29, 2020 (the "**APA**") on the terms and conditions set out in the APA.
3. The Receiver now seeks an Order:
  - (a) abridging the time for service, validating service, and dispensing with further service of the within Application;
  - (b) approving the activities, fees and disbursements of the Receiver as set out in the First Report of the Receiver, as filed with the Court (the "**First Report**");
  - (c) approving the sale of the Purchased Assets on the terms and conditions as set out in the APA;
  - (d) vesting title in the Purchaser free and clear of all liens, charges and encumbrances; and
  - (e) directing that the Confidential Supplement to the First Report (the "**Confidential Supplement**") be sealed with the Court unless otherwise ordered by the Court, until such time as the sale has been completed by the Receiver.
4. The Receiver relies on the facts as set out in the First Report. Capitalized terms used herein, where not defined, have the same meaning as ascribed to them in the First Report.

## ISSUES:

1. Should this Court abridge the time for service, validate service, and dispense with further service of the within Application?
2. Should this Court approve the sale of the Purchased Assets to the Purchaser on the terms and conditions set on the APA?
3. Should this Court issue an Approval and Vesting Order?
4. Should this Court issue the requested Sealing Order with respect to the Confidential Supplement?

## **LAW AND ARGUMENT**

### **1. Validation of Service**

1. There is a limited timeframe provided by the APA to obtain court approval and close the transaction. The Receiver has provided notice of these proceedings to all parties that received notice of the previous application seeking the Receivership Order, as well as to the Port, Hebei, Houseman and the three bidders that provided Final Offers to the Receiver. As noted in the First Report, the Receiver has been unable to identify all of the unsecured creditors of the Companies. However, following the closing of the sale of the Purchased Assets, the Receiver intends to undertake a claims solicitation process for unsecured creditors and shareholders to submit claims to the Receiver. The Receiver anticipates making a further application to Court for the approval of a claims process.
2. Due to the difficulty in identifying and serving all of the unsecured creditors, the Receiver seeks an order abridging the time for service, validating service and dispensing with further service of this Application to any other creditors of the Companies.
3. This Court has the discretion to abridge the time for service, validate service and dispense with further service of the Receiver's Application pursuant to Rule 3.03(1), Rule 6.04(2) and Rule 6.06 of the *Rules of the Supreme Court, 1986*.

**Reference:** *Rules of the Supreme Court, 1986*, Rule 3.03(1), Rule 6.04(2) and Rule 6.06 [Tab 1]

### **2. Approval of Sale**

4. The factors set out by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.* remain the leading analytical framework followed by the courts in determining whether to approve a sale of assets by a court-appointed receiver. The court stated that it should be reluctant to second-guess the considered business decisions made by its receiver. The court then outlined the factors that it must consider:

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

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

**Reference:** *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 at para 16 (Ont CA) [Tab 2]

5. The Ontario Court of Appeal cautioned against rejecting the recommendations of a receiver:

"I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O.R.]:

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

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers."

**Reference:** *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 at para 21 (Ont CA) [Tab 2]

6. Finally, the Ontario Court of Appeal discouraged comparing the offer accepted by the receiver to other offers:

"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."

**Reference:** *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 at para 30 (Ont CA) [Tab 2]

7. The *Soundair* decision has been routinely followed by this Honourable Court in these types of applications for court approval, most recently in *Sports Villas Resort, Inc. (Re)* wherein Justice Stack listed the factors set out in the *Soundair* decision and noted that the receiver is entitled to considerable deference by the court:

"The Ontario Superior Court of Justice in *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 11 C.B.R. (5th) 207, 139 A.C.W.S. (3d) 72 (Ont. S.C.J.), additional reasons at [2005] O.J. No. 2421, 140 A.C.W.S. (3d) 35 (Ont. S.C.J.), held that a receiver, as a court-appointed officer experienced in the insolvency field, is entitled considerable deference by the court relating to a sale of assets process and the adequacy of the receiver's efforts.

This Court, citing *Soundair*, provided the following comments with respect to applications for approval and vesting in receivership proceedings at paragraphs 20 and 21 of *Canadian Imperial Bank of Commerce (Re)*, 2018 NLSC 175 (N.L.

S.C.):

20 Based on the information and evidence provided, I am satisfied that the Receiver took the necessary and reasonable steps to obtain the best price for the assets. Where the Receiver has achieved its main obligation in obtaining as high a value for the assets as it reasonably could, the Court is entitled to find that the Receiver has acted properly and according to the directions given to it by the Court (*Regal Constellation Hotel Ltd., Re* (2004), 128 A.C.W.S. (3d) 646, 37 C.L.R. (3d) 207 (Ont. S.C.J. [Commercial List])

21 The Court's authority to confirm the actions of the Receiver is recognized in its entitlement to rely on the Receiver's expertise in arriving at its recommendations as it is assumed that the Receiver is acting properly unless it is clearly shown to be otherwise (*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.)."

**Reference:** *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 at paras 33-34 (NLSC) [Tab 3]

8. In *Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp.*, the Ontario Superior Court held that it is appropriate for a receiver to prefer an offer that contains more certainty than a competing bid:

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

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

**Reference:** *Skyepharmaceutical PLC v. Hyal Pharmaceutical Corp. (Re)* 1999 CarswellOnt 3641 at para 5 (Ont SC) [Tab 4] affirmed by the Ontario Court of Appeal at 2000 CarswellOnt 466 (Ont CA) [Tab 5]

9. + The Ontario Superior Court also held that unsuccessful bidders have no standing in these applications:

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

**Reference:** *Skyepharma PLC v. Hyal Pharmaceutical Corp. (Re)* 1999 CarswellOnt 3641 at para 8 (Ont SC) [Tab 4]

10. This decision was affirmed by the Ontario Court of Appeal which provided the following rationale:

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

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

**Reference:** *Skyepharma PLC v. Hyal Pharmaceutical Corp. (Re)* 2000 CarswellOnt 466 at paras 25-26 (Ont CA) [Tab 5]

11. This principle has been reiterated in the following cases which have also held that unsuccessful bidders have no standing in applications for court approval:

- (i) *Cobrico Developments Inc. v. Tucker Industries Inc.* 2000 CarswellAlta 1211 at para 32(Alta QB) [Tab 6];
- (ii) *Mega Bleu Inc./Mega Blue Inc., Re* 2003 CarswellNB 255 at paras 28-29 (NBQB) [Tab 7]; and
- (iii) *Business Development Bank of Canada v. Cansugar Inc.* 2006 CarswellNB 358 at para 24 [Tab 8] (NBQB).

12. In the present case, each of the Soundair factors has been met by the Receiver in its efforts to sell the assets of the Companies:

1. *The Receiver has made an extensive effort to get the best price and has not acted improvidently.*

- (i) Following its appointment by the Receivership Order, the Receiver conducted its due diligence and determined that the Prior Sales Process was a thorough and extensive endeavour to canvass the market generally and that potential investors/purchasers for this type of property with the financial credentials to develop it had been thoroughly canvassed.
- (ii) In light of the Prior Sales Process, the Receiver believed that a second sales and solicitation process conducted by the Receiver would not result in any superior offers to the offer previously submitted on May 12, 2020 (the "Pre-

existing Offer"), which offer was supported by Sprott, the Companies' senior secured creditor.

- (iii) When the Receiver was provided with unsolicited expressions of interest to the purchase the Property of the Companies from two interested parties, the Receiver explored those options notwithstanding Sprott's support of the Pre-existing Offer. The Receiver determined that there was now a more competitive sales environment for the Kami Mine than was the case during the Prior Sales Process. The Receiver then worked to achieve a sales price that would result in the full pay out of the Sprott Indebtedness and provide funds for distribution to other creditors.
- (iv) The efforts of the Receiver resulted in a very substantial increase in the purchase price for the Purchased Assets that had been obtained through the Prior Sales Process that now results in all creditors being paid in full as well as providing for substantial recovery for the shareholders of the Companies.

2. *The Receiver has considered the interests of all parties.*

As noted above, Sprott, the Companies' senior secured creditor, previously supported the Pre-existing Offer. Notwithstanding Sprott's support for that offer, the Receiver continued to make efforts to increase the purchase price for the Purchased Assets, for the benefit of any other secured creditors, the unsecured creditors and the shareholders of the Companies.

It is clear that the interests of all parties who would have an interest in the process were fully considered by the Receiver.

3. *The Receiver considered the efficacy and integrity of the process by which offers were obtained.*

Although the sales process managed by the Receiver may have been unconventional, the process was conducted in a manner that was fair and reasonable in the circumstances. All interested parties were treated fairly and confidentiality was maintained. By way of example, at the request of one of the bidders, the Receiver retained a third party to receive copies of all Final Offers in order to address any concerns regarding the timing and handling of the offers being received.

Considering the unique nature of the mining assets being sold, the Receiver adopted a process that was fair and reasonable and, in light of the outcome, very effective.

4. *There was no unfairness in the process.*

The sales process employed by the Receiver was fair to all parties. The Receiver conducted itself in a manner that was transparent, fair and reasonable. All interested parties were provided with the same information and all parties were given the same opportunity to submit their final and best offers to the Receiver.

It is not the role of the court to review in minute detail every element of the process by which a receiver's decision is reached. In *Soundair*, the Ontario Court of Appeal stated that the court must exercise extreme caution before interfering with the process

adopted by a receiver. There is no compelling evidence requiring this Court to interfere with the process used by the Receiver in this instance.

**Reference:** *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 at para 46 (Ont CA) [Tab 2]

13. The Receiver repeats the foregoing paragraphs and submits that the terms of the proposed sale satisfy all of the applicable legal requirements and merit the approval of this Honourable Court.

3. **Approval and Vesting Order**

14. The Receiver seeks a vesting order for the Purchased Assets, for the following reasons:

- (a) The APA is conditional upon the Purchaser receiving an Approval and Vesting Order on closing;
- (b) A vesting order will allow the Receiver to complete the transaction contemplated by the APA in a shorter period of time than would be possible if the Receiver is required to negotiate with each of the secured creditors or other claimants for a release of their respective encumbrances;
- (c) A vesting order will give the Purchaser confidence that it will be obtaining title to the Purchased Assets free and clear of any and all security interests, mortgages, trusts, deemed trusts, liens or other claims; and
- (d) A vesting order will substitute the sale proceeds for the Purchased Assets and provide a forum that is fair to all parties, the receivership proceedings, to establish the respective priorities to the sale proceeds, in contrast to the Receiver having to negotiate agreements with the secured creditors or other claimants in the absence of a vesting order.

15. The Receiver therefore seeks a vesting order from this Honourable Court, approving the APA and vesting all right, title and interest of the Companies in the Purchased Assets in and to the Purchaser upon the filing of a certificate by the Receiver certifying that the transactions contemplated by the APA have been completed to the satisfaction of the Receiver.

16. A key feature of the draft Approval and Vesting Order is the requirement that funds payable to the Receiver from sale of the Purchased Assets pursuant to the Order are to stand in place and stead of the assets being sold – with all claims to those assets attaching to the net sale proceeds with the same priority as they enjoyed immediately prior to the sale.

17. The distribution of the net sale proceeds would be a matter for consideration by the Court on a separate Application, to be brought by the Receiver at a later date on notice to all interested parties.

18. Section 183(1)(g) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended invests the Court with "such jurisdiction at law and in equity as will enable it to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act." This provision preserves the inherent jurisdiction of this Court to deal with the property within the jurisdiction of the Court and to control the proceedings



before it. The Vesting Order is an order dealing with property rights within the jurisdiction of this Court and is within the inherent jurisdiction of this Court.

**Reference:** *Bankruptcy and Insolvency Act ("BIA")*, RSC 1985, c B-3, s. 183(1)(g) [Tab 9]

19. The Receiver submits that the issuance of the proposed Vesting Order would facilitate the Receiver in the exercise of its mandate pursuant to the Receivership Order, is in the best interests of the general body of creditors, and would not operate to prejudice any party.

4. **Sealing Order**

20. The Receiver requests that a Court Order be granted sealing the Confidential Supplement and that it remain under seal unless otherwise ordered by the Court, to avoid any negative impact that could result from dissemination of the information contained in the Confidential Supplement. The Confidential Supplement contains commercially sensitive information pertaining to the valuation of the Companies and certain confidential information in respect of the offers submitted to the Receiver. Publication of the information contained in the Confidential Supplement would pose serious risks to the commercial interests of stakeholders and would irreparably harm the Receiver's efforts to maximize realizations from the Property should the proposed sale not close.

21. This Honourable Court has recognized that sealing orders in respect of commercially sensitive information are appropriate in the receivership context, particularly in respect of information related to the sale or proposed sale of assets:

"I also granted an order sealing the Receiver's First Report until the transaction contemplated in the application is completed or upon further order of the Court. As a court of inherent jurisdiction, this Court has authority to seal part or all of a court record (*Barnes, Re*, 2016 NLTD(G) 106 (N.L. T.D.)). The receiver submits that this is an appropriate case for me to exercise my discretion in accordance with generally accepted insolvency practice to grant a sealing order over the Receiver's First Report and its appendices, until completion of the sale contemplated by this application.

....

Because the proposed sale of the Subject Property has not been approved, the receiver is rightly concerned that the sensitive information contained in the Receiver's First Report could adversely affect the sale of these assets to another party."

**Reference:** *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 at paras 7-9 (NLSC) [Tab 3]

22. The Receiver submits that it is appropriate for the Court to grant the requested Sealing Order in this instance until the transaction contemplated by the APA has been completed.

**Conclusion**

23. The Receiver respectfully requests that this Honorable Court grant the relief requested, for the reasons set out in the First Report and in this Memorandum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador, this 30<sup>th</sup> day of October, 2020.

  
\_\_\_\_\_  
**Geoffrey Spencer**

McInnes Cooper

Solicitors for the Receiver

Whose address for service is:

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**TO: Supreme Court of Newfoundland & Labrador  
Trial Division (In Bankruptcy)  
P.O. Box 937  
313 Duckworth Street  
St. John's, NL A1C 5M3**

**AND TO: The Service List attached as Schedule "A" to the Application**

**List of Authorities:**

1. *Rules of the Supreme Court, 1986*, Rule 3.03(1), Rule 6.04(2) and Rule 6.06
2. *Royal Bank v Soundair Corp* 1991 CarswellOnt 205 (Ont CA)
3. *Sports Villas Resort, Inc. (Re)* 2020 CarswellNfld 188 (NLSC)
4. *Skyepharm PLC v. Hyal Pharmaceutical Corp. (Re)* 1999 CarswellOnt 3641 (Ont SC)
5. *Skyepharm PLC v. Hyal Pharmaceutical Corp. (Re)* 2000 CarswellOnt 466 (Ont CA)
6. *Cobrico Developments Inc. v. Tucker Industries Inc.* 2000 CarswellAlta 1211 (Alta QB)
7. *Mega Bleu Inc./Mega Blue Inc., Re* 2003 CarswellNB 255 (NBQB)
8. *Business Development Bank of Canada v. Cansugar Inc.* 2006 CarswellNB 358 (NBQB)
9. *Bankruptcy and Insolvency Act ("BIA")*, RSC 1985, c B-3, s. 183(1)(g)