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April 3, 2017

Honourable Justice Glen G. McDougall
Supreme Court of Nova Scotia (Halifax)
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

My Lord:

Re: **Motion of Victory Farms Inc. ("VFI") and Jonathan Mullen Mink Ranch Limited ("JMMR") for Certain Relief pursuant to the *Companies' Creditors Arrangement Act* ("CCAA"),**

A motion is to be heard by your Lordship on April 7, 2017, at 10.am. VFI and JMMR ("the Applicants") seek the following orders:

1. An Order extending the stay of proceedings granted on August 31, 2016, up to and including May 31, 2017;
2. An Order approving the sale transaction contemplated by a Stalking Horse Asset Purchase Agreement dated as at February 9, 2017 between the Applicants and North American Fur Auctions Inc.;
3. An Order approving a Claims Procedure process; and
4. An Order correcting a clerical mistake in the 2nd Charging Order issued February 16, 2017.

Filed on this motion are:

1. The 7th Report of the Monitor[1]

[1] The monitor will file prior to the hearing

PL# 136351/6381734

2. Four draft orders;
3. This brief.

An affidavit of service will be filed when the matter comes before the court.

The Facts

"Designated Creditors"

The details of the secured creditors referred to as "Designated Creditors" in the Sales Procedure Order are set out in the Affidavit of Tim Hill, Q.C., filed on August 24, 2016. To again summarize, the secured charges affecting the property of VFI and JMMR are as follows:

(a) VFI owns one real property parcel which is mortgaged in favour of Nova Scotia Farm Loan Board ("NSFLB");

(b) JMMR owns eight real property parcels, three of which are mortgaged in favour of Farm Credit Canada ("FCC");

(c) VFI has registered against its personal property charges in favour of American Legend Cooperative ("ALC"), NSFLB, FCC, the Bank of Nova Scotia ("BNS"), CNH Industrial Capital Canada Ltd. ("CNH"), and North American Fur Auctions Inc. ("NAFA");

(d) JMMR has registered against its personal property charges in favour of ALC, FCC, and NAFA; and

(e) There is one judgment in favour of the Workers' Compensation Board registered against the personal property of VFI.

Appendix "D" to the Third report of the Monitor (dated November 21, 2016 and filed November 22, 2017) contains the then financial statements of the Applicants. These show that the liabilities of the Applicants total some $15,725,000, the bulk of which is owed to ALC and NAFA.

The Sales Process to Date

The Court approved the Stalking Horse and Bidding Procedures Order on February 16, 2017. The purpose was to test the market for the Applicants' assets in advance of an auction of them should there be higher bids. The intent was to maximize the value of the Applicants' assets and to avoid low bids in a going concern sale.

The 7th Report of the Monitor sets out in great detail the efforts of the Monitor to market the assets in compliance with the Stalking Horse and Bidding Procedures Order.

The Monitor advertised in the Chronicle Herald (Provincial Edition), and in each of the Yarmouth Vanguard and the on-line edition of the Digby Courier, once weekly for five consecutive weeks. In addition, the Monitor advertised in the Insolvency Insider for five consecutive weeks.

The Monitor advertised the opportunity on the Monitor's website up to and including the bid deadline specified in the Stalking Horse and Bidding Procedures Order.

The Monitor also identified industry group websites, contacts within the fur farming industry, and other individuals and groups to whom targeted information circulars were sent. In this regard, the Monitor advertised in the Canadian Mink Breeders Association newsletter, asked the Nova Scotia Mink Breeders Association to circulate same to its members (but who declined to do so), had contact with the President of the Prince Edward Island Mink Breeders Association who advised that its members were aware of the sale, and attempted to contact the Newfoundland and Labrador Mink Breeders Association (without result).

The Monitor placed an advertisement in the Atlantic Farm Focus magazine. This is an Atlantic Canadian magazine that targets the agricultural and rural communities of the Maritimes with a monthly publication of approximately eleven thousand copies.

The Monitor also placed an online advertisement with AllNovaScotia.com which ran daily for two consecutive weeks.

Notwithstanding these efforts, the Monitor was only contacted by three parties before the bid deadline.

The first party initiating contact received an information package, executed a non-disclosure agreement, and was provided with additional financial information. No bid was received from that party.

A second party requested an information package and was provided with a non-disclosure agreement for execution. That party subsequently contacted the Monitor and advised that it had no interest in proceeding further.

Finally, a third party contacted the Monitor, executed a non-disclosure agreement, and was provided with an information package. No bid was received from that party.

In summary, no Qualifying Bids as described in the Stalking Horse and Bidding Procedures Order were received prior to the bid deadline.

The Monitor has expressed the opinion that the Sale Approval and Vesting Order "is required to support the Applicants' restructuring efforts and that the terms of the Order are appropriate as a means of facilitating the restructuring of the Applicants".

The Motions Before the Court

1. The Extension of the Stay

The applicants seek a stay extension during the Claims Procedure process to allow that to be completed, and the final Distribution Order to be sought.

In our previous submissions, we drew the attention of the court to the following points. We have not attached the cases cited again, as they remain in the court file.

Section 11.02(2) of the CCAA, reads:

> **11.02(2) Stays, etc. — other than initial application**
>
> A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

The prerequisites for the making of such an order are set out in section 11.02(3):

11.02(3) Burden of proof on application

The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

The Court's attention is respectfully drawn to the following extracts from *Re San Francisco Gifts Ltd.*[2], which summarize the approach taken to the issues raised in section 11.02(3) (although it is noted that the sections are renumbered as a result of the 2009 amendments):

Fundamentals

11 The well established remedial purpose of the *CCAA* is to facilitate the making of a compromise or arrangement by an insolvent company with its creditors to the end that the company is able to stay in business. The premise is that this will result in a benefit to the company, its creditors and employees. The Act is to be given a large and liberal interpretation.

[2] 2005 ABQB 91

12 The court's jurisdiction under s. 11(6) to extend a stay of proceedings (beyond the initial 30 days of a *CCAA* order) is preconditioned on the applicant satisfying it that:

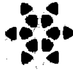
(a) circumstances exist that make such an order appropriate; and
(b) the applicant has acted, and is acting, in good faith and with due diligence.

13 Whether it is "appropriate" to make the order is not dependant on finding "due diligence" and "good faith." Indeed, refusal on that basis can be the result of an independent or interconnected finding. Stays of proceedings have been refused where the company is hopelessly insolvent; has acted in bad faith; or where the plan of arrangement is unworkable, impractical or essentially doomed to failure.

Meaning of "Good Faith"

14 The term "good faith" is not defined in the *CCAA* and there is a paucity of judicial consideration about its meaning in the context of stay extension applications. The opposing landlords on this application rely on the following definition of "good faith" found in *Black's Law Dictionary* to support the proposition that good faith encompasses general commercial fairness and honesty:

A state of mind consisting of: (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealings in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage. [Emphasis added]

BOYNECLARKE 
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> 15 "Good faith" is defined as "honesty of intention" in the *Concise Oxford Dictionary*.
>
> 16 Regardless of which definition is used, honesty is at the core. ...
>
> ***Supervising Court's Role***
>
> 28 The court's role during the stay period has been described as a supervisory one, meant to: "...preserve the *status quo* and to move the process along to the point where an arrangement or compromise is approved or it is evident that the attempt is doomed to failure." That is not to say that the supervising judge is limited to a myopic view of balance sheets, scheduling of creditors' meetings and the like. On the contrary, this role requires attention to changing circumstances and vigilance in ensuring that a delicate balance of interests is maintained.
>
> 29 Although the supervising judge's main concern centres on actions affecting stakeholders in the proceeding, she is also responsible for protecting the institutional integrity of the *CCAA* courts, preserving their public esteem, and doing equity. She cannot turn a blind eye to corporate conduct that could affect the public's confidence in the *CCAA* process but must be alive to concerns of offensive business practices that are of such gravity that the interests of stakeholders in the proceeding must yield to those of the public at large.

To summarize, the Court is vested with a great deal of discretion on a motion such as this. Throughout its inquiry, the Court will bear in mind the "well established remedial purpose of the CCAA", which is "to facilitate the making of a compromise or

arrangement by an insolvent company with its creditors to the end that the company is able to stay in business".

In reaching a decision on the motion the Court is informed by its appreciation of the honesty of the intentions of the debtor, the effect of an extension on the stakeholders in the business (which may include equity owners, employees and creditors, amongst others), and the integrity of the CCAA process.

In the case at bar, there is no suggestion that the applicants lack integrity in their operations or approach to the CCAA process, or that the process is doomed to failure. There was a patently honest attempt to save the business by reaching a realistic compromise with the creditors. That failed. The Applicants have now run a sales process and a sale has been accomplished. In order to determine initial entitlement to the realized funds, a Claims Procedure process is required. The stay will allow this to be accomplished, and will "preserve the status quo" until that process culminates in a motion for a Final Distribution Order.

Having stated same, it should also be noted that in the event a claim is disallowed the dispute process may well result in a further extension being sought in the event that process does not run its mandated course prior to May 31, 2017.

2. *The Sale Approval and Vesting Order*

Section 36 of the *CCAA* governs the sale of assets of a debtor subject to the *Act*:

> **Restriction on disposition of business assets**
>
> **36 (1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

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

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

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

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

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

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

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

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

Section 36 has been the subject of a number of cases, and the leading text summarizes the Court's duty on an application to approve a sale thus:

> In deciding whether a sale of substantial assets should be approved by the court, an appropriate analogy is to be found in cases dealing with the approval of a sale by a court-appointed receiver. The following are the duties of the court in deciding whether the sale should be approved:
>
> 1. to consider whether the debtor has made a sufficient effort to obtain the best price and has not acted improvidently;
> 2. to consider the interests of the parties;
> 3. to consider the efficacy and integrity of the process by which offers have been obtained; and
> 4. to consider whether there has been unfairness in the working out of the process: *Re Canadian Red Cross Society*, *supra*[3].

Each of these points are addressed in turn.

Was there sufficient effort to obtain the best price?

This matter proceeded by way of a stalking horse bid. That set a base price. The Stalking Horse and Bidding Procedures Order approved by the Court set a process by which any interested party could make a bid and compete with the stalking horse bidder (NAFA) for the purchase of the assets.

Despite the Monitor meeting and indeed exceeding the advertising requirements of the Stalking Horse and Bidding Procedures Order no bids were received.

Are the best interests of the parties served by the sale?

The Applicants cannot continue to operate on an indefinite basis given the level of debt and market conditions. As noted by the Monitor, this sale maximizes the sale proceeds

[3] L.W. Houlden and Geoffrey B. Morawetz, *Houlden & Morawetz Analysis* N§196, essentially adopting the principles enumerated in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)

and in that sense is preferable to a liquidation on a piecemeal basis. The sale will allow the business to be continued, albeit by a new owner.

An objection by a secured creditor to a sale is not determinative of "what is in the best interest of the parties". Where the Court finds that an offer is clearly preferable to a forced liquidation or a bankruptcy, it will be in the interests of all stakeholders that the sale be approved[4].

The efficacy and integrity of the process by which offers have been obtained

The process was approved by the Court, which considered it a fair method of attempting to maximize the sale proceeds. The process was conducted competently and diligently by the Monitor. As noted, the Monitor exceeded the Court directed remit in its efforts to market the assets. The process was efficient and the Monitor acted with integrity.

Has there been unfairness in the working out of the process?

It is respectfully submitted that nothing in the approved Stalking Horse and Bidding Procedures Order, or in the manner in which the Monitor conducted its obligations thereunder, demonstrate any hint of unfairness. The Monitor acted scrupulously and fairly.

In summary, it is respectfully submitted that the Sale Approval and Vesting Order should issue. With respect to the form of same, it is in the form recently approved by this Court and issued in Hfx. 453673: *Re Hefler Forest Products Limited*. Minimal changes were made with respect to the naming of parties etc., and an additional schedule was added so that the Agreement of Purchase and Sale being approved is attached to the order, rather than appearing in a separate affidavit.

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[4] *Re Winnipeg Motor Express Inc.*, 2008 MBQB 297

It should be noted that, as with the Order in *Re Hefler Forest Products Limited,* the Sale Approval and Vesting Order provides for the repayment of the DIP facility (paragraph 7.b). In this case, the DIP charge is not all encompassing, but rather:

> ... a charge (the "DIP Lender's Charge") on the property of the Applicants limited to limited to a charge over the livestock (mink) of the Applicants, including breeding stock, the pelts derived therefrom ("the Mink"), but also including cash derived from advances from the DIP Lender and accounts receivable derived from the sale of the Mink ("the DIP Charged Property"), and the proceeds thereof, as security for any and all obligations of the Applicants under or pursuant to the DIP Facility and the DIP Term Sheet, which charge shall not exceed the aggregate amount owed to the DIP Lender under the DIP Facility and the DIP Term Sheet. The DIP Lender's Charge shall have the priority set out herein.

The DIP repayment will therefore be ascribed to that portion of the proceeds of sale set out in the Agreement of Purchase and Sale (which is appended to the Order).

3. *The Claims Procedure Order*

The Claims Procedure Order is in a form derived from the Ontario practice. The following points are of note:

(a) The Order does not provide for an adjudication of the priority of claims. Priority issues will be addressed when a Final Distribution Order is sought;

(b) The Order provides only for claims from certain secured creditors, described in the Order as "Designated Creditors", as it is clear that there can be no surplus for unsecured creditors;

(c) Those creditors whose security will not be effected by the sale are not included i.e. BNS (security over a motor vehicle), and CNH (security over several tractors);

(d) Secured creditors with security over real property are not included *vis a vis* that security (FCC and NSFLB), as the real property is sold subject to those real property mortgages;

(e) The Monitor is required to send Proofs of Claim, the Schedule to Proof of Claim and an Instruction Letter to the Designated Creditors by April 12, 2017;

(f) Proofs of Claim must be returned by the Claims Bar Date which is April 28, 2017;

(g) If the claim is contested, a Notice of Disallowance must be delivered by the Monitor to the Designated Creditor within 10 days after the Claims Bar Date;

(h) If the Designated Creditor disputes the disallowance of its claim, a Dispute Notice must be delivered to the Monitor within 10 days after the date of the Notice of Disallowance;

(i) A period of 14 days is allowed for the Monitor and Designated Creditor to attempt to resolve the issue, failing which the aggrieved Designated Creditor has a further 7 days to apply to the Court for resolution of the matter.

It is submitted that this abbreviated process is efficacious given the nature of the likely claims and the limited number of potential claimants. The Monitor has approved the process, and is in agreement with same.

4. The "Slip" Order

The Court is referred to counsel's brief dated February 9, 2017, and filed on the same date. In particular, at paragraph 3 on page 1, the request for an increase in DIP financing is from $1,500,000 to $3,000,000. This is elaborated upon at page 14 of the brief.

Reference is also made to same at page 5 of the 6th Report of the Monitor dated February 10, 2017 and filed the same day.

The request was approved orally by the Court. However, it appears that the Order issued specified $2,500,000 as the total approved DIP financing, rather than $3,000,000 sought and approved. This appears to be a result of counsel's error in providing the order.

The Court's attention is respectfully drawn to *Civil Procedure Rule* 78.08 which reads in part:

> A judge may do any of the following, although a final order has been issued:
>
> (a) correct a clerical mistake, or an error resulting from an accidental mistake or omission, in an order; ...

The "slip" rule is one of long standing, and one recently noted and recognized by the Nova Scotia Court of Appeal[5]:

> 38 Although the Chambers judge may have reached the right decision in that case, his statement that "one judge cannot interfere with the order of another judge of co-ordinate jurisdiction, unless that power has been given by some statute" is too broad for two reasons. First, the Chambers judge did not acknowledge the longstanding and wide exceptions to this general rule not the least of which is the so-called "Slip rule" (Rule 78.08 of the *Nova Scotia Civil Procedure Rules*) which allows a court to correct technical mistakes and errors with respect to the express intentions of court. Second, the Chambers judge did not appear to appreciate that a Chambers judge has the inherent jurisdiction to control process even though that had been accepted as far back as *Wallace v. Davis*, 1907 CarswellNS 93 (N.S. T.D.) and it has since been acknowledged by this Court, for example, in *Goodwin, supra* and *Ofume, supra*.

[5] *Lord* v. *Smith*, 2013 NSCA 34

Here the Applicants seek to correct an error "with respect to the express intentions of court". It is respectfully submitted that the Order correcting the amount of authorized DIP financing should issue.

Conclusion

In racing parlance, we are now entering the final furlong in this process.

The issuance of the "slip" Order corrects an obvious clerical error.

The issuance of the Sale Approval and Vesting Order will allow the receipt of the sale proceeds, and enable the purchaser to continue with the business. It will also conclude the DIP financing process and provide for the repayment of same.

The issuance of the Claims Procedure Order will set the process by which the claims of secured creditors *prima facie* entitled to claim against the sales process can be quantified and the security confirmed. The priority of secured creditors will be addressed when a Final Distribution Order is sought.

The Stay Extension Order is necessary to maintain the status quo as the entire process moves to an end.

All of which is respectfully submitted

BOYNECLARKE LLP

Tim Hill, Q.C.

HMANALY N§196
Houlden & Morawetz Analysis N§196

Houlden and Morawetz Bankruptcy and Insolvency Analysis

Companies Creditors Arrangement Act
Sections 35-36

L.W. Houlden and Geoffrey B. Morawetz

N§196 — Court Approval of Sale of Assets

N§196 — Court Approval of Sale of Assets

See s. 36

There is a restriction on the disposition of business assets by the debtor while it is under the protection of the *CCAA* without the approval of the court. The sections below describe the conditions under which the court may approve a sale, including the factors the court must consider before granting the order to sell or dispose of assets outside the ordinary course of business. This section also discusses the caselaw prior to enactment of the amendments under Chapter 36 Statutes of Canada.

A monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since this would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party, *i.e.* the new prospective purchaser or the union representing the employees, over others. In determining the appropriateness of the sale process, the court will consider whether the monitor made a sufficient effort to get the best price and did not act improvidently; the interests of all parties; and whether there is any unfairness in the process: *Re Tiger Brand Knitting Co.* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.). See also *Royal Bank v. Soundair Corp.* (1991), [1991] O.J. No. 1137, 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.); *Crown Trust Co. v. Rosenberg* (1986), 1986 CarswellOnt 235, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.).

See Shelley Fitzpatrick, "Liquidating *CCAA*s — Are We Praying to False Gods?"; and Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone Awry?", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009).

The court has jurisdiction to make an order for a sale of substantial assets of the debtor prior to the plan being placed before the creditors for consideration. The source of this jurisdiction is twofold: the power of the court to impose terms and conditions on the granting of a stay order under s. 11; and the inherent jurisdiction of the court to fill in gaps in the legislation so as to give effect to the objects of the *CCAA*: *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299, 1998 CarswellOnt 3346, [1998] O.J. No. 3306; additional reasons at (1998), 5 C.B.R. (4th) 321, 1998 CarswellOnt 3345; further additional reasons at (1998), 5 C.B.R. (4th) 319, 1998 CarswellOnt 3347 (Ont. Gen. Div. [Commercial List]); leave to appeal refused (1998), 32 C.B.R. (4th) 21, 1998 CarswellOnt 5967 (Ont. C.A.).

In deciding whether a sale of substantial assets should be approved by the court, an appropriate analogy is to be found in cases dealing with the approval of a sale by a court-appointed receiver. The following are the duties of the court in deciding whether the sale should be approved:

1. to consider whether the debtor has made a sufficient effort to obtain the best price and has not acted improvidently;

2. to consider the interests of the parties;

3. to consider the efficacy and integrity of the process by which offers have been obtained; and

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4. to consider whether there has been unfairness in the working out of the process: *Re Canadian Red Cross Society, supra.*

In *Re Skydome Corp.* (1998), 16 C.B.R. (4th) 125, 1998 CarswellOnt 5914 (Ont. Gen. Div. [Commercial List]), after granting a stay order, a substantial offer was received for the purchase of the debtor company; the court granted an extension of the stay and directed the monitor to put the debtor up for sale on the open market under an auction bidding process.

There is no need to appoint an interim receiver to carry out a sale of substantial assets in *CCAA* proceedings. After a proper call for tenders, the court can, prior to a formal plan being filed, approve such a sale being made directly by the debtor to a purchaser where a sale is the only viable alternative for the debtor: *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 194, 2001 CarswellOnt 3331 (Ont. S.C.J. [Commercial List]); leave to appeal refused (2001), 27 C.B.R. (4th) 197, 150 O.A.C. 384, 2001 CarswellOnt 3482 (Ont. C.A.). The sale of assets of the debtor company during the course of *CCAA* proceedings was consistent with the broad remedial purpose and flexibility of the *Act*: *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197, 2001 CarswellOnt 3482 (Ont. C.A.).

One of the applicants in a *CCAA* proceeding had granted a restrictive covenant on its land in return for $345,000 from a purchaser of adjacent property that for 40 years no restaurant uses would be allowed without consent of purchaser. The applicant now sought an order vesting that property in a third party purchaser free of the restrictive covenant as part of a liquidating sale process in which the purchaser had made it a condition that an order be granted. The Ontario Superior Court of Justice declined to grant requested vesting order, citing cases under the *Conveyancing and Law of Property Act* suggesting that in *CCAA* proceedings, the court has to act with greater caution in discharging a covenant running with land than in dealing with executory contracts. The court held this case was not one where an order terminating an executory contract was sought to permit continued operation of business as a going concern, but rather, it was a liquidating sale for benefit of secured creditors. No evidence was before the court that the third party would be unwilling to complete the sale transaction at a reduced price, with the restrictive covenant left in place. Also, there is no evidence of the type of operation to be entered into by third party, and thus no evidence on which to make a finding of lack of prejudice to the beneficiary of the restrictive covenant: *Re Terastar Realty Corp.* (2005), 2005 CarswellOnt 5985, 16 C.B.R. (5th) 111, 39 R.P.R. (4th) 1 (Ont. S.C.J.).

In *Re PSINET Ltd.* (2001), 28 C.B.R. (4th) 95, 2001 CarswellOnt 3405 (Ont. S.C.J. [Commercial List]); affirmed (2002), 2002 CarswellOnt 619, 32 C.B.R. (4th) 102 (Ont. C.A.). the court, in the course of *CCAA* proceedings, approved a sale of assets of the debtor and ordered that an amount sufficient to pay the claim of an objecting creditor be paid into court pending a subsequent determination of the amount owing to the creditor and the creditor's entitlement to payment.

Mr. Justice Clément Gascon of the Québec Superior Court considered the conditions under which a court should approve a stalking horse bid in the context of a *CCAA* restructuring. The court held that there are four factors, which while not necessarily exhaustive, are important considerations in assessing whether or not a stalking horse bid should be authorized. First, has there been some control exercised at the first stage of competition to become the stalking horse bidder and to what extent? Given that the stalking horse establishes the benchmark to attract other bids, accuracy is key to the integrity of the whole process; and since the stalking horse bid is normally subject to a break fee, accuracy is also important as the call for overbids will have to exceed a certain margin over and above the stalking horse bid. Second, the court should consider whether there is a need for stability within a very short time frame for the debtor to continue operations and the contemplated restructuring to be successful. Since a stalking horse bid process is generally more stringent and less flexible than a traditional call-for-tender process, in the resort to such a process, time should normally be of the essence. Third, the court held that it must consider the economic incentives for the stalking horse bidder, in terms of break fee, topping fee and overbid increments protection in terms of whether they are fair and reasonable in the circumstances. This consideration enhances fairness to all bidders and helps to ensure that fees do not chill the market and deter other potential bidders and thus render the process inefficient. Finally, the court held that it would consider whether the time lines contemplated are reasonable to insure a fair process at the second stage of the process, specifically, consideration of all interested bidders. In the circumstances, the court held that the process followed by the monitor failed to satisfy the first and third considerations and accordingly, the court declined to authorize the proposed process. The monitor had made no attempt to canvass the market to see if any other party was interested in becoming the stalking horse bidder, and this fact combined with the fact that the monitor had not completed its own evaluation of the assets such that it could use a benchmark against which to assess the stalking horse bid. The court was not convinced that the monitor had made sufficient efforts to get the best price at the stalking horse bid level. Second, the court found that the monitor did not establish that the break fee and overbid increments protection of the stalking horse bidder were fair and reasonable. Here, the proposed 10% in economic incentives was well

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above the 1% to 3% normally viewed as reasonable, particularly in the absence of any evidence of real administrative expenses associated with the stalking horse bidding role. The court held that in the situation of a restructuring that is in reality a liquidation leading to minimal recovery, it is important that the process followed is above reproach. The court dismissed the motion for a stalking bid process: *In the Matter of the Compromise or Arrangement of Boutique Euphoria Inc. and Lingerie Studio Inc.* (19 July 2007), Dossier no. 500-11-030746-073 (Que. S.C.).

Where a court in *CCAA* proceedings authorizes a substantial sale of assets of the debtor company, it can also authorize the assignment to the purchaser of an agreement for the supply of equipment by the debtor to a customer and can prohibit the customer from terminating the agreement, notwithstanding that defaults have been committed and are continuing to be committed by the debtor and that the customer objects to the making of the order. In making the order, the court found that the debtor had made a sufficient effort to obtain the best price and was not acting improvidently; that the sale took into account the interests of trade creditors, employees and members of the public: that the efficacy and integrity of the process by which the offers were obtained was adequate; and that there had been no unfairness in the process: *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 302, 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298 (Ont. S.C.J. [Commercial List]). Subsequently, there was a hearing concerning the form of the order. The customer submitted that the form of the order permitting the assignment should be made subject to any and all claims of the customer for its contractual entitlements under its agreement with the debtor. The court did not grant this request. It gave additional reasons for its previous order by finding that its order prohibiting proceedings by the customer had been made under the authority of s. 11(4)(c) of the *CCAA* and directed that any proceedings by the customer were prohibited except those that were consistent with the assignment that had been approved by it: *Re Playdium Entertainment Corp.* (2001), 31 C.B.R. (4th) 309, 2001 CarswellOnt 4109 (Ont. S.C.J. [Commercial List]).

A standby purchase agreement in favour of a major lender to the debtor will be approved over objections of some stakeholders where it is shown that it will provide much needed stability and confidence in the debtor company, allowing it to maintain its relationships with customers, suppliers and employees and to emerge as a viable competitive entity from the *CCAA* process: *Re Air Canada [Deutsche Bank purchase agreement motion]* (2004), 49 C.B.R. (4th) 177, 2004 CarswellOnt 1845 (Ont. S.C.J. [Commercial]).

In general, a court should accept a proposed sale process under the *CCAA* when it has been recommended by a monitor and is supported by the major creditors. The discretion to vary the process should be exercised only in exceptional circumstances. The sale process of a company under *CCAA* protection ought not to be dictated by a supplier *qua* supplier. As well, the union's concern for the welfare of the debtor's workers did not justify trumping the creditors' concerns that they be treated fairly in a sale process: *Re Ivaco Inc.* (2004), 2004 CarswellOnt 2397, 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]).

In *Re 843504 Alberta Ltd.* (2003), 2003 CarswellAlta 1786, 2003 ABQB 1015, 4 C.B.R. (5th) 306, 30 Alta. L.R. (4th) 91, 351 A.R. 222 (Alta. Q.B.), a sale process proposed by the monitor was not approved prior to creditor approval of a plan. The court observed that Alberta solutions generally require a corporate entity to continue in some form or another and will allow for a liquidation proposal only in exceptional circumstances. The court distinguished the Alberta approach from the Ontario approach, referring to *Royal Bank v. Fracmaster Ltd.* (1999), 1999 CarswellAlta 539, [1999] A.J. No. 675, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.), where debtors have been able to make use of the *CCAA* to liquidate when there is no prospect of corporate survival, and when no plan of arrangement has been proposed.

In a trilogy of judgments in *Les Boutiques San Francisco*, the Québec Superior Court considered the requirements for sale of assets. In endorsing a sale, the court considered the following factors: the bank syndicate supported the sale; the monitor had advised the court that the offer was adequate and acceptable; the debtor had received no other offer; the offer was greater than the liquidation value of the company; the sale would result in continued employment for most employees; and it represented the best price possible after having conducted a sale process. The court held that creditors were the only parties with claims on the assets. Relying on the judgment in *Re Loewen Group Inc.* (2001), [2001] O.J. No. 5640, 2001 CarswellOnt 4910, 32 C.B.R. (4th) 54, 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List]), which found that the shareholders did not have an economic interest remaining in an insolvent company and hence did not have the right to veto a proposed plan to sell all or substantially all of the assets, the court in *San Francisco* held that proposed sale did not require approval of shareholders and the court authorized the purge of rights under the *Code de procédure civile du Québec*: *Re Boutiques San Francisco Inc.* (2004), 2004 CarswellQue 10918, REJB 2004-54720, 7 C.B.R. (5th) 189 (Que. S.C.). In second judgment on asset sales in the same *CCAA* proceeding, considering a request to authorize alienation of certain assets, the court approved the process

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conducted, observing that one of the goals of the *CCAA* is to encourage an orderly and fair process. The court held that the debtor and monitor had put in place a reasonable process for the selection of offers aimed at an efficient, equitable, transparent and rapid search for the best result to the ultimate benefit of all creditors. While a competitive bid offered a better price with more conditions, the court held that price is not the only guide, and on balance, concluded that the resulting bidder should be endorsed. The court approved the application and authorized the debtor to conclude an agreement lease and sale of fixed assets: *Re Boutiques San Francisco Inc.* (2004), REJB 2004-54736, 2004 CarswellQue 753, 5 C.B.R. (5th) 197, [2004] R.J.Q. 965 (Que. S.C.). In a third judgment closely following the first two, the Québec Superior Court held that a sale process was reasonable, sufficient and equitable in that the market was canvassed, the received offers were analyzed and those with insufficient price or unacceptable financial conditions were rejected, and an offer was selected subject to certain conditions being met. Overall, the court was satisfied that the offer accepted was the highest price and most advantageous conditions, observing that major creditors supported the sale; almost all of the employees would remain employed under the successor company; and the debtor could continue to operate without the sizeable weekly losses that it was incurring: *Re Boutiques San Francisco Inc.* (27 février 2004), no. C.S. Montréal 500-11-022070-037 (C.S.Q.).

In the context of a sale of substantially all the debtor's assets under the *CCAA* where proceeds of sale are substituted for the debtor's assets and are subject to claims of the debtor's secured creditors, the sale proceeds cannot constitute trust funds in favour of construction lien claimants under the *Construction Lien Act* since, in such circumstances: a debtor is not an owner of the assets sold to the extent that secured creditors have an interest therein; the debtor has no interest in or right to any of the net sale proceeds ultimately paid to and held by the monitor appointed in the *CCAA* proceedings; and at best, the debtor simply acts as a conduit for the receipt by the monitor of the sale proceeds: *Re Veltri Metal Products Co.* (2005), 2005 CarswellOnt 3326, [2005] O.J. No. 3217, 201 O.A.C. 79, 16 C.B.R. (5th) 289 (Ont. C.A.).

The Ontario Superior Court of Justice held that it is appropriate to re-open a sales process for a very short timeframe to consider further offers for a debtor company's assets under the *CCAA* where there is at least the potential that a new offer will lead to a much-improved return for the unsecured creditors than an existing firm offer. The court held that the Ontario Court of Appeal's decision in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, [1991] O.J. No. 1137, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.) could be distinguished in the circumstances, since there was at least the potential for a much-improved return for unsecured creditors. The court also found that although there was a risk to the estate of further costs and time in connection with the re-opening of the sales process, such risks were warranted in the circumstances since the unsecured creditors, i.e., the stakeholders who would bear such risks, were prepared to assume the risks: *Re 1587930 Ontario Ltd.* (2006), 2006 CarswellOnt 6419, 25 C.B.R. (5th) 260 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court approved an extension of a stay under the *CCAA* to allow the debtor to sell and replace aircraft in service to meet federal regulatory changes and held that it was appropriate to delay the vote of creditors on a proposed *CCAA* plan until the sale of assets occurred as it was generally aimed at trying to reorganize the enterprise to allow it to continue as a going concern. With respect to the secured creditor of the original aircraft who would be an unsecured creditor after the planes were sold and the assets used to satisfy the secured part of its claim, the court held that while it would be inappropriate to require the creditor to vote as an unsecured creditor if the balance owing by the debtor remained partially secured, there was no reason why the creditor should not be required to vote as an unsecured creditor once the amount of the unsecured claim was determined: *Re Hawkair Aviation Services Ltd.* (2006), 2006 CarswellBC 1637, 2006 BCSC 1006, 23 C.B.R. (5th) 215 (B.C. S.C. [In Chambers]).

In *Re Air Canada*, Farley J. held that substantial harm to the integrity of the insolvency on *CCAA* matters regime would be done if a structured equity investment process pursued by the stakeholders was turned into an outright auction. He held that the "final and best" in relation to an offer to invest "should be given its ordinary meaning in Canadian insolvency jurisprudence and practice". As well, the court concluded that it was contrary to the interests of certainty and finality to give all stakeholders an opportunity to make submissions to the board of directors regarding offers. It would be unreasonable for the board, which had the assistance of financial and other advisors, to be inundated with the submissions of multiple stakeholders: *Re Air Canada* (2003), 2003 CarswellOnt 5243, 46 C.B.R. (4th) 1 (Ont. S.C.J. [Commercial List]).

Where applications were brought by two disappointed bidders or potential bidders on the purchase and sale of assets of one of the debtor entities, the Alberta Court of Queen's Bench held that although costs are not often awarded against unsuccessful parties in a *CCAA* proceeding, there are certain applications where the no-costs convention is not operative and costs are awarded. Madam Justice Romaine observed: "There are policy reasons for this convention: generally, stakeholders in *CCAA* proceedings are involuntary parties in the process, compelled to participate by reason of the *CCAA* debtor seeking protection

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of the *Act*. Creditors and other stakeholders often bring applications in order to protect the priority of their positions or to seek a lifting of the stay provisions in circumstances they believe warrant such relief." Romaine J. noted that the parties involved were sophisticated commercial entities that had voluntarily entered into the process in an attempt to better their positions. The policy reasons that underlie the no-costs convention were not operative in this case, and there was no reason to depart from the general rule awarding costs to the successful parties, as a recognition of the usual risks of litigation. Although the applications had little chance of success, Romaine J. did not find that they were so improper or vexatious as to warrant an exceptional award of complete indemnity costs. Costs were awarded on a party and party scale. The financial stakes were very high and conduct that in other circumstances may have given rise to penal costs had to be viewed with greater tolerance: *Re Calpine Canada Energy Ltd.* (2008), 2008 CarswellAlta 1163, 46 C.B.R. (5th) 243 (Alta. Q.B.).

The Manitoba Court of Queen's Bench approved the sale of assets of a debtor subject to *CCAA* proceedings. The absence of a formal plan of arrangement did not prevent the court from approving the transaction. The alternative was likely a forced liquidation, which was not in the interest of all stakeholders: *Re Winnipeg Motor Express Inc.* (2008), 2008 CarswellMan 560, 49 C.B.R. (5th) 302 (Man. Q.B.); leave to appeal denied (2008), 2008 CarswellMan 564, 48 C.B.R. (5th) 22 (Man. C.A. [In Chambers]).

A monitor should not be enjoined from proceeding with an offer submitted as part of a court-approved sale process, even where a new offer arising following the bid deadline may preserve jobs, since this would amount to an unfairness in the working out of the sale process to the detriment of the current purchaser and the secured creditors; interfere with the efficacy and integrity of the sale process; and prefer the interests of one party (*i.e.* the new prospective purchaser or the union representing the employees), over others: *Re Tiger Brand Knitting Co.* (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.).

The Québec Superior Court held that it has the jurisdiction to authorize a sale of substantially all of the assets of a debtor company in *CCAA* proceedings in appropriate circumstances where it meets the broad remedial purpose of the statute, is aimed at allowing the company to carry out business causing the least harm to employees and other stakeholders, and is aimed at meeting the claims of creditors and preserving business relationships. The court must be satisfied that the sale is the result of a fair and transparent sale process; is in the interests of the parties; that there has been no unfairness in the working out of the process; and that the monitor made a sufficient effort to get the best price and did not act improvidently. Here, the monitor acted fairly and the process was not flawed. The process included identifying and approaching strategic partners and investors, creating a data room, confidentiality agreements, a request for bids and further information, a board of directors informed and involved, the offering of equal chances to all bidders, and ensuring the process was transparent: *Re Rail Power Technologies Corp.* (2009), 2009 CarswellQue 6503, 2009 QCCS 2885 (Que. S.C.).

Where a *CCAA* proceeding was commenced, portions of the stay were lifted to allow for a filing in bankruptcy; however, the remainder of the *CCAA* stay remained in effect. The court granted an application by the bankrupt to discharge a debenture and have the monitor sell parcels of land. The court held that the creditor was not legally able to file a notice of debenture and notice of crystallization when it did as it was prohibited from doing so by the continuing *CCAA* stay order and thus the notices were null and void. The monitor was permitted to use proceeds from the sale of the parcels of land to pay outstanding administrative and DIP charges: *Re M.L. Wilkins & Son Ltd.* (2009), 2009 CarswellNB 660, 52 C.B.R. (5th) 66, 2008 NBQB 391 (N.B. Q.B.).

The Ontario Superior Court of Justice granted the motion of the applicants approving a bidding procedure under the *CCAA*, and granted immediately after His Honour Judge Gross of the United States Bankruptcy Court for the District of Delaware approved the bidding procedures in the Chapter 11 proceedings. The order granted by Morawetz J. of the Ontario court also approved an asset sale agreement for the purposes of conducting a "stalking horse" bidding process in accordance with the bidding procedure, including a break fee and expense reimbursement. The hearing was conducted by video conference with the U.S. Court in accordance with the provisions of the Cross-Border Protocol that had previously been approved by the U.S. and Canadian courts. The court held that it has jurisdiction under the *CCAA* to approve a sales process in the absence of a formal plan of compromise or arrangement and a creditor vote. It held that the *CCAA* is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives, and a sale by the debtor that preserves the business as a going concern was, in his view, consistent with those objectives. Factors to be considered include, but are not limited to: is a sale transaction warranted at this time; will the sale benefit the whole "economic community"; do any of the debtor's creditors have a *bona fide* reason to object to the sale of the business; and is there a better viable alternative? Justice Morawetz considered these factors and approved the bidding procedures. The sale agreement was accepted for the purposes

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of conducting the "stalking horse" bidding process: *Re Nortel Networks Corp.* (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

After a stalking horse process and bidding procedure, the *CCAA* supervising judge, in a joint hearing with the U.S. bankruptcy court under chapter 11 U.S. *Bankruptcy Code* proceedings, approved a sale and vesting order in respect of an asset purchase agreement, finding that the process was fair and reasonable and produced a fair and reasonable result. The bid by the purchaser was found to be the best offer, yielding the highest net recovery for creditors. No party opposed the order sought; and the court held that the sale and purchase of assets assured a compromise of debt that was accepted by debtholders and preserved value of the name and reputation of the business as a going concern. The court held that it had considered the interests of all parties, the efficacy and integrity of the process by which offers were obtained, and had determined that there had been no unfairness in the working out of the process: *Re Eddie Bauer of Canada Inc.* (2009), 2009 CarswellOnt 5450, 57 C.B.R. (5th) 241 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice considered the threshold requirements of s. 36 of the *CCAA*, which specifies that court approval is required if a debtor company under *CCAA* protection proposes to sell or dispose of assets outside of the ordinary course of business. The court determined that a proposed transition and reorganization restructuring agreement among related entities was an inter-entity arrangement and was not a sale or disposition of assets that was covered by s. 36 of the *CCAA*. The assets and business would be transferred as a going concern to a new wholly-owned subsidiary (the "transferee"). The transferee would assume the current accounts payable, current expenses, deferred revenue, any amounts due to employees, unfunded liability of the pension plan and benefit plans, and obligations under contracts, licences and permits relating to the business. The transferee would offer employment to all of the employees on terms and conditions substantially similar to the debtor and it would pay a portion of the price in cash. Justice Pepall noted that court approval under s. 36 of the *CCAA* is only required if those threshold requirements are met, and it is only once they are met that the court will consider the list of non-exclusive factors in determining whether to approve a sale or disposition. The courts have typically taken a common sense approach to the term "ordinary course of business" and have considered the normal business dealings of each particular seller. Justice Pepall held that not every internal corporate reorganization escapes the purview of s. 36. A court should, in each case, examine the circumstances of the subject transaction within the context of the business carried on by the debtor. Here, the agreement provided a framework for the entities to properly restructure their inter-entity arrangements for the benefit of their respective stakeholders. Justice Pepall concluded that it would be commercially unreasonable to require the debtors to engage in a third party sales process contemplated by s. 36(4) before permitting them to realign the shared services agreement. In the circumstances, s. 36 was not applicable. However, court approval should be sought in circumstances where the sale or disposition is to a related person and there is an apprehension that the sale may not be in the ordinary course of business. Having reviewed the proposed transaction, Pepall J. held that she was satisfied that the transaction did facilitate restructuring and was fair and that the agreement should be approved; the monitor supported the agreement, and the agreement was in the best interests of a number of stakeholders who were consulted. The alternative to approval would likely be a cessation of the business: *Re Canwest Global Communications Corp.* (2009), 2009 CarswellOnt 7169 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a stalking horse bid process in a *CCAA* proceeding, and in the course of such approval, noted a distinction between the approval of a bid process and the approval of a sale of assets. The bid process provided for an auction process and the proposed stalking horse, which was an insider and related party, had been considered by the financial advisors, the independent committee of the board and the monitor. It was opposed by a potential bidder. Justice Morawetz, adopting the tests used in *Re Nortel Networks Corp.* (2009), 2009 CarswellOnt 4467, 55 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]), considered whether a sale transaction was warranted at this time; whether the sale would benefit the whole economic community; whether the creditors had a *bona fide* reason to object to the sale of the business; and whether there was a better viable alternative. Section 36 of the *CCAA* permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out factors to be considered on such a sale; however, Morawetz J. noted that the amendments did not directly address the factors that a court should consider when deciding to approve a sale. Section 36 is engaged when determining whether to approve a sale, and Morawetz J. noted that issues can arise after approval of a sales process and prior to the approval of a sale that require 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. With respect to a contested break fee, Morawetz J. held that this fee was a business decision that had been considered by the applicant, its advisors and key creditor groups and that the amount of the break fee was consistent with break fees that had been approved in other proceedings. In the circumstances of this case, Morawetz J. held that it was not necessary for the court to substitute its business judgment for that of the Applicants: *Re Brainhunter Inc.* (2009), 2009

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CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]).

The debtors were granted *CCAA* protection and on the same date, related entities in the U.S. filed for protection under Chapter 11 of the U.S. *Bankruptcy Code*. The U.S. Bankruptcy Court subsequently issued an order approving a sale and investor solicitation process for the sale of substantially all of the debtor group's and the Québec Superior Court issued a similar order; no one objected to the issuance of the orders and no appeal was launched in either jurisdiction. The process resulted in the execution of an asset sale agreement and a stalking horse bid process was approved by both courts. As result of the bidding process, the major difference between two bids was that the original prospective purchasers used credit bidding to the extent of $78 million, while other bidder offered an additional $78 million in cash. Both bidders were both former lenders of the debtors. The contemplated sale following the auction included the debtor's fixed assets and unencumbered assets. The original prospective purchasers were comprised of a group of lenders under the First Lien Credit Agreement, which held in aggregate approximately 65% of the total First Lien Debt of $438 million, secured by all of its fixed assets. They were also majority lenders under the First Lien Credit Agreement and, as such, were entitled to make certain decisions with respect to the First Lien Debt, including the right to use the security as a tool for credit bidding. The other bidder was comprised of a group of First Lien Lenders holding a minority position of approximately 10%. The Québec Superior Court approved the sale of the assets of the debtors to the original prospective purchasers, which had, in part, utilized a credit bid. Justice Mongeon held that if credit bidding was to take place, the amount of the credit bid should not exceed, but should be allowed to go as high as the face value amount of the credit instrument on which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. He held that it would be impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise. Justice Mongeon observed that the courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Further, once the process is put in place, and the various stakeholders accept the rules, including the possibility of credit bidding, the fact that credit bidding was used as a tool should not be raised as an argument to set aside a valid bidding and auction process. Once an approved bidding procedure is started, it should continue, absent any illegality or non-compliance of proper procedures. Here, the winning bid satisfied a number of interested parties, including the winning bidders, the monitor and several other creditors. In applying s. 36 of the *CCAA*, Mongeon J. held that the elements of s. 36 need not to be all fulfilled in order to grant an order; the court should look at the transaction as a whole and decide whether or not the sale is appropriate, fair and reasonable. The court can approve the process for reasons other than those mentioned in s. 36 or refuse to grant it for reasons not mentioned in s. 36. Relying on *Re Canwest Publishing Inc./Publications Canwest Inc.* (2010), 2010 CarswellOnt 3509, 68 C.B.R. (5th) 233 (Ont. S.C.J. [Commercial List]); and *Re Nortel Networks Corp.* (2009), 2009 CarswellOnt 4838, 56 C.B.R. (5th) 224 (Ont. S.C.J. [Commercial List]), the court held that the process applied to the present case met the criteria set out in those decisions; the price to be paid by the winning bidder was satisfactory given the circumstances and the terms and conditions of the winning bid were acceptable: *Re White Birch Paper Holding Co.* (2010), 2010 CarswellQue 10954, 2010 QCCS 4915 (Que. S.C.); leave to appeal refused (2010), 2010 CarswellQue 11534, 2010 QCCA 1950 (Que. C.A.).

In a court-authorized two-track process under the *CCAA*, involving both an asset purchase agreement and a direction to the monitor to solicit liquidation proposals, the monitor brought a motion for direction with respect to the inclusion of a competitor in the liquidation sale process. The court held that confidentiality concerns about the competitor were valid; it had filed no undertaking that it would not gain a competitive advantage by having access to the debtor's premises and internal operations; and access was not needed for information regarding intellectual property; moreover, sale on a going-concern basis by one purchaser would be advantageous to stakeholders: *Re W.C. Wood Corp.* (2009), 2009 CarswellOnt 7113, 61 C.B.R. (5th) 69 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a sale transaction involving transfer of the business and sale of real property of the applicants in both Canada and the United States. The transaction was the culmination of a marketing process under the *CCAA* authorized by court order. Objections were raised by the subordinate secured creditor who questioned the jurisdiction of the court to convey real property assets located in the U.S. The Ontario debtor company operated from businesses located in Canada and the United States. The selection of purchaser was based on a thorough analysis of all of the financial and commercial terms in all of the bids, and was recommended by the monitor and was approved by the first lien lenders steering committee and the independent directors committee. The second lien lenders had been consulted, and their views and questions were taken into account in the final selection of purchaser. The court held that it was well established that once a process has been put into place by court order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances. To permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that had been achieved. The inter-creditor agreement (ICA), entered

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into several years prior, was binding on the group of related companies; and by its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian *CCAA* and *BIA*, as well as the U.S. *Bankruptcy Code*, might apply. The court was satisfied that the issues raised by the second lien lenders were inextricably linked to the restructuring of the applicants and the completion of the transaction, and as such were appropriate for consideration by the Ontario Court. It was satisfied that, by operation of the credit agreement and the ICA, the first lien lenders were entitled to exercise their remedies, which they proposed to do by adding the additional applicants as *CCAA* applicants. They may then release their security over the assets to be transferred in connection with the exercise of their remedies and by doing so, the security of the second lien lenders over the transferred assets would be automatically and simultaneously released. Campbell J. accepted that the effect of the transaction may indirectly be a transfer of U.S. real property assets and the release of a security over them of the second lien lenders. The effect of the transaction was such that the claims of local creditors of the business of the U.S. mills remained unaffected. The court was not apprised of any ordinary creditor other than the second lien lenders that would be so affected. Justice Campbell was satisfied that the Ontario Court had jurisdiction to provide the relief requested, which was the product of the marketing process that was approved by the Ontario Court and which was not objected to by any party when it was initiated: *Re Grant Forest Products Inc.* (2010), 2010 CarswellOnt 2445, 67 C.B.R. (5th) 258 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court granted vesting orders, on the basis that the orders did not compromise potential environmental liabilities toward certain Provinces. The issue of liability would, at best, be decided at the time of the sanction order and if not, at a later date. The motion was for the issuance of various orders authorizing the sale of non-core properties. In previous motions, vesting orders had been issued pertaining to properties located in Québec, in view of the absence of contestation by the Province of Québec. The current motion was limited to properties owned by the debtor in Ontario, British Columbia and New Brunswick. The motion sought vesting orders authorizing the transfer of properties to one of the debtor's subsidiaries, and vesting title in that purchaser free and clear of all liens, securities and other charges. As worded, the vesting orders would not, however, exempt the purchaser from environmental obligations in respect of the properties. The debtor had agreed to provide funding to the receiver of the purchaser specifically to permit prudent care, custody and management of the properties. Gascon J. also held that the vesting orders would not exempt the vendors of the properties from their potential environmental liabilities towards the Provinces as former owner, occupier or operator of the properties. The vesting orders would not extinguish the Provinces' existing remedies, if any, under their statutes against a former owner or occupier resulting from past environmental obligations or liabilities. The properties at issue were not required by the debtor for future operations and Gascon J. held that the proposed sales were prudent and reasonable measures to potentially enhance the business of the debtor for emergence from *CCAA*: *Re AbitibiBowater inc.* (2010), 2010 CarswellQue 9633, 2010 CarswellQue 9634, 2010 CarswellQue 9635, 2010 CarswellQue 9636, 2010 CarswellQue 9637 (Que. S.C.).

The Ontario Superior Court of Justice approved the transfer of proceedings under Part III of the *BIA* to the *CCAA*. With respect to a proposed sale process, Brown J. referenced *Re Nortel Networks Corp.*, setting out the factors a court should consider when reviewing a proposed sale process under the *CCAA* in the absence of a plan: (a) Is a sale transaction warranted at this time? (b) Will the sale benefit the whole "economic community"? (c) Do any of the debtors' creditors have a *bona fide* reason to object to the sale of the business? (d) Is there any better viable alternative? After considering the evidence, Brown J. approved the going-concern sale process: *Re Clothing for Modern Times Ltd.* (2011), 2011 CarswellOnt 14402, 88 C.B.R. (5th) 329 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a sale of assets, notwithstanding a late superior offer that materialized after the deadline established in the court approved sales process. The objecting creditor held a beneficial interest in the subordinated secured plan notes and was the fourth largest trade creditor of the debtor. The creditor submitted that it expected to receive less than 6% recovery on its holdings under the notes and no recovery on its trade debt; but if the late offer were accepted, it expected to receive full recovery under the notes, and possibly a distribution with respect to its trade debt. The court held that s. 36 of the *CCAA* sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction, including (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (b) whether the monitor approved the process leading to the proposed sale or disposition; (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Justice Morawetz held that the list of factors set out in s. 36(3) of the *CCAA* largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), which specifies that when

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assessing whether to approve a transaction to sell assets, the court should consider: whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. Morawetz J. held that that at the time the offer was accepted, the late offer was higher but was non-binding. The court held that the test is not whether another bidder was aware of the opportunity to participate in a sales process, but rather, whether the officer has made sufficient effort to get the best price and has not acted improvidently. Justice Morawetz concluded that the efforts to market the assets were reasonable in the circumstances. Although the late offer was higher than the purchaser's offer, Morawetz J. was of the view that the increase was not such that he would consider the accept transaction to be improvident in the circumstances. In all respects, Morawetz J. was satisfied that there had been no unfairness of the working out of the process. In the result, Morawetz J. determined that the approval and vesting order should be granted: *Re Terrace Bay Pulp Inc.* (2012), 2012 CarswellOnt 9470, 92 C.B.R. (5th) 40, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court reviewed the law relating to the sale of assets in a *CCAA* proceeding. The court issued an order approving a divestiture process to be followed by the debtor company for the sale of some of its assets. The debtor, with the help of its chief restructuring officer (CRO) and the monitor, followed the procedure provided for in the divestiture process to find qualified bidders for the assignment of the contract. Two qualified bidders were named, and one of those bids was accepted. A creditor that held first ranking security on the assets involved in the contract and on the proceeds supported the debtor. Another party opposed arguing lack of transparency and unfairness. Justice Gouin held that a crucial aspect of the proceedings was that the divestiture process followed by the debtor for the assignment of the contract had already been approved and authorized by the court. Further, participating bidders had reviewed and accepted the full terms and conditions of the divestiture process under the order, thus the process, including all its steps and phases, could not be challenged at this point in time. Justice Gouin observed that the divestiture process was structured so as to maximize the debtor's' chances of getting as much value as possible for its assets; however, the process still had to be implemented transparently, fairly and with integrity. The monitor was of the view that the whole bidding process was reasonable, had been conducted in accordance with the rules, and was fair and transparent. Justice Gouin held that s. 36(3) of the *CCAA* lists some of the factors that the court considers before authorizing a sale of assets: whether the process leading to the proposed sale or disposition was reasonable in the circumstances; whether the monitor approved the process leading to the proposed sale or disposition; whether the monitor filed with the court a report stating that, in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; the extent to which the creditors were consulted; the effects of the proposed sale or disposition on the creditors and other interested parties; and whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Gouin J. held that once a process has been put in place by court order for the sale of assets of a failing business, that process should be honoured, except in extraordinary circumstances. The court will not lightly interfere with the exercise of the commercial and business judgment properly exercised by the applicant and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. Here the court was satisfied that the process was implemented with transparency, integrity, efficacy, and fairness: *Re Aveos Fleet Performance Inc./Aveos performance aéronautique inc.*, 2012 CarswellQue 8620, 2012 QCCS 4074 (Que. S.C.).

See Shelley Fitzpatrick, "Liquidating *CCAA*s — Are We Praying to False Gods?"; and Bill Kaplan, "Liquidating *CCAA*s: Discretion Gone Awry?", in J. Sarra, ed., *Annual Review of Insolvency Law, 2008* (Toronto: Carswell, 2009); Daniel R. Dowdall and Jane O. Dietrich, "Do Stalking Horses Have a Place in Intra-Canadian Insolvencies?", in Janis Sarra, *ed.*, *Annual Review of Insolvency Law, 2005* (Toronto: Carswell, 2006) at 1-14. For a detailed discussion of the "Stalking Horse Bid Process" that is used in Chapter 11 proceedings in the United States, see the following articles: David Cohen and David Kolesar, "Canadian Perspective on the Chapter 11 Stalking Horse Bid Process", 21 Nat. Insol. Rev. 26, and Robert Stoll, Amy Korte and Sajida Maladi, "Maximizing Disposition Value Through the 'Stalking Horse' Bidding Process", 21 Nat. Insol. Rev. 33.

For a discussion of stalking horse bids in the context of a receivership, see *Re Crate Marine Sales Ltd.*, 2015 CarswellOnt 2248, 23 C.B.R. (6th) 202, 2015 ONSC 1062 (Ont. S.C.J. [Commercial List]) under L§20 "Sale of Assets by Receiver".

The Ontario Superior Court of Justice approved a transaction by which the debtor would surrender its interest in eleven store leases to the landlord entities. The transaction would give rise to a significant intercompany claim that would be addressed in a claims process. After taking into account the factors listed in s. 36(3) of the *CCAA*, Morawetz J. approved the lease transaction agreement. He was satisfied that the process for achieving the sale transaction was fair and reasonable in the circumstances. Justice Morawetz noted that the monitor's consent to the entering into of the termination agreement, and the

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filing of its Third Report, did not constitute approval by the monitor as to the validity, ranking or quantum of the intercompany claim. When the intercompany claims are submitted in the claims process, the monitor was to prepare a report and make it available to the court and all creditors; and the creditors would have an opportunity to seek any remedy or relief with respect to the intercompany claim in the claims process. Justice Morawetz held that it was appropriate for the monitor to take an active and independent role in the review process, such that all creditors would be satisfied with respect to the transparency of the process: *Re Target Canada Co.*, 2015 CarswellOnt 3261, 23 C.B.R. (6th) 314, 2015 ONSC 1487 (Ont. S.C.J.).

The Ontario Superior Court of Justice approved a sale of assets to a related party purchaser in *CCAA* proceedings. Pursuant to s. 36(3) and (4) of the *CCAA*, the court must be satisfied that good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition. Justice Morawetz noted that the factors listed in s. 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the *CCAA*. Further, he noted that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, [1991] O.J. No. 1137 (Ont. C.A.). Under s. 36(4) of the *CCAA*, the court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interest of the stakeholders of the applicants and that the risk to the estate associated with a related party transaction has been mitigated. Justice Morawetz was satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge on the branding would ultimately be successful, the litigation risks would, in his view, be expected to materially affect the value of the purchased assets to an unrelated third party. Justice Morawetz also noted that the monitor had been involved throughout the proposed transaction, and its view was that the purchase price exceeded the estimated liquidation values and benefited the creditors. Justice Morawetz was satisfied that the transaction was in the best interests of stakeholders and provided some enhanced economic value to the estate. He held that the requirements of s. 36(7) had been satisfied. That section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *BIA*, in addition to amounts that were owing for post-filing services to a debtor company. In the result, the sale was approved and the approval and vesting order was granted: *Re Target Canada Co.*, 2015 CarswellOnt 5211, 30 C.B.R. (6th) 335, 2015 ONSC 2066 (Ont. S.C.J. [Commercial List]).

Subsequent to an allocation judgment, the Ontario Superior Court of Justice considered a motion for reconsideration or clarification of its reasons for judgment in a joint trial held with the U.S. Bankruptcy Court for the District of Delaware. Justice Newbould stated that there is no doubt that a court has jurisdiction to change or amend a judgment in Canada before it is formally drawn up and signed, but a court should be most reluctant to do so, and should exercise the jurisdiction only in an exceptional case. Justice Newbould observed that clarification is a less contentious matter. Clarification may be given where the original judgment "was so expressed as to lead to uncertainty and confusion" or contains a latent ambiguity. Justice Newbould held that there was no basis for reconsideration motion; there was a lack of evidence to support the U.S. debtors' position, and that the lack of evidence was the result of tactical decisions taken by the U.S. debtors and other US interests in presenting their cases at the trial that creditor recoveries were not relevant to how the lockbox funds should be allocated. Newbould J. held that it was open to the U.S. debtors to explore the issue at the trial, which they did not do so presumably for tactical reasons, or to offer their view in their closing brief as to how guaranteed bonds should be treated in a *pro rata* allocation. Any failure to brief was a decision taken by the U.S. debtors and the unsecured creditors' committee. Justice Newbould did clarify paragraphs 251 and 258(2) of the allocation decision. The U.S. debtors also sought an order that the two courts "shall retain oversight of and adopt procedures as necessary to measure the amount of the disputed claims", including any claim not allowed prior to the allocation decisions. Justice Newbould saw no basis to make such an order. He noted that following the release of the allocation decisions, an application in the U.K. was made to the Chancellor of the High Court of England and Wales for the appointment of a supervisory judge in this matter. The Chancellor appointed Mr. Justice Snowden, a judge of the Chancery Division of the High Court of England and Wales, as the supervisory judge in relation to the various debtors in those proceedings ("the EMEA debtors"). Newbould J. stated that Snowden J. will deal with any hearings in relation to the EMEA debtors, including contested claims and will be the appropriate judge to engage in any judicial cooperation with the Canadian and U.S. courts that is deemed necessary and appropriate. Newbould J. also stated that the joint administrators are officers of the English court who are duty-bound to act in good faith and in accordance with applicable law in those proceedings. Justice Newbould stated that to make the order sought by the U.S. debtors would fly in the face of the principles of comity, which Canadian courts have long shown respect to in insolvency proceedings and which are now promulgated in the *CCAA*: *Re Nortel Networks Corp.*, 2015 CarswellOnt 10304, 27 C.B.R. (6th) 51, 2015 ONSC 4170 (Ont. S.C.J. [Commercial List]); motions for leave to appeal dismissed 2016 CarswellOnt 6785, 2016 ONCA 332 (Ont.

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C.A.).

The Saskatchewan Court of Queen's Bench granted standing to the applicant bidder who opposed the sale process proposed by a monitor. Justice Gabrielson noted that generally speaking, a prospective purchaser must acquire a legal right or interest in the sale process before it has standing to object to the confirmation of a sale to a successful bidder, citing *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, 2000 CarswellOnt 466, 47 O.R. (3d) 234, 15 C.B.R. (4th) 298, [2000] O.J. No. 467 (Ont. C.A.) and other cases. Justice Gabrielson noted, however, that in those cases, the application that the court was considering was for approval of a specific sale of assets rather than an approval of a sale process. Although the monitor referred to an intended process in its first report, the monitor did not seek or obtain the court's approval of that process. Accordingly, Gabrielson J. was satisfied that the applicant bidder, as an interested party seeking to purchase the assets, did have standing to bring an application to determine whether the process previously followed was fair to it as a prospective purchaser and had standing to make submissions as to whether the sale process proposed was appropriate. Generally speaking, the court will accept the recommendations of the monitor. Here, even though court approval of a sale process had not been obtained, the monitor proceeded to solicit letters of intent from interested parties. The court had not had an opportunity to comment on or approve the sale process. Notwithstanding this lack of approval, interested purchasers were given the monitor's first report and would have relied on it. The sale process as contained in the monitor's second report, which the court was being asked to approve, did not have a stalking horse sale process, had added two criteria and had limited the final sale negotiations to four parties. Using the *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) tests, Justice Gabrielson held that no evidence had been provided as to the valid business reasons for the changes; and that the bidder had been misled by the monitor, albeit not intentionally. The Court found that the bidder may have experienced prejudice as a result. Gabrielson J. therefore granted the application to be included in the group of qualified bidders referred to in the proposed sale process. With respect to the approval of the sale process, Gabrielson J. did not accept that the process proposed by the monitor was unreasonable. The Court was satisfied that the sale process proposed by the monitor should be amended to include the applicant as a qualified bidder to be allowed to take part in the second round of negotiations. In all other aspects, the sale process was approved: *9286594 Canada Inc. v. Advance Engineering Products Ltd.*, 2015 CarswellSask 427, 28 C.B.R. (6th) 97, 2015 SKQB 196 (Sask. Q.B.).

In a *CCAA* proceeding, the Ontario Superior Court of Justice approved a sale of assets of the debtor to an entity owned indirectly by the first ranking secured creditors ("first lien lenders") pursuant to a credit bid made by the first lien agent. The sale transaction was an asset purchase that would enable the business to continue as a going concern. It included the transfer of substantially all of the assets; the assumption by the purchaser of substantially all trade payables, contractual obligations and employment obligations; and an offer of employment to all of employees. Justice Newbould noted that liquidating *CCAA* proceedings without a plan of arrangement are now part of the insolvency landscape in Canada, but it is usual that the sale process be undertaken after a court has blessed the proposed sale methodology with a monitor fully participating in the sale process and reporting to the court. In this case, Justice Newbould held that the sale or investment sales process ("SISP") and the credit bid sale transaction met the *Soundair* requirements. The monitor expressed the view that the SISP was undertaken in a thorough and professional manner and the results demonstrated that none of the interested parties would, or would be likely to, offer a price for the business that would be sufficient to repay the amounts owing to the first lien lenders under the first lien credit agreement. The monitor's view was that there was no realistic prospect that the debtor could obtain a new source of financing sufficient to repay the first lien debt. Justice Newbould reviewed the factors set out in s. 36(3) of the *CCAA* and was satisfied that the sale transaction should be approved. Justice Newbould granted a vesting order, and also approved the payment of amounts to first lien lenders, noting that they had priority over the interests of the second lien lenders under the inter-creditor agreement. Justice Newbould noted that the conditions for releases were laid down in *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 CarswellOnt 4811, (sub nom. *Metcalfe & Mansfield Alternative Investments II Corp., Re)* 92 O.R. (3d) 513, 45 C.B.R. (5th) 163, 2008 ONCA 587, [2008] O.J. No. 3164 (Ont. C.A.), specifically, third party releases are authorized under the *CCAA* if there is a reasonable connection between the third party claim being compromised in the plan and the restructuring achieved by the plan. While there was no *CCAA* plan in this case, Newbould J. could see no reason not to consider the principles established in *Metcalfe* when considering this sale under the *CCAA*, with any necessary modifications due to the fact that it is not a sale pursuant to a plan. In this case, Newbould J. declined to approve the release by the first lien lenders; he was of the view that the beneficiaries of the release by the first lien lenders were providing nothing to the first lien lenders in return for the release. Newbould J. found that the bank as a first lien lender would be required to give up any claim it might have against the other parties to the release for any matters arising prior to or after the support agreement while receiving nothing in return for its release: *Re Nelson Education Ltd.*, 2015 CarswellOnt 13576, 29 C.B.R. (6th) 140, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List]).

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In a *CCAA* proceeding, the British Columbia Supreme Court approved a sale and investment solicitation process ("SISP"), a key employee retention plan, the appointment of a financial advisor and a CRO. Citing *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), the Court held that the factors to consider with respect to the SISP were: (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. Justice Fitzpatrick noted that although the court in *CCM Master Qualified Fund* was considering a sales process proposed by the receiver, she was in agreement that these factors were also applicable in assessing the reasonableness of a proposed sale process in a *CCAA* proceeding. Justice Fitzpatrick agreed with the monitor's assessment that the SISP was reasonable and represented the best opportunity for the debtor to successfully restructure as a going concern. Justice Fitzpatrick held that a consideration of this issue required some context in terms of the current governance status of the debtor; at the time of this application, there was only one remaining director, based in the U.S. Fitzpatrick J. concluded that there was a legitimate risk that the debtor may not have executive leadership at a critical time. She was satisfied that, in these circumstances, professional advisors were necessary to have a chance for a successful restructuring. Fitzpatrick J. concluded that the appointment of financial advisor and CRO fulfilled the requirements of being "appropriate" in the sense that the expertise would assist the debtor in achieving the objectives of the *CCAA*. The jurisdiction to grant charges for such professional fees is found in s. 11.52 of the *CCAA*. The Court held that a non-exhaustive list of factors to consider when determining whether the proposed compensation is appropriate and whether charges should be granted for that compensation include: (i) the size and complexity of the businesses being restructured; (ii) the proposed role of the beneficiaries of the charge; (iii) whether there is an unwarranted duplication of roles; (iv) whether the quantum of the proposed charge appears to be fair and reasonable; (v) the position of the secured creditors likely to be affected by the charge; and (vi) the position of the monitor. Justice Fitzpatrick was satisfied that the debtor's assets and operations were significantly complex so as to justify the appointments and proposed compensation; the process had been crafted in a fashion that recognized the respective roles of the professionals and also allowed for a coordinated effort that would assist each of them in achieving their specific goals. Each had a distinct focus and it was expected that their joint enterprise would produce a better result overall: *Re Walter Energy Canada Holdings, Inc.*, 2016 CarswellBC 158, 33 C.B.R. (6th) 60, 2016 BCSC 107 (B.C. S.C.). For a discussion of the KERP charge in this judgment, see N§79 "Key Employee Retention Plans and Key Employee Incentive Plans".

In a *CCAA* proceeding, the British Columbia Supreme Court approved the sale of a mining property by way of a credit bid. The application was opposed by a subsequent ranking secured creditor. Justice Butler referenced several defaults by the debtor company and concluded that the debtor's reclamation obligations were due and owing. The fact that the precise amount of the indebtedness could not be determined did not mean that the debt created by the reclamation obligations and secured by a reclamation security agreement was not due and owing. With respect to the issue of whether the court should approve an asset sale entirely based on a credit bid, Butler J. noted that, while not common, credit bids had been approved in *CCAA* proceedings. Justice Butler noted that the court must consider all the circumstances to determine whether the proposed asset sale is fair and reasonable. The court will consider: whether sufficient effort has been made to obtain the best price; the debtor has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process. Having considered all the factors set out in s. 36(3) and the tests applied by the courts, Justice Butler was satisfied that he should exercise his discretion to approve the sale. The monitor was of the view that the sale price and terms were commercially reasonable and satisfactory; the solicitation and sale process ("SISP") was a thorough sales process as a result of which a large number of potential purchasers were identified and contacted; the monitor opined that the sale or disposition would be equally beneficial to creditors as a sale or disposition on bankruptcy; the monitor terminated the SISP after receipt of inadequate offers from purchasers; and the terms allowed payout of priority claims. Butler J. was satisfied that the attempts to market the debtor's assets were extensive and there was no basis to criticize the integrity of the process. He noted that the large shortfall in the recovery was unfortunate, but there was no undue prejudice to the parties in authorizing the sale: *Re North American Tungsten Corp.*, 2016 CarswellBC 20, 33 C.B.R. (6th) 45, 2016 BCSC 12 (B.C. S.C.).

Justice Fitzpatrick of the British Columbia Supreme Court held that in reviewing a proposed sale process, the court should consider the fairness, transparency and integrity of the proposed process, the commercial efficacy of the proposed process in light of the specific circumstances, and whether the sale process will optimize the chances of securing the best possible price for the assets up for sale. She further held that a chief restructuring officer and financial advisor were necessary in the circumstances if there was to be a chance for a successful restructuring. She exercised her authority under s. 11.52 of the *CCAA* to grant charges for their professional fees on the basis that the debtor's assets and operations were sufficiently

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complex to justify the appointment and proposed compensation, and there were significant regulatory, environmental and employment issues to address: *Re Walter Energy Canada Holdings Inc.*, 2016 CarswellBC 158, 33 C.B.R. (6th) 60, 2016 BCSC 107 (B.C. S.C.).

The Government of the Northwest Territories ("NWT") held security for reclamation obligations of the debtor, including a first registered charge over mining property. NWT sought approval to sell the mining claim property belonging to the debtor by way of an asset purchase agreement ("APA") pursuant to a credit bid. Several creditors opposed. Butler J. granted the application, finding that the debtor's reclamation obligations were due and owing; and held that whether the bid was cash or NWT's credit bid, the purchase price must first satisfy outstanding *CCAA* priority charges (administration, interim financing and directors' charge), and then be applied against NWT's security. The highest offer received by the monitor was a half million less than the credit bid. The Court found that the bid met the criteria under s. 36(3) of the *CCAA;* the effort to obtain the best price was more than sufficient, and the consideration received was fair and reasonable, taking into account the market value of the property: *Re North American Tungsten Corp.*, 2016 CarswellBC 20, 33 C.B.R. (6th) 45, 2016 BCSC 12 (B.C. S.C.).

The Ontario Superior Court of Justice dismissed the motion of a union, which had sought an order qualifying the subject bidder as a phase II bidder in a sale and solicitation process ("SISP"). Justice Newbould noted that the SISP had been heavily negotiated by the stakeholders, including representatives of the union and retirees; it provided for consultation on the various steps by the debtor, the chief restructuring advisor ("CRA"), the financial advisor, and the monitor, and in some matters, provided for consultation with the "consultation parties", including the union and retirees. The SISP provided for the debtor, CRA, financial advisor, and the monitor to determine the issue of a bidder's financial ability to complete a transaction. The SISP also provided that the monitor would determine what information with respect to the bids would be provided to the consultation parties. Newbould J. noted that one of the things bargained for by the union in the negotiations leading to the SISP was the right to meet with bidders in meetings to be supervised by representatives of the monitor. Newbould J. held that the SISP process was of crucial importance to the union and he did not view technical roadblocks being used to prevent the union from meeting with the subject bidder at that time as being particularly helpful to the process. However, Newbould J. recognized that the entire SISP process was being driven by very tight timelines and that there had been other important matters taking the time of all concerned. Newbould J. added that in a *CCAA* case, with all of its hurly-burly complexity, one should not engage in hindsight nitpicking of well-intentioned actions of the parties. Newbould J. was of the view that technically the union might be right, but as a practical matter, it made no difference. The bidder had provided sufficient evidence of its financial ability to close the contemplated transaction, and the union had no role to play in that decision. The Court was reluctant to interfere with the business decision of the parties who had made the decision: *Re Essar Steel Algoma Inc.*, 2016 CarswellOnt 7809, 36 C.B.R. (6th) 230, 2016 ONSC 3205 (Ont. S.C.J.).

The Manitoba Court of Appeal dismissed an appeal from the decision of a judge who had approved the receiver's motion for a sale of assets. With respect to the standard of review, the motion judge owed the decision of the receiver significant deference. While it is the duty of the court to ensure the integrity of the process, the court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather, to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. Justice Steel noted that the decision of the motion judge was an exercise in judicial discretion and was entitled to deference in the Court of Appeal. The Court of Appeal would intervene only if the motion judge erred in law, misapprehended the evidence in a material way or was clearly wrong. Justice Steel noted that when reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. The interests of all parties should be taken into account, including the interests of the unsecured creditors. However, in this case, the offer to pay unsecured creditors over time out of future profits was not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. As result, the secured creditors were the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the receiver not to take into account the portion of the offer dealing with unsecured creditors: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 CarswellMan 147, 2016 MBCA 46 (Man. C.A.).

(1) — Prohibition on Selling Assets Outside Ordinary Course of Business Without Court Approval

A debtor company can not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. The court may authorize the sale or disposition even if shareholder approval was not obtained, despite any requirement for shareholder approval under federal or provincial law or other requirement, s. 36(1).

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The Ontario Superior Court of Justice sanctioned a plan of arrangement of related entities in a *CCAA* application, finding that s. 36 of the *CCAA* does not apply to transfers contemplated by the plan as the transfers were merely steps that were required to implement the plan and to facilitate the restructuring: *Re Canwest Global Communications Corp.* (2010), 2010 CarswellOnt 5510, 70 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]).

(2) — Notice Required of Application to Court for Sale of Assets

Secured creditors likely to be affected by a proposed sale or disposition are to be given notice of the application, in order to allow creditors the opportunity to oppose the order: s. 36(2).

(3) — Criteria the Court to Apply

Section 36(3) sets out the factors the court must consider before granting the order to sell or dispose of assets outside the ordinary course of business. The court will consider whether the process leading to the proposed sale or disposition was reasonable in the circumstances; whether the monitor approved the process; whether the monitor filed with the court a report stating that in its opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; the extent to which the creditors were consulted; the effects of the proposed sale or disposition on the creditors and other interested parties; and whether the consideration to be received for the assets is reasonable and fair, taking into account their market value: s. 36(3).

The Ontario Superior Court of Justice approved a sale of assets to a related party purchaser in *CCAA* proceedings. Pursuant to s. 36(3) and (4) of the *CCAA*, the court must be satisfied that good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition. Justice Morawetz noted that the factors listed in s. 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the *CCAA*. Further, he noted that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, [1991] O.J. No. 1137 (Ont. C.A.). Under s. 36(4) of the *CCAA*, the court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interest of the stakeholders of the applicants and that the risk to the estate associated with a related party transaction has been mitigated. Justice Morawetz was satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge on the branding would ultimately be successful, the litigation risks would, in his view, be expected to materially affect the value of the purchased assets to an unrelated third party. Justice Morawetz also noted that the monitor had been involved throughout the proposed transaction, and its view was that the purchase price exceeded the estimated liquidation values and benefited the creditors. Justice Morawetz was satisfied that the transaction was in the best interests of stakeholders and provided some enhanced economic value to the estate. He held that the requirements of s. 36(7) had been satisfied. That section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *BIA*, in addition to amounts that were owing for post-filing services to a debtor company. In the result, the sale was approved and the approval and vesting order was granted: *Re Target Canada Co.*, 2015 CarswellOnt 5211, 30 C.B.R. (6th) 335, 2015 ONSC 2066 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court granted an approval and vesting order with respect to the sale of the Chromite shares in a *CCAA* proceeding. The order was granted over the objections of six First Nations Bands and Canadian Development and Marketing Corporation (CDMC), the latter being an unsuccessful bidder. Justice Hamilton noted that the criteria in s. 36(3) of the *CCAA* are not cumulative or exhaustive. The court must look at the proposed transaction as a whole and decide whether it is appropriate, fair and reasonable, the court relying on *Re White Birch Paper Holding Co.*, 2010 CarswellQue 10954, 72 C.B.R. (5th) 49, 2010 QCCS 4915, [2010] Q.J. No. 10469 (C.S. Que.); leave to appeal refused 2010 CarswellQue 11534, 72 C.B.R. (5th) 74, 2010 QCCA 1950 (C.A. Que.) and *Re AbitibiBowater Inc.*, 2009 CarswellQue 14189, 2009 QCCS 6460 (C.S. Que.). *Re AbitibiBowater Inc.*, the Court held that in determining whether to authorize the sale of assets under the *CCAA*, the court should consider, amongst others, the following key factors: have sufficient efforts to get the best price been made and have the parties acted providently; the efficacy and integrity of the process followed; the interests of the party; and whether any unfairness resulted from the working out process. Justice Hamilton stated that a further consideration is the business judgment rule and the weight to be given to the recommendation of the monitor. After reviewing the facts in detail, Hamilton J. found that "[59] This is not a case where there is a fundamental flaw in the process, such as the parties having unequal access to information or one party seeking to amend its offer after it had knowledge of the other offers. The process

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was fair. It was not perfect, but the courts do not require perfection." Justice Hamilton concluded that the sale process was reasonable within s. 36(3)(a) of the *CCAA*. Justice Hamilton then addressed the issue of whether the First Nations Bands had other grounds on which to object to the transaction. Justice Hamilton noted that the interest of the First Nations Bands remained at a very preliminary level. The First Nations Bands also pleaded that they had a special interest in the transaction because they live and exercise their Aboriginal treaty rights guaranteed by the *Constitution Act, 1982*. For the purposes of the motion, Hamilton J. assumed that pleading was true. However, Hamilton J. found that it was unclear to what extent a change of control of the corporations which own the interests in the project impacted on those rights. The identity of the shareholders of the corporations does not change the rights of the First Nations Bands or the obligations of the corporations in relation to the development of the project. Justice Hamilton dismissed the objection made by the First Nations Bands: *Re Bloom Lake, g.p.l.*, 2015 CarswellQue 4072, 27 C.B.R. (6th) 1, 2015 QCCS 1920 (C.S. Que.).

In a *CCAA* proceeding, the British Columbia Supreme Court approved the sale of a mining property by way of a credit bid. The application was opposed by a subsequent ranking secured creditor. Justice Butler referenced several defaults by the debtor company and concluded that the debtor's reclamation obligations were due and owing. The fact that the precise amount of the indebtedness could not be determined did not mean that the debt created by the reclamation obligations and secured by a reclamation security agreement was not due and owing. With respect to the issue of whether the court should approve an asset sale entirely based on a credit bid, Butler J. noted that, while not common, credit bids had been approved in *CCAA* proceedings. Justice Butler noted that the court must consider all the circumstances to determine whether the proposed asset sale is fair and reasonable. The court will consider: whether sufficient effort has been made to obtain the best price; the debtor has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process. Having considered all the factors set out in s. 36(3) and the tests applied by the courts, Justice Butler was satisfied that he should exercise his discretion to approve the sale. The monitor was of the view that the sale price and terms were commercially reasonable and satisfactory; the solicitation and sale process ("SISP") was a thorough sales process as a result of which a large number of potential purchasers were identified and contacted; the monitor opined that the sale or disposition would be equally beneficial to creditors as a sale or disposition on bankruptcy; the monitor terminated the SISP after receipt of inadequate offers from purchasers; and the terms allowed payout of priority claims. Butler J. was satisfied that the attempts to market the debtor's assets were extensive and there was no basis to criticize the integrity of the process. He noted that the large shortfall in the recovery was unfortunate, but there was no undue prejudice to the parties in authorizing the sale: *Re North American Tungsten Corp.*, 2016 CarswellBC 20, 33 C.B.R. (6th) 45, 2016 BCSC 12 (B.C. S.C.).

The Alberta Court of Queen's Bench granted the debtors' motion to approve certain sales of assets generated through a sales and investor solicitation process ("SISP") that was conducted prior to the debtors filling under the *CCAA*. The proceeds of the sales would be insufficient to fully pay out the secured creditor, and would generate no return to unsecured creditors, including the holders of the unsecured bonds. The trustee of the bonds challenged the process. The parent company was a private corporation incorporated under the *Alberta Business Corporations Act*; four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions. In subsequent Chapter 15 proceedings in the United States, the U.S. Court declared the centre of main interest ("COMI") to be located in Canada and the *CCAA* proceedings to be a "foreign main proceeding." Justice Romaine noted that the debtors had been severely impacted by the drop in global oil and gas prices since mid-2014. They had taken a number of steps to reduce costs, identify strategic partners and attempt to raise additional capital, ultimately agreeing to implement the SISP. The bondholders made proposals that were rejected. Justice Romaine referenced s. 36(3) of the *CCAA*, which sets out six non-exhaustive factors that must be considered in approving a sale by a *CCAA* debtor of assets: (a) whether the process leading to the proposed sale was reasonable in the circumstances; (b) whether the monitor approved the process leading to the proposed sale; (c) whether the monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e) the effects of the proposed sale on creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Justice Romaine noted that in this case, the monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced; however, the monitor had given an opinion on the process, which Romaine J. considered as part of her review. Justice Romaine also referenced the *Soundair* principles, observing that notwithstanding that these guidelines were provided prior to the enactment of s. 36 of the *CCAA*, they were still useful guidelines: a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently? b) Were the interests of all parties considered? c) Were there any questions about the efficacy and integrity of the process by which offers were obtained? d) Was there unfairness in the working out of the process? (*Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, [1991] O.J. No.

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1137 (Ont. C.A.)). Justice Romaine also noted *Re AbitibiBowater inc.*, 2010 CarswellQue 4082, 71 C.B.R. (5th) 220, 2010 QCCS 1742 (C.S. Que.), which held that a court should give due consideration to two further factors: the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent, and efficient; and the weight to be given to the recommendation of the monitor. Justice Romaine observed that s. 36 provides that a *CCAA* court may authorize the sale or disposition of assets outside the ordinary course of business; thus, there is no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement. Here, the monitor supported the sales, and was of the view that liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. Justice Romaine noted that a pre-filing SISP was not of itself abusive of the *CCAA*. Nothing in the statute precludes it. A pre-filing SISP must meet the principles and requirements of s. 36 of the *CCAA* and must be considered against the *Soundair* principles. After reviewing the evidence, Romaine J. concluded that while some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. She was satisfied that despite a challenging economic environment, the process was competitive and robust. Justice Romaine held that allegations of bad faith, deception, secrecy, and excessive deference by the debtor to the syndicate were not supported by the evidence. The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the *ad hoc* bondholders did not offer nearly enough to pay out that debt. Section 6 of the *CCAA* requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The syndicate as the principal secured creditor group held an effective "veto" over the approval of any plan proposed by the bondholders. Justice Romaine also noted that the syndicate had doubts that the bondholders' proposals would even provide sufficient operating capital to keep the debtors operating for the months it would take to implement their proposals; and further held the bondholders had not been improperly denied access to information, and would not have been entitled to know the details of the third party bids. Justice Romaine further held that even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current *CCAA* proceedings would not be terminated and any restructuring in the U.S. would necessarily have to be coordinated with these *CCAA* proceedings: *Re Sanjel Corp.*, 2016 CarswellAlta 900, 36 C.B.R. (6th) 239, 2016 ABQB 257 (Alta. Q.B.).

(4) — Sale to Related Party

There are additional factors to take into account where the proposed sale or disposition is to a person who is related to the debtor company. The court may authorize the sale or disposition only if satisfied that good faith efforts were made to sell or dispose of the assets to a non-related person, and the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition: s. 34(4). Related person for purposes of this section is defined to include: (a) a person that directly or indirectly has control of the company; (b) a director or officer of the company; and (c) persons related to a director, officer or control person: s. 36(5).

The Ontario Superior Court of Justice approved a sale of assets to a related party purchaser in *CCAA* proceedings. Pursuant to s. 36(3) and (4) of the *CCAA*, the court must be satisfied that good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition. Justice Morawetz noted that the factors listed in s. 36(3) are not intended to be exhaustive, nor are they intended to be a formulaic check-list that must be followed in every sale transaction under the *CCAA*. Further, he noted that the factors overlap, to a certain degree, with the factors set out in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, [1991] O.J. No. 1137 (Ont. C.A.). Under s. 36(4) of the *CCAA*, the court must be satisfied, overall, that sufficient safeguards were adopted to ensure that a related party transaction is in the best interest of the stakeholders of the applicants and that the risk to the estate associated with a related party transaction has been mitigated. Justice Morawetz was satisfied that the process was reasonable in light of the unique assets involved. Whether or not a legal challenge on the branding would ultimately be successful, the litigation risks would, in his view, be expected to materially affect the value of the purchased assets to an unrelated third party. Justice Morawetz also noted that the monitor had been involved throughout the proposed transaction, and its view was that the purchase price exceeded the estimated liquidation values and benefited the creditors. Justice Morawetz was satisfied that the transaction was in the best interests of stakeholders and provided some enhanced economic value to the estate. He held that the requirements of s. 36(7) had been satisfied. That section provides a degree of protection to employees and former employees for unpaid wages the employees would have been entitled to receive under the *BIA*, in addition to amounts that were owing for post-filing services to a debtor company. In the result, the sale was approved and the approval and vesting order was granted: *Re Target Canada Co.*, 2015

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CarswellOnt 5211, 30 C.B.R. (6th) 335, 2015 ONSC 2066 (Ont. S.C.J. [Commercial List]).

(5) — Court May Authorize Sale or Disposition Free and Clear of Security

The court may order that the property be sold to the purchaser free and clear of charges, liens and restrictions of any kind. The interests of the secured creditor are protected by the requirement that the proceeds of the sale or disposition be subject to the same charges, liens or restrictions as the original property: s. 36(6).

(6) — Court to Authorize Only Where Satisfied Company Can and Will Make Specified Payments

The court may grant the authorization for a sale only if the court is satisfied that the company can and will make the payments that would have been required under ss. 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement, specifically, certain remittances due to the Crown and payments to employees as set out in s. 136 of the *BIA* and compensation to employees for services rendered after proceedings commenced: s. 36(7).

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2008 MBQB 297
Manitoba Court of Queen's Bench

Winnipeg Motor Express Inc., Re

2008 CarswellMan 560, 2008 MBQB 297, 172 A.C.W.S. (3d) 564, 233 Man. R. (2d) 267, 49 C.B.R. (5th) 302

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C. c-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the Applicants")

Suche J.

Heard: October 24, 2008
Oral reasons: October 24, 2008
Docket: Winnipeg Centre CI 08-01-56696

Counsel: G. Bruce Taylor, Jennifer J. Burnell for Applicants
Harvey G. Chaiton for Heller Financial Canada Holding Company, GE Canada Leasing Services Company
Donald G. Douglas for Paccar Financial Services Ltd.
John M. Reimer-EPP for 7062001 Canada Limited
Douglas G. Ward, Q.C. for Alterinvest Fund L.P. (BDC)
Robert A. Dewar, Q.C. for Ramwinn Diesel, Inc.
William G. Haight for Key Equipment Finance Canada Ltd.
David R.M. Jackson for Monitor, Ernst & Young Inc.

Subject: Insolvency

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Sale of assets — Trucking company brought application under Companies' Creditors Arrangement Act, all proceedings against company were stayed, monitor was appointed, and with monitor's assistance company undertook consolidation of its operations and reduction of its fleet — Two formal offers to acquire company were presented from company's CEO ("CEO's offer") and from another transport company, and as result of monitor's negotiation, CEO's offer was one which met all conditions — Company brought application seeking order accepting CEO's offer and approving sale of certain assets — Choice before court was to approve CEO's offer or to allow forced liquidation or bankruptcy, and monitor, all secured

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creditors, and certain equipment lessors recommended accepting CEO's offer — However, creditor BDC, which had charge on company's fixed assets and over its receivables, opposed offer as disadvantageous to it and submitted that stay should not be ordered without plan of arrangement — Application granted — Monitor made sufficient effort to obtain best price, and efficacy and integrity of process by which offers were obtained were not questioned by any party — BDC was unhappy that it did not get more out of offer, but that was not sufficient to show that interests of parties were not served — Accepting offer was preferable to forced liquidation or bankruptcy and it was in interests of all stakeholders that transaction proceed — Issue of refusing stay where no plan of arrangement existed ought to have been raised at time initial order was granted, and even if reason existed to deny initial stay, no reason existed to reject sale transaction five months later — No jurisdictional impediment existed to granting order sought and proposed sale was preferable to alternatives and in interests of all stakeholders.

Table of Authorities

Cases considered by *Suche J.*:

Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re (1998), 1998 CarswellOnt 3346, 5 C.B.R. (4th) 299, 72 O.T.C. 99 (Ont. Gen. Div. [Commercial List]) — considered

Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp. (2008), 2008 BCCA 327, 2008 CarswellBC 1758, 83 B.C.L.R. (4th) 214, 296 D.L.R. (4th) 577, 46 C.B.R. (5th) 7, [2008] 10 W.W.R. 575 (B.C. C.A.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — considered

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11 — pursuant to

Employment Standards Code, S.M. 1998, c. 29
Generally — referred to

APPLICATION by company for approval of sale of assets.

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***Suche J.*:**

1 WME seeks an order approving the sale of certain of its assets to 7062001 Canada Limited. I advised the parties yesterday that I was granting the order as requested and would provide reasons today.

2 This transaction is the end result, although perhaps not the final step, in these proceedings, which began on May 15, 2008 when I granted an initial order under s. 11 of the *CCAA*, staying all proceedings against the company, appointing Ernst & Young Inc. as the monitor, and authorizing DIP financing on the amount of $1,000,000.

Background

3 WME is a trucking distribution and storage company headquartered in Winnipeg. As at the date of the initial order, it had terminals in several other cities in Canada and a customer base, diverse both geographically and in nature. Most of its business involved travel to the United States. It operated a fleet of approximately 175 tractors and 243 trailers. It employed 215 employees and over 80 independent contractor owner/operators. It also had outstanding liabilities of approximately $34,000,000. In 2007, WME experienced escalating losses, declining revenues, and increased expenses. It lost approximately $3,400,000 on total revenues of $71,000,000 during the year. This trend accelerated in 2008. The fact that the bulk of WME's business was in the United States, given the rising Canadian dollar, increased cost of fuel, and a downturn in the American economy, was a poisonous mix for WME. By early 2008, senior management had come to the realization that it was necessary for the company to downsize if it was to survive. Actions by several creditors, most significantly its fuel supplier, brought the issues to a head and precipitated an application under the *CCAA*.

4 From the outset of these proceedings the view of WME management was that the company needed to be downsized — or right-sized — for it to continue to carry on business, but that prospect, or at worst a sale as a going concern once that had been achieved, was a realistic goal.

5 When the order was granted, WME was supported by its major secured creditors, GE and Heller, who together supplied acquisition funding, operating funds, and equipment under leases. At various times some or other of BDC, who has security over WME's fixed assets, the prior vendor, who provided take-back financing, and an assortment of equipment lessors, have also supported the proceedings.

6 Over the last five months WME, with the assistance of the monitor, has undertaken the very considerable task of consolidating its operations, reducing staff/independent contractors, reducing its fleet, and returning equipment no longer required to lessors from various locations across North America, with what appears to be minimal disruption to service to its customers and while at the same time readying the company for sale and collecting its receivables in more or a less an orderly fashion.

7 Certain leases — both for premises and equipment — have been repudiated with lessors suffering losses, employees have been terminated, and a significant number of trade creditors have been left without payment. However, WME has continued in business and met all of its ongoing obligations. With the exception of GE, and except otherwise for approximately two months, it has also paid all ongoing equipment lease and financing charges.

The Monitor

8 Within a week of the initial order, the monitor prepared a Notice of Opportunity to Acquire WME and distributed it to 22 perspective purchasers. This generated interest from nine different parties. By late August, three parties had either expressed interest, made an offer, or sent a letter of intent. At about this point, Mr. Page, the CEO of WME, (and now the sole shareholder of 7062001 Canada Limited) indicated interest in submitting an offer.

9 The monitor requested that offers be updated and, ultimately, only two formal offers were presented: one from Mr. Page and another from another transport company.

10 None of the offers — either those that were initially made or the two eventually submitted as formal offers —

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contemplated any financial return or funds for WME's unsecured creditors or shareholders, and secured creditors would suffer substantial shortfalls in all instances. The sale before me for consideration will result in at least $9,000,000 in unpaid liabilities.

11 The two offers also required the acceptance of the purchaser as a customer by GE. As both left something to be desired, the monitor requested and was granted an order extending its power to allow it to negotiate the best deal and report back thereafter. Ultimately the other party was unable to obtain GE's consent. The Page offer was improved and all other conditions were either met or waived by it.

12 The choice before the court, then, is to approve the Page offer (now structured through the corporation 7062001 Canada Limited), or to allow a forced liquidation or bankruptcy.

13 The monitor has been of the view from the time the first set of offers were received in late August, that a going concern sale was preferable to a forced liquidation because it would provide at least the following benefits:

- an orderly transition of customers;
- offers of employment to some employees;
- enhanced collection of WME's receivables;
- opportunities for certain equipment lessors to continue leasing equipment; and
- a sale of unencumbered equipment.

14 In terms of the offer that is before the court, the monitor expresses the view that it is fair and reasonable and will provide substantial benefit to the stakeholders. It recommends that the offer be accepted. It is joined in this recommendation by all secured creditors and even certain of the equipment lessors whose leases will not be assumed. The only party opposing is BDC.

15 WME is indebted to BDC in the approximate amount of $2,400,000. In addition to a charge on WME's fixed assets, BDC has a charge over receivables but stands second to Heller. The possibility exists that it may receive some return on this. It also likely has first claim to proceeds of sale of some of WME's equipment. These are the only payments it will receive.

16 The monitor obtained an appraisal of the fixed assets at approximately $430,000 before any liquidation costs. In its recent report, the monitor has expressed the view that $260,000, being the allocation to the equipment owned by WME, in the proposed transaction, represents a reasonable estimate of what would be available in net funds after taking into consideration all costs of liquidation.

17 BDC argues that this transaction should not be approved, in essence because it works an unfairness or, perhaps in other language, it is not appropriate in all the circumstances because of disadvantage to BDC. Mr. Ward points out that unlike a plan of arrangement, where all creditors with the same type of security are paid the same percentage return, BDC is left with considerably less than the other secured creditors and much less than what it would obtain on a liquidation.

18 Mr. Ward also raises the fact that as part of the purchase price, some $40,000 will go to pay outstanding pre-order vacation pay, which would otherwise be a liability of Mr. Page as a director of WME.

19 Finally, and perhaps most importantly, Mr. Ward cites the recent decision of the British Columbia Court of Appeal in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, [2008] B.C.J. No. 1587 (B.C. C.A.), where the court found that absent a plan of arrangement or compromise a stay of proceedings should not be ordered.

Analysis

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20 I turn, then, to the applicable law.

21 In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), the Ontario Court of Appeal stated that in considering whether to approve a sale by a court-appointed receiver, the duty of the court was to consider:

(i) whether the receiver had made sufficient effort to get the best price and had not acted improvidently;

(ii) the interests of the parties;

(iii) the efficacy and integrity of the process by which offers were obtained; and

(iv) whether there has been unfairness in the working out of the process.

22 In *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), Blair J. adopted this same test when considering a proposed transaction in a *CCAA* proceeding.

23 In this case, the actions of the monitor in making sufficient effort to obtain the best price, and the efficacy and integrity of the process by which offers were obtained, are not questioned by any party. The efforts, not only of the monitor but also of WME in locating potential purchasers, the use of confidentiality agreements and sealed reports to protect the integrity of the process, and the monitor's efforts in negotiating the best deal, together, speak of an efficient and very professional approach by the monitor.

24 The issue of unfairness in the process identified in *Soundair*, concerns actions of the receiver typically towards a potential purchaser. As long as the receiver has acted reasonably prudently, fairly and not arbitrarily, its recommendation should be accepted.

25 Last, is the question of the interest of the parties. It is well accepted in *CCAA* proceedings that regard should be had to the interests of all of the stakeholders, which may well go beyond the debtor and creditor, and extend to employees, customers, and the like. It is perhaps under this heading that BDC's concern could be considered.

26 Having said that, BDC has either supported or taken no position on every request made by WME during the course of these proceedings. It has actively supported several extension motions, including when the stated objective of the monitor in seeking the extension, was to locate a buyer; and the extension which allowed Mr. Page the opportunity to prepare an offer. I note this was done after having received a summary of the earlier three offers or expressions of interest.

27 Ultimately BDC was in support of the other formal offer submitted but not accepted by GE. That support, I might add, was conditional on BDC not being subject to the DIP financing.

28 This brief summary is telling, in my view. I take from it that BDC is simply unhappy that it did not get more out of this transaction. That in and of itself is not sufficient objection to say that the interests of the parties have not been served.

29 It is also the case that the matter of the priority of the DIP financing is yet to be determined, so in theory, BDC may have an opportunity to improve its position.

30 Considerable time was also spent on the issue of the "optics" of the situation, namely, that Mr. Page, the CEO of WME in the period leading up to and during its financial difficulties, will ultimately be the sole owner of a well capitalized company, while creditors, secured and unsecured, are left with substantial losses. The matter of the unpaid vacation wages, it is argued, adds to this concern.

31 Having canvassed the matter thoroughly during the hearing of this motion — perhaps the point of leaving no stone unturned — I agree with WME that no benefit accrues to Mr. Page or any of the other directors by inclusion of $40,000 to pay pre-May 15 vacation pay, as part of the purchase price. Directors' liabilities under *The Employment Standards Code* only

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arise when the employer company is not able to pay. Here, the $40,000 would otherwise have been paid by WME on the expiry of the stay and prior to the closing of this transaction.

32 As to the fact that Mr. Page ends up being the effective owner of the business, in the end, the only viable offer made for the purchase of the assets of WME was his. "Optics" are only a concern if the appearance is a reflection of the substance of a situation. In this instance it is not. Mr. Page himself gave up a considerable claim for vacation pay. WME, with Mr. Page leading the management team, has acted with due diligence and good faith throughout these proceedings.

33 My conclusion is that the offer is clearly preferable to a forced liquidation or a bankruptcy and it is in the interests of all stakeholders that the transaction proceed.

34 The last issue concerns the question of the jurisdiction of the court to approve a sale where no Plan of Arrangement has been filed. In *Cliffs Over Maple Bay Investments Ltd.*, *supra*, the British Columbia Court of Appeal overturned a lower court decision granting a stay under s. 11 of the *CCAA* and authorizing DIP financing.

35 The business of the company was the development of some land into residential homes and a golf course. Various parts of the property were between 50% and 95% complete. Financial difficulties occurred when delays and cost overruns developed, but the situation became critical when it was discovered that the anticipated water source for the golf course was not available. When the company advised the mortgagees of the property of this, they responded with Notices of Intention to enforce their security. A receiver was appointed, which precipitated an application by the company for a stay under the *CCAA*. The order was granted.

36 On appeal, the lenders argued that the *CCAA* should not apply to companies whose business is a single land development or is essentially dormant. The court rejected these arguments but found that the real question was whether a stay of proceedings should have been granted at all. Tysoe J.A., writing on behalf of the court, states:

> 26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.
>
> 27 The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:
>
>> An Act to facilitate compromises and arrangements between companies and their creditors.

37 While recognizing that the legislation is intended to have wide scope and allows a judge to make orders to effectively maintain the status quo while an insolvent company attempts to restructure or otherwise organize its affairs, Tysoe J.A. goes on to say:

> 32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at para. 7 (Ont. Ct. Jus. — Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at para. 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at para. 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

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33 Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (BCSC), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

38 Given that the debtor company proposed only a restructuring and did not intend to propose a plan of arrangement or compromise, Tysoe J.A. was of the view that this was not a proper case for a stay. He concludes:

38 ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

39 Justice Tysoe's description of the fundamental purpose of the *CCAA*, is not, in my view, consistent with that of other courts, who have accepted that a sale of assets without a plan of arrangement can be ordered. In *Lehndorff General Partner Ltd., Re* [1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List])], Farley J. stated:

5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. ...

40 In *Red Cross, supra*, this issue was considered by Blair J., who states at para. 45:

It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by

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> their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

41 In the flight away from receiverships resulting from the potential liability of receivers, it seems that *CCAA* proceedings are becoming not only vehicle of choice, but a necessary remedy where liquidation or bankruptcy would not be in the interests of a debtor company and creditors. Everyone agrees the *CCAA* is intended to be flexible, and must be given a broad and liberal interpretation to achieve its objectives. I consider those objectives to be both more fundamental and broader than the title of the statute, and go beyond the circumstances of a formal plan of arrangement. The world of commercial lending and the complexity of security interests has evolved, and I consider the remedial nature of the *CCAA* allows it to deal with such changes.

42 It also seems to me that a formal plan of arrangement or compromise is, at least theoretically, always a possibility, so to require a debtor company to utter some magic incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the CCAA, is overly technical and inconsistent with this remedial objective. The result of such a conclusion may simply be that applicants would make a statement in some *pro forma* or boiler plate language, or go through an exercise for no valid purpose.

43 However, even if the view expressed by the B.C. Court of Appeal is the correct one, this is an issue which ought to have been raised at the time the initial order was granted or on the comeback hearing. So, even if this were a reason to deny the initial stay, I do not see that it is a reason to reject a sale transaction some five months later.

44 In conclusion, then, I see no jurisdictional impediment in granting the order sought and I am of the view that the proposed sale is preferable to the alternatives, and clearly in the interests of all stakeholders.

Application granted.

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2013 NSCA 34
Nova Scotia Court of Appeal

Lord v. Smith

2013 CarswellNS 177, 2013 NSCA 34, 1039 A.P.R. 189, 226 A.C.W.S. (3d) 1156, 328 N.S.R. (2d) 189

Leanne Smith, Appellant v. Michael Kenneth Lord, Respondent

Farrar J.A., Beveridge J.A., Bryson J.A.

Heard: January 22, 2013
Judgment: March 11, 2013
Docket: C.A. 405435

Proceedings: affirming *Lord v. Smith* (2012), 2012 CarswellNS 992, 1029 A.P.R. 48, 324 N.S.R. (2d) 48, 2012 NSSC 232 (N.S. S.C. [In Chambers])

Counsel: Christa M. Brothers, Scott R. Campbell, for Appellant
J. Walter Thompson, Q.C., David S. Green, for Respondent

Subject: Civil Practice and Procedure

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XVI Disposition without trial
XVI.4 Dismissal for delay
XVI.4.h Defences to application
XVI.4.h.ii Delay fault of solicitor

Headnote

Civil practice and procedure --- Disposition without trial — Dismissal for delay — Defences to application — Delay fault of solicitor

Plaintiff alleged he was injured in 1998 motor vehicle accident caused by defendant — Plaintiff filed statement of claim in 2000, but no further documents were filed by either party — Order of dismissal was issued in 2003 — No procedural steps were taken until plaintiff contacted prothonotary's office in 2010 — Plaintiff claimed he did not have notice of dismissal, always intended to prosecute claim and finally pursued matters himself when he became fed up with lack of progress by his solicitor in 2010 — Plaintiff brought successful motion to set aside dismissal of action due to delay — Defendant appealed — Appeal dismissed — In circumstances where order was made ex parte without notice to parties, motions judge had inherent jurisdiction to hear motion and decide whether to grant requested remedy — Motions judge did not commit reviewable error in finding that it was not necessary to presume prejudice to defendant — Motions judge found that plaintiff was not personally responsible for delay and there was no substantial prejudice — There was evidentiary basis for motions judge's findings and he did not err in law — Patent injustice did not result from decision.

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Clarke v. Sherman (2002), 24 C.P.C. (5th) 203, 2002 NSCA 64, 2002 CarswellNS 219, 26 M.V.R. (4th) 1, 205 N.S.R. (2d) 112, 643 A.P.R. 112 (N.S. C.A.) — followed

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Innocente v. Canada (Attorney General) (2012), 2012 NSCA 36, 2012 CarswellNS 233, 998 A.P.R. 273, 315 N.S.R. (2d) 273 (N.S. C.A.) — referred to

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Wallace v. Davis (1907), 1907 CarswellNS 93, 4 E.L.R. 272 (N.S. T.D.) — considered

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Rules considered:

Civil Procedure Rules, N.S. Civ. Pro. Rules 2009
R. 78.08 — referred to

APPEAL by defendant from judgment reported at *Lord v. Smith* (2012), 2012 CarswellNS 992, 1029 A.P.R. 48, 324 N.S.R. (2d) 48, 2012 NSSC 232 (N.S. S.C. [In Chambers]), granting plaintiff's motion to set aside dismissal of action due to delay.

***Farrar J.A.*:**

1 By Order dated April 7, 2003, (the Order), Associate Chief Justice J. Michael MacDonald (as he was then) dismissed the respondent, Michael Kenneth Lord's action against the appellant Leanne Smith, on a Prothonotary's motion in Chambers. Almost nine years later, on March 28, 2012, Mr. Lord filed a motion asking the court to exercise its inherent jurisdiction to set aside the Order.

2 By decision dated June 12, 2012, ([*Lord v. Smith*] 2012 NSSC 232 (N.S. S.C. [In Chambers])) Nova Scotia Supreme Court Justice Peter Rosinski allowed the plaintiff's motion and set aside the Order.

3 Ms. Smith seeks leave to appeal and, if granted, appeals from the Order of the motions judge alleging that he committed reviewable error in the formulation, consideration and application of the test for setting aside a dismissal order.

4 For the reasons that follow, I would grant leave to appeal but dismiss the appeal. However, in these circumstances, without costs to either party.

Background

5 This unfortunate story starts with a rear end motor vehicle collision on December 11, 1998, between Mr. Lord and Ms. Smith. On December 12, 2000, an Originating Notice/Statement of Claim was filed by Mr. Lord's then solicitor, Kyle D. Langille alleging that Ms. Smith was at fault for the accident and that he suffered injuries as a result of it.

6 At some time between the filing of the Originating Notice and July 2, 2002, Mr. Langille ceased to act for Mr. Lord and John McKiggan took over as his solicitor.

7 On July 2nd, 2002, Mr. McKiggan wrote to Ms. Smith's insurer enclosing "a copy of all the medical information ... received for Mr. Lord to date." The insurer continued to deal with Mr. McKiggan throughout 2002 and 2003.

8 On December 18, 2002, a Notice to Appear was issued returnable to Chambers on Appearance Day on January 3, 2003. The Notice to Appear was issued pursuant to Practice Memorandum #27 which provided that the court could, on its own motion, bring a matter forward to Appearance Day to discuss the status of the case where more than 24 months had passed since the filing of the Originating Notice and Statement of Claim and no Defence had been filed.

9 The Prothonotary attempted to contact Mr. Langille. However, at that time Mr. Langille had his law practice taken over by the Nova Scotia Barristers' Society. In contacting the Barristers' Society the Prothonotary was informed that Mr. Lord was representing himself in the matter.

10 The Prothonotary then attempted to locate Mr. Lord and was unsuccessful in doing so.

11 As a result, on April 7th, 2003, approximately four months after the Prothonotary had first made inquiries about the

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matter, MacDonald, A.C.J. issued the Order dismissing the action on the basis that the court had been unable to locate Mr. Lord and that he "presumably" had no interest in advancing the claim.

12 The motions judge below concluded that at the time the dismissal order was issued, Mr. Lord was being represented by Mr. McKiggan. However, there was nothing in the court file to indicate this. The plaintiff and his counsel were unaware of the motion before the Chambers judge and did not receive notice of the imminent dismissal of his action.

13 Similarly, as no Defence had been filed neither the defendant nor counsel representing her was notified.

14 Nothing more occurs until March 17, 2004, when Dennise Mack, in-house counsel for Aviva Insurance, Ms. Smith's insurer, attempted to file a Defence on behalf of Ms. Smith. At that time she was informed by court officials that the action had been dismissed.

15 On March 19th, 2004, Ms. Mack called Mr. McKiggan to inform him that his client's action had been dismissed.

16 On that same day Mr. McKiggan telephoned the Prothonotary's office and left a message. The Prothonotary responded by letter dated April 1, 2004, advising Mr. McKiggan of the chronology of events, which I have set out above, that resulted in the dismissal of his client's action. She also advised that it was open to him to make an application to set aside the Order.

17 Inexplicably, there were no further steps taken in this proceeding until the plaintiff's present counsel, David Green, contacted the Prothonotary's office, by telephone, on October 22nd, 2010. Again the Prothontary responded in writing advising Mr. Green of the circumstances surrounding the dismissal of the action, and advising of her contact with Mr. McKiggan in 2004.

18 Again, inexplicably, no further action was taken until the motion to set aside the Dismissal Order was filed on March 28, 2012, nearly a year and a half later.

Issues

19 The appellant raises three issues with respect to this appeal:

1. Did the motions judge have jurisdiction to entertain the motion?

2. Did the motions judge commit a reviewable error by disregarding a presumption of law, namely, the presumption of serious prejudice in the face of inordinate delay?

3. Did the motions judge otherwise commit a reviewable error in setting aside the dismissal order?

Standard of Review

20 The first issue, whether the motions judge had jurisdiction to entertain the motion, is a pure question of law and will be reviewed on the correctness standard. Similarly, the second issue, whether the motions judge disregarded or failed to apply a mandatory presumption of law is also a question of law and will be reviewed on a standard of correctness. (*Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.), ¶8-9).

21 The third issue involves the ultimate discretion of the motions judge. We will not intervene unless the motions judge applied wrong principles of law or a patent injustice would result (*Innocente v. Canada (Attorney General)*, 2012 NSCA 36 (N.S. C.A.), ¶29.

Analysis

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1. Did the motions judge have jurisdiction to entertain the motion?

22 The appellant argues that the motions judge did not have jurisdiction to set aside an order of another judge of co-ordinate jurisdiction.

23 With respect I disagree. The motions judge found, and I agree, that, in these circumstances where the Order was made *ex parte* without notice to the parties, he had inherent jurisdiction to hear the motion and decide whether to grant the remedy requested.

24 Chief Justice MacDonald in *Central Halifax Community Assn. v. Halifax (Regional Municipality)*, 2007 NSCA 39 (N.S. C.A.) provided the following definition of inherent jurisdiction:

> **34** Every superior court in this country has a residual discretion to control its process in order to prevent abuse. Procedural rules, however well intentioned, cannot be seen to stand in the way of basic fairness. This overriding judicial discretion is commonly referred to as the court's inherent jurisdiction. It is a jurisdiction sourced independently from any rule of court or statute. ...

25 In his seminal article, IH Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Current Legal Problems 23 Jacob defined the inherent jurisdiction of the court as:

> ... the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.
>
> (Emphasis mine)

26 In *Goodwin v. Rodgerson*, 2002 NSCA 137 (N.S. C.A.), this Court is unequivocal:

> 17 The inherent jurisdiction of the court has been described as a vague concept and one difficult to pin down. It is a doctrine which has received little by way of analysis, but there is no question it is a power which a superior trial court enjoys to be used where it is just and equitable to do so. ...
>
> (Emphasis mine)

27 Inherent jurisdiction is a highly flexible tool. As Master Jacob said at p. 23:

> ...[I]t "may be invoked in an apparently inexhaustible variety of circumstances and may be exercised in different ways. This peculiar concept is indeed so amorphous and ubiquitous and so pervasive in its operation that it seems to defy the challenge to determine its quality and to establish its limits.
>
> (Emphasis mine)

28 The scope of inherent jurisdiction was discussed in *Halifax (Regional Municipality) v. Ofume*, 2003 NSCA 110 (N.S. C.A.), where Saunders, J.A. delineated the scope of inherent jurisdiction broadly to encompass judicial actions that further the goals of "effectiveness", "efficiency" and "fairness":

> [40] ... In the instant case the discretion exercised by ...[the trial judge] derives from the Court's inherent jurisdiction to

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> control its own proceedings. I see this control as fundamental to a court that derives its power and existence not from statute but from the Constitution. The operation of the court is a necessary function of our society. The inherent jurisdiction which helps to maintain the efficiency and fairness of such a court is something far greater than the jurisdiction to correct substantive problems, as was considered in **Baxter**. The inherent jurisdiction exercised by the Chambers judge here is the kind of jurisdiction spoken of by Lord Morris in **Connelly, supra**, quoted in **Montreal Trust Co., supra**, which gives rise to the "powers which are necessary to enable [a court] to act effectively."
>
> (Emphasis mine)

29 Despite its large scope and flexibility, inherent jurisdiction is not available for use in every situation. As Chief Justice MacDonald in *Central Halifax Community Assn., supra*, observed: ...[Inherent jurisdiction] remains a safety net that can prevent abuse in those truly exceptional cases. (¶44) It must be exercised judicially and with caution. It is typically limited to procedural matters. It cannot effect changes in the substantive law, and it cannot be exercised so as to contravene a law.

30 William Charles in his article "Inherent Jurisdiction and its Application by Nova Scotia Courts: Metaphysical, Historical or Pragmatic?" (2010), 33 Dalhousie L.J. 63 enumerated this Court's observations on the topic of inherent jurisdiction, summarizing three of them as follows:

> ... [Inherent jurisdiction] is primarily a procedural concept which the courts must be cautious in exercising and [which] should not be used to make changes in substantive law.
>
> Action taken pursuant to inherent jurisdiction requires an exercise of discretion. This discretion must always be exercised judicially.
>
> A judge does not have an unfettered right to do what is thought to be fair as between the parties. A court's resort to its inherent jurisdiction "must be employed within a framework of principles relevant to the matters in issue." [Footnotes Omitted] (p. 13)

31 In *Perfaniuk v. Ladobruk*, [1960] M.J. No. 40 (Man. C.A.), a decision of the Manitoba Court of Appeal, one party (the insurer) was deprived of an opportunity to have its day in court as a result of a procedural matter. An insured had been involved in a motor vehicle accident and was served with a statement of claim by the appellant. The insured failed to notify the insurer, the respondent, and as a result the action was not defended. The trial judge issued an interlocutory judgment, assessed the damages and entered judgment against the respondent.

32 The respondent insurer learned of the judgment and immediately applied to have the judgment set aside and to be named as a third party to the action. The respondent's motion was granted. The appellant appealed, arguing that the court was "without jurisdiction to set the judgment aside at the instance of the insurer" (¶3).

33 The Manitoba Court of Appeal was satisfied the Court of Queen's Bench had inherent power to set aside any of its judgments in a proper case and rejected as without foundation the argument that entry of a final judgment put an end to the jurisdiction of the court to set it aside (¶7).

34 The authorities make it abundantly clear that in circumstances such as this, where an *ex parte* order was granted dismissing the plaintiff's action, without notice to the plaintiff (and in this case, to the defendant), the court has the inherent jurisdiction to review the order to determine whether it ought to be set aside. However, this overriding judicial discretion must be exercised judicially within a framework of principles relevant to the matters in issue.

35 I am satisfied the motions judge had jurisdiction to entertain the motion before him. I would dismiss this ground of appeal.

36 Before leaving this area, I would like to comment on the decision of *Francis v. Haliburton*, [1975] N.S.J. No. 500 (N.S. T.D.), a decision of MacIntosh, J. of the Nova Scotia Supreme Court, Trial Division. In that case, the court was asked

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to set aside an order dismissing an action for want of prosecution. The Order was made *ex parte*.

37 In determining that he had no jurisdiction to vary the order, the Chambers judge said the following:

> 14 In **Volhoffer v. Volhoffer**, [1925] 3 D.L.R. 552, at page 559, Lamont, J.A., stated:
>
> > "In **Koosen v. Rose** (1897), 76 L.T. 145, Lord Esher said, at p. 146:-
> >
> > > Now, one judge cannot interfere with the order of another judge of co-ordinate jurisdiction, unless that power has been given by some statute.
> >
> > It is true, as was held in the case of **Re Sproule** (1886), 12 S.C.R. 140, that every Superior Court has inherent jurisdiction to supervise its own process and to set it aside if issued improvidently, but that does not mean that such jurisdiction may be exercised by a single Judge in Chambers, in the absence of a Rule of Court authorizing him to do so. [*page626]
>
> I am therefore of opinion that, except upon an appeal, a Judge in Chambers has no jurisdiction to set aside an order of the Local Master made in Chambers."
>
> 15 I take these authorities to be a proper statement of the law here involved.
>
> 16 Under the circumstances, as set forth in this application, I am of the opinion there is no jurisdiction in me as Chambers Judge to vary or rescind the order of a Local Judge of the Trial Division of the Supreme Court.

38 Although the Chambers judge may have reached the right decision in that case, his statement that "one judge cannot interfere with the order of another judge of co-ordinate jurisdiction, unless that power has been given by some statute" is too broad for two reasons. First, the Chambers judge did not acknowledge the longstanding and wide exceptions to this general rule not the least of which is the so-called "Slip rule" (Rule 78.08 of the *Nova Scotia Civil Procedure Rules*) which allows a court to correct technical mistakes and errors with respect to the express intentions of court. Second, the Chambers judge did not appear to appreciate that a Chambers judge has the inherent jurisdiction to control process even though that had been accepted as far back as *Wallace v. Davis*, 1907 CarswellNS 93 (N.S. T.D.) and it has since been acknowledged by this Court, for example, in *Goodwin*, *supra* and *Ofume*, *supra*.

2. Did the motions judge commit a reviewable error by disregarding a presumption of law, namely, the presumption of serious prejudice in the face of inordinate delay?

39 The trial judge accepted, and the parties agreed, that the proper analytical framework for him to apply in determining whether to set aside the Order was as set out in *Hiscock v. Pasher*, 2008 NSCA 101 (N.S. C.A.). In that case this Court had to consider whether a Chambers judge erred in his consideration of an appeal from a Prothonotary's order dismissing an action.

40 In that case, Roscoe, J.A. observed that such orders were administrative and were not made after consideration of the merits of the case. She adopted the test applicable to a motion seeking dismissal for want of prosecution. She stated the test as follows:

> 23 Under **Rule** 28.13, the defendant bears the burden as the applicant. On appeal from a prothonotary's **Rule** 28.11 order, the plaintiff, as the appellant, ought to bear the burden of proving:
>
> > 1. That there is no inordinate or inexcusable delay, or, if there is, that it is not the plaintiff personally who is to

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blame for the delay;

2. That the plaintiff has always intended to proceed with the action and was either unaware of the *Rule* 28.11 notice or her solicitor's failure to respond to it;

3. That the defendant has not likely been prejudiced by the delay; and,

4. After balancing all the relevant factors, it is shown to be in the interests of justice, to set aside the prothonotary's order.

41 Roscoe, J.A.'s recitation of the test for dismissal for want of prosecution differs slightly from the well-established and non-controversial test set out in *Clarke v. Sherman*, 2002 NSCA 64 (N.S. C.A.):

> 8 Thus, to summarize, in order to succeed the onus is upon a defendant to show: first, that the plaintiff is to blame for inordinate delay; second, that the inordinate delay is inexcusable; and third, that the defendant is likely to be seriously prejudiced on account of the plaintiff's inordinate and inexcusable delay. If the defendant is successful in satisfying these three requirements, the court, before granting the application must, in exercising its discretion, go on to take into consideration the plaintiff's own position and strike a balance - in other words, do justice - between the parties.(Underlining in original)

42 The main distinction is that under the test for dismissal for want of prosecution, reference is made to the defendant likely being "seriously prejudiced" whereas in Roscoe, J.A.'s test in *Pasher* the word "seriously" was not included.

43 Although the wording may be slightly different, I take the two tests to be the same; not simply any likelihood of prejudice would be sufficient to deny the plaintiff a remedy but that there has to be a likelihood of serious prejudice.

44 I now turn to the appellant's argument on this point which is, that there is a mandatory presumption that the defendant has suffered prejudice and that failing to apply this mandatory presumption resulted in reversible error by the trial judge. With respect to the appellant's position, the presumption is not mandatory, but rather its application will depend on the circumstances of each individual case. In *MacMillan v. Children's Aid Society of Cape Breton*, 2006 NSCA 13 (N.S. C.A.), Hamilton, J.A. summarized the law as follows:

> 19 The case law indicates prejudice may be presumed in some circumstances. The judge referred to this case law and found that in the circumstances of this case he should presume serious prejudice rather than require the respondents to prove it:
>
> > [23] Mr. Justice Chipman of our Court of Appeal in*Saulnier v. Dartmouth Fuels Ltd.* (1991), 106 N.S.R. (2d) 425, ... confirmed the *Cooper* test in *Martell*, [1978] N.S.J. No. 512 on the question of onus at page 430. ... I quote:
> >
> > > All that can be said generally about onus is that while the onus is initially upon the defendant as applicant to show prejudice, there may be cases where the delay is so inordinate as to give rise in the circumstances to an inference of prejudice that falls upon the plaintiff to displace. The strength of the inference to be derived from any given period of delay will depend upon all the circumstances in the case.
> >
> > [24] And finally in *Moir v. Landry* (1991), 104 N.S.R. (2nd) 281 (N.S.C.A.), this was a case involving a three year delay. Mr. Justice Hallett, of the Court of Appeal, writing for the Court, noted that the onus to establish prejudice falls on the defendant except in cases of unusual long delay, such as the ten years in Martell. Justice Hallett said at page 284 in *Moir v. Landry, supra*, ...:

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> A plaintiff has a right to a day in Court and should not lightly be deprived of that right. Therefore, it is only in extreme cases of inordinate and inexcusable delay that a Court should presume serious prejudice to the defendant in the absence of evidence to support such a finding.
>
> [25] This is one of those cases. I am satisfied that as a result of the inordinate, inexcusable, extreme delay in excess of ten years in relation to this matter, that I can presume serious prejudice to the defendants. I do not find that the plaintiff has satisfied the onus to establish that no such prejudice exists.
>
> (Emphasis mine)

45 In cases where there has been an inordinate delay prejudice is sometimes presumed without further proof. However, it is not mandatory as suggested by the appellant. The strength of the inference, if any, is to be derived from all of the circumstances of the case.

46 In this case, although the motions judge did not reference a presumption, he makes reference to the circumstances that are present in this case which led him to conclude that the prejudice was not so substantial to preclude him granting the relief sought. Those circumstances include: the accident was a rear-end collision; the insurer being aware of the accident early on and had an opportunity to investigate that accident; the insurer had received some medical information relating to Mr. Lord's condition; the motions judge felt that any deficiencies in the medical records would likely be to the prejudice of the plaintiff; and he was satisfied, despite the passage of time, there could be a fair trial between the parties.

47 Therefore, I conclude that the motions judge found it was not necessary to presume prejudice to the appellant. He considered all of the evidence presented to him by way of affidavit and cross-examination and determined the prejudice likely to be suffered by the respondent was not substantial.

48 In reaching this conclusion he did not commit any reviewable error.

49 I would dismiss this ground of appeal.

3. Did the motions judge otherwise commit a reviewable error in setting aside the dismissal order?

50 Under this ground of appeal Ms. Smith argues that the motions judge underemphasized the real prejudice that the appellant faces; under-emphasized the responsibility of Mr. Lord for the inordinate delay and under-emphasized the alternative remedy (an action against his former counsel).

51 Those arguments were all made before the Chambers judge. He concluded that Mr. Lord was not personally responsible for the delay and that there was no substantial prejudice to the plaintiff. There was an evidentiary basis for his findings. In arriving at this conclusion he did not err in law nor does a patent injustice result from his decision.

52 With respect to the potential alternative remedy against his former counsel, whatever action Mr. Lord may have against his former counsel and its potential success is mere speculation. In my view, it was appropriate for the motions judge to give it little weight in his deliberations.

53 One final note, this was a motion to set aside a dismissal order, nothing more. There may be other motions relating to the matter including renewal of the Originating Notice and Statement of Claim, limitation of actions or dismissal for want of prosecution. This decision should not be taken as a constraint upon a motions judge's discretion in addressing any other matter which may come before the court below.

Conclusion

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54 I would grant leave to appeal, but dismiss the appeal. Given the unusual circumstances of this case I would not award costs to either party.

Appeal dismissed.

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