Court File No. CV-16-11582-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF PERFORMANCE SPORTS GROUP LTD., BAUER HOCKEY CORP., BAUER HOCKEY RETAIL CORP., BAUER PERFORMANCE SPORTS UNIFORMS CORP., BPS CANADA INTERMEDIATE CORP., BPS DIAMOND SPORTS CORP., EASTON BASEBALL/SOFTBALL CORP., KBAU HOLDINGS CANADA, INC., PERFORMANCE LACROSSE GROUP CORP., PSG INNOVATION CORP., BAUER HOCKEY RETAIL INC., BAUER HOCKEY, INC., BAUER PERFORMANCE SPORTS UNIFORMS INC., BPS DIAMOND SPORTS INC., BPS US HOLDINGS INC., EASTON BASEBALL/SOFTBALL INC., PERFORMANCE LACROSSE GROUP INC., PSG INNOVATION INC.

(Applicants)

BOOK OF AUTHORITIES OF THE APPLICANTS
(Re: Sale Approval)

Dated: February 3, 2017

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

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

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

Morawetz J.

Heard: June 29, 2009
Written reasons: July 23, 2009
Docket: 09-CL-7950

Counsel: Derrick Tay, Jennifer Stam for Nortel Networks Corporation, et al
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M. Starnino for Superintendent of Financial Services, Administrator of PBGF
S. Philpott for Former Employees
K. Zych for Noteholders
Pamela Huff, Craig Thorburn for MatlinPatterson Global Advisors LLC, MatlinPatterson Global Opportunities Partners III L.P., Matlin Patterson Opportunities Partners (Cayman) III L.P.
David Ward for UK Pension Protection Fund
Leanne Williams for Flextronics Inc.
Alex MacFarlane for Official Committee of Unsecured Creditors
Arthur O. Jacques, Tom McRae for Felske & Sylvain (de facto Continuing Employees' Committee)
Robin B. Schwill, Matthew P. Gottlieb for Nortel Networks UK Limited
A. Kauffman for Export Development Canada
D. Ullman for Verizon Communications Inc.
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Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Telecommunication company entered protection under Companies' Creditors Arrangement Act ("Act") — Company decided to pursue "going concern" sales for various business units — Company entered into sale agreement with respect to assets in Code Division Multiple Access business and Long-Term Evolution Access assets — Company was pursuing sale of its other business units — Company brought motion for approval of bidding procedures and asset sale agreement — Motion granted — Court has jurisdiction to authorize sales process under Act in absence of formal plan of compromise or arrangement and creditor vote — Sale by company which preserved its business as going concern was consistent with objectives of Act — Unless sale was undertaken at this time, long-term viability of business would be in jeopardy.

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MOTION by company for approval of bidding procedures for sale of business and asset sale agreement.

***Morawetz J.*:**

Introduction

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

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

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

4 The following are my reasons for granting these orders.

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

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

7 The Sale Agreement is not insignificant. The Monitor reports that revenues from CDMA comprised over 21% of Nortel's 2008 revenue. The CDMA business employs approximately 3,100 people (approximately 500 in Canada) and the LTE business employs approximately 1,000 people (approximately 500 in Canada). The purchase price under the Sale Agreement is $650 million.

Background

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

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

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

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

12 On June 19, 2009, Nortel announced that it had entered into the Sale Agreement with respect to its assets in its CMDA business and LTE Access assets (collectively, the "Business") and that it was pursuing the sale of its other business

units. Mr. Riedel in his affidavit states that Nortel has spent many months considering various restructuring alternatives before determining in its business judgment to pursue "going concern" sales for Nortel's various business units.

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

(a) the impact of the filings on Nortel's various businesses, including deterioration in sales; and

(b) the best way to maximize the value of its operations, to preserve jobs and to continue businesses in Canada and the U.S.

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

(a) the Business operates in a highly competitive environment;

(b) full value cannot be realized by continuing to operate the Business through a restructuring; and

(c) in the absence of continued investment, the long-term viability of the Business would be put into jeopardy.

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

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

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

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

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

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

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

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

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

Issues and Discussion

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

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

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

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

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

29 The CCAA has been described as "skeletal in nature". It has also been described as a "sketch, an outline, a supporting framework for the resolution of corporate insolvencies in the public interest". *ATB Financial v. Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 45 C.B.R. (5th) 163 (Ont. C.A.) at paras. 44, 61, leave to appeal refused [2008] S.C.C.A. No. 337 (S.C.C.). ("ATB Financial").

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

(a) the power of the court to impose terms and conditions on the granting of a stay under s. 11(4) of the CCAA;

(b) the specific provision of s. 11(4) of the CCAA which provides that the court may make an order "on such terms as it may impose"; and

(c) the inherent jurisdiction of the court to "fill in the gaps" of the CCAA in order to give effect to its objects. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]) at para. 43; *PSINET Ltd., Re* (2001), 28 C.B.R. (4th) 95 (Ont. S.C.J. [Commercial List]) at para. 5, *ATB Financial*, *supra*, at paras. 43-52.

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

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

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

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

> The purpose of the CCAA is to facilitate arrangements that might avoid liquidation of the company and allow it to continue in business to the benefit of the whole economic community, including the shareholders, the creditors (both secured and unsecured) and the employees. *Citibank Canada v. Chase Manhattan Bank of Canada* (1991), 5

C.B.R. (3 rd) 167 (Ont. Gen. Div.) at para. 29. *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.) at para. 5.

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

35 Counsel to the Applicants makes reference to a number of cases where courts in Ontario, in appropriate cases, have exercised their jurisdiction to approve a sale of assets, even in the absence of a plan of arrangement being tendered to stakeholders for a vote. In doing so, counsel to the Applicants submits that the courts have repeatedly recognized that they have jurisdiction under the CCAA to approve asset sales in the absence of a plan of arrangement, where such sale is in the best interests of stakeholders generally. *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re*, *supra*, *Re PSINet*, *supra*, *Consumers Packaging Inc., Re* [2001 CarswellOnt 3482 (Ont. C.A.)], *supra*, *Stelco Inc., Re* (2004), 6 C.B.R. (5th) 316 (Ont. S.C.J. [Commercial List]) at para. 1, *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.), *Caterpillar Financial Services Ltd. v. Hard-Rock Paving Co.* (2008), 45 C.B.R. (5th) 87 (Ont. S.C.J.) and *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]).

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

> The sale of Consumers' Canadian glass operations as a going concern pursuant to the Owens-Illinois bid allows the preservation of Consumers' business (albeit under new ownership), and is therefore consistent with the purposes of the CCAA.
>
> ...we cannot refrain from commenting that Farley J.'s decision to approve the Owens-Illinois bid is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered. *Re Consumers Packaging, supra, at paras. 5, 9.*

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

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

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

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

> I would observe that usually it is the creditor side which wishes to terminate CCAA proceedings and that when the creditors threaten to take action, there is a realization that a liquidation scenario will not only have a negative effect upon a CCAA applicant, but also upon its workforce. Hence, the CCAA may be employed to provide stability

during a period of necessary financial and operational restructuring - and if a restructuring of the "old company" is not feasible, then there is the exploration of the feasibility of the sale of the operations/enterprise as a going concern (with continued employment) in whole or in part. *Re Stelco Inc*, *supra*, at para. 1.

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

41 Counsel to the Applicants also referred to decisions from the courts in Quebec, Manitoba and Alberta which have similarly recognized the court's jurisdiction to approve a sale of assets during the course of a CCAA proceeding. *Boutiques San Francisco Inc., Re* (2004), 7 C.B.R. (5th) 189 (C.S. Que.), *Winnipeg Motor Express Inc., Re* (2008), 49 C.B.R. (5th) 302 (Man. Q.B.) at paras. 41, 44, and *Calpine Canada Energy Ltd., Re* (2007), 35 C.B.R. (5th) 1 (Alta. Q.B.) at para. 75.

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

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

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

45 The *Cliffs Over Maple Bay* decision has recently been the subject of further comment by the British Columbia Court of Appeal in *Asset Engineering LP v. Forest & Marine Financial Ltd. Partnership*, 2009 BCCA 319 (B.C. C.A.).

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

> 24. In *Cliffs Over Maple Bay*, the debtor company was a real estate developer whose one project had failed. The company had been dormant for some time. It applied for CCAA protection but described its proposal for restructuring in vague terms that amounted essentially to a plan to "secure sufficient funds" to complete the stalled project (Para. 34). This court, per Tysoe J.A., ruled that although the Act can apply to single-project companies, its purposes are unlikely to be engaged in such instances, since mortgage priorities are fully straight forward and there will be little incentive for senior secured creditors to compromise their interests (Para. 36). Further, the Court stated, the granting of a stay under s. 11 is "not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring"...Rather, s. 11 is ancillary to the fundamental purpose of the CCAA, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the CCAA's fundamental purpose". That purpose has been described in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984) 11 D.L.R. (4th) 576 (Alta. Q.B.):
>
>> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors. [at 580]

> 25. The Court was not satisfied in *Cliffs Over Maple Bay* that the "restructuring" contemplated by the debtor would do anything other than distribute the net proceeds from the sale, winding up or liquidation of its business. The debtor had no intention of proposing a plan of arrangement, and its business would not continue following the execution of its proposal - thus it could not be said the purposes of the statute would be engaged...
>
> 26. In my view, however, the case at bar is quite different from *Cliffs Over Maple Bay*. Here, the main debtor, the Partnership, is at the centre of a complicated corporate group and carries on an active financing business that it hopes to save notwithstanding the current economic cycle. (The business itself which fills a "niche" in the market, has been carried on in one form or another since 1983.) The CCAA is appropriate for situations such as this where it is unknown whether the "restructuring" will ultimately take the form of a refinancing or will involve a reorganization of the corporate entity or entities and a true compromise of the rights of one or more parties. The "fundamental purpose" of the Act - to preserve the *status quo* while the debtor prepares a plan that will enable it to remain in business to the benefit of all concerned - will be furthered by granting a stay so that the <u>means</u> contemplated by the Act - a compromise or arrangement - can be developed, negotiated and voted on if necessary...

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

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

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

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

I accept this submission.

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

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

> (a) Nortel has been working diligently for many months on a plan to reorganize its business;
>
> (b) in the exercise of its business judgment, Nortel has concluded that it cannot continue to operate the Business successfully within the CCAA framework;
>
> (c) unless a sale is undertaken at this time, the long-term viability of the Business will be in jeopardy;

(d) the Sale Agreement continues the Business as a going concern, will save at least 2,500 jobs and constitutes the best and most valuable proposal for the Business;

(e) the auction process will serve to ensure Nortel receives the highest possible value for the Business;

(f) the sale of the Business at this time is in the best interests of Nortel and its stakeholders; and

(g) the value of the Business is likely to decline over time.

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

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

Disposition

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

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

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

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

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

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

Motion granted.

End of Document

TAB 2

COURT FILE NO.: 09-8483-00CL
DATE: 20091204

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER of a Plan of Compromise or Arrangement of Brainhunter Inc., TrekLogic Inc., Brainhunter Canada Inc., Brainhunter (Ottawa) Inc. and Protec Employment Services Limited

Applicants

APPLICATION UNDER SECTION 18.6 OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Jay A. Swartz and James D. Bunting, for the applicants
Grant B. Moffat, for Deloitte and Touche Inc.
Edmond Lamek, for Toronto-Dominion Bank
Joseph Bellissimo, for Roynat Capital Inc.
Daniel R. Dowdall, for certain noteholders
Patrick F. Schindler, for an unsecured judgment creditor

HEARD: December 2, 2009

Newbould J.

[1] On December 2, 2009 after hearing submissions from the parties present, I made an initial order granting CCAA protection to the applicants, with reasons to follow. These are my reasons.

[2] There is no question that the Court has jurisdiction to hear the application pursuant to section 9 of the CCAA as the applicants' head offices are located in Toronto, Canada. At the time of the application, Brainhunter Inc. was listed on the TSX. The applicants qualify as debtor

companies pursuant to section 3 of the CCAA as the applicants are affiliated companies with total claims against them of more than $5 million. The applicants are all insolvent.

[3] The applicants are in the business of providing human resources with the skill sets to satisfy their clients' needs. The applicants' business operates in large part through umbrella agreements generally referred to as Master Service Agreements. These agreements are entered into by the applicable applicant and each of their respective contract staffing clients.

[4] Each time a contract staffing client wishes to retain the services of an individual (each a "Contractor") pursuant to a Master Services Agreement, the client will enter into a sub-agreement referred to as a statement of work in respect of the specific Contractor. The applicable applicant subsequently enters into an agreement with the Contractor to fulfill the statement of work and the Contractor issues invoices to the applicant for the work he or she performs for the client. The applicant then pays the Contractor and bills the client. Because the applicants receive payment from their clients after they pay their Contractors, the applicants are dependent on having adequate credit facilities available to fund the payments to Contractors until the related invoices from the client can be collected.

[5] TD Bank and Roynat are secured creditors with security over all of the assets of the applicants. As at October 31, 2009 there was principal outstanding of $18.7 million to TD Bank and principal and interest of $5.9 million owing to Roynat.

[6] In addition there are secured subordinated promissory notes secured only on the assets of Brainhunter Inc. The principal and interest outstanding as at October 31, 2009 was $11.9 million. Most of the material assets of the applicants are not held in Brainhunter Inc., but by the other applicants.

[7] TD Bank and the applicants have entered into a debtor-in-possession financing term sheet, pursuant to which the TD Bank has agreed to provide the applicants with $7 million of DIP financing to enable the applicants to meet their working capital requirements during the CCAA proceedings.

[8] This application is in some respects unusual because the applicants state that they intend at the outset to solicit a going concern asset sale of the business, and that it is likely that there will be no plan of arrangement filed. The factum on their behalf states:

> 5. If protection is granted under the CCAA, the Applicants intend to bring a motion seeking approval of a bid process to solicit going concern asset purchase offers for the Applicants' business, as well as offers to sponsor a plan of arrangement (the "Bid Process"). The Applicants have entered into an agreement to sell substantially all of their assets as a going concern on the understanding that this agreement will serve as a stalking horse bid. The Bid Process will solicit competing offers from prospective investors to bid up the stalking horse bid.
>
> 24. Although the proposed Bid Process could result in the filing of a plan of arrangement or plan of compromise, it is more likely to result in the sale of the Applicants' business.

[9] The applicants submit that this Court has the jurisdiction to provide them with protection under the CCAA in circumstances such as these where the applicants may not file a formal plan of compromise or arrangement.

[10] I agree with the applicants that protection under the CCAA may be granted in these circumstances. I say that for the following reasons.

[11] The initial protection is supported by TD Bank and Roynat. It is also supported by the secured noteholders represented by Mr. Dowdall, being a little more than 60% of the noteholders. Mr. Dowdall has other concerns that I will deal with.

[12] It is well settled in Ontario that a court in a CCAA proceeding may approve a sale of all or substantially all of the assets of a debtor company as a going concern. In *Re Consumers Packaging Inc.* (2001) 27 C.B.R. (4th) 197 (Ont. C.A.), the Court stated:

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

[13] Similarly, it is well settled in Ontario that a court in a CCAA proceeding may order the sale of a business in the absence of a plan of arrangement being put to stakeholders for a vote. In

Re Nortel Networks Corp. (2009), 55 C.B.R. (5th) 229 Morawetz J. came to this conclusion after analyzing a number of cases that had made such an order. See paras 35 to 40 of his reasons for judgment.

[14] It seems to me that if at some point in time after an initial CCAA protection order has been made, it appears appropriate to undertake a sales process to sell the business without a plan of arrangement in place, there is no reason why CCAA protection should not initially be granted if at the outset it is thought appropriate to undertake a sales process without a plan of arrangement in place. It is simply a matter of timing as to when it appears appropriate to pursue a sale of the business without a plan of arrangement in place.

[15] *Re Nortel* was decided before the new CCAA provisions came into force on September 18, 2009. The new relevant provision does not, however, affect the principles accepted by Morawetz J. in that case. Section. 36(1) provides:

> 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.

[16] In *Re Canwest Global Communications Corp*. released November 12, 2009, Pepall J. stated the following regarding s. 36:

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

[17] The applicants have not yet brought their motion for approval of a sales process, and consideration as to whether such a sales process is appropriate will take place when the motion is

heard.[1] The fact that the motion was anticipated at the time of the initial order with no plan of arrangement in sight does not mean however that the initial order should not be made.

[18] The applicants seek an order declaring that the Contractors are "critical suppliers", permitting the payment of pre-filing amounts to the contractors and creating a charge that secures the obligations owed to the Contractors.

[19] The authorization to pay pre-filing amounts is now codified in section 11.4 of the CCAA. Pursuant to this section, the Court has the discretion to:

(a) declare a person to be a critical supplier, if it is satisfied the person is a supplier of goods or services to the company and the goods or services are critical to the company's continued operations (s. 11.4(1));

(b) make an order requiring the "critical supplier" to supply any goods or services specified by the Court to the company on any terms and conditions that are consistent with the supply relationship or the Court considers appropriate (s. 11.4(2));

(c) grant a charge in favour of a person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order (s. 11.4(3)); and

(d) order the security or charge to rank in priority over the claim of any secured creditor of the company (s. 11.4(4)).

[20] The rationale for the enactment of section 11.4 is explained in the Industry Canada Clause by Clause Briefing Book as follows:

> Companies undergoing a restructuring must be able to continue to operate during the period. On the other hand, suppliers will attempt to restrict their exposure to credit risk by denying credit or refusing services to those debtor companies. To balance the conflicting interests, the court will be given the authority to designate certain key suppliers as "critical suppliers". The designation will mean that the supplier will be required to continue its business relationship with the debtor company but, in return, the critical supplier will be given security for payment.

[1] The motion is now scheduled for December 8, 2009

[21] The applicants submit, and I accept, that an order permitting the payment of pre-filing amounts is necessary to ensure the continued provision of personal services from the Contractors to the applicants and to prevent the potentially significant harm that could follow if such payments are not made. If the Contractors are not paid for services provided before the filing of the application, there is a substantial risk they will not continue to perform services under the current statements of work. This would result in a default by the applicants to their clients and impact the ability of the applicants to continue as a going concern.

[22] As the Contractors are individuals, the applicants did not seek an order requiring the continued supply of personal services. However, they requested a charge to secure payment to the Contractors in order to provide assurances to the Contractors that their relationship will be unaffected during the CCAA proceedings. The amount of the Contractors' charge requested is $15 million which represents an estimated average of the amount owing to Contractors. The applicants requested that the Contractors’ charge rank in priority to all secured lenders other than the TD Bank. Roynat is agreeable to that and the notesholders represented here do not oppose it. Deloitte & Touche Inc, in their capacity as the proposed monitor, in their pre-filing report support the charge as reasonable.

[23] I am satisfied that it is appropriate to provide in the initial order that the Contractors are declared to be critical suppliers, that the applicants shall be entitled to pay outstanding and future amounts owing to Contractors and that a Contractors’ charge as requested be provided.

[24] The applicants also requested other charges, being (i) an administration charge of $1 million: (ii) a KERP charge of $290,000 under which the CEO is to be paid a retention bonus of $50,000 for two months in addition to his salary and 10 key employees will be paid up to $190,000 if they remain with the company for four months from the date of filing: (iii) a directors and officers charge of $1.7 million; and (iv) a DIP charge to secure the $7 million DIP facility being provided by TD Bank.

[25] TD Bank and Roynat support these charges and their priority provided for in the initial order. Deloitte & Touche Inc. expressed the view that the proposed charges are necessary and

reasonable and will provide the applicants with the opportunity to successfully complete a restructuring.

[26] Mr. Dowdall for the noteholders raised a concern with some of these charges. He said that while counsel for the applicants discussed with him in advance the intention to file, he was not made aware of the details and his clients have not had an opportunity to review the information provided in the material filed with the Court. Thus he wishes to reserve his clients' rights with respect to these charges. He has a concern that while typically such concerns when raised at the initial application are met with the response that there is a come-back clause in the initial order, people start relying on the charges and it becomes difficult to oppose them as time passes. I think his concern is a fair one. In this case, however, not only is there a come-back clause with a 7 days notice requirement, but the matter will be before the Court shortly on December 8, 2009 when the motion to approve a sales process will be dealt with. Mr. Dowdall's clients will have had an opportunity to consider their position before then and be able to move to vary the initial order if they so desire.

[27] In the circumstances, on the basis of the record before me, the charges appear appropriate and are approved. This is without prejudice, however, to the noteholders right to contest them. Any delay, however, in taking steps to contest them will obviously seriously affect any attack on them.

[28] Mr. Schindler represents an unsecured judgment creditor owed approximately $250,000. His client of course had not seen the material before it was filed, and Mr. Schindler said that he had been intending to ask that the entire matter be adjourned for a week, and that he was asking that the charges not be made for at least a week to provide his client with time to consider whether they are warranted.

[29] In exercising the balancing of interests required in a CCAA application, it would be risky indeed to delay the application or these charges at the request of one unsecured creditor. These are standard charges and deemed necessary by the proposed monitor. It should be noted that the sections of the CCAA under which the charges are authorized, being sections 11.2(1), 11.4(1), 11.51(1) and 11.52(1), provide that notice of a request for such charges is to be given to the

secured creditors who are likely to be affected by the charge. Notice is not required to be given to unsecured creditors. In the circumstances, I declined the request to delay the charges.

Newbould J.

Released: December 4, 2009

COURT FILE NO.: 09-8483-00CL
DATE: 20091204

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

IN THE MATTER OF the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER of a Plan of Compromise or Arrangement of Brainhunter Inc., TrekLogic Inc., Brainhunter Canada Inc., Brainhunter (Ottawa) Inc. and Protec Employment Services Limited

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REASONS FOR JUDGMENT

Newbould J.

Released: December 4, 2009

TAB 3

CITATION: Canwest Global Communications Corp., 2010 ONSC 2870
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100521

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

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

PEPALL J.

ENDORSEMENT

Relief Requested

[1] The LP Entities seek an order: (1) authorizing them to enter into an Asset Purchase Agreement based on a bid from the Ad Hoc Committee of 9.25% Senior Subordinated Noteholders ("the AHC Bid"); (2) approving an amended claims procedure; (3) authorizing the LP Entities to resume the claims process; and (4) amending the SISP procedures so that the LP Entities can advance the Ad Hoc Committee transaction (the AHC Transaction") and the Support Transaction concurrently. They also seek an order authorizing them to call a meeting of

unsecured creditors to vote on the Ad Hoc Committee Plan on June 10, 2010. Lastly, they seek an order conditionally sanctioning the Senior Lenders' CCAA Plan.

<u>AHC Bid</u>

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

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

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

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

additional $150 million in value which will be available for the unsecured creditors of the LP Entities.

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

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

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

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

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

- the Senior Lenders will received 100 cents on the dollar;
- the AHC Transaction will preserve substantially all of the business of the LP Entities to the benefit of the LP Entities' suppliers and the millions of people who rely on the LP Entities' publications each day;
- the AHC Transaction preserves the employment of substantially all of the current employees and largely protects the interests of former employees and retirees;
- the AHC Bid contemplates that the transaction will be implemented through a Plan under which $150 million in cash or shares will be available for distribution to unsecured creditors;
- unlike the Support Transaction, there is no option <u>not</u> to assume certain pension or employee benefits obligations.

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

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

[13] The proposed disposition of assets meets the section 36 CCAA criteria and those set forth in the *Royal Bank of Canada v. Soundair Corp.*[1] decision. Indeed, to a large degree, the criteria

[1] [1991] O.J. 1137.

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

Claims Procedure Order and Meeting Order

[14] Turning to the Claims Procedure Order, as a result of the foregoing, the scope of the claims process needs to be expanded. Claims that have been filed will move to adjudication and resolution and in addition, the scope of the process needs to be expanded so as to ensure that as many creditors as possible have an opportunity to participate in the meeting to consider the Ad Hoc Committee Plan and to participate in distributions. Dates and timing also have to be adjusted. In these circumstances the requested Claims Procedure Order should be approved. Additionally, the Meeting Order required to convene a meeting of unsecured creditors on June 10, 2010 to vote on the Ad Hoc Committee Plan is granted.

SISP Amendment

[15] It is proposed that the LP Entities will work diligently to implement the AHC Transaction while concurrently pursuing such steps as are required to effect the Support Transaction. The

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

Dual Track and Sanction of Senior Lenders' CCAA Plan

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

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

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

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

Conclusion

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

Pepall J.

Released: May 21, 2010

[2] 2000, A.B.Q.B. 442, leave to appeal refused 2000, A.B.C.A. 23, affirmed 2001, A.B.C.A. 9, leave to appeal to S.C.C. refused July 12, 2001.

CITATION: Canwest Global Communications Corp., 2010 ONSC 2870
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100521

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: May 21, 2010

TAB 4

X

91186 003

No. 318/91

COURT OF APPEAL FOR ONTARIO

Goodman, McKinlay and Galligan JJ.A.

B E T W E E N :

THE ROYAL BANK OF CANADA Plaintiff/Respondent - and - SOUNDAIR CORPORATION, CANADIAN PENSION CAPITAL LIMITED and CANADIAN INSURERS' CAPITAL CORPORATION Defendants (Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively "CCFL") - Appellants) (Soundair Corporation - Respondent)	J.B. Berkow and S.H. Goldman for the appellants J.T. Morin, Q.C. for Air Canada L.A.J. Barnes and L.E. Ritchie for the Royal Bank of Canada S.F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., Receiver of Soundair Corporation (Respondent) W.G. Horton for Ontario Express Limited N.J. Spies for Frontier Air Limited Heard: June 11, 12, 13 and 14, 1991

GALLIGAN J.A. :

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

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

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

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

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

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

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

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

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

Those negotiations came to an end when an offer made by Air Canada on June 19, 1990, was considered unsatisfactory by the Receiver. The offer was not accepted and lapsed. Having regard to the tenor of Air Canada's negotiating stance and a letter sent by its solicitors on July 20, 1990, I think that the Receiver was eminently reasonable when it decided that there was no realistic possibility of selling Air Toronto to Air Canada.

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

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

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

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

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

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

(1) did the Receiver act properly when it entered into an agreement to sell Air Toronto to OEL?;

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

I will deal with the two issues separately.

I. <u>Did the Receiver Act Properly in Agreeing to Sell to OEL</u>?

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

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

As did Rosenberg J., I adopt as correct the statement made by Anderson J. in Crown Trust Company v. Rosenberg (1986), 60 O.R. (2d) 87 at pp.92-94 of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

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

2. It should consider the interests of all parties.

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

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

I intend to discuss the performance of those duties separately.

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

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

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

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

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

> Its decision was made as a matter of business judgment <u>on the elements then available to it</u>. It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and

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

I also agree with and adopt what was said by Macdonald J.A. in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1 at 11 (N.S.S.C.A.D.):

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

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

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

I am convinced that the decision made was a sound one in the circumstances faced by the Receiver on March 8, 1991.

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

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

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

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

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

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

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

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

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

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

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

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

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

Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was, that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000.

The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

3. **Consideration of the efficacy and integrity of the process by which the offer was obtained**

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

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

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:
>
>> In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard -- this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

In Salima Investments Ltd. v. Bank of Montreal (1985), 21 D.L.R. (4th) 473 at 476, the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

Finally, I refere to the reasoning of Anderson J. in Crown Trust v. Rosenberg, supra, at p.124:

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

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

Before this court, counsel for those opposing the confirmation of the sale to OEL suggested many different ways in which the Receiver could have conducted the process other than the way which he did. However, the evidence does not convince me that the Receiver used an improper method of attempting to sell the airline. The answer to those submissions is found in the comment of Anderson J. in Crown Trust v. Rosenberg, supra, at p.109:

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

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

4. Was there unfairness in the process?

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

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

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

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

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

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

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

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

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

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

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

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

The second is at p.111:

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

> am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.

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

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

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

I agree.

The Receiver made proper and sufficient efforts to get the best price that it could for the assets of Air Toronto. It adopted a reasonable and effective process to sell the airline which was fair to all persons who might be interested in purchasing it. It is my opinion, therefore, that the Receiver properly carried out the mandate which was given to it by the order of O'Brien J. It follows that Rosenberg J. was correct when he confirmed the sale to OEL.

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

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

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

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

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

The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an interlender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the interlender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive $3,375,000 of the $6,000,000 cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

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

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

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

The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this Receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

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

P.P. Galligan J.A.

McKinlay J.A.:

I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in Crown Trust v. Rosenberg. While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

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

McKinlay J.A.

GOODMAN J.A. (dissenting):

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

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

In British Columbia Developments Corporation v. Spun Cast Industries Ltd. et al. (1978), 26 C.B.R. (N.S.) 28, Berger J. said at p.30:

> Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This

> court does not having a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds it is difficult to take issue with that finding. If on the other hand he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

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

I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately $3,000,000 to $4,000,000. The Bank submitted that it did not wish to gamble any further with respect to its investment and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the downpayment and placed it in the position of a joint entrepreneur but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial downpayment on closing.

In Cameron v. Bank of N.S. (1981), 38 C.B.R. (N.S.) 1 (N.S.S.C.A.D.) Hart J.A., speaking for the majority of the court, said at p.10:

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

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

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

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

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

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

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

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

I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in Cameron, supra, quoted by

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

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

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

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

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

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

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

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

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

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

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

Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18,000,000. After the appointment of the Receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the Receiver. Although this agreement contained a clause which provided that the Receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada ...", it further provided that the Receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the Receiver to Air Canada was of short duration at the Receiver's option.

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

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

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

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

This statement together with other statements set forth in the letter was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the Receiver at that time. It did not form a proper foundation for the Receiver to conclude that there was no realistic possibility of selling Air Toronto Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990 the Receiver was of the opinion that the fair value of Air Toronto was between $10,000,000 and $12,000,000.

In August 1990 the Receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August

20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

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

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

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

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

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

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

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

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

The fact of the matter is that by March 7, 1991, the Receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the Receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately three months the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

In effect the agreement was tantamount to a 45 day option to purchase excluding the right of any other person to purchase Air

Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

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

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

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

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

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

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

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

In my opinion the offer accepted by the Receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash downpayment in the 922 offer constitutes approximately two-thirds of the contemplated sale price whereas the cash downpayment in the OEL transaction constitutes approximately 20-25% of the contemplated sale price. In terms of absolute dollars, the downpayment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3,000,000 to $4,000,000.

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

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

I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of downpayment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the downpayment may be the most important factor to be considered and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

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

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

J.A.

No. 318/91

COURT OF APPEAL FOR ONTARIO

Goodman, McKinlay and Galligan JJ.A.

B E T W E E N :

THE ROYAL BANK OF CANADA

Plaintiff/Respondent

\- and -

SOUNDAIR CORPORATION, CANADIAN PENSION CAPITAL LIMITED AND CANADIAN INSURERS' CAPITAL CORPORATION

Defendants
(Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively "CCFL") - Appellants)

(Soundair Corporation - Respondent)

J U D G M E N T

Released: July 3, 1991

*acm

57

TAB 5

CITATION: Re Grant Forest Products Inc., 2010 ONSC 1846
Court File No. CV-09-8247-00CL
Date: 20100330

ONTARIO
SUPERIOR COURT OF JU.S.TICE
(Commercial List)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

Sean Dunphy, Kathy Mah for the Monitor

Daniel Dowdall, Jane O. Dietrich for the Applicants Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., Grant U.S. Holdings GP

Kevin McElcheran for the Toronto-Dominion Bank, Agent for First Lien Lenders

Fred Myers, Joe Pasquariello for Bank of New York Mellon, Agent for SLL

Sheryl Seigel for Georgia-Pacific LLC

Richard Swan for Peter Grant Sr.

Aubrey Kauffman for Independent Directors of Grant Forest Products Inc.

Heard: February 1 and 8, 2010

C. CAMPBELL J.:

REASONS FOR DECISION

[1] This Application seeks approval of the Sale transaction and a Vesting Order to complete the transfer of the control of the business of Grant Forest Products Inc. to the purchaser Georgia-Pacific. The transaction is the culmination of the marketing process under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36, as amended ("CCAA"), authorized by an order of this Court dated June 25, 2009.

[2] Approval of the transaction is opposed by the Second Lien Lenders ("SLL")[1] under an Inter-Creditor Agreement (the "ICA") of which Grant Forest is a party, on the basis that this Court does not have jurisdiction to, in effect, convey real property assets located in the United States.

1 The appearing party on this motion is the Agent for the Second Lien Lenders, also referred to in the materials as Second Lien Creditors, hereinafter SLL.

[3] An adjournment of the approval motion sought by the largest shareholder of Grant Forest, seeking time for improvement of expressions of interest by others into bids, was not granted. Consideration of the issues raised on this motion requires analysis of the many similarities and few differences between the restructuring and insolvency processes in Canada and the United States in cross-border transactions.

[4] For reasons that follow, I am satisfied that this Court does have jurisdiction and it is appropriate to approve this complicated transaction. In order to deal with the objections raised, it is necessary to outline the transaction in some detail, the particulars of which are summarized in the Sixth Report of the Monitor.

[5] Grant Forest Products Inc. ("GFP"), an Ontario company, and certain of its subsidiaries are privately owned corporations carrying on an Oriented Strand Board manufacturing business from facilities located in Canada and the United States. The most common uses of the companies' products are sheathing in the walls, floors and roofs in the construction of buildings and residential housing.

[6] Two GFP mills are located in Ontario, one in Alberta (50% with Footner Forest Products) and two in the counties of Allendale and Clarendon in South Carolina.

[7] The U.S. mills are owned indirectly through one of the Applicants, being the Grant Partnership registered in the state of Delaware. At present, due to decreased demand, only one Ontario mill and the Allendale mill in South Carolina are operating.

[8] The Applicants, being the parent GFP, its Canadian subsidiaries Grant Alberta Inc. and Grant Forest Product Sales Inc., together with Grant U.S. holdings GP ("Grant U.S. Partnership") and its related entities, obtained protection under the CCAA on June 25, 2009, when a stay of proceedings was granted and Ernst and Young Inc. ("E&Y") was appointed Monitor. The Order also approved the continuation of the engagement of a chief restructuring advisor.

[9] The Applicants have two levels of primary secured debt. The total debt obligations are comprised of the following facilities:

First Lien Creditor Agreement

[10] As at May 31, 2009, the First Lien Lenders ("FLL")[2] were owed the principal amount of $399 million plus accrued interest of approximately $5.3 million pursuant to a credit agreement dated October 26, 2005 and amended March 21, 2007. An additional $8.7 million was owed to one or more of the FLL pursuant to interest rate swap agreements the liability of which was secured to the FLL Agent.

2 Like the Second Lien Lenders, the First Lien Lenders appeared formally by their Agent, were sometimes referred to as the First Lien Creditors and will be hereinafter referred to as the FLL.

Second Lien Creditor Agreement

[11] The bank of New York Mellon ("BNY") as successor is the Agent for the SLL, to whom as of May 31, 2009 was owed the principal amount of approximately $150 million plus accrued interest of approximately $42 million pursuant to a credit agreement dated as of March 21, 2007 as amended as of April 30, 2009. GFP and the Grant U.S. Partnership are the borrowers under the FLL Agreement with all related entities as guarantors of the FLL indebtedness. The Grant U.S. Partnership is the borrower under the SLL Agreement with all related entities as guarantors of the SLL debt.

[12] GFP and the Grant U.S. Partnership are in default under the FLL Agreement and the Grant U.S. Partnership is in default under the SLL Agreement. Both the FLL and SLL Agents hold various security in Canada over each of their respective property and assets.

Inter-Creditor Agreement

[13] The Applicants together with the entities related to the Grant U.S. Partnership, the FLL and SLL are parties to an Agreement dated March 21, 2007, which among other things deals with the relationship between the FLL security and the SLL security. Both the FLL and the SLL rely on this Agreement in respect of the issue as between them, which affects priority over assets.

The Marketing Process

[14] Prior to the filing that gave rise to the initial order, the Applicants had engaged a financial advisor and an investment banking firm to advise on capital and strategic options to address the Applicants' debt position and liquidity needs and to locate investors or sell the business. While this process did not result in a transaction that could be implemented, the Applicants were of the view that the business could be sold as a going concern or they could sponsor a plan of arrangement to be consummated in CCAA proceedings. The Initial Order, which has not been objected to since being granted on June 25, 2009, contained a six page elaborate "Investment Offering Protocol" to provide interested parties with the opportunity to offer to purchase the business and operations in whole or in part as a going concern or to offer to sponsor a plan of arrangement of the Applicants or any of them.

[15] The three phases of the marketing process are described in detail in paragraphs 35 to 47 of the Sixth Report of the Monitor. The process, which commenced in July 2009, involved contact with 91 potentially interested parties, narrowed to 13 who responded with expressions of interest, with eight parties invited to phase Two to conduct further due diligence.

[16] At this phase, the interested parties were provided access to the Applicants' facilities, advised of the bid process and had until August 30, 2009 to submit revised proposals. This was subsequently extended to September 11, 2009 in order to accommodate due diligence requirements, plant tour schedules and management meetings with the eight interested parties who were to submit revised proposals on or before September 11, 2009.

[17] As reported by the Monitor, two of the bids were inferior by their terms or consideration and three were within a similar range. As a result of due diligence items and closing conditions which risked the completion of the transaction, revised bids were extended to October 2, 2009 for the three interested parties.

[18] As of October 16, 2009, 66 2/3% of the FLL debt and the Independent Directors Committee voted in favour of the selection of the Georgia-Pacific bid, one of the world's leading manufacturers and marketers of tissue, packaging, paper pulp and building products, to proceed to Phase Three.

[19] As reported in the Fifth Report of the Monitor dated November 26, 2009, SLL who were prepared to agree to certain confidentiality provisions were apprised on October 15 of the status of the marketing process.

[20] An exclusivity agreement was reached with Georgia-Pacific on October 20, 2009, which required the Applicants to refrain from seeking bids, responding to or negotiating with any party other than Georgia-Pacific with respect to the items included in the bid of Georgia-Pacific during a period of exclusivity which extended through a series of extensions to January 8, 2010, when the parties finalized a purchase and sale agreement that is in the material filed with the Court.

[21] I accept the conclusion of the Monitor as set out in paragraph 56 of the Sixth Report:

> 56. It is the Monitor's view that the Marketing Process included a structured, fair, wide and effective canvassing of the market as demonstrated by the following:
>
> a. contact by the Investment Offering Advisor of 91 interested parties comprising both financial and strategic parties located in North America, South America, Europe and Asia;
>
> b. the execution of 32 NDAs by interested parties who were then granted access to review the Data Room and the subsequent submission of 13 EOIs at the end of *Phase 1*;
>
> c. the EOIs of eight interested parties that were invited to participate in *Phase II* provided a value range which was market derived and tested, and as such, supported the conclusion that the consideration included in Georgia Pacific's bid reflected fair value;
>
> d. of the eight interested parties that were invited to *Phase II*, five submitted improved bids in respect of consideration and/or closing conditions at the close of *Phase II* and of the three interested parties that were invited through to *Phase IIb*, each party again improved its bid in terms of consideration and/or closing conditions at the end of *Phase IIb*.
>
> e. the selection of Georgia Pacific to negotiate a PSA was based on a thorough analysis of all of the financial and commercial terms presented in all of the bids, was recommended by the Monitor and the CRA and was approved by the First Lien Lenders Steering Committee and the Independent Directors Committee; and
>
> f. the Second Lien Lenders were consulted, and their views and questions were taken into account in the final selection of Georgia Pacific.

[22] This approval motion was originally returnable on February 1, 2010; it was adjourned to allow the parties to respond to two additional motions. The first, brought on behalf of the FLL, seeks to add as "Additional Applicants" the U.S. entities directly related to the Grant U.S. Partnership, "Grant NewCo LLC" and various Georgia-Pacific Canadian and U.S. entities.

[23] The second motion, on behalf of the SLL, was to adjourn or dismiss the Approval Vesting motion on the basis that this Court did not have jurisdiction to deal with the assets in the United States that are the subject of the transaction and such assets would have to be dealt with under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware.

[24] On February 1 and on the adjourned date of February 8, counsel for Peter Grant Senior sought a further adjournment to enable consideration of a recently received "offer." In its Seventh Report the Monitor reported on receipt of a letter which expressed interest in the Applicants' assets by a new "bidder." In its Report, the Monitor advised that in its opinion, the expression of interest could be considered as no more than that and reported that it did not comply with the Investment Offering Protocol.

[25] Counsel for the SLL sought and was granted access to the correspondence but Mr. Grant was not, due to his involvement in a bid as per the terms of the Investment Offering Protocol.

[26] On February 5, with knowledge of the position taken by the SLL and the specifics of the Georgia-Pacific agreement, another expression of interest was received by the Monitor and brought to the attention of the Court. This expression of interest from a previous "bidder" whose bid was rejected, sought to amend its previous position to accommodate the concern that the SLL had with respect to the Georgia-Pacific agreement.

[27] The Court ruled that both of these expressions were no more than invitations to negotiate. In neither case by their terms were they intended to create binding obligations until definitive agreements were reached.

[28] The Applicants and those parties supporting the Georgia-Pacific agreement urged that the integrity of the process would be compromised if further consideration were given to nothing more than expressions of interest.

[29] It is now well established in insolvency law in Canada 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, excepting extraordinary circumstances.

[30] In *Re Tiger Brand Knitting Co.*, [2005] O.J. No. 1259 (S.C.J.), I noted at para. 31 that integrity of "process is integral to the administration of statutes such as the BIA and CCAA."

[31] The leading case in Ontario, which confirms the importance of integrity of process, is *Royal Bank of Canada v. Soundair Corp* (1991), 7 C.B.R. (3d) 1, a decision of the Court of Appeal for Ontario. At issue was the power of the Court to review a decision of a receiver to approve one offer over another for the sale of an airline as a going concern. In reinforcing the importance of integrity of process, the Court quoted from Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 at p. 92 adopted the following:

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

2. It should consider the interests of all parties.

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

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

[32] In this case, numerous parties participated over a number of months in a complex process designed to achieve not only maximum value of the assets of the business, but to ensure its survival as a going concern for the benefit of many of the stakeholders.

[33] I am satisfied that to permit an "invitation" to reopen that process not only would destroy the integrity of the process, but would likely doom the transaction that has been achieved.

Motion to Add Applicants

[34] The motion brought by the FLL Agent to add additional applicants was supported by the original Applicants, the purchasers and the Monitor, and opposed by the SLL as part of the objection to jurisdiction of this Court. The purpose of adding Additional Applicants was said to be necessary to make the transaction effective.

[35] The transaction with Georgia-Pacific contemplates the transfer of certain assets that are on terms as set out in the Agreement between GFP and related Canadian entities, and to the Canadian purchaser (a Georgia-Pacific subsidiary) with the claims of any person against such transferred assets attaching to the net proceeds received from the sale of such transferred assets.

[36] Additionally, the transaction contemplates that the partnership interests in Grant U.S. Partnership will be surrendered and cancelled. Grant U.S. Partnership will issue new partnership interests to the Georgia-Pacific U.S. purchaser vehicle and the additional purchaser.

[37] The aggregate consideration being paid by the Canadian purchaser for the transferred assets and the U.S. purchasers for the Grant U.S. Partnership interests is $403 million, subject to adjustment.

[38] Through the U.S. purchasers' acquisition of the purchasers' partnership interests, the U.S. purchasers will acquire Grant U.S. Partnership, Southeast, Clarendon, Allendale, U.S. Sales, Newco. It is urged that through this structure the Applicants will maximize the value of their assets.

[39] The agreement and transaction require that the security previously granted by the applicable U.S. applicants (the "Additional Applicants") in favour of the FLL and SLL and the indebtedness and liability of the applicable Additional Applicants to them and the Lenders under the FLL Agreement and the SLL Agreement be released and discharged upon closing of the transaction.

[40] The position of the FLL, supported by the Applicants and the Monitor, is that the only way in which the transaction can be accomplished with the price that the FLL and the Applicants are prepared to accept is with the proposed structure that would include a transfer of the Grant

U.S. Partnership interests as partnership interests, rather than a direct transfer of the assets of Grant U.S. Partnership.

[41] The FLL, the Applicant and the Purchasers urge that without the tax benefit that arises from the proposed structure, the Agreement of Purchase and Sale with Georgia-Pacific would not have been completed.

Position of SLL

[42] The position of the SLL, both in opposing the motion to add Additional Applicants and opposing Approval of the Sale, is that the relief sought is overly broad, inappropriate and would have the effect of mandatory orders against U.S. parties which would extinguish U.S. security over U.S. realty and personalty. The effect of the extinguishment is to absolve FLL of all forms of liability when it is neither a CCAA debtor nor an officer of this Court.

[43] It is urged that there is no jurisdiction on which the FLL can seek an unlimited judicial release. The FLL cannot add the SLL as a party for any purpose that is to seek avoiding prior scrutiny in the U.S. courts of the merits of its actions and of the U.S. affiliates of the Original Applicants and the SLL.[3]

[44] The SLL Agent asserts that the effect of the Application is to ask this Court, in the guise of a motion in a CCAA proceeding concerning Canadian debtors, to allow it on behalf of U.S. FLL to sue U.S. defendants for a final declaration of right and a mandatory injunction under the Inter-Creditor Agreement that is governed by U.S. law and U.S. choice of forum.

[45] This is said to occur without delivering any originating process or meeting tests for the exercise of jurisdiction of this Court over U.S. parties concerning U.S. property. SLL submits that the FLL failed to provide any of the legal and procedural safeguards required by the Rules of Civil Procedure to any foreign or proposed defendant.

[46] It is further urged that the ICA specifically provides the FLL with rights only upon the sale of assets under section 363 of the U.S. bankruptcy code. Therefore, it is submitted, a motion in a CCAA proceeding by the Original Applicants is not an appropriate forum for the resolution of the interpretation of a contract between the U.S. non-parties that is to be decided under U.S. law.

[47] The SLL also complain that engaging the term "center of main interest" with respect to the U.S. affiliates is not a relevant question for this Court. Rather, it is a transparent attempt to pre-empt a U.S. court from making a determination required under the U.S. Bankruptcy Code, which may affect the standard of review afforded by the U.S. court upon any recognition proceedings that the original Applicants may choose to bring before the U.S. court in the future.

3 It is to be noted that there is no existing U.S. action of which the Court was made aware by either the SLL or the FLL.

[48] Finally, it is suggested that what the FLL Agent seeks is contrary to the principles of comity and the common law principle that a court should decide only matters properly before it and necessary to its own decision.

[49] The evidence before the Court is that on completion of the transaction, there will be a shortfall to the FLL on their debt and likely no recovery by the SLL on their debt. The SLL suggest that a separate auction sale of the U.S. mills might achieve a better price for these assets. There is no evidence before the Court to back up this assertion.

Inter-Creditor Agreement

[50] The ICA, which was entered into as of March 21, 2007, binds the GFP group of companies, including Grant U.S. Partnership as well as the FLL and the SLL. The FLL and the SLL rely on the Agreement in support of their respective positions.

[51] The stated purpose of the Agreement was to induce the FLL to consent to GFP incurring the second lien obligations and to induce the FLL to extend credit for the benefit of GFP.

[52] By its terms and the definition of "bankruptcy code" in the ICA, the parties recognized that the Canadian statutes, being the CCAA and the BIA, as well as the U.S. Bankruptcy Code, might apply.

[53] Counsel for the SLL relies on clause 9.10 of the ICA definition of "Applicable Law," which provides: "this agreement and the rights and obligations of the parties hereunder shall be governed by, and shall be construed and enforced in accordance with, the laws of the state of New York."

[54] Accordingly, it is argued on behalf of the SLL that this Court should not have regard to any issues as between the FLL and SLL, but rather leave those to be litigated as between those parties in the State of New York.

[55] The position of the FLL is that a Court having jurisdiction over insolvency of a Canadian entity might well be required to have regard to the ICA in dealing with legitimate and appropriate insolvency remedies in Canada. In this regard, counsel notes that clause 9.7 of the ICA identifies New York as a "non-exclusive" venue for disputes involving the Agreement.

[56] The position of the Applicants and those supporting the ICA is that this Court is being asked to consider and approve a restructuring transaction in a process that has been overseen by this Court, and which includes, *inter alia*, a comprehensive marketing process involving an Ontario Court-appointed officer. This process has always expressly included the Applicants and their subsidiaries and the business that the integrated corporate group operated in North America from headquarters situated in Ontario.

[57] The Applicants submit it is appropriate for this Court to deal with issues raised under the ICA between the FLL and SLL, where that is incidental to approval of this Canadian restructuring transaction.

[58] I am satisfied that the issues raised by the SLL are inextricably linked to the restructuring of the Applicants and the completion of the transaction and as such are appropriate for consideration by this Court.

[59] I am satisfied that, by operation of the Credit Agreement and ICA, the FLL are entitled to exercise their remedies, which they propose to do in this motion 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 SLL over the Transferred Assets is automatically and simultaneously released.

[60] I am satisfied that the transaction, whereby Canadian assets are transferred to a Canadian Georgia-Pacific subsidiary and the assets of the essentially GFP-owned partnership interests in Grant U.S. Partnership are transferred to a newly created U.S. partnership by Georgia-Pacific, would not have been possible without the tax advantages that are available as a result of the form of this transaction.

[61] To suggest, as does the submission of the SLL, that the entire transaction is flawed because the effect is a transfer of some assets in the United States without the sale process envisaged in section 363 of the U.S. Bankruptcy Code, would be a triumph of form over substance.

[62] I accept 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 SLL. The effect of the transaction is such that the claims of local creditors of the business of the U.S. mills remain unaffected. The Court was not apprised of any ordinary creditor other than the SLL that would be so affected.

Comity and U.S. Chapter 15

[63] Counsel for the SLL Agent objected to the use by the Applicants of the term COMI (being Center Of Main Interest) in respect of this CCAA Application.

[64] I accept that the term COMI has only been formally recognized in amendments to the CCAA, which came into effect in September 2009 after the filing of this Application. The term has gained recognition in the last few years as cross-border insolvencies have increased, particularly with the use of flexibility of the CCAA.

[65] Comity, as expressed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*[4], is "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." Comity balances "international duty and convenience" with "the rights of (a nation's) own citizens... who are under the protection of its laws."[5]

[66] Without in any way intending to intrude on the law of another jurisdiction, it is appropriate to have a look at the plain wording of the ICA.

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4 [1971] 2 S.C.R. 1077 at 1096
5 Ibid.

[67] It is to be noted that there is no evidence put forward by the SLL Agent to suggest that the position of the FLL in respect of the ICA is incorrect. The only response from the SLL Agent is that the matter is not for this Court.

[68] The suggestion by the SLL is that the effect of the Order sought is to vest title in U.S. assets. The FLL assert that all that is being done is the enforcement of their secured creditor remedies and release of their security, which under the ICA has the effect of releasing the security of the SLL.

[69] The FLL submit that Section 3.1 of the ICA recognizes the broad remedies available to the FLL to enforce their security, using all the remedies of a secured creditor under the Bankruptcy Laws of the U.S. including the CCAA, without consultation with the SLL. The submission is further that the SLL are bound by any determination made by the FLL to release its security. The SLL is to provide written confirmation on the FLL becomes the agent of the SLL for that purpose.

[70] The relevant sections of the ICA are set out in Appendix A hereto. As noted above, the position of the FLL is that they are exercising contractual remedies under the ICA.

[71] For the SLL, the argument is that this Court should not interfere with the obligation of the FLL to commence proceedings in the appropriate jurisdiction (New York) to enforce its obligations against the SLL. Neither the SLL nor the FLL has commenced New York actions.

[72] I am satisfied that this Court does have jurisdiction to provide the relief requested, which is the product of the marketing process that was not only approved by this Court, but not objected to by any party when it was initiated.[6]

[73] I do not accept the submission on behalf of the SLL that "the proposed CCAA proceedings for the U.S. Affiliates are not proper CCAA proceedings at all, but are merely proposed as a mechanism for Canadian vesting of U.S. assets."

[74] The relief sought is not merely a device to sell U.S. assets from Canada. This is a unified transaction, each element of which is necessary and integral to its success. It is properly a Canadian process.

[75] There are many instances in which Canadian courts have granted vesting orders in relation to assets situated in the United States. Some of the orders are referred to in the factum of the FLL, including *Re Maax Corporation et al*.,[7] *Re Madill Equipment Canada,*[8] *Re ROL Manufacturing (Canada) Ltd*.,[9] *Re Biltrite Rubber Inc.*[10] and *Re Pope and Talbot, Inc. et. al.*[11]

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6 Supplemental Initial Order, at paragraphs 8 and 24, Motion Record of the First Lien Lenders' Agent, at pages 10 and 18

7 *Re. Maax Corporation*, unreported, Orders of the Superior Court of Quebec, TD Supplementary Brief of Authorities, Tabs 1a-c; Order by the US Bankruptcy Court for the District of Delaware Granting Recognition and Related Relief, TD Supplementary Brief of Authorities, Tab 1d.

8 *Re Madill Equipment Canada*, Case No. 08-41426, Distribution and Vesting Orders of the Supreme Court of British Columbia; Order of the US Bankruptcy Court (Western District of Washington at Tacoma) Granting Motion

[76] Decisions on both sides of the border have recognized that the United States and Canada have a special relationship that allows bankruptcy and insolvency matters to proceed with relative ease when assets lie in both territories. As the U.S. Bankruptcy Court for the Southern District of New York acknowledged in ABCP's *Metcalfe & Mansfield Alternative Investments et al*,.[12] both systems are rooted in the common law and share similar principles and procedures. Bankruptcy proceedings in the United States acknowledge international proceedings and work alongside, rather than over, foreign matters. Chapter 15 of the U.S. Bankruptcy Code exemplifies this in its foreign bankruptcy proceedings: "the court should be guided by principles of comity and cooperation with foreign courts."[13]

[77] In the cross-border case of *Re Muscletech Research and Development Inc*,[14] COMI was found to be in Canada despite factors indicating the U.S. would also be a suitable jurisdiction. Particularly, most of the creditors were located in the U.S., as was the revenue stream. Most of the major decisions regarding the company were made in Canada, its directors and officers were located in Ontario, banking was done in Ontario, etc. Justice Farley noted the positive relationship between Canada and the U.S. and credited this relationship to the adherence to comity and common principles. Judge Rakoff, presiding over the Chapter 15 proceedings, agreed with Farley J.'s endorsement, specifically noting that the factors outlined in the Canadian endorsement persuaded him over the factors in favour of U.S. COMI. Farley J. noted at paragraph 4 of his endorsement, and Judge Rankoff implicitly agreed, that "the courts of Canada and the U.S. have long enjoyed a firm and ongoing relationship based on comity and commonalities of principles as to, *inter alia*, bankruptcy and insolvency."

[78] As noted by counsel for the SLL at paragraph 44 of their factum:

> Courts routinely enforce Canadian judgments in banluptcy, respecting our similar common law traditions including our respect for comity and restraint. In enforcing the decision of this Honourable Court in Metcalfe & Mansfield Alternative Investments et al., ("ABCP") the US Bankruptcy Court for the Southern District of New York, wrote:
>
> > The U.S. and Canada share the same common law traditions and fundamental principles of law. Canadian courts afford creditors a full and fair opportnity to be heard in a manner consistent with standards of U.S. due process. u.s. federal courts have repeatedly granted comity to Canadian proceedings. United Feature Syndicate, Inc. v. Miler Features

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Authorizing Sale of Assets, TD Supplementary Brief of Authorities, Tab 2.
9 *Re. ROL Manufacturing (Canada) Ltd., et al.*, unreported, Order of the Quebec Superior Court (Commercial Division) Approving the Sale of the PSH Division, TD Supplementary Brief of Authorities, Tab 3a; Order of the US Bankruptcy Court, Southwestern District of Ohio, Authorizing and Approving Sale of PSH Division, TD Supplemental Brief of Authorities, Tab 3c.
10 *Re Biltrite Rubber Inc.*, Case No. 09-31423 (MAW), Sale Approval and Vesting Order and Distribution Order of the Ontario Superior Court of Justice, TD Supplemental Brief of Authorities, Tabs 4a-b; Order of the US Bankruptcy Court for the Northern District of Ohio Western Division Enforcing the Orders of the Ontario Court, TD Supplementary Brief of Authorities, Tab 4c.
11 *Re. Pope and Talbot, Inc. et al*., Case No. 08-11933 (CSS), Orders of the US Bankruptcy Court for the District of Delaware, TD Supplementary Brief of Authorities, Tab 5.
12 United States Bankruptcy Court (S.D.N.Y.), Case No. 09-16709, January 5, 2010, Martin Glenn J.
13 *Metcalfe* at 18
14 . (2006) 19 C.B.R. (5th) 54 (*Muscletech*), titled *Re RSM Richter Inc. v. Aguilar* 2006 U.S. Dist. LEXIS 57595 (S.D.N.Y.) (*Re RSM Richter*)

> Syndicate, Inc., 216 F. Supp. 2d 198, 212 (S.D.N.Y. 2002) ("There is no question that bankruptcy proceedings in Canada-a sister common law jurisdiction with procedures akin to our own-are entitled to comity under appropriate circumstances.") (internal quotation marks and citations omitted); Tradewell, Inc. v. American Sensors Elecs., Inc., No. 96 Civ. 2474(DAB), 1997 WL 423075, at *l n.3 (S.D.N.Y. 1997) ("It is well-settled in actions commenced in New York that judgments of the Canadian courts are to be given effect under principles of comity.") (internal quotation marks and citation omitted); Cornjeldv. Investors Overseas Servs., Ltd., 47l F. Supp. 1255, l259 (S.D.N.V. 1979) ("The fact that the foreign country involved is Canada is significant. It is wellsettled in New York that the judgments of the Canadian courts are to be given effect under principles of comity. Trustees in bankruptcy appointed by Canadian courts have been recognized in actions commenced in the United States. More importantly, Canada is a sister common law jurisdiction with procedures akin to our own, and thus there need be no concern over the adequacy of the procedural safeguards of Canadian proceedings.") (internal quotation marks and citations omitted)15

[79] *MAAX Corporation* (*MAAX*) provides some assistance on the U.S. treatment to CCAA proceedings in asset sales. The salient elements in *MAAX* included the fact that the sale was conducted prior to entering CCAA protection, only the Canadian entity ultimately sought protection under the Act and no concurrent U.S. proceedings were initiated at first. The MAAX companies operated extensively in the U.S. and internationally, and were eventually brought into the U.S. via Chapter 15. The Canadian court approved the move into the U.S. and granted the sale. While there were some operating companies based almost solely in the U.S. (opening bank accounts to qualify under the CCAA, as was done in the present case), the U.S. Bankruptcy Court looked at the entity as a whole and granted the petition.[16] The American court approved of a flexible approach to the U.S. asset sale, allowing it to go forward without a competitive bidding process, stalking horse or auction.

[80] One of the essential features of the orders sought is the requirement that recognition be sought and obtained in the U.S. Bankruptcy Court, pursuant to Chapter 15 of that Code, of the Orders sought in this Court, including the adding of Additional Applicants.

[81] I am satisfied that if there is a valid objection by the SLL, it is appropriately made in the U.S. Bankruptcy Court at a hearing to recognize this Order. I do not accept the proposition that this Court, by making the Order sought, would usurp a determinative review by the U.S. Court should it be found necessary.

[82] Given the purpose and flexibility of the CCAA process, it is consistent with the jurisdiction of this Court to add the Additional Applicants for the appropriate purpose of facilitating and implementing the entire transaction, which is approved.

Conclusion

[83] For the foregoing reasons, I am satisfied:

1. That it is not appropriate to re-open the Marketing Process;

15 See footnote 12, *supra.*
16 *In re MAAX Corp., et al.*, No. 08-11443 (Bankr. D. Del. Aug. 6, 2008)

2. That this Court does have jurisdiction to consider a sale transaction that incidentally does affect assets of a Canadian company in the United States;

3. That in all the circumstances it is appropriate to approve the proposed transaction.

____

C. CAMPBELL J.

Released:

Appendix A

Applicable Provisions of the Inter-Creditor Agreement

<u>Section 3.1</u>

Until the Discharge of First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the other First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set-off and the right to credit bid their debt) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the consent of the Second Lien Collateral Agent or any other Second Lien Claimholder…

<u>Section 5.1(a)</u>

If in connection with the exercise of the First Lien Collateral Agent's remedies in respect of the Collateral provided for in Section 3.1, the First Lien Collateral Agent, for itself or on behalf of any of the other First Lien Claimholders, releases any of its Liens on any part of the Collateral or releases any Grantor from its obligations under its guaranty of the First Lien Obligations in connection with the sale of the stock, or substantially all the assets, of such Grantor, then the Liens, if any, of the Second Lien Collateral Agent, for itself or for the benefit of the Second Lien Claimholders, on such Collateral, and the obligations of such Grantor under its guaranty of the Second Lien Obligations, shall be automatically, unconditionally and simultaneously released...

…The Second Lien Collateral Agent, for itself or on behalf of any such Second Lien Claimholders, promptly shall execute and deliver to the First Lien Collateral Agent or such Grantor such termination statements, releases and other documents as the First Lien Collateral Agent or such Grantor may request to effectively confirm such release.

<u>Section 5.1(c)</u>

Until the Discharge of First Lien Obligations occurs, the Second Lien Collateral Agent, for itself and on behalf of the Second Lien Claimholders, hereby irrevocably constitutes and appoints the First Lien Collateral Agent and any officer or agent of the First Lien Collateral Agent, with full power of substitution, as its true and lawful attorney-in-fact with full irrevocable power and authority in the place and stead of the Second Lien Collateral Agent or such holder or in the First Lien Collateral Agent's own name, from time to time in the First Lien Collateral Agent's discretion, for the purpose of carrying out the terms of this Section 5.1, to take any and all appropriate action and to execute any and all documents and instruments which may be necessary to accomplish the purposes of this Section 5.1, including any endorsements or other instruments of transfer or release.

CITATION: Re Grant Forest Products Inc., 2010 ONSC 1846
Court File No. CV-09-8247-00CL
Date: 20100330

SUPERIOR COURT OF JU.S.TICE
ONTARIO
(Commercial List)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GRANT FOREST PRODUCTS INC., GRANT ALBERTA INC., GRANT FOREST PRODUCTS SALES INC. and GRANT U.S. HOLDINGS GP

REASONS FOR DECISION

C. CAMPBELL J.

Released: March 30, 2010

TAB 6

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Veris Gold Corp. (Re),
2015 BCSC 1204

Date: 20150710
Docket: S144431
Registry: Vancouver

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

And

In the matter of the *Canada Business Corporations Act*,
R.S.C. 1985, c. C-44

And

In the matter of the *Business Corporations Act*,
S.B.C. 2002, c. 57

And

In the Matter of Veris Gold Corp., Queenstake Resources Ltd., Ketza River Holdings, and Veris Gold USA, Inc.

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Monitor, Ernst & Young Inc.:	J. Sandrelli T. Jeffries
Counsel for Deutsche Bank A.G.:	D. Vu
Counsel for Moelis & Company:	C. Ramsay S. Irving K. Mak
Counsel for Whitebox Advisors LLC, WBox 2014-1 Ltd.:	K. Jackson D. Toigo

Counsel for the Attorney General of Nevada:	R. Morse N. Vaartunou A/S
Counsel for Nevada Cement:	C. Ramsay K. Mak
Counsel for NV Energy:	C. Brousson J. Bradshaw A/S
Counsel for Government of Yukon:	J. Porter
Counsel for AIG:	K. Siddall
Counsel for Linde LLC:	S. Ross
Place and Date of Hearing:	Vancouver, B.C. May 28, 2015
Place and Date of Judgment:	Vancouver, B.C. July 10, 2015

Introduction

[1] This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The assets of the petitioner companies (collectively, "Veris Gold") principally comprise a gold mine in the State of Nevada, United States of America and mining properties in Yukon, Canada.

[2] There has been no shortage of effort in these proceedings to restructure the considerable debt or monetize the assets of Veris Gold for the benefit of the stakeholders. However, in the face of considerable operational setbacks and disappointing refinancing and sale results, those stakeholders now face two stark options: (i) allow the interim lender to deal with the assets in a receivership or liquidation scenario; or (ii) allow an orderly transfer of the assets to that interim lender by way of a credit bid which would allow operations in the U.S. to continue.

[3] The court-appointed monitor, Ernst & Young Inc., (the "Monitor") now applies to complete the sale to a new entity created by the interim lender, which is said to provide the best result achievable in less than desirable circumstances.

Background Facts

[4] Much of the history of these proceedings was set out in my reasons for judgment issued earlier this year: *Veris Gold Corp. (Re)*, 2015 BCSC 399. For the purposes of this application, I will summarize that history as follows.

[5] On June 9, 2014, this Court granted an initial order. This filing was necessary in light of the imminent steps that were to be taken by Veris Gold's major secured creditor, Deutsche Bank A.G. ("DB") to collect its debt of approximately US$90 million.

[6] The Canadian filing was immediately followed by the Monitor commencing proceedings in Nevada pursuant to Chapter 15 of the *United States Bankruptcy Code*, 11 U.S.C. §§ 101-1532 (the "*Bankruptcy Code*").

[7] Arising from orders granted in both the Canadian and Nevada proceedings and the agreements reached between Veris Gold and DB, matters were stabilized. Those orders and agreements allowed Veris Gold to continue its efforts to restructure its debt and equity with the assistance of Raymond James & Associates. In addition, firm milestone dates were put in place to conclude any refinancing and also to commence a sales process if those refinancing efforts were not successful.

[8] In October 2014, this Court approved interim financing to be obtained from WBox 2014-1 Ltd. (“WBox”) in the amount of US $12 million.

[9] On November 18, 2014, this Court approved a detailed sale and solicitation process to be conducted by Moelis and Company ("Moelis"), again with firm deadlines for such matters as receipt of qualified bids. Although certain of the deadlines under the sales process were extended, no qualified bids were received by the extended bid deadline, January 30, 2015.

[10] Following these disappointing sale results, the Monitor engaged in discussions with Veris Gold and the two stakeholders who appeared to have the only economic interest remaining in the assets, being DB and WBox. What was critical at this time was allowing Veris Gold to continue to operate in the ordinary course while these stakeholders considered their next steps.

[11] In mid-February 2015, DB issued various notices of default under its security and the agreements reached earlier with Veris Gold. This also resulted in an immediate default under the interim financing agreements between Veris Gold and WBox. With a view to securing greater oversight over the continued operations of Veris Gold, DB later applied for and was granted an order expanding the powers of the Monitor on February 23, 2015. That order was later recognized by the U.S. court in the Chapter 15 proceedings on March 2, 2015.

[12] By late March 2015, both DB and WBox were continuing to consider their options, including the possibility of making a credit bid for the assets. WBox conducted due diligence of the assets toward that possibility. The Monitor reported

at that time that, absent a credit bid from DB, a credit bid from WBox was the only viable alternative.

[13] Accordingly, on March 30, 2015, this Court granted an order extending the stay of proceedings to April 7, 2015 to enable completion of discussions in relation to a credit bid transaction whereby certain of Veris Gold's assets would be transferred to a nominee of WBox.

[14] On April 2, 2015, Veris Gold suffered yet another operational setback when a fire occurred at the processing plant, causing an estimated shutdown of one week. The already tenuous cash problems were therefore exacerbated by the deferral of revenue of approximately US$4 million as a result of the shutdown. The timing of this difficulty was unfortunate, in that by this time, the Monitor had negotiated an agreement in principle with WBox for the purchase of the assets and an increase in the interim funding to allow operations to continue to the closing date.

[15] Not surprisingly, the fire and ensuing difficulties caused WBox to delay any credit bid and the provision of further financing while it considered, among other things, the impact on the cash requirements of continuing operations. In addition, in light of what the Monitor described as the "mounting challenges", the Monitor and WBox moved to a consideration of liquidation scenarios. Preliminary work on various shutdown options, including care and maintenance, indicated that significant monies would have to be expended even before the assets could be transferred on an orderly basis to environmental regulators.

[16] On April 7, 2015, this Court extended the stay of proceedings to April 24, 2015 in order to enable WBox and other interested parties to assess their options and to allow the Monitor time to have further discussions with the environmental regulators. During this extension of the stay period, WBox renewed discussions with the Monitor in respect of a potential transaction that would involve the equity participation of a financial partner. It was discussed that this partner could participate in WBox's nominee, which would be the entity to hold and operate Veris Gold's mining assets.

[17] Discussions were also ongoing at this time whereby WBox would provide increased financing to Veris Gold in order to allow further time to finalize a transaction.

[18] On April 24, 2015, this Court granted an order extending the stay of proceedings to June 12, 2015. In addition, at the request of the Monitor, an order was granted increasing the interim funding from WBox by US$3 million to US$15 million, which would allow Veris Gold’s operations to continue. WBox approved a cash flow forecast and it was agreed that WBox would maintain control over payments made from this further facility. On April 29, 2015, the U.S. court approved this amendment to the interim financing facility.

[19] On May 28, 2015, Veris Gold entered into an asset sale agreement (the “Agreement”) with WBVG, LLC (“WBVG”). WBVG is an entity wholly owned by WBox although, as anticipated, WBox sought and obtained the future participation of another equity partner. The transaction provides that WBox will transfer a majority interest in WBVG to 2176423 Ontario Ltd., a company owned by Eric Sprott. Mr. Sprott was already involved in Veris Gold, having a 20% equity interest and also having a royalty interest in the Nevada mining properties.

[20] The salient terms of the Agreement are as follows:

a) WBVG will purchase all tangible and intangible assets of Veris Gold, subject to certain defined excluded assets;

b) the Monitor is to continue efforts to sell the Ketza assets in Yukon over a 60-day period with any sale proceeds being payable to WBVG. If no sale occurs, then those assets will be transferred to WBVG;

c) WBVG is to assume certain obligations arising under assumed contracts, including all bonds, and also pay any “cure costs” relating to such assumed contracts, limited to US$10 million;

d) WBVG will assume the amounts owing to WBox under the interim lending facility and will pay certain of the court-ordered charges, such as the administration charges, having priority over the interim lender's charge in favour of WBox to a maximum of US$1.8 million;

e) WBVG will not assume any liabilities for pre-closing obligations;

f) all employees of Veris Gold are to be terminated on closing and WBVG may offer employment to some or all of them; and

g) a "DIP Financing Cash Reserve" fund estimated in the amount of US$3.1 million is to be established to pay certain post-filing obligations that will be outstanding as of the closing date, including employee wages and amounts due to suppliers and contractors for the supply of goods and services. Any funds remaining in the DIP Financing Cash Reserve after these payables have been satisfied shall be returned to WBVG.

[21] The Agreement is still conditional in that it is subject to approval by both this Court and the U.S. court. Further conditions relate to obtaining an assignment of certain critical contracts, such as bonding agreements and other arrangements with the Nevada environmental regulators.

Statutory Framework

[22] The authority of this Court to approve the sale is found in s. 36 of the *CCAA*. Section 36(3) of the *CCAA* sets out a list of non-exhaustive factors to be considered by the court:

> (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.

[23] A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *Re White Birch Paper Holding Co.*, 2010 QCCS 4915 at para. 49, 72 C.B.R. (5th) 49, leave to appeal ref'd 2010 QCCA 1950.

[24] In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 at 6 (C.A.) are helpful in considering whether to approve a sale:

1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
2. The interests of all parties;
3. The efficacy and integrity of the process by which offers were obtained; and
4. Whether there has been any unfairness in the sales process.

[25] Various authorities support that, in considering the test under s. 36 of the *CCAA*, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Re Canwest Publishing Inc.*, 2010 ONSC 2870 at para. 13; *White Birch* at para. 50; *Re PCAS Patient Care Automation Services Inc.*, 2012 ONSC 3367 at para. 54.

<u>Discussion</u>

(a) *CCAA* Factors

[26] I am more than satisfied that the factors set out in s. 36(3) of the *CCAA* support the granting of the order approving the Agreement with WBVG.

[27] I have already outlined the extensive process by which Veris Gold's assets were exposed to the market by Moelis in accordance with the court-approved sales

process. That process, which took place over many months, unfortunately did not yield any realistic offers, despite an extension of the bid deadline.

[28] The Monitor did receive a non-binding expression of interest from a party on May 8, 2015. Some of the persons behind this expression of interest had been involved in the unsuccessful sales process. However, despite the purchase price being slightly above the WBox borrowings (US$20 million), the Monitor's view was that it would not be pursued by reason of the numerous significant conditions and the reality that the delay in pursuing any offer would place Veris Gold's operations at significant risk given its precarious financial (cash) condition. On May 13, 2015, this indicative offer was increased to US$23 million but that increase did not elicit any support from either WBox or the Monitor.

[29] In response to the concerns of WBox and the Monitor, this party submitted a non-binding indicative offer on May 22, 2015 with additional materials indicating that financing had been tentatively obtained. Even so, the Monitor supported WBox's continued position that this offer should not be pursued further given the risk and delay in doing so. DB did not challenge this assessment.

[30] It should be noted that, with the possible exception of DB, no one was more interested in obtaining an offer to purchase the assets than WBox in terms of seeing some recovery under the interim financing. In large part, WBVG's offer is made somewhat reluctantly by WBox as the only real alternative to obtaining some value from the assets secured under its court-ordered charge.

[31] The Monitor has been extensively involved throughout these proceedings and the sales efforts, particularly given the Monitor's role in brokering the peace between Veris Gold and DB that allowed the refinancing and sale efforts to continue without much controversy. To that extent, the Monitor was very much involved in fashioning the sales process that was eventually approved by the court on November 18, 2014.

[32] At this time, the stark reality is that no other viable options exist other than this sale or a receivership and liquidation, with the latter providing considerable

uncertainty in terms of future operations. That uncertainty has justifiably caused some concern with the regulators, both in Nevada and Yukon, who must necessarily address any environmental issues that might precipitously arise from a failure to continue operations.

[33] In my view, the process leading to this transaction was fair and reasonable in the circumstances. No person has suggested that these efforts were insufficient or inadequate.

[34] Needless to say, the Monitor, being the applicant, is in favour of the transaction with WBVG and recommends its approval by the court. The Monitor has been involved in the negotiations and finalization of the asset sale agreement throughout.

[35] The reasons to approve the sale to WBVG and to do so quickly are outlined in the Monitor's sixteenth report to the court dated May 25, 2015. The portions of the report that highlight those reasons are:

> [Veris Gold] would unlikely be able to recover from a further significant interruption of operations. The result would likely be the commencement of a liquidation process with the resultant loss of jobs, supply chain benefits and heightened environmental risks related to the need to transition care and maintenance activities to the Nevada environmental regulators on an extremely short timeline.
>
> …
>
> The [transaction] is essentially a realization process by [WBox], which has no viable alternatives. The operations continue on borrowed time, and prolonging any process results, in the Monitor's view, in significant risk to numerous stakeholders – [WBox], employees, suppliers of goods and services, and the environmental regulators.
>
> …
>
> [I]t is urgent to have an expedited resolution to these proceedings. … The alternative, which would involve facilitating due diligence by the EOI Party or other late emerging parties, together with the related purchase agreement negotiations and discussions with the environmental regulators, translates into an extended timeframe and a higher risk of non-completion or future operational disruption. The party exposed to the risk of loss in the event on non-completion is [WBox].

[36] There has obviously been extensive consultation with WBox throughout these proceedings since the interim financing was initially approved in October 2014.

[37] Since February 2015, when it was clear that no sales had materialized, DB's interest in these proceedings has undoubtedly lessened. This is largely due to the realization that there was likely no value beyond what was owed to WBox under its interim financing, which stands in priority to the secured debt of DB. In essence, DB's lack of opposition to this sale is in recognition that it will obtain no recovery of the substantial debt owed by Veris Gold to it in excess of US$90 million.

[38] Other creditors junior in priority to DB have not been consulted; however, it has been abundantly clear since January 2015 that DB stood little chance of collecting even a portion of its debt, let alone realize a refinancing or sale that would see these junior creditors recover from any excess. Therefore, the proposed transaction will have no material effect on these other creditors.

[39] It has also necessarily been the case that the various parties, and in particular the Monitor, WBox, Mr. Sprott and WBVG, have been in extensive discussions with the environmental regulators throughout these proceedings and specifically regarding the proposed transaction with WBVG. Discussions were held with the Nevada Division of Environmental Protection and the U.S. Forest Service in connection with the proposed transaction and any alternative scenarios. Those regulators were either in support or not opposed to the relief sought on this application, having secured terms in the proposed court order to address any concerns on their part.

[40] While the outcome for DB and other pre-filing creditors is complete non-recovery, the benefits for various other stakeholders, being WBox, the employees, suppliers and the environmental regulators, is evident enough. It is these stakeholders who will suffer in the event that Veris Gold's operations do not continue and the environmental regulators in Nevada are left with the significant care and maintenance responsibilities for the mine site in a liquidation scenario. This transaction will see a continuation of Veris Gold's operations in Nevada. Accordingly,

I agree with the Monitor that this is the best outcome for these operational stakeholders.

[41] The operations in Yukon have been dormant for some time. Discussions between the Monitor and the Yukon regulators are continuing at this time toward a potential purchase of the Ketza assets by Yukon and a relinquishment of Veris Gold's mineral claims and mining leases there. The Agreement contemplates that these discussions will continue, hopefully toward a satisfactory conclusion.

[42] The Monitor and WBox have also addressed in part concerns expressed by the court concerning the ongoing supply of goods and services and the uncertainty of payment for those goods and services while the Agreement was being negotiated. As noted above, upon the closing of the transaction, employees and suppliers to the Nevada mine site will be paid by Veris Gold for goods and services supplied up to the time of closing. As it relates to the employees, this addresses the requirement in the *CCAA*, s. 36(7) in that the court is satisfied that employee-related claims will be paid. Additional benefits will also redound to all of these stakeholders by either the potential of continued employment with WBVG or the continuation of many of the supply contracts which are to be assumed by WBVG post-closing.

[43] I also conclude that the history of these proceedings, as outlined above, demonstrates that the consideration to be received for Veris Gold's assets is reasonable and fair, taking into account their market value. While no appraisals of the assets have been obtained, that fair market value is reflected in the market response to the extensive sales efforts undertaken.

[44] No one misunderstands that if the transaction is not approved WBox will withdraw funding and Veris Gold will almost certainly have to commence an orderly wind down of its operations and liquidation of its assets to satisfy the debt owed to WBox. It is more than likely that WBox will suffer a shortfall in a liquidation scenario. A liquidation scenario will also likely result in the Nevada environmental regulators taking over care and maintenance of the mine site on an expedited basis, at

significant expense and with the possibility of environmental damage resulting from a surrender of the mine site without the lead time needed by the regulators.

[45] In all the circumstances, a consideration of all the factors in s. 36 of the *CCAA* supports the conclusions that the proposed transaction is fair and reasonable and that the Agreement should be approved.

(b) Assignment of Contracts

[46] The asset sale agreement provides that WBVG will be assigned the "Assigned Contracts", which are defined as meaning "all Designated Seller Contracts" and also described as "Required Assigned Contracts". All of these contracts are listed in a schedule attached to the purchaser disclosure schedule delivered by WBVG to Veris Gold.

[47] The Monitor seeks approval of the assignment of the Designated Seller Contracts, save to the extent that consents from counterparties have not already been obtained.

[48] The relevant statutory authority to approve such assignments is found in s. 11.3 of the *CCAA*:

> 11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.
>
> ….
>
> (3) In deciding whether to make the order, the court is to consider, among other things,
>
> > (*a*) whether the monitor approved the proposed assignment;
> >
> > (*b*) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
> >
> > (*c*) whether it would be appropriate to assign the rights and obligations to that person.
>
> (4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

> (5) The applicant is to send a copy of the order to every party to the agreement.

[49] The Monitor's report and recommendations are in support of approval of these assignments. These approvals are part of the Monitor's overall recommendations in favour of the Agreement. WBVG has indicated its willingness to continue the operations of Veris Gold in Nevada on a going concern basis. The participation of WBox and Mr. Sprott lend credibility to its ability to do so, while performing any obligations under these contracts.

[50] In that context, it is appropriate that WBVG obtain the benefit of contracts that will facilitate its ability to continue these operations. Indeed, some of the contracts are critical or necessary for future operations.

[51] In addition, the Agreement contemplates the payment of "cure costs" which are defined in the Agreement in relation to statutory obligations arising under both s. 11.3(4) of the *CCAA* and s. 365(b)(1) of the *Bankruptcy Code* where the assignment of contracts is approved. Cure costs are defined in the Agreement as follows:

> "Cure Cost" means, as applicable with respect to any Seller, (i) any amounts or assurances required by Section 365(b)(1) of the U.S. Bankruptcy Code under any applicable Designated Seller Contract or (ii) any amounts required to satisfy monetary defaults in relation to the applicable Designated Seller Contract pursuant to Section 11.3 of the CCAA.

[52] Each of the Designated Seller Contracts and related anticipated cure costs are set out in a schedule to the Agreement. Pursuant to the Agreement, such cure costs are payable on closing. The order sought provides that upon payment, and upon assignment:

> 10. … the Required Assigned Contracts [aka the Designated Seller Contracts] shall be deemed valid and binding and in full force and effect at the Closing, and the Purchaser shall enjoy all of the rights and benefits under each such Required Assigned Contract as of the applicable date of assumption.

[53] Section 11.3 of the *CCAA* came into force in September 2009. Prior to that time, there was little case authority in terms of a *CCAA* court approving assignments of contracts over the objections of counterparties. One of those early cases is *Playdium Entertainment Corp., Re*, [2002] 31 C.B.R. (4th) 302 (Ont. S.C.J.); additional reasons [2002] 31 C.B.R. (4th) 309 (Ont. S.C.J.).

[54] In *Re Nexient Learning Inc.*, [2010] 62 C.B.R. (5th) 248 at 258 (Ont. S.C.J.), Wilton-Siegel J. cited both Spence J. in *Playdium* and Tysoe J. (as he then was) in *Re Woodward's Ltd.* (1993), 79 B.C.L.R. (2d) 257 (S.C.), in framing the test as being whether the assignment was "important to the reorganization process". Also of relevance was the effect of the assignment on the counterparty and the principle that third party rights should only be affected as is absolutely required to assist in the reorganization and in a manner fair to that counterparty: see the additional reasons in *Playdium* at 319; *Nexient* at 259. See also discussion in *Barafield Realty Ltd. v. Just Energy (B.C.) Limited Partnership*, 2014 BCSC 945 at paras. 107-108.

[55] The approach of the courts in these earlier cases was essentially confirmed in *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, where the Court stated the basis upon which relief might be "appropriate" and that any relief should result in "fair" treatment to all stakeholders:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. <u>Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit</u>.
>
> [Emphasis added.]

[56] Like many other amendments to the *CCAA* in September 2009, s. 11.3 was intended, in my view, to codify what had been the general approach to assignment issues, while also clarifying certain matters that had been to that time uncertain. One example of certainty achieved, although irrelevant on this application, arises by s. 11.3(2) which excludes certain contracts from the statutory authority of the court in s. 11.3(1).

[57] Since its enactment, judicial consideration of s. 11.3 is scarce. In *Re TBS Acquireco Inc.*, 2013 ONSC 4663, D.M. Brown J. (as he then was) approved the assignment of certain leases and designated contracts, finding that this would result in the continuation of the business in the greatest number of stores and the continued employment of the greater number of people. Cure costs were also to be paid: see paras. 19-25.

[58] I do not see the result in *TBS* as deviating from the previous approach of the courts in considering whether to approve an assignment based on the twin goals of assisting the reorganization process (i.e., the sale in this case) while also treating a counterparty fairly and equitably. These considerations can be discerned in particular from the factors set out in s. 11.3(3) set out above.

[59] That brings me to the only issue that arises here in relation to the assignments. While no objection was raised to the assignments by persons who did not otherwise consent, the Monitor's counsel was candid in advising the court that only those persons on the service list were served with the Canadian application materials. It is not therefore apparent that the counterparties to the contracts did in fact receive a copy of the application materials.

[60] This is not an approach that I would endorse. It may often be the case that a counterparty is not a creditor of the estate and therefore, that party would not get notice of the filing at the commencement of those proceedings. Further, even if that is the case, no assignment issue may be apparent at the time of initial service to the point that such person would take steps to be placed on the service list.

[61] The best practice in these circumstances is to serve all counterparties to the particular contracts that are sought to be assigned, whether they are on the service list or not. Section 11.3(1) specifically provides that the application is to be “on notice to every party to an agreement”. Common sense dictates that the person to be directly affected by the assignment should have the ability to consider whether the applicant debtor company has satisfied its burden that the order is appropriate, including the factors set out in s. 11.3(3). Only by service will that counterparty be made aware of the need to consider its position if such approval is granted and possibly advance evidence and considerations that would be equally relevant to the court’s decision on the issue.

[62] Before proceeding with the application in *TBS*, Brown J. was satisfied that the applicant had given notice of the request to seek a court-authorized assignment of the contracts: para. 25.

[63] As I have mentioned, there was urgency in approving the Agreement so that Veris Gold’s operations could continue in the ordinary course. Further delay was not feasible nor was it in the interests of all the stakeholders. The Monitor’s counsel advised that all of the counterparties were in the U.S. and most of those counterparties, being capital lessors, were represented by Nevada counsel. Finally, I was advised that all of these counterparties were served with the U.S. application materials in anticipation of an application in Nevada to also approve the Agreement immediately after this application. Therefore, specific notice of the terms of the Agreement and the fact that approval of the assignment was sought would have been provided in any event, albeit in the context of the U.S. court materials.

[64] In these exigent and extraordinary circumstances, I approved the assignments on the terms sought, but subject to the U.S. court being satisfied with the notification to and service on the counterparties to the Required Assigned Contracts who did not receive direct notice of this application. In that way, these counterparties will have been given the ability to attend the U.S. hearing and make

submissions on the relief sought, all of which is a required condition to closing the Agreement.

Conclusion

[65] Veris Gold has faced a number of operational challenges and adverse events over the course of this restructuring proceeding. Initially at least, they faced significant opposition by their major secured creditor, DB. Efforts to refinance or sell the assets have been met with little interest and certainly no offer was received by that process on which to base a transaction.

[66] As matters stand, Veris Gold's operations are undercapitalized and susceptible to further disruptions unless stability is achieved quickly to avoid a liquidation process. That process would undoubtedly result in a loss of jobs, disruption of supply arrangements and heightened environmental risk.

[67] The only realistic alternative is the one before the court on this application; namely, a credit bid by WBox, the interim lender, which would see a continuation of the operations in Nevada. The Monitor's view is that proceeding to close the Agreement on an expedited basis is necessary to protect the interests of the principal stakeholders in Veris Gold's operations, namely WBox, the employees, suppliers of goods and services and the environmental regulators.

[68] The statutory requirements of the *CCAA* in ss. 36 and 11.3 have been satisfied by the Monitor toward approval of the Agreement, including approving the assignments of the Required Assigned Contracts. I am also satisfied that the orders sought are appropriate in the circumstances and consistent with the objectives of the *CCAA*.

[69] The relief sought by the Monitor is granted. The Agreement is approved and Veris Gold and the Monitor are authorized to proceed to finalize the transactions with WBVG. The vesting of the assets on closing will be subject to an order of the U.S. court approving the Agreement and making such other ancillary orders as are appropriate in accordance with the *Bankruptcy Code*. The order provides that any

issues that may be raised by the U.S. environmental regulators will be addressed by the U.S. court. Accordingly, this Court requests the aid, recognition and assistance of the U.S. court in terms of the carrying out of the terms of the order granted.

[70] Finally, all orders sought with respect to the approval of the assignment by Veris Gold to WBVG of the Required Assigned Contracts are granted on the terms sought, including that such approval is subject to the payment of the cure costs.

"Fitzpatrick J."

TAB 7

CITATION: TBS Acquireco Inc. (Re), 2013 ONSC 4663
COURT FILE NO.: CV-13-10018-00CL
DATE: 20130710

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT TO TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC. and TBS STORES INC.

BEFORE: D. M. Brown J.

COUNSEL: A. Merskey and D. Pearlman, for the Applicants, TBS Acquireco Inc., The Bargain! Shop Holdings Inc. and TBS Stores Inc.

M. Laugesen, for Wells Fargo Capital Finance Corporation Canada

J. Sirivar, for BlackRock Kelso Capital Corporation

L. Galessiere, for Loblaw Properties Ltd., OPB Realty Inc. and Highland Park Shopping Centre Inc.

E. Lamek, for the Monitor

D. Yiokaris, A. Scotchmer and J. Harnum, for Certain Terminated Employees

HEARD: July 9, 2013

REASONS FOR DECISION

I. Motions in a *CCAA* proceeding to approve a sale, assign contracts and appoint representative counsel for terminated employees

[1] On February 26, 2013, this Court made an order granting the application of TBS Acquireco Inc. ("TBS") and certain of its direct Canadian subsidiaries, The Bargain! Shop Holdings Inc. ("TBSHI") and TBS Stores Inc. ("TBSI"), for relief under the *Companies' Creditors Arrangement Act* ("*CCAA*") (the "Initial Order"). The Initial Order appointed Ernst & Young Inc. as monitor. The applicants operate a chain of general merchandise retail stores under the names "The Bargain! Shop" and "Red Apple". The stores largely are located in smaller communities across Canada.

[2] In previous orders this Court approved a sale and investment solicitation process ("SISP") and the liquidation of a large number of stores the applicants had decided to divest as part of their restructuring under the *CCAA* process.

[3] The applicants moved for (i) approval of the transaction with BlackRock Kelso Capital Corporation contemplated pursuant to an agreement of purchase and sale dated as of June 10, 2013 between the applicants, as sellers, and BlackRock Kelso, or its designate, as purchaser (the "Transaction"). As well, the applicants sought approval under section 11.3 of the *CCAA* for the assignment of certain Acquired Store Leases and Designated Contracts.

[4] In addition, Ms. Lucy Zita, a former employee of the applicants, moved for an order appointing her as a representative of terminated employees of the applicants, appointing representative counsel and requiring that the legal fees incurred on behalf of such terminated employees to ensure maximum recovery under the *Wage Earner Protection Program Act* be paid out of some of the proceeds of the BlackRock Kelso transaction.

[5] Yesterday morning I granted the applicants' motion and I dismissed the motion by the Terminated Employees, with these written Reasons to follow.

II. The BlackRock Transaction

[6] Section 36(1) of the *CCAA* governs: see, also, *Re White Birch Paper Holding Company*, [2010] Q.J. No. 10469, paras. 48-49.

[7] Proper notice of this approval motion was given to all interested parties by service of those on the service list, including secured creditors who were likely to be affected by the proposed sale. No interested party opposed the relief sought. The senior secured creditor, Wells Fargo Capital Finance Corporation Canada, supported the applicants' motion.

A. The sale process

[8] By order made April 25, 2013, this Court approved the SISP. The approved process permitted a secured lender to make a credit bid.

[9] Both the applicants and the monitor filed detailed evidence describing the steps taken during the SISP. In addition to utilizing a standard solicitation/confidentiality agreement/electronic data room due diligence marketing process, the applicants, after consultation with the Monitor, established a special SISP Committee comprised of senior management which assisted the Monitor in administering the SISP without the need for involving the applicants' boards. This structure was put in place because most members of the boards were related, had expressed interest in submitting an offer under the SISP, or otherwise were involved with potential SISP participants.

[10] The evidence filed disclosed that the applicants followed the SISP procedures approved by this Court.

[11] The Monitor reported that in its view the timelines in the SISP were commercially reasonable and all interested parties had a reasonable opportunity to participate in the SISP and to submit an offer.

[12] I conclude that the process leading to the proposed sale was reasonable in the circumstances, the securing of court approval of the SISP enabled creditors to comment on the sale process chosen, and the Monitor supported and actively participated in the process leading to the proposed sale.

B. The BlackRock Transaction

[13] By the bid deadline the applicants had received two bids: a financing offer from a Toronto asset-based lender that was subject to further due diligence and negotiation and the BlackRock Kelso going-concern offer. Eric Claus, President of the applicants, deposed the BlackRock Kelso offer "represented the best alternative for the Applicants' business and its numerous stakeholders, including approximately 1,800 employees, landlords for 165 locations and many suppliers across the country." The Monitor reported that the BlackRock Transaction "offered financial terms that were clearly superior to the other bid that was received and the Monitor is satisfied that the consideration to be received for the assets is fair and reasonable in the circumstances".

[14] Under the Transaction, a subsidiary of BlackRock Kelso will purchase substantially all of the applicants' assets and is committed to continuing running 165 of the applicants' stores. The purchaser will offer employment to all employees of the applicants, save for those who worked at stores that have been closed or liquidated, and will offer employment to all senior management of the applicants. The purchase price contains several components:

(i) The payment in cash on closing of the applicants' debt to Wells Fargo of approximately $20 million;

(ii) Settlement of the applicants' debt to BlackRock Kelso of approximately $23 million, save for about $500,000;

(iii) The purchaser's commitment, supported by BlackRock Kelso, to transition funding pursuant to a Funding and Transition Agreement, including a commitment to fund certain Priority Payables ($1.2 million) and CCAA Completion Costs ($1.8 million). The Priority Payables consist largely of unremitted HST and PST and a cash collateralization of the administrative reserve; and,

(iv) The assumption by the purchaser of certain obligations of the applicants to its employees and customers, including ordinary course of business obligations to employees who accept employment with the purchaser, obligations under the Acquired Store Leases and Designated Contracts, and honouring gift cards and certificates and obligations incurred post-filing in connection with open purchase orders and goods in transit (all estimated at approximately $3.6 million).

The BlackRock Agreement of Purchase and Sale contains certain conditions, including the obtaining of all consents necessary for the assignment of Acquired Store Leases and Designated Contracts (largely IT service and equipment rental contracts).

[15] The purchase price will not be sufficient to offer any consideration to the applicants' unsecured creditors for amounts owing prior to the commencement of this *CCAA* proceeding.

[16] In light of the credit bid component of the BlackRock offer, the Monitor obtained security opinions from its legal counsel concerning the validity, perfection and enforceability of the BlackRock Kelso security. The Monitor reported that "subject to the standard qualifications and assumptions, the security opinions conclude that the BlackRock Kelso security is valid and enforceable, and is properly perfected in each of the Reviewed Provinces where the security is registered against a particular Applicant". The priority of security between BlackRock Kelso and Wells Fargo is subject to an intercreditor agreement.

[17] The Monitor reported that in its view "the proposed Transaction will maximize value for all stakeholders of the Applicants, including their creditors, employees, suppliers and other stakeholders as opposed to a liquidation under a bankruptcy, as well as to ensure the continued employment of numerous employees of Applicants".

C. Analysis

[18] Based upon my review of the evidence, the BlackRock Transaction should be authorized. The SISP was approved by this Court and was followed. The applicants seek approval of the superior bid. Although the transaction only will offer consideration to secured creditors, it will see the continuation of a substantial portion of the applicants' business, albeit under the ownership of the purchaser, with the preservation of approximately 1,800 jobs and the continuation of 165 store leases: *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5^{th}) 229 (Ont. S.C.J.), para. 47. I therefore authorize the BlackRock Transaction under *CCAA* s. 36.

III. Assignment of Acquired Store Leases and Designated Contracts

[19] The affidavit of Mr. Klaus and the Monitor's report described in detail the efforts made to secure the consents of the landlords to the assignment to the purchaser of the store leases for the locations to be assumed under the BlackRock Transaction (the "Acquired Store Leases") and to secure the consents of the counterparties to several IT servicing and equipment rental contracts, the so-called Designated Contracts. As part of the dealings with the landlords and contract counterparties, the applicants, with the assistance of the Monitor, sought to identify the amount of the cure costs owing in respect of each location or contract. Detailed information packages were sent to each landlord and contract counterparty, and negotiations ensued.

[20] As of the date of the hearing, the applicants, through Monitor's counsel, had received 149 consents to the assignment of leases, out of the proposed 165 locations. Agreements on cure costs have been reached, but a few landlords have not delivered consents. However, those landlords did not oppose the assignment of their leases to the purchaser.

[21] The Monitor reports that if consents to assign leases were not received before the hearing, it would be "appropriate to order the assignment of the leases of each of the Reconciled

Locations to the Purchaser". Schedule "C" to the proposed Approval and Vesting Order identified the cure cost amount for each of what were termed the "Reconciled Locations".

[22] As to the Designated Contracts, the applicants have resolved issues with the counterparties to a sufficient extent that those counterparties which have not signed consents do not oppose the relief sought by the applicants. The Monitor recommends that "the Designated Contracts be assigned to the Purchaser by the court at the agreed cure costs amount or, failing which, at the amount of the cure costs reflected in the applicants' books and records." Schedule "D" to the proposed Approval and Vesting Order identified each Designated Contract and the cure cost amount for each.

[23] The Monitor approves of the proposed assignment of the Acquired Store Leases and Designated Contracts to the purchaser:

> Absent the assignment to the Purchaser, the applicable leases and Designated Contracts would be disclaimed pursuant to the provisions of the *CCAA* and the inventory at that location would be liquidated, the employees would be terminated and the relevant store would be closed. The Purchaser, a wholly-owned subsidiary of BlackRock Kelso, has the financial resources necessary to carry out the obligations under the Acquired Store Leases, Acquired Option Store Leases and the Designated Contracts. Since the Purchaser will be continuing to carry on the real business operated by the Applicants and will be in a stronger financial position than the Applicants given the reduced debt and closing of unprofitable stores, it is, in the Monitor's view, appropriate to assign the Acquired Store Leases and Acquired Option Stores Leases to the Purchaser, together with the Designated Contracts.

[24] At the hearing, agreement was reached between the applicants and certain of the landlords on language dealing with the rights of a counterparty to a Lease or Designated Contract to exercise any right or remedy in respect of any non-monetary default under the contract. The agreed upon language now forms paragraph 6 of the Approval and Vesting Order which reads:

> THIS COURT ORDERS that no counterparty to an Acquired Premises Lease, or Designated Contract shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants' insolvency or the Applicants' CCAA proceedings. In addition, no counterparty shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants having breached a non-monetary obligations unless such non-monetary breach arises or continues after the Scheduled Contract is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the applicable Scheduled Contract. For clarification purposes, no counterparty shall rely on a notice of default sent to the Applicants to terminate a Scheduled Contract to terminate the Scheduled Contract as against the Purchaser.

[25] Section 11.3 of the *CCAA* governs on this issue. I am satisfied that the applicant has given notice of its request to seek a court-authorized assignment of the Acquired Store Leases and Designated Contracts to every party to such agreements. As noted above, the Monitor approves the proposed assignments. The evidence disclosed that the purchaser would be able to

perform the obligations under the contracts, and I think the large number of consents received by the applicants from the landlords attested to their perception of the purchaser's ability on that score, as did the lack of any opposition at the hearing to the sought assignments. In those circumstances, it would be appropriate to assign the rights and obligations to the purchaser under the Acquired Store Leases and Designated Contracts. That would result in the continuation of business in the greatest number of stores and the continued employment of the greatest number of people. Finally, the identification in the Approval and Vesting Order of the cure amounts required to be paid to the counterparties on the assignment of the contracts indicates that all monetary defaults will be remedied on or before closing, save for those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the applicants' failure to perform a non-monetary obligation: *CCAA*, s. 11.3(4). Consequently, I granted the assignment order sought by the applicants.

IV. Appointment of representative counsel

A. The request and the context

[26] Lucy Zita had been a long-term employee of the applicants. Her employment was terminated shortly after this *CCAA* proceeding was commenced.

[27] Ms. Zita deposed that since the commencement of this proceeding the applicants have closed about 66 Bargain! Shop stores and terminated between 450 and 650 employees. From counsel's submissions I understand that some of the terminated employees may have been working on a part-time basis. Ms. Zita stated that there are substantial severance and termination pay amounts owing to those former employees. She deposed that the terminated employees would be entitled to payments for eligible wages under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47 ("*WEPPA*").

[28] Given that eligibility for payments under *WEPPA* arises on the bankruptcy or receivership of an employer, Ms. Zita deposed that "we want to ensure that a bankruptcy or receivership takes place as soon as possible so that we can apply for and receive WEPP payments". According to Ms. Zita, "since most Bargain! Shop employees are lower income people and have to look for another job, it is hard to raise money to hire a lawyer and we do not have any extra cash". She therefore asks to be appointed as the representative of those employees who have claims against the applicants arising out of their employment with them and seeks the appointment of the firm of Koskie Minsky LLP as representative counsel to act in this proceeding. Her motion contemplated that Koskie Minsky would provide legal advice to employees on employment claims, set up a hotline for employees/former employees answered by trained staff, set up an information webinar for the employees, ensure that a timely bankruptcy occured so that employees could receive their WEPPA payments, calculate and verify severance claim calculations to ensure maximum WEPPA recovery, assist employees in completing WEPPA claims and secure payment of WEPPA claims.

[29] Ms. Zita requests that the funds for representative counsel be paid out of the CCAA Completion Costs which form part of the consideration contained in the BlackRock Kelso APA. At the hearing, proposed representative counsel requested that up to $125,000 from the CCAA Completion Costs be authorized for its work.

[30] The applicants opposed the motion submitting that no need had been demonstrated for the appointment of a representative and representative counsel to deal with the identified employment issues.

[31] Counsel for the Monitor submitted that no cash is left in the applicants' system at the end of each day; all receipts are swept into an account established under one of their borrowing facilities. As a result, the applicant companies have no money to fund a representative counsel and any funding would have to come from part of the purchase price consideration under the BlackRock Kelso APA. Monitor's counsel noted that under the terms of the Funding and Transition Agreement which forms part of the Transaction, funding advances by the purchaser under that agreement, which will include advances to pay CCAA Completion Costs, are to be held in a Funding Account under the control of the Monitor. Sections 4.5 and 4.6 of the Funding and Transition Agreement provide that if any excess funds (as defined in that agreement) remain in the Funding Account either on a weekly basis or at the termination of that agreement, then they are to be returned to the purchaser. Since the Funding and Transition Agreement therefore creates a contractual obligation to use funds advanced by the purchaser for specified purposes, including the CCAA Completion Costs, the Monitor submitted it would not be appropriate for this Court to require that they be used for other purposes.

[32] Monitor's counsel also observed that it is contemplated the applicants will be placed in bankruptcy following the completion of the transition of operations to the purchaser, likely sometime in August, and at that time the Trustee will become responsible to deal with *WEPPA* claims as specified in section 21 of the *WEPPA* and its accompanying regulations. The Monitor submitted that there was no need to appoint a representative counsel to perform that work.

B. Analysis

[33] A few months after Nortel Networks Corporation filed under the *CCAA*, several motions were brought to appoint representative counsel for pensioners, former employees and current employees of the applicant companies. The monitor in that proceeding supported the appointment of representative counsel in light of the large number of former employees of the applicants because:

> former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.[1]

[34] In that case the Court appointed representative counsel. It did so because it agreed with the following submissions made by one of the proposed representative counsel:

> In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means *to pursue a claim in complex CCAA proceedings or other related insolvency proceedings*. It was further submitted that

[1] *Nortel Networks Corporation*, 2009 CanLII 26603 (Ont. S.C.J.), para. 7.

> the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. *The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency*.[2]

[35] Representative counsel for former employees and retirees also was appointed in the *Canwest CCAA* proceeding.[3] Again, the motion for such an appointment was brought only a few months following the making of the initial order under the *CCAA* and before the Court was asked to approve any sale or plan. As the Court observed in that case:

> No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large *CCAA* proceedings. Examples include *Nortel Networks Corp.*, *Fraser Papers Inc.*, and *Canwest Global Communications Corp.* (with respect to the television side of the enterprise)...
>
> Factors that have been considered by courts in granting these orders include: the vulnerability and resources of the group sought to be represented; any benefit to the companies under *CCAA* protection; any social benefit to be derived from representation of the group; the facilitation of the administration of the proceedings and efficiency; the avoidance of a multiplicity of legal retainers; the balance of convenience and whether it is fair and just including to the creditors of the Estate; whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and the position of other stakeholders and the Monitor.[4]

[36] I accept the principles set out in the *Nortel* and *Canwest* cases, but their application to the specific facts of this case leads to a different result. The present *CCAA* proceeding does not bear the degree of complexity as did those in *Nortel* and *Canwest*. A SISP process was approved by this Court back on April 25, 2013, a fair sales and marketing process was run, and it resulted in only one going-concern offer to purchase. Under that Transaction, no sales proceeds will be available for unsecured creditors. From the evidence filed in this Court, that was the best result achievable under the particular circumstances of these applicant companies. This representation motion has been brought only at the end of that process.

[37] While the loss of a job by any person is devastating to that person, the remedies available to a terminated employee are defined in the law. In the present case no money will be available for pre-filing unsecured claims. The Monitor submitted that a bankruptcy will follow upon the

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[2] *Ibid.*, para. 13, emphasis added.
[3] *Canwest Publishing Inc.*, 2010 ONSC 1328.
[4] *Ibid.*, paras. 20 and 21.

completion of the transition of business operations to the purchaser, and *WEPPA* claims can be advanced at that time. Given that *WEPPA* imposes duties on a trustee in respect of such claims, I have difficulty understanding what significant extra "value-added" representative counsel could bring to the employment-related claims process at this very late stage of this proceeding. In addition, counsel for the Monitor indicated that the Monitor had committed to completing the bankruptcy proceeding for about $50,000, a much lower amount than that sought for representative counsel. Finally, the applicant companies have no money to fund representative counsel. To fund representative counsel out of the contractual CCAA Completion Costs portion of the purchase price would result in the purchaser underwriting the legal fees of one class of unsecured creditors. In light of the duties imposed on a trustee to deal with *WEPPA* claims, I do not regard as fair the proposal of the moving party that the Court, in effect, amend the proposed agreement of purchase and sale - following its submission in a court-approved SISP and following its conditional acceptance by the applicants - to use part of the purchase price for such a purpose. Consequently, I dismissed the motion brought by the Terminated Employees.

V. Other matters

[38] I approved the Monitor's Eleventh Report.

[39] A few hours after the hearing I signed the formal order granting the motion brought by the applicant companies.

D. M. Brown J.

Date: July 10, 2013

TAB 8

2010 CarswellQue 11311
Quebec Superior Court

White Birch Paper Holding Co., Re

2010 CarswellQue 11311, 72 C.B.R. (5th) 63, EYB 2010-181372

In the Matter of the Plan of Arrangement and Compromise of: White Birch Paper Holding Company and White Birch Paper Company and Stadacona General Partner Inc. and Black Spruce Paper Inc. and F.F. Soucy General Partner Inc. and 3120772 Nova Scotia Company and Arrimage de Gros Cacouna Inc. and Papier Masson Ltée (Debtors) and Ernst & Young Inc. (Monitor) and Stadacona Partnership, Limited and F.F. Soucy Limited Partnership and F.F. Soucy, Inc. & Partners, Limited Partnership (Mises en Cause)

Robert Mongeon, J.C.S.

Judgment: September 28, 2010

Docket: C.S. Montréal 500-11-038474-108

Counsel: None given

Subject: Insolvency; Corporate and Commercial

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 --- Companies' Creditors Arrangement Act — Miscellaneous

Debtor company experienced financial difficulties and sought protection under Companies' Creditors Arrangement Act — As part of its restructuring, debtor company contemplated sale of all its assets — Stalking horse bidding process was initiated, with corporation B as stalking horse bidder — Use of credit was permitted as part of bidding process by parties and monitor — Bidding procedures were further approved by US bankruptcy court and by Superior Court of Quebec — Date of September 17, 2010 was set as limit to submit qualified bid under stalking horse bidding procedures — On September 17, 2010, group of investors, corporation S, comprising of former lenders of B, submitted qualified bid — On September 21, 2010, auction was commenced and winning bid was B's bid — Debtor company brought motion seeking Superior Court's approval of sale of assets to B — Motion granted — In accordance with s. 36 of Act, Court approved sale and ordered that all debtor's rights, title, benefit and interest in and to assets should vest in purchaser, free and clear of any security interests or charges — Therefore, B should become sole purchaser and acquirer of debtor company's assets.

Faillite et insolvabilité --- Loi sur les arrangements avec les créanciers des compagnies — Divers

Compagnie débitrice a connu des problèmes financiers et s'est mise sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Dans le cadre de sa restructuration, la compagnie débitrice a envisagé la possibilité de vendre tous ses actifs — Processus de soumission d'amorce a été lancé, la société B agissant à titre de soumissionnaire d'amorce — Recours au crédit a été permis dans le cadre du processus de soumission d'amorce par les parties et le contrôleur — Processus d'appel d'offres a de plus été approuvé par un tribunal américain de faillite et par la Cour supérieure du Québec — Date du 17 septembre 2010 a été fixée comme échéance pour la soumission d'offres conformes dans le cadre du processus de soumission d'amorce — Groupe d'investisseurs, la société S, composée d'anciens investisseurs de B, a, le 17 septembre 2010, soumis une offre conforme — Examen des offres a débuté le 21 septembre 2010 et la soumission de B a été choisie — Compagnie débitrice a déposé une requête demandant à la Cour supérieure d'approuver la vente des actifs à B — Requête accueillie — En conformité avec l'art. 36 de la Loi, la Cour a approuvé la vente et a ordonné que tous les droits, titres et intérêts dans et sur les actifs soient transférés à l'acheteur libres de toute sûreté ou charge — Par conséquent, B devrait devenir le seul acheteur et acquéreur des actifs de la compagnie débitrice.

Table of Authorities

Statutes considered:

Bank Act, S.C. 1991, c. 46
Generally — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

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

s. 11.3 [en. 1997, c. 12, s. 124] — pursuant to

s. 36 — referred to

Forêts, Loi sur les, L.R.Q., c. F-4.1
art. 38 — referred to

Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5
s. 7(3)(c) — considered

Personal Property Security Act, S.N.S. 1995-96, c. 13
Generally — referred to

Trade-marks Act, R.S.C. 1985, c. T-13
Generally — referred to

MOTION by debtor company seeking approval of sale of all its assets.

***Robert Mongeon, J.C.S.*:**

Approval and Vesting Order

CONSIDERING the Debtors' "*Motion to Approve the Sale of Substantially All the WB Group's Assets*" (the "*Motion*") in respect of a sale transaction contemplated by an asset sale agreement (the "*Sale Agreement*") dated August 10, 2010 and amended on August 23, August 31, 2010 and September 23, 2010, amongst White Birch Paper Company and the other entities identified therein as sellers (collectively, the "*Sellers*"), as sellers, and BD White Birch Investment LLC (the "*Purchaser*") and such other Person(s) as it may designate (each, a "*Designated Purchaser*"), as purchaser, for the sale of substantially all of the Assets of the Sellers, and all of its terms, conditions, schedules, exhibits and related and ancillary agreements (collectively, the "*Transaction*"), and the Report dated September 23, 2010 (the "*Report*") of Ernst & Young Inc. in its capacity as the monitor (the "*Monitor*") of the Debtors and the Mises en Cause;

CONSIDERING the representations made by counsel; and

GIVEN the provisions of the CCAA and, in particular, Section 36 thereof;

WHEREFORE, THE COURT:

1 *GRANTS* the Motion;

2 *DECLARES* sufficient the service and notice of the Motion and hereby dispenses with further service thereof;

3 *ORDERS* that capitalized terms used herein and not otherwise defined shall have the meaning given to them in the Sale Agreement;

4 *ORDERS AND DECLARES* that the Sale Agreement and all of its terms and conditions (including all schedules and exhibits thereto and related and ancillary agreements and all schedules and exhibits thereto) and the Transaction are hereby fully and finally approved. The execution, delivery and performance of the Sale Agreement and the Transaction (with any such amendments as the parties thereto may agree to in accordance with the terms thereof) by the Debtors and the Mises en Cause party thereto is hereby authorized and approved, and the Debtors and the Mises en Cause and the Monitor are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets to the Purchaser or a Designated Purchaser;

5 *ORDERS* that the Debtors and the Mises en Cause are authorized and directed to perform their obligations under the Sale Agreement and in respect of the Transaction;

6 *ORDERS AND DECLARES* that, subject to paragraph 16 of this Order, upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "*Monitor's Certificate*"), all of the Debtors' and the Mises en Cause's right, title, benefit and interest in and to the Assets shall vest absolutely in the Purchaser or a Designated Purchaser, free and clear of and from any and all right, title, interest, security interests (whether contractual, statutory, or otherwise), hypothecs (legal or contractual), prior claims, mortgages, pledges, deeds of trust, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens (statutory or otherwise), executions, levies, charges, or other financial or monetary claims, options, rights of first offer or first refusal, real property licenses, encumbrances, conditional sale arrangements, leasing agreements or other similar restrictions of any kind, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured, legal, possessory or otherwise (collectively, the "*Claims*"), including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Order of the Honourable Robert Mongeon, J.S.C. dated February 24, 2010 or any other Order of this Honourable Court in these proceedings; (ii) all charges, security interests or claims evidenced by registrations pursuant to the Registre des droits personnels et réels mobiliers (Québec), the Personal Property Security Act (Nova Scotia), the *Bank Act (Canada)* or any other personal property registry system, or recorded with the Canadian Intellectual Property Office pursuant to the Trade-marks Act (Canada); and (iii) all Excluded Liabilities (all of which are collectively

referred to as the "*Encumbrances*", but excluding Permitted Encumbrances (other than those Permitted Encumbrances specified in clause (i) of the definition of Permitted Encumbrances in the Sale Agreement and any other Permitted Encumbrances specifically contemplated to be discharged by this Order)). For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Assets shall, upon delivery of the Monitor's Certificate, be and are hereby expunged and discharged as against the Assets. Counsel for the Purchaser and any agents appointed by such counsel may, immediately following the Closing of the Transaction, proceed with the discharge of such Claims and Encumbrances including, without limitation, the electronic discharge of any financing statements, UCC registrations, mortgages or other registrations in respect thereof;

7 *ORDERS* that for the purposes of determining the nature and priority of Claims and Encumbrances, the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) shall stand in the place and stead of the Assets, and that from and after the delivery of the Monitor's Certificate, all Claims and Encumbrances (other than the D & O Charge and the Administrative Charge) shall attach to the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) with the same priority as they had with respect to the Assets immediately prior to the sale, as if the Debtors' and the Mises en Cause's right, title and interest in and to the Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale;

8 *ORDERS* that the Monitor shall administer the Wind-Down Amount in accordance with the provisions of the Sale Agreement including, without limitation, Section 5.18 thereof;

9 *ORDERS* that: (i) all right, title and interest in and to any portion of the Wind-Down Amount that is not used to pay costs associated with winding-down the Sellers' estate in accordance with Section 5.18 of the Sale Agreement shall vest absolutely in the Purchaser as at the Closing Date and shall promptly be distributed to the Purchaser; and (ii) the Wind-Down Amount shall not be considered to be proceeds of sale of the Assets and the Claims and Encumbrances shall not attach to the Wind-Down Amount;

10 *ORDERS* that upon the delivery of the Monitor's Certificate to the Purchaser: (i) the Administration Charge provided for in the Initial Order be and is hereby released, expunged and discharged; and (ii) the D&O Charge provided for in the Initial Order be and is hereby released, expunged and discharged;

11 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Témiscouata, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovable listed in Schedule "B" hereto which are located in Rivière-du-Loup, in the Province of Québec (being hereinafter described as the "*Rivière-du-Loup Property*"); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Rivière-du-Loup Property as described in Schedule "B", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Témiscouata:

(i) a hypothec charging buildings only granted in favour of **White Birch Paper** Company by F.F. Soucy General Partner Inc./Commandité F.F. Soucy Inc. for an amount of $250,000,000 and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 029;

(ii) a hypothec granted for an amount of $250,000,000 in favour of **White Birch Paper** Company by F.F. Soucy, Inc. & Partners, Limited Partnership/F.F. Soucy, inc. & associés, Société en commandite and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 030;

(iii) a first hypothec granted for an amount of $550,000,000 and a second hypothec granted pursuant to the same deed for an amount of $250,000,000 granted in favour of Credit Suisse First Boston, Toronto Branch, by **White Birch Paper** Company and registered at the office of the Registration Division of Témiscouata on April 7, 2005 under number 12 195 031;

(iv) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 18, 2009 under number 16 731 954;

(v) a legal hypothec (construction) granted for an amount of $2,692,455.81 registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, and registered at the office of the Registration Division of Témiscouata on November 27, 2009 under number 16 758 360;

(vi) a hypothec on a universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by **White Birch Paper** Company registered at the office of the Registration Division of Témiscouata on March 4, **2010** under number 16 979 262;

(vii) a hypothec on the universality of immovables granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch, by F.F. Soucy L.P./F.F. Soucy S.E.C. and registered at the office of the Registration Division of Témiscouata on March 4, **2010** under number 16 979 263; and

(viii) a prior notice of the exercise of a sale under judicial authority registered by Service d'impartition Industriel Inc. against F.F. Soucy S.E.C., as owner, registered at the office of the Registration Division of Témiscouata on April 21, **2010** under number 17 095 095 and on June 15, **2010** under number 17 281 485, which registrations refer to the legal hypothecs registered under numbers 16 731 954 and 16 758 360 referred to above;

12 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Québec, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "C" hereto which are located in Québec City, in the Province of Québec (being hereinafter described as the "*Quebec City Properties*"); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Québec City Properties as described in Schedule "C", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Quebec:

(i) a hypothec on a universality of immovables granted for an amount of $550,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 317;

(ii) a hypothec on a universality of immovables granted for an amount of $250,000,000 in favour of Credit Suisse First Boston Toronto Branch by Stadacona L.P./Stadacona S.E.C. and Stadacona General Partner Inc./Commandité Stadacona Inc. pursuant to a deed registered at the office of the Registration Division on April 7, 2005 under number 12 195 318;

(iii) a legal hypothec (construction) for an amount of $2,067,704.24 in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. and registered at the office of the Registration Division on May 19, 2006 under number 13 298 021;

(iv) a prior notice of the exercise of a sale by judicial authority in favour of OSLO Construction Inc. against Stadacona S.E.C., owner, and Commandité Stadacona Inc., owner, registered on August 2, 2006 under number 13 534 837, this prior notice being in reference to a legal hypothec that was registered at the office of the Registration Division under number 13 126 592 which has been totally discharged;

(v) a prior notice of the exercise of a sale by judicial authority in favour of KSH Solutions Inc. against Stadacona S.E.C. and Commandité Stadacona Inc. registered at the office of the Registration Division on October 20, 2006 under number 13 742 043, this prior notice being in reference of the legal hypothec registered under number 13 298 021 referred to in Section (iii) above;

(vi) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona General Partner Inc./Commandité Stadacona inc. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 835; and

(vii) a hypothec on a universality of property granted for an amount of $200,000,000 in favour of Crédit Suisse AG, Toronto Branch by Stadacona L.P./Stadacona S.E.C. pursuant to a deed registered at the office of the Registration Division on March 4, 2010 under number 16 977 836;

13 *ORDERS* the Land Registrar of the Land Registry Office for the Registry Division of Papineau, upon presentation of the Monitor's Certificate, in the form appended as Schedule "A" hereto, and a certified copy of this Order accompanied by the required application for registration and upon payment of the prescribed fees, to publish this Order and (i) to proceed with an entry on the index of immovables showing the Purchaser or a Designated Purchaser (as the case may be) as the absolute owner in regards to the immovables listed in Schedule "D" hereto which are located in Gatineau, in the Province of Québec (being hereinafter described as the "*Gatineau Property*"); and (ii) proceed with the reduction and cancellation of any and all Encumbrances but only insofar as concerns the Gatineau Property as described in Schedule "D", including, without limitation, the following registrations published at the said Land Registry Office for the Registration Division of Papineau:

(i) a hypothec in the amount of $550,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of "*fondé de pouvoir*", registered on January 25, 2006 under number 13 011

629;

(ii) a hypothec in the amount of $250,000,000 by Papier Masson Ltée in favour of Crédit Suisse, Toronto Branch, in its quality of "*fondé de pouvoir*", registered on January 25, 2006 under number 13 011 630;

(iii) a legal hypothec in the amount of $1,808,000 in favour of Hydro-Québec, registered on September 2, 2009 under number 16 512 303 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau;

(iv) a legal hypothec in the amount of $3,205,539.79 in favour of Hydro-Québec, registered on November 20, 2009 under number 16 737 683 against the part of the Property known as lot 2 469 374 and located at the civic address 2 Montreal Road West, City of Gatineau; and

(v) a hypothec in the amount of $200,000,000 by Papier Masson Ltée in favour of Crédit Suisse AG, Toronto Branch, registered on March 4, 2010 under number 16 977 911;

14 *ORDERS* the Québec Personal and Movable Real Rights Registrar, upon presentation of the required form with a certified copy of this Order and the Monitor's Certificate, to reduce the scope of the hypothecs listed in Schedule "E" hereto in connection with the Assets and to cancel, release and discharge all of the Encumbrances from the Assets in order to allow the transfer to the Purchaser or a Designated Purchaser (as the case may be) of the Assets free and clear of any and all Encumbrances created by those hypothecs;

15 *ORDERS* the officer responsible for the register of timber supply and forest management agreements according to article 38 of the Forest Act (Quebec), upon presentation of a true copy of this vesting order, to proceed with the cancellation and discharge of all the Encumbrances from the timber supply and forest management agreements of the Sellers, including, without limitation, the following registrations:

(i) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 01;

(ii) a hypothec on the CAAF #00205081602 granted by Stadacona S.E.C. in favour of Credit Suisse First Boston Toronto Branch dated 2005-04-06 and registered on November 18, 2005 under number 002 05 11 18 02.

16 *ORDERS* that, pursuant to section 11.3 of the CCAA, and subject to paragraph 17 of this Order, the Debtors and the Mises en Cause are authorized and directed to assign the Debtors' and the Mises en Cause's respective rights and obligations under the contracts, leases and agreements and other arrangements of which the Purchaser, or a Designated Purchaser takes an assignment on Closing pursuant to and in accordance with the terms of the Sale Agreement (the "*Designated Seller Contracts*", as defined in and pursuant to the terms of the Sale Agreement) and that such assignments are hereby approved and are valid and binding upon the counterparties to the Designated Seller Contracts (the "*Counterparties*") notwithstanding any restriction or prohibition on assignment contained in any such Designated Seller Contract; provided, however, that, the effectiveness of the assignment of any such Designated Seller Contract pursuant to this Order and the Sale Agreement shall be conditioned upon payment in full of the Cure Cost, if any, payable in respect of any such Designated Seller Contract (as determined by agreement among the parties or order of this Court);

17 *ORDERS* that the Cure Cost payable in respect of any Designated Seller Contract shall be as agreed between the Purchaser and the Counterparty, failing which the Purchaser or the Counterparty shall be entitled to apply to this Court for an order determining the amount of such Cure Cost and, if such application is made, the assignment of such Designated Seller Contract shall not become effective until (i) such Cure Cost shall have been determined by a final, non-appealable order of this Court and (ii) such Cure Cost shall have been paid in full to the Counterparty; provided, however, that, nothing in this Order shall affect or limit the Purchaser's right under the Sale Agreement to elect in its sole discretion, at any time at least five (5) business days prior to Closing, to exclude any contract, lease, agreement or other arrangement from being a Designated Seller Contract under the terms of the Sale Agreement;

18 *ORDERS* that, from and after the Closing Date, all Persons shall be deemed to have waived all defaults then existing or previously committed by the Debtors or the Mises en Cause under, or caused by the Debtors or the Mises en Cause under, and the non-compliance of the Debtors or the Mises en Cause with, any of the Designated Seller Contracts arising solely by reason of the insolvency of the Debtors or the Mises en Cause or as a result of any actions taken by the Debtors or the Mises en Cause pursuant to the Sale Agreement or in these proceedings, and all notices of default and demands given in connection with any such defaults under, or noncompliance with, any of the Designated Seller Contracts shall be deemed to have been rescinded and shall be of no further force or effect;

19 *ORDERS AND DIRECTS* the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof;

20 *ORDERS* that neither the Purchaser nor any Designated Purchaser nor any affiliate thereof shall assume or be deemed to assume any liabilities or obligations whatsoever of any of the Debtors or the Mises en Cause (other than as expressly assumed in relation to any Designated Seller Contracts assigned pursuant to this Order and under the terms of the Sale Agreement), including without limitation, any liabilities or obligations in respect of, in connection with or in relation to: (i) any Seller Employee Plans (other than a Transferred Employee Plan); (ii) any and all termination, severance or related amounts which any current or former employee of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement) could at any time assert against any of the Debtors or the Mises en Cause; or (iii) any and all

former, current or future employees of the Debtors or the Mises en Cause (other than the Transferred Employees who become employees of the Purchaser or a Designated Purchaser on Closing as provided for in the Sale Agreement);

21 *ORDERS* that the Purchaser and any Designated Purchasers, and their respective affiliates and officers, directors, employees, delegates, agents and representatives shall, effective immediately upon Closing of the Transaction, be and be deemed to be irrevocably and unconditionally fully and finally released of and from any and all claims, obligations or liabilities whatsoever arising from any event, fact, matter or circumstance occurring or existing on or before the Closing Date in relation to or in connection with the Debtors or the Mises en Cause or their respective present or past businesses, properties or assets, including, without limitation, any and all claims, obligations or liabilities whatsoever, whether known, anticipated or unknown, in relation to or in connection with the Seller Employee Plans (other than any Transferred Employee Plans) and the former, current or future employees of the Debtors and the Mises en Cause (other than any Transferred Employees who become employees of the Purchaser or a Designated Purchasers on Closing in accordance with the terms and conditions of the Sale Agreement) and provided that the foregoing shall not operate to release the Purchaser or any Designated Purchaser from any liabilities or obligations expressly assumed under the terms of the Sale Agreement;

22 *ORDERS* that, notwithstanding:

(i) the pendency of these proceedings;

(ii) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Debtors or the Mises en Cause and any bankruptcy order issued pursuant to any such applications; and

(iii) any assignment in bankruptcy made in respect of any of the Debtors or the Mises en Cause;

the provisions of the Sale Agreement and the Transaction, and the vesting of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets in the Purchaser or a Designated Purchaser pursuant to this Order and all other transactions contemplated thereby shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Debtors or the Mises en Cause and shall not be void or voidable by creditors of any of the Debtors or the Mises en Cause, nor shall they constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue or other challengeable, voidable or reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall they constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation;

23 *ORDERS* that the Sale Agreement and any related or ancillary agreements shall not be repudiated, disclaimed or otherwise compromised in these proceedings;

24 *ORDERS* that, pursuant to clause 7(3)(c) of the Personal Information Protection and Electronic Documents Act (Canada) and any substantially similar legislation, the Debtors and the Mises en Cause are authorized and permitted to disclose and transfer to the Purchaser or any Designated Purchaser all Employee Records. The Purchaser or any Designated Purchaser shall maintain and protect the privacy of any personal information contained in the Employee Records and shall be entitled to collect and use the personal information provided to it for the same purpose(s) as such information was used by the Debtors and the Mises en Cause;

25 *ORDERS* that forthwith upon receipt of the proceeds from the sale of the Debtors' and the Mises en Cause's right, title and interest in and to the Assets, and prior to payment or repayment of any other claims, interests or obligations of or against the Debtors or the Mises en Cause, all outstanding Obligations (as defined in the Interim Financing Credit Agreement (as defined in the Initial Order of this Court dated February 24, **2010**)) owed by the Debtors or the Mises en Cause under the Interim Financing Credit Agreement will be repaid in full and in cash from the proceeds of the sale of the Assets (other than the Wind-Down Amount and the Reserve Payment Amount) pursuant to the Sale Agreement;

26 *ORDERS* that all Persons shall co-operate fully with the Debtors and the Mises en Cause, the Purchaser, any Designated Purchaser, their respective Affiliates and the Monitor and do all such things that are necessary or desirable for purposes of giving effect to and in furtherance of this Order, the Sale Agreement and the Transaction;

27 *THIS COURT HEREBY REQUESTS* the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States or elsewhere, including the United States Bankruptcy Court for the Eastern District of Virginia, to give effect to this Order and to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Debtors, the Mises en Cause and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Debtors, the Mises en Cause and the Monitor and their respective agents in carrying out the terms of this Order;

28 *ORDERS* that this Order shall have full force and effect in all provinces and territories in Canada;

THE WHOLE *without* COSTS.

Motion granted.

TAB 9

Court of Queen's Bench of Alberta

Citation: Allarco Entertainment Inc. (Re), 2009 ABQB 503

Date: 20090914
Docket: 0903 09146
Registry: Edmonton

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

And in the Matter of Allarco Entertainment Inc. and Allarco Entertainment 2008 Inc. and Alliance Films Inc.

Memorandum of Decision
of the
Honourable Madam Justice J.B. Veit

Summary

[1] On June 16, 2009, the Allarco Entertainment companies, which operate Super Channel - a pay-per-view television channel - obtained protection from their creditors pursuant to the provisions of the *Companies' Creditors Arrangement Act*. As part of the initial, *ex parte*, order under the statute, Allarco Entertainment obtained a "pay-per-play" regime in relation to its obligations to Alliance Films Inc., a program supplier. Alliance Films now applies for a variation of the initial order: it argues that the court had no jurisdiction to grant what amounts to a major, unilateral, variation of its contracts with Allarco Entertainment. For an overall fee which was to be paid in instalments, the Alliance contracts allowed Allarco Entertainment to exhibit films and television series, including the right to exhibit through subscription video on demand, for a limited number of times over a specific time period. Alliance asserts that the contract fees are paid for the ongoing right to exhibit the films or series episodes, that there is no "pay-per-play" provision in the contracts, and that the courts should not have imposed such a variation on Alliance.

[2] Alternatively, Alliance argues that if the court does have jurisdiction to approve such contract variations, the court should not have exercised its discretion in favour of this variation

because a "pay-per-play" regime constitutes a negative incentive on the debtor, Allarco Entertainment, to use the service provided by Alliance.

[3] Alliance Films Inc. brought this motion in July, 2009. The court adjourned the motion on the condition that Allarco Entertainment negotiate in good faith with Alliance. The resulting negotiations were unsuccessful. On August 17, 2009, Allarco Entertainment terminated its contracts with Alliance Films. In its amended motion, in addition to asking for a variation in relation to the "pay-per-play" term in the initial order, Alliance also now asks the court to invalidate Allarco Entertainment's terminations.

[4] *In its initial order, even if the court did have jurisdiction to vary the Allarco Entertainment/Alliance Film contracts by establishing a different payment structure than the one set out in the contracts, it should not have done so: a post-protection service provider usually has the right to maintain its contract prices.*

[5] The CCAA states that where, under licence agreements, a contractor provides new services to a debtor who has obtained creditor protection, that service provider is entitled to "immediate payment"; this is compared to the provider who provided services prior to the granting of creditor protection, whose right to enforce payment is stayed. The CCAA does not state the basis on which compensation is to be paid for post-protection services. Allarco Entertainment argues that the basis for compensation should be "what is just and reasonable"; here, the debtor claims that a "pay-per-play" payment scheme is fair because it will get rid of instalment payments to Alliance, the payment of which will hinder Allarco Entertainment's ability to re-organize. Alliance Films argues that, at this stage of the CCAA proceedings, the court does not have the right to make unilateral contract changes. At this stage of the proceedings, the broad wording of the CCAA, which is remedial legislation, does allow the courts to make some contracts between debtors and creditors: for example, with respect to utilities such as electricity, the court can allow the service provider to be paid not only the usual utility rate but also a security deposit: ***Hydro-Québec.*** Another example is the court's decision that some contract provisions relate to past services, and cannot therefore be enforced, and that other contract provisions relate to post-protection services for which the debtor incurs an obligation of immediate payment: ***Nortel***. These are examples of the limited way in which the courts have jurisdiction to vary contracts in an initial order under CCAA proceedings. It is not necessary to articulate the principle which applies to the jurisdiction of the court in relation to contracts, s. 11.3(a) of the CCAA, and initial orders, but if that were required, it may be that, in the initial order courts have only a limited jurisdiction to affect contractual rights and that contractual payment terms negotiated between debtors and creditors generally represent the payments which debtors are required to make if they use the services set out in those contracts post-protection as that scale of payment best represents both a fair and reasonable price for the services and business in the ordinary course. This principle arises from the common law's respect for contractual obligations. Generally, contracts cannot be varied by courts: contracts represent, in effect, a law which private parties have agreed applies to them. Court can interpret or rectify, but not vary, contracts. Even courts of equity generally limited themselves to deciding which contracts, or portions of contracts, would not be enforced by the justice system. Legislation could, of course, give to the courts the jurisdiction to vary or create contracts;

however, given the clear state of the common law on this issue, explicit statutory provisions would be required to give courts a general jurisdiction to vary contracts. Such explicit authority is not given to courts in the CCAA at this stage of proceedings. The court's only authority in the situation here was to distinguish between those portions of the Alliance contracts which represent services that have already been performed, the enforcement of which is stayed, and those portions which deal with the provision of ongoing services, the payment for which Allarco Entertainment was required to make according to the contract if it wished to continue using Alliance's services.

[6] *Allarco Entertainment is, however, entitled to terminate its contracts with Alliance Films.*

[7] After the issuance of the initial order, Allarco Entertainment negotiated with Alliance in good faith. The granting of protection from creditors is designed to promote such negotiations. Alliance is not required to continue to provide services to Allarco Entertainment post-protection; on the other hand, Allarco Entertainment is entitled to terminate contracts. The court does have a general oversight jurisdiction to determine if the termination of a contract by a debtor is just and reasonable. On this motion, Allarco Entertainment has satisfied that test: among other important aspects of the statutory test, the evidence establishes that, during the negotiations, Alliance Films was attempting to obtain a security status for its contracts which did not exist in its original contracts. Granting new security to Alliance post-protection would have given Alliance an advantage over other Allarco Entertainment creditors. Allarco Entertainment was in fact prevented from acceding to these attempts by Alliance Films.

Cases and authority cited

[8] **By Alliance Film:** ***Thomson Knitting Inc., Re*** (1925), 1925 CarswellOnt 5 (Ont. S.C. in Bankruptcy, App. Div.) citing ***William Hamilton Mfg. Co. v. Hamilton Steel and Iron Co.*** (1911), 23 O.L.R. 270; ***Doman Industries Ltd., Re*** (2003), 2003 CarswellBC 538 (B.C.S.C.); ***Skeena Cellulose Inc., Re*** (2003), 2003 CarswellBC 1399 (B.C.C.A); ***Doman Industries Ltd., Re***, 2004 CarswellBC 1545 (B.C.C.A In Chambers); ***T. Eaton Co., Re*** (1999), 1999 CarswellOnt 3542 (Ont. S.C.J. [Commercial List]) citing ***Keddy Motor Inns Ltd., Re*** (1992), 13 C.B.R. (3d) 245 (N.S.C.A.); ***Doman Industries Ltd., Re*** 2004 CarswellBC 1262 (B.C.S.C.); ***Companies Creditors' Arrangement Act,*** R.S.C. 1985, c. C-36, as amended, s. 11.3; ***Stelco Inc., (Re)*** 2005 CarswellOnt 1537 (C.A.); ***In Re Enron Corp.*** 279 B.R. 695 (N.Y. Bankr. Gonzalez 2002); ***In Re Kmart Corporation*** 293 B.R. 905; ***In Re Thatcher Glass Corporation*** 59 B.R. 797 at 6 (Banker D. Conn. 1986).

[9] **By the Allarco Entertainment corporations:** ***Lehndorff General Partner Ltd., Re***, 9 B.L.R. (2d) 275 (Ont. Ct. J. (Gen. Div.)); ***T. Eaton Co., Re***, (1997) 46 C.B.R. (3d) 293 (Ont. Ct. J. (Gen. Div.)); ***Nortel Networks Corp., Re***, 2009 WL 1763447 (Ont. Sup. Ct.); ***In Re Kmart Corporation, et al., Debtors***, 293 B.R. 905 (Ill. Bankr. Sonderby 2003); ***In Re Enron Corp. et al. Debtors***, 279 B.R. 695 (N.Y. Bankr. Gonzalez 2002); ***Skeena Cellulose Inc., Re***, (2002), 43 C.B.R. (4th) 187 (B.C.S.C.); ***Blue Range Resource Corp., Re***, (2000), 192 D.R.R. (4th) 281 (Alta. C.A.); ***T. Eaton Co., Re***, (1999), 14 C.B.R. (4th) 288 (Ont. S.C.J.); ***Doman Industries Ltd., Re***

(2004), 29 B.C.L.R. (4th) 178 (S.C.); ***Blue Range Resource Corp., Re***, (1999), 245 A.R. 154 (Q.B.); ***New Skeena Forest Products Inc., Re***, 2005 BCCA 192; ***Woodward's Ltd., Re***, (1993), 100 D.L.R. (4th) 133 (B.C.S.C.); ***Campeau v. Olympia & York Developments Ltd.*** (1992), 14 C.B.R. (3d) 303 (Ont. Ct. J. Gen. Div.); ***Air Canada (Re)*** 66 O.R. (3d) 257, [2003] O.J. No. 2976 (C.A.); ***Sagecrest Dixon Inc. (Re)*** [2009] O.J. No. 1127 (Comm.List); ***Air Canada (Re)*** [2003] O.J. No. 6239 (Comm.List).

[10] **By the court:** ***Smith Brothers Contracting Ltd. (Re)*** [1998] B.C.J. No. 728 (B.C. Sup. Ct.); ***West Bay SonShip Yachts v Esau*** 2009 BCCA 31, [2009] B.C.J. No. 120; ***Smoky River Coal (Re)*** 2001 ABCA 209, [2001] A.J. No. 1006; ***Hydro-Québec c Fonderie Poitras ltée*** 2009 QCCA 1416, [2009 J.Q. no 7438; ***Les Boutiques San Francisco Incorporées*** [2004] Q.J. No. 2886.

[11] Appendix A: The payment scheme in the initial order

1. Background

[12] The following information is uncontested, or if contested, the court is able to come to a conclusion on the existence of a fact without ordering a trial of that issue.

a) Factual

[13] The Allarco Entertainment companies operate Super Channel, an English language general interest pay television channel, one of only 3 pay-per-view television channels in Canada. The business of the companies is licensed and regulated by the Canadian Radio-Television and Telecommunications Commission, CRTC. One of the licensing requirements is the delivery of a certain proportion of Canadian content programming, which requirement ensures greater value for programming packages which satisfy that requirement.

[14] The Allarco Entertainment companies rely on broadcasting distribution undertakings, BDUs, such as Rogers, Shaw and Bell TV, to sell Super Channel as a programming option. By law, the BDUs are obligated to treat all program networks equally, and not to unfairly encourage their customers to purchase the services of one program network in preference to others. Allarco Entertainment has an ongoing complaint about one of the BDUs, alleging that that distributor has not dealt fairly with Super Channel; this complaint is now the subject of a lawsuit, which is being case managed in Ontario. In a parallel mode, Allarco Entertainment has also laid its complaints against that BDU with the CRTC; there has not yet been a resolution of those complaints by the Commission.

[15] When they applied for an initial order under the CCAA, the Allarco Entertainment companies had approximately 425 outstanding program license agreements, PLAs, with various entertainment program suppliers. Although the Allarco Entertainment companies had their own form of PLA which it used whenever possible, some of the more well known program licensors required the Allarco Entertainment companies to enter into the licensors' standard form of PLA. Approximately $64,000,000.00 of programming has been delivered to the Allarco Entertainment

companies, for which payment had not been made when those companies applied for protection from their creditors.

[16] Allarco Entertainment's PLAs with Twentieth Century Fox are the most significant component of the Super Channel programming cost.

[17] Alberta Treasury Branch is the first secured creditor of the Allarco Entertainment companies; it holds general security agreements containing a charge over Allarco Entertainment's present and after acquired personal property. The ATB facility is currently fully drawn. ATB has agreed, on certain conditions, to reestablish the MasterCard facility for Allarco Entertainment. ATB has also indicated to Allarco Entertainment that it is prepared, on certain conditions, to forbear in pursuing recovery under the guarantee of the ATB facility.

[18] Alliance has 5 PLAs with Allarco Entertainment. The PLAs typically give to Allarco Entertainment the right to play the programs offered in a package on an exclusive basis. Moreover, the first time an individual program is broadcast, Allarco Entertainment can advertise the play as a premiere, which has added value over and above the rights of exclusive broadcast.

[19] When Alliance first brought this motion, it was concerned mainly with two of its program licence agreements with Allarco Entertainment, the January 15, 2008 PLA - Super Channel Q1 08 package - and the February 25th 2008 PLA - Super Channel Q2 08 package. Those agreements are similarly structured. However, there are at least two important terms which are found in the latter agreement which are not found in the former.

[20] The first of these terms is:

> Security Interest
>
> Licensee shall grant Licensor a security interest in respect of Licensee's payment obligations and Licensee shall execute and deliver documentation necessary to effect the foregoing.

Although Q2 2008 was agreed to and accepted by the parties on March 31st, 2008, by June 16, 2009, no security documents had been prepared by either Allarco Entertainment or Alliance Films. Alliance characterizes this contractual term as an equitable charge which has all the validity of a legal charge.

[21] The second of the terms is:

> Termination Rights
>
> In the event of default by Licensee (including failure to pay amounts when due and/or if assignment for the benefit of creditors, seeks relief under any bankruptcy law or similar law for the protection of debtors, or allows a petition of bankruptcy to be filed against it, or a receiver or trustee to be appointed for substantially all of its assets that is not removed with 30 days), Licensor shall be entitled to terminate or suspend Licensee's

> rights with respect to programming (i) licensed hereunder; and/or (ii) licensed to Licensee by Licensor pursuant to any other agreement. In the event Licensor decides to terminate Licensee's rights to programming, all rights will automatically revert to Licensor, free and clear of any and all encumbrances and Licensor shall be entitled to immediate possession of all related materials.

In its PLAs which contained termination rights, Alliance did not terminate its contracts with Allarco Entertainment once it knew that Allarco Entertainment had obtained an initial order under the CCAA.

[22] Alliance has 3 other PLAs with Allarco Entertainment. Alliance did not focus on these 3 PLAs because no payments are due at this time in relation to those agreements. Of those additional agreements: PLA 2007/2008 Allarco Package does not contain any security or termination clauses; PLA Super Channel Q4- 08 package does not contain a security clause but does contain a termination clause; and, PLA Super Channel Q3-08 Package contains both a security clause and a termination clause.

[23] In their applications before the Court, Allarco Entertainment has provided the court with this broad stroke explanation of what its Plan of Arrangement might entail:

- sale to a third party investor of a portion or all of the equity in the business, having in mind the value of the existing CRTC license;
- ongoing active involvement in the business by entities related to Charles R. Allard, the sole director of Allarco Entertainment Inc.;
- significant reduction in both the cost of programming and general overhead expense would allow a viable business at a much lower level of subscriber involvement;
- success in the claim against the BDU would increase the number of subscribers;
- injection of funding into the business either by way of equity or further loans.

[24] The Allarco Entertainment companies proposed, and in the initial order the court approved, PricewaterhouseCoopers Inc. as the Monitor under these proceedings. The Monitor has not, of course, taken a position on this application; however, the Monitor reports that, to date, it has not uncovered any abusive conduct by the Allarco Entertainment companies.

[25] Paragraph 16 of the initial order provided that payment under the PLAs between Allarco Entertainment and various program licensors was to be made in accordance with the terms set out in para. 43 of the affidavit of the President and Chief Operating Officer of the Allarco Entertainment companies. Those terms are set out in appendix A hereto.

[26] Since the granting of the initial order, Allarco Entertainment has continued to advertise access to Alliance programming, including subscription on demand, SVOD, rights.

[27] The initial order has been extended by court order to September 30, 2009.

[28] There is a dispute between the parties about the proportion of the contract payments which Alliance Films has received, and would receive, since the protection order. That issue will be discussed further in relation to the termination by Allarco Entertainment of the Alliance contracts.

[29] There is a dispute between the parties concerning the content of the negotiations which preceded the termination by Allarco Entertainment of the Alliance contracts. This dispute will be referred to in the discussion of the termination issue hereunder.

[30] As of August 17, 2009, Allarco Entertainment repudiated its contracts with Alliance and noted, "Any damages suffered by Alliance as a result of such repudiation will be dealt with in the claims process in the CCAA proceedings".

[31] Although the PLA providers set out in the Appearances section hereunder have been given notice of this application, only MGM has provided evidence and submissions on the motion, although many of the other parties attended the hearing by telephone. MGM is owed in excess of $1,400,000.00 in outstanding claims for licensing fees not paid to it prior to the date of the initial order in these proceedings. MGM would have expected payments in excess of $2,000,000.00 between the date of the initial order and February 2010 in the ordinary course. MGM will continue to provide Allarco with new films, at a discounted price, while MGM defers certain other payments for films which have already been delivered to Allarco. MGM is of the view that the continuation of the CCAA process is in the best interest of MGM and likely in the best interest of many other programming suppliers in these proceedings.

b) Legislative

[32] Section 11 of the CCAA reads:

> 11. (1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> (2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.
>
> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(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 or proceeding with any other action, suit or proceeding against the company.

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,
(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);
(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 or proceeding with any other action, suit or proceeding against the company.

. . .

(6) The court shall not make an order under subsection (3) or (4) unless
(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
(b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[33] In 1997, the following amendment was made to s. 11 of the BCCA:

11.3 No order made under section 11 shall have the effect of
(a) prohibiting a person from requiring immediate payment for goods, services, <u>use of</u> leased or <u>licensed</u> property or other valuable consideration provided after the order is made; or
(b) requiring the further advance of money or credit.

(Emphasis added)

2. At this stage of the CCAA proceedings, does the court have the jurisdiction to approve unilateral contract changes proposed by Allarco Entertainment to Alliance Film contracts?

[34] The short answer to this question is, No.

[35] As a prelude to the discussion of the specific issue which is before the court, the court observes that the conclusion reached by Bauman J. in ***Smith Brothers***, a leading decision on the interpretation of s. 11.3 of the CCAA, to the effect that it is the <u>use</u> (emphasis in the original at para. 19) of “leased property, not the making of the lease itself, after the stay order, which is within the purview of s. 11.3(a)” also apply here. The implications of that finding are twofold: the Alliance contracts are “true” licenses within the meaning of ***Smith Brothers*** - which means

on the one hand that they are not security documents - and, Alliance cannot be forced to provide the portions of those contracts which relate to the provision of services post-protection without an immediate claim for those services.

[36] The nature of the Alliance contracts is that they provide a service - the right to advertise and broadcast the availability of a package of programming - rather than the right to make a single broadcast. The advertising by Allarco Entertainment of the availability of the Alliance Films packages, including SVOB rights, constitutes "use" of the Alliance Films licensed property.

[37] Allarco argues that s. 11.3 (a) of the CCAA which entitles a service provider to require immediate payment for services provided after the initial order does not indicate the payment basis on which those services will be provided. Allarco Entertainment suggests that this gap in the legislation is one which the court has the jurisdiction to fill and that the test for determining payment should be what is a just and equitable basis for compensation. Alliance argues that there is no gap, or that if there is a gap, the terms of the contract relating to payment should be accepted as being the proper basis for the provision of post-protection services.

[38] To provide guidance in filling the gap, Allarco Entertainment proposes American jurisprudence pursuant to s. 503(b) of the *Bankruptcy Code* which allows a court to give priority treatment to "administrative expenses". However, in order to do so, the court must conclude not only that the debt arises out of a transaction with the debtor in possession, but also that the payment of the debt is beneficial to the operation of the debtor's business. Allarco notes that the concept of "beneficial" is narrowly interpreted, as is to be expected in a regime where those administrative expenses receive priority. For example, in ***Kmart Corporation***, the bankruptcy court asserted that "post-petition performance alone does not automatically translate into a benefit to the estate, even if there was inducement on the part of the debtor"; the same principle was also applied in ***Enron***.

[39] I agree with Allarco Entertainment that there is a gap in the CCAA relating to the payment for post-protection services.

[40] However, with respect, I disagree with Allarco Entertainment's proposed use of American jurisprudence. As the B.C. Court of Appeal emphasizes in ***West Bay SonShip***, although similar policy objectives inform Canadian and American insolvency legislation, and while certain American decisions might even be persuasive in certain Canadian insolvency situations, in each specific potential use of American jurisprudence care must be exercised to ensure that, in the particular case, both the American legislative scheme is similar to that in Canada and, in the absence of expert evidence on the state of American law, that the American reasoning in a particular case is not conflated with the state of American jurisprudence on the issue.

[41] For example, here the Alliance Films PLAs are, in Canadian or Albertan parlance, executory contracts. However, American authorities are not helpful on the treatment of "executory contracts" in the CCAA partly because the specialized interpretation of that term in

American bankruptcy law is different from the interpretation of that term in Alberta and perhaps in Canada:

> 31 In "A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals - Joint Task Force on Business Insolvency Law Reform - March 15, 2002", the authors cited the following meanings for "executory contract":
>
> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:
>
>> a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.
>> (Countryman, "Executory Contracts in Bankruptcy" (1974) 57 Minnesota Law Review 439 (Part 1), at 460).

[42] More pertinently in this particular case, while there is in the American *Bankruptcy Code* a priority for administrative expenses which include "the actual, necessary costs and expenses of preserving the estate", there is no such limitation in s. 11.3 of the CCAA. Here, all post-protection service providers are entitled to claim immediate payment for their services. Therefore, the American jurisprudence is not, in this particular case, helpful.

[43] In any event, however, no decision has been brought to my attention in which an American court has, other than in a utility situation which will be discussed later in the context of Canadian case law, itself calculated a price other than the contract price for the provision of post-protection services. Indeed, the weight of American jurisprudence on the issue appears to be that the contract price is assumed to be a reasonable price unless the debtor can show that the contract price is clearly unreasonable.

[44] In the circumstances here, rather than to rely on American jurisprudence for guidance, it is more appropriate to rely on Canadian law and on first principles. As has been noted in much of the jurisprudence which interprets the CCAA, there is jurisdiction in the statute for a court to work out arrangements that will maximize benefits to all affected parties. As our Court of Appeal put it in ***Smoky River Coal, (Re)***:

> 16 CCAA orders become the roadmap for the proceedings and the litigation which may follow. Orders must therefore be drafted with clarity and precision. The purpose of the CCAA must be kept at the forefront in both drafting and interpreting a CCAA order. The CCAA is remedial legislation. As was stated in Re Lehndorff General Partner Ltd. (1992), 17 C.B.R. (3d) 24 (Ont. Gen. Div):

> 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 a plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court.
>
> (Emphasis added)

[45] The court's jurisdiction is not, however, unlimited. One limiting feature is the timing of the court's intervention. There is no doubt that, at the stage of the approval or failure of a plan, a court can impose terms on an unwilling creditor. We are not, however, at that stage.

[46] At this stage, that is the stage of the initial order, whatever services are provided post-protection are offered by service providers who are entitled to be paid for those services. Generally, two payment regimes will be adopted. One is that ongoing service providers will accept, at least until the presentation of a plan, some new, negotiated, plan. Obviously if the parties to a contract agree to a variation of the terms of that contract, that variation governs. However, a service provider is not required to provide post-protection services without the right to claim immediate payment. If a service provider will not agree to modify its contractual payment terms in order to provide post-protection services, then the debtor must either terminate the contract or pay the contractual amount. In reaching this conclusion, I rely on the fact that, at the stage of the initial order, it would be inappropriate for a court to attempt to draw up a contract for the parties. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the services provided. Not only are courts not business experts, but the cost of attempting to bring the court up to speed on the reasons that a creditor and a debtor each have for advancing a payment proposal would exhaust the financial capacity of an already insolvent debtor. At the stage of the presentation of a plan, the situation is, of course, different: at that stage the court has much more information on which to rely, including the business acumen of all other creditors.

[47] Two exceptions to the general rule that contract terms govern have been identified in the jurisprudence. First, there are utility contracts: see ***Hydro-Québec***. Even though the original contract for service did not contain any form of security payment, a court approved a security deposit as a term of post-protection provision of services. The provision of utilities is, however, a unique form of contract. On the one hand, utility contracts are contracts of adhesion whose payment terms are typically regulated by government or government-established commissions, and, on the other, the debtor does not typically have any choice in service providers. In those circumstances, it is appropriate for a court to set the terms of payment for post-protection services since a utility provider should not be required to provide post-protection services which require the advance of further credit: see s. 11.3(b). It appears that American jurisprudence takes a similar view with respect to utilities: see ***Thatcher Glass***. The crucial nature of utility services requires the intervention of the court where the parties cannot agree on a fee for post-protection

services; in other circumstances, a service provider can protect itself by refusing to provide services. These principles are usefully addressed by the Court of Appeal in ***Hydro-Québec***:

> 80 L'alinéa a) de l'article 11.3 de la LACC établit un principe clair : pendant la période de suspension, le fournisseur a droit d'être payé pour les services qu'il rend au fur et à mesure de leur utilisation.
>
> 81 Voici d'ailleurs les commentaires du professeur Richard H. McLaren au sujet de cet article:
>
>> Section 11.3 acts as an exemption to the stay provisions of s. 11 of the CCAA. It appears the section is meant to balance the rights of creditors with debtors. The section addresses the concern that judges had too much discretion in issuing stays. Under s. 11.3(a), if a person supplies goods or services or if the debtor continues to occupy or use leased or licensed property, the court will not issue a stay order with respect to the payment for such goods or services or leased or licensed property. In essence, s. 11.3(a) will not permit the court to prohibit these individuals from demanding payment from the debtor for goods, services or use of leased property, after a court order is made.16
>
> 82 Ce principe connaît cependant des limites pratiques. Il arrive parfois que la réalité s'oppose à ce que le fournisseur soit payé immédiatement pour les services qu'il fournit à une compagnie débitrice. La fourniture d'électricité en est un exemple patent : il s'agit d'un service continu qu'il est impossible de facturer au fur et à mesure de la consommation.
>
> 83 En pareilles circonstances, il est juste et équitable pour le fournisseur de services de demander des garanties de paiement. Commentant la décision Re Smoky River Coal Ltd17, les auteurs Houlden, Morawetz et Sarra déclarent:
>
>> Under its inherent powers, the court can create a security for creditors who supply goods and services to the debtor after the filing of a CCAA petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the CCAA fails, the court can determine who are entitled to share in the proceeds of the security interest.18
>
> . . .
>
> 87 Au sujet du droit applicable, le juge Rolland s'exprime en ces termes:
>
>> [13] Il découle de ce qui précède qu'un fournisseur ne peut exiger d'être payé d'avance pour un service à fournir.
>> [14] Ainsi, un créancier peut exiger d'être payé immédiatement lors de la livraison, mais pas de recevoir un paiement d'avance pour des services à fournir.
>> [15] La situation est relativement simple lorsqu'il s'agit d'un bien individualisé, vendu et livré.

> [16] Cela peut être plus compliqué dans les cas d'un approvisionnement continu d'un service comme l'électricité, le téléphone ou le gaz.
> [17] Exiger de la débitrice qu'elle paie un mois d'avance comme le demande Gaz Métro, alors qu'elle entend fermer plus de 30 locaux au cours des prochains jours ou semaines, a pour effet de créer un fardeau trop onéreux pour la débitrice.
> [18] La LACC ne fait pas exception quant aux créanciers qu'il s'agisse de fournisseur d'un service continu par opposition à un fournisseur de biens.
> [19] Le tribunal a discrétion pour établir une procédure permettant au fournisseur de ne pas être préféré ou pénalisé par rapport aux autres créanciers.
> (je souligne)

[48] In that particular case, the court concluded that a $42,000.00 guarantee was reasonable in the circumstances.

[49] The second exception from the obligation to pay the contract price for post-protection service, an exception which constitutes a lesser intrusion on the freedom of contract than the outright establishment of new payment terms, is the selection by a court from amongst the provisions of one contract of certain services for which the debtor must pay the contract price while other provisions are identified as ones for which the debtor is not immediately required to pay: ***Nortel***. In that case, the contract - a collective agreement - included both payments to persons who were no longer providing service to the debtor and payments to persons who were providing post-protection service to the debtor. The union advanced two arguments in support of its claim that all contract payments should be made post-protection. The first was that the services that had been provided in the past were part of the consideration for services that were being provided post-protection. The second was that, because of a statutory requirement, the union did not have the freedom which most service providers have, to refuse to provide ongoing service to a debtor which has received protection from its creditors. (On this latter point, there is a certain analogy between the union - which could not, for legislative reasons, withdraw its services despite the wording of s. 11.3(a) - and Alliance, which cannot withdraw the services which it provided in three contracts because those contracts grant licences to Allarco Entertainment without termination rights arising on insolvency.) The ***Nortel*** court rejected both arguments. Although the court decided which portions of the contract had to be paid, it did not purport to vary the contractual basis for payment; it merely decided which portions of the contract were eligible for payment post-protection.

[50] It appears that a similar approach was taken in ***Les Boutiques San Francisco***: the debtor could either decide to terminate the contract for display shelves, or pay the contract price for those units.

[51] There may be other exceptions to the general rule but I have not been provided with any Canadian case law which has identified any such exceptions.

[52] The two exceptions to the rule that post-protection services are to be paid according to the contract price reenforce the generality of the rule. Generally, contracts cannot be varied by courts: they can be interpreted or rectified but not varied. Even courts of equity limited themselves to remedies which recognized the basic authority of contracts: a court of equity

might, for example, require a contracting party to render proper accounts even though that was not a term of the contract if the rendering of accounts was necessary to enforce the contract. Similarly, a court of equity might grant relief from the consequences of certain contracts - such as contracts that were unconscionable. In other cases, a court might decide that, for public policy reasons, certain contracts, such as gambling contracts, would not be enforced by the justice system.

[53] Legislation could, of course, give to the courts a broad jurisdiction to create or vary contracts or to over-ride them. An example of the latter is the *Divorce Act* which provides that a court should taken into account any contract between the parties in relation, for example, to spousal support, but that the court is not limited in making a spousal support order by the terms of the contract between the parties.

[54] Given the respect for contracts in the common law, explicit statutory provisions are required to give courts the jurisdiction to impose unilateral variations in contracts. Such explicit authority is not given to courts in the CCAA at the initial order stage.

[55] Moreover, as was noted at the outset, it is important to correctly identify the nature of the Alliance PLAs: these are not pay-per-play contracts, but rather contracts which allow Allarco Entertainment to advertise the availability of Alliance product without in fact broadcasting Alliance product. The effect of imposing a pay-per-play payment term on Alliance at this stage would be to impose upon Alliance the obligation to provide a continuing service - allowing Allarco Entertainment to continue to advertise the availability of Alliance programming - without providing payment for that service. Indeed, as Alliance has emphasized, Allarco Entertainment's web-site continued, post-protection, to advertise Alliance programming. It is not necessary on this application to determine whether forcing Alliance to continue to provide its services to Allarco Entertainment can also be characterized as requiring Alliance to make a further advance of credit to Allarco.

[56] For the reasons set out above, having now heard argument from the party affected, this court varies para. 16 of its initial, *ex parte*, order by removing the reference to para. 43(b) of the Knox affidavit and replacing it with a reference to the contractual payments due to Alliance.

3. Should the court invalidate Allarco Entertainment's termination of the Alliance Films contracts?

[57] The short answer to this question is, No.

[58] Alliance correctly states that the statutory right of a debtor which has obtained protection from its creditors to terminate contracts is subject to judicial oversight. Alliance argues that it is not reasonable for Allarco Entertainment to terminate its contracts because:

- Allarco was able to obtain a "pay-per-play" clause and they should therefore be required to honour the contracts;

- the exchanges between Allarco and itself establish that Allarco was intent on obtaining a "pay-per-play" provision to give itself additional, inappropriate, power in its negotiations with Alliance;
- it is not appropriate for Allarco Entertainment to defend its actions by starting from the proposition that it has only so much cash available; rather, Allarco should be required to raise additional funds;
- Allarco Entertainment did not negotiate in good faith.

[59] For the purpose of this application, the court sets the following test which Allarco Entertainment must meet for termination of its contracts with Alliance Films: the termination must be fair, appropriate, reasonable, and must have been issued after good faith negotiations. I have concluded that Allarco Entertainment meets that test.

[60] In coming to that conclusion, the most important of the reasons considered by the court is the evidence that Alliance attempted, during the negotiations, to become a secured creditor, an effort that would have given Alliance an unfair advantage over other Allarco Entertainment creditors. The fact that Alliance was negotiating for such security benefits is acknowledged by Alliance; it takes the position, however, that this was not a "new" feature since some of its contracts contained provision for granting security. With respect, this is not defensible. Each contract must be enforced on its own; three of the Alliance contracts did not contain a security clause. With respect to those agreements, the addition of a security clause would be "new". Moreover, even with respect to those two contracts which did contain a security clause, no security documents had been executed.

[61] In addition to the grave concern about Alliance attempting to improve its position relative to other debtors, there are other factors which the court weighs in Allarco Entertainment's favour in concluding that it should not invalidate Allarco's termination of Alliance contracts:

- while it is true that, during the negotiations, Allarco Entertainment was the beneficiary of a "pay-per-play" regime and had thus obtained what it wanted relative to Alliance as a creditor, Allarco Entertainment was also aware that Alliance had attacked the legitimacy of that provision. While on this motion Allarco valiantly argued in favour of the "pay-per-play" regime relative to Alliance, it is not unreasonable to assume that Allarco also came to an informed decision that it was at least vulnerable on that issue;

- there was a reasonable business basis for Allarco Entertainment's original application for a "pay-for-play" regime relative to Alliance. It appears to me that the main business argument in Allarco's failure is that substantial ongoing payments to Alliance throughout the year as opposed to what the evidence describes as the overwhelming position in other contracts which provide for payments at the beginning and at the end of the licence period, or at the beginning, after 12 months and at the end of the licence period seriously hamper Allarco's attempts to establish a plan which would allow them to go forward rather than to fall into bankruptcy;

- there is a dispute between Allarco Entertainment and Alliance about the cost to Alliance of the "pay-per-play" provision: Allarco states that it had paid more than 5 cents on the dollar of contractual obligations. Alliance states that termination of its contracts will place it in a worse position that the PLA providers with whom Allarco has been able to reach an accommodation. While it may be true that termination will be less advantageous to Alliance than going forward on some accommodation basis, part of the point of the CCAA is to allow for the termination of some contracts so long as the test for termination is met;

- similarly, it is a reasonable business concern of Allarco's to have fresh programming to offer potential subscribers and that such programming not consist solely of leftovers from other potential licensees;

- it would not make sense to impose upon an insolvent company the obligation to borrow more money in order to meet all its debts before it terminated certain of its contracts. Such an inflexible rule would make an effective reorganization impossible. On the evidence on this motion, at this stage of the CCAA proceedings, Allarco Entertainment has made reasonable arrangements with its banker and guarantor;

- there is no evidence that Allarco negotiated in bad faith. Rather, the evidence suggests that Allarco was attempting to make reasonable accommodations with Alliance. For example, it is not reasonable that Allarco should be required to take only that programming which has been refused by all other potential licensees. Nor is it the case that Alliance is irrevocably linked to Allarco: Alliance has other markets to which it can offer its programming;

- finally, the opinion of MGM - a creditor which is roughly in the same position relative to Allarco Entertainment as is Alliance - that there have been significant changes in the business of all affected companies which legitimizes the writing down of entertainment packages for the purposes of the development of a CCAA plan supports the general approach which Allarco Entertainment has taken in the negotiations.

[62] Although Alliance Film's notice of motion requests an order invalidating Allarco Entertainment's termination of the Alliance Films contract, at the hearing Alliance suggested that what it really wanted was a determination of the variation agreement first. If that issue were resolved in its favour, Alliance then hoped that further negotiations with Allarco Entertainment would be possible. Alliance suggested that even if Allarco Entertainment were to maintain its termination of the contracts, then Alliance may require some additional evidence to support its position that the termination should not be approved. With respect, I cannot adopt that approach. The determination about whether a termination at this stage meets the required test should be made as close as possible to the date of termination in order to ensure that the court has the same overall perspective as did the parties as of the date of termination.

4. Costs

[63] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 2nd, 3rd, 8th and 9th days of September, 2009.
Dated at the City of Edmonton, Alberta this 14th day of September, 2009.

J.B. Veit
J.C.Q.B.A.

Appearances:

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Eric Vallieres, McMillan
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Patrick Roche, Heenan Blaikie
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Roger P. Simard, Fraser Milner Casgrain LLP
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Andre Bennett, President & CEO, Cinema Esperanza International Inc.
for Cinema Esperanza International Inc.

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Bertrand Langlois, CA, VP Finance, Christal Films Distributions Inc.
for Christal Films Distributions Inc.

Alan H. Brown, Boughton Law Corporation
for Starz Media LLC

Appendix A

The following are the portions of para. 43 of Mr. Knox's first affidavit which are incorporated by reference in para. 16 of the initial court order:

> (a) For those existing Program License Agreements in which the fee for delivery of a single broadcast, such as a prize fight, must be paid upon delivery of that Program, the cash flow contemplates such payment as each Program is delivered;
>
> <u>(b) In the case of those existing Program License Agreements with fixed terms and with a limited number of Exhibition Days, and where the license window is already open, the Cash Flow Projections have been prepared based upon a formula where the overall cost of the Contract is divided by the total number of Exhibition Days permitted, with that Exhibition Day rate being applied for the number of Exhibition Days the Business actually runs that program during the Cash Flow Projection period</u>;
>
> (c) For existing Program Licensing Agreements which provide for monthly payments, those payments falling due during the CCAA proceedings will be paid;
>
> (d) As a license window opens during the CCAA Proceedings on a Licensing Agreement now in existence, license fees shall be paid in accordance with that Licensing Agreement; and
>
> (e) For Programming which is obtained by the Business during the CCAA Proceedings under Licensing Agreements not now in existence, the licensing fees shall be paid in accordance with the terms of each such Program License Agreement.

(Emphasis added)

The only program licence agreements which come within the terms set out in para. (b) above are the Alliance Films Inc. PLAs.

TAB 10

Court of Queen's Bench of Alberta

Citation: Ford Credit Canada Limited v. Welcome Ford Sales Ltd., 2010 ABQB 798

Date: 20101210
Docket: 1003 00638, BK03 115383

Registry: Edmonton

Between:

Ford Credit Canada Limited

Plaintiff

- and -

Welcome Ford Sales Ltd. and Royle Smith

Defendants

Corrected judgment: A corrigendum was issued on December 13, 2010; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
on Various Applications
of the
Honourable Mr. Justice D.R.G. Thomas

I Background Facts

[1] The background facts on these applications are found in my Memorandum of Decision , 2010 ABQB 199 ("Decision No. 1") and several facts and defined terms are restated here for ease of reference.

[2] On January 14, 2010 Ford Credit Canada Limited ("Ford Credit") applied for the appointment of Meyers Norris Penny Ltd. as Receiver/Manager ("Receiver") of Welcome Ford Sales Ltd. ("Welcome Ford") and an order ("Receivership Order") was made in Q.B. Action No. 1003 00638 ("Receivership Proceedings").

[3] Welcome Ford had operated a vehicle dealership ("dealership") in the City of Fort Saskatchewan for many years. The most recent Dealership Sales and Services Agreement between Welcome Ford and the Ford Motor Company of Canada Ltd. ("Ford Motor") is dated August 20, 2007 (" Dealership Agreement") and it incorporates the "Standard Provisions." These two documents govern the relationship between Ford Motor and Welcome Ford and are collectively described as "the DSSA".

[4] The Defendant Royle Smith ("Smith") is the principal shareholder of Welcome Ford and his involvement in this litigation has been very limited.

[5] Ford Motor manufactures and sells motor vehicles through a network of dealers across Canada, including the dealership operated by Welcome Ford.

[6] Ford Credit provides financing to Ford dealerships, including Welcome Ford, to enable the franchisees to acquire and sell Ford vehicles.

[7] The Bank of Montreal ("BMO") is the operating lender to Welcome Ford. From the outset BMO has argued that the assets of Welcome Ford, including all of the vehicles financed by Ford Credit and the DSSA, should be sold *en bloc*. After several applications the fate of the inventory claimed by Ford Credit has been resolved and the Receiver is content with those arrangements. The resolution of that issue has occurred since the initial application by Ford Motor requesting that the stay imposed in the Receivership Order be lifted. That application was refused in Decision No. 1.

[8] By Orders of the Court granted March 23 and 25, 2010 in the Receivership Proceedings, the Receiver was authorized and directed to finalize an information package and to circulate it to prospective purchasers with a call for tenders for the assets of Welcome Ford.

[9] The Receiver has received four bids for the assets of Welcome Ford, but two of those bids were not recommended for further consideration. The Receiver also recommended that the Court direct that the remaining two bidders be offered the opportunity to submit a further bid for the assets of Welcome Ford on an extremely short timeline, with the highest bid to be recommended by the Receiver for acceptance. That has now been done.

[10] The bids presently under consideration by the Receiver are conditional upon the granting of an order which would assign the DSSA to the successful bidder.

[11] On May 17, 2010, on the application of BMO an order was granted declaring Welcome Ford to be bankrupt and appointing the Receiver as the Trustee of the Estate of Welcome Ford ("Bankruptcy Order").

[12] The Trustee has applied pursuant to s. 84.1 of the *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA")* for an order assigning the rights and obligations of Welcome Ford under the DSSA to the party that is ultimately the successful bidder for the assets of Welcome Ford in the Receivership Proceedings.

[13] This decision deals with three outstanding motions, namely:

(a) The application by the Receiver for an order approving the *en bloc* sale of the assets of the Welcome Ford dealership, including the DSSA;

(b) The application by the Trustee pursuant to s. 84.1 of the BIA for an order assigning the rights and obligations of Welcome Ford under the DSSA to the successful bidder for the assets of Welcome Ford in the Receivership Proceedings; and

(c) The outstanding applications by Ford Motor for, *inter alia*, declarations that the DSSA is a 'personal contract' not capable of being assigned without the consent of Ford Motor and also for an order lifting the stay of proceedings imposed by the Receivership Order to allow Ford Motor to terminate the DSSA.

BMO supports the applications by the Trustee/Receiver and continues its opposition to the Ford Motor positions that the DSSA has been terminated by fundamental breach, is incapable of assignment because of its personal nature and should not be assigned without the consent of Ford Motor.

II Issues

[14] The outstanding issues arising here are addressed in a sequence which flows from the position taken by Ford Motor that the resolution of the "fundamental breach" question is a threshold issue. In the event that no fundamental breach is found, then Ford contends that the DSSA is a personal contract which is incapable of assignment and should not, in any event, be assigned. Given those positions by Ford Motor, I have decided to address the issues arising from the various applications as follows:

(A) Has the DSSA been terminated by fundamental breach?

(B) Can and should the Trustee assign the DSSA pursuant to s. 84.1 of the *BIA*?

(A) Has the DSSA been terminated by fundamental breach?

[15] Ford Motor takes the position that the DSSA has been "fundamentally breached" with the legal consequence that the franchise agreement represented by the DSSA between Ford Motor and Welcome Ford has been terminated. Ford Motor argues that this is a threshold issue.

[16] Three fundamental breaches of the DSSA are alleged including:

(1) The appointment of the Receiver on January 14, 2010;

(2) The 'shuttering' of the Welcome Ford premises on January 13, 2010; and

(3) The 'improper conduct' of Smith and senior employees of Welcome Ford prior to and leading up to the closure of the dealership on January 13, 2010.

(1) The appointment of the Receiver on January 14, 2010

[17] This point was not strenuously advanced by Ford Motor during oral argument but was touched on in its written materials.

[18] The notion of fundamental breach in relation to a franchise agreement such as the DSSA has been recognized by superior courts in Canada. In *Shelanu Inc. v. Three Print Franchising Corp.*, 2003 CarswellOnt 2038, 38 B.L.R. (3d) 42 (Ont. C.A.) at paras. 113 and 114 summarizes the test for fundamental breach and its application to a franchise arrangement.

[19] In this case the Receiver stands in the place of Welcome Ford and from the outset has sought to honour the DSSA and to sell the assets of Welcome Ford *en bloc* including the asset represented by the DSSA. The Receiver has been unable to achieve that goal because of positions taken by Ford Motor that there is no DSSA to assign and that the Fort Saskatchewan franchise area has become an 'open point' in Ford Motor parlance.

[20] On the evidence before me, I find that the Receiver has at all times has been willing to honour the DSSA and its commercial purpose but has not been able to do so primarily because of the conduct of and the positions taken by Ford Motor. I adopt the reasoning expressed in *Shelanu* that because the franchisee in that case was able to carry on the commercial purpose of the franchise after the bankruptcy the franchise agreement was not terminated. Similarly here, I

conclude that no fundamental breach has been made out because the Receiver, which stands in the place of Welcome Ford, has always been willing and has done its best to maintain the value of the dealership, including the DSSA.

(2) The 'shuttering' of the Welcome Ford premises

[21] Ford Motor argues a second fundamental breach arising from the 'shuttering' of the Welcome Ford premises on January 13, 2010, thereby depriving Ford Motor of the benefit of the DSSA. Ford Motor argues further that the DSSA and the dealer network of Ford Motor (a collective of all DSSA's) are all premised on a Ford dealer operating in the particular franchise areas. In essence, it argues that the performance of the DSSA through the full-time operation of a dealership is at the core of the commercial arrangement represented by the DSSA and that this has been lost to Ford Motor since the closure of the physical premises of Welcome Ford.

[22] In support of this instance of fundamental breach Ford Motor relies on the case of *Canadian Western Bank v. 702348 Alberta Ltd. and Guild Developments Inc.*, 2009 ABQB 271 (***"Guild"***). That case involved termination of real property leases in a receivership context.

[23] Both the Receiver and BMO reject these arguments and BMO in particular questions the applicability of the *Guild* case.

[24] While I accept that the Welcome Ford dealership has not been operating since mid-January 2010 that is not for lack of effort on the part of the Receiver which has been trying from the outset to effect a sale of the assets of Welcome Ford *en bloc*. The Receiver has been met at every step by resistance from Ford Motor. Welcome Ford can only operate as an active business if the Receiver can receive new product and support from the manufacturer of that product. By its conduct Ford Motor has made it clear that that would not be facilitated. I agree with the position of the Receiver and BMO that the proposed sale of the Welcome Ford dealership including the DSSA would substantially (if not entirely) cure all of the alleged defaults under the DSSA and that it is the opposition by Ford Motor that has prevented a timely sale from going forward.

[25] In respect to the *Guild* case, I repeat that Ford Motor has at all times resisted any further operation of Welcome Ford as a franchise. This is a different situation from the *Guild* case where the receiver made a decision not to remedy the lease breaches through completion of a building. In this case Ford Motor informed the Receiver early in the Receivership Proceedings that it did not wish to have a Ford dealership operating at the Welcome Ford premises and that it would not consent to the assignment of the DSSA. Notwithstanding this objection Ford Motor now criticizes the Receiver's failure to operate the dealership and relies on such failure in support of its argument that the DSSA ought to be terminated.

[26] There are other differences between this case and the *Guild* scenario, particularly the observation that unlike *Guild* the Receiver here is in a position to quantify the value of the

dealership property because it has received one offer to purchase the Welcome Ford real estate assets independently of the DSSA. BMO argues that this constitutes incontrovertible evidence that any sale of the Welcome Ford real estate independent of the DSSA would result in a significantly reduced realization. I agree that this response by a bidder in an open tendering process is convincing evidence that splitting the DSSA away from the empty premises of Welcome Ford would result in a much lower realization for the creditors.

[27] In summary, the consistent efforts by Ford Motor to block any sale of Welcome Ford, including the DSSA, leads me to conclude that no fundamental breaches exist here which would lead to the termination of this contract.

(3) Improper conduct by Smith and senior employees of Welcome Ford

[28] Finally, Ford Motor alleges a fundamental breach because Welcome Ford has engaged in conduct unbecoming a reputable business person which in the reasonable opinion of Ford Motor adversely affects the operation and business of Welcome Ford and the good name, goodwill and reputation of Ford Motor.

[29] Because of the alleged misconduct and the failure to operate the dealership Ford Motor commissioned a 'Special Analysis' to assess the need for direct representation in the Fort Saskatchewan area in the future. I had commented on the weight to be given to the 'Special Analysis' in Decision No. 1 (see paras. 20 & 21, 2010 ABQB 199). Since issuing Decision No. 1, Ford Motor has presented further evidence in the April 22, 2010 Turgeon Affidavit in what appears to be an effort to shore up the 'Special Analysis'. I have reviewed that Affidavit and the cross-examination of Mr. Turgeon and conclude that the 'Special Analysis' has no greater weight now than I had earlier assigned to it in my Decision No. 1. Consequently, I continue to give little weight to the 'Special Analysis' in this decision.

[30] Ford Motor argues it is apparent that, even prior to the closure of Welcome Ford and the appointment of the Receiver, the franchisee was in fundamental breach of the DSSA as a result of improper conduct.

[31] Since filing its supplemental brief on these applications Ford Motor now states that it has received a copy of a statement of claim (no action number given) containing allegations of fraud against a former manager of Welcome Ford.

[32] The statement of claim is said to show that a manager of Welcome Ford misappropriated funds in the amount of approximately $1,279,525.12 by way of a fraud against Welcome Ford. Ford Motor points out that an attachment order has been granted by this Court in respect to this claim and argues that Welcome Ford was in breach of provisions of the DSSA as a result.

[33] It is trite to say that allegations of misconduct in a statement of claim are just that. In any event they are made against a senior officer of Welcome Ford, not Welcome Ford or Smith. It is

true that the Court has issued an attachment order but the persons affected or at least some of them have retained lawyers and appeared through counsel before the Court, including the application on June 29.

[34] There is no evidence that Smith has ever been involved in fraudulent conduct. What little evidence exists on this point suggests it is more likely that Smith is an absentee owner who may have been victimized by some of the ex-employees of Welcome Ford. The allegations of misconduct are serious and require strict proof.

[35] There is no evidence presented on these applications in the form of additional affidavits by Mr. Turgeon or in his cross-examinations on these depositions which show definitively and to my satisfaction any damage to the good reputation of Ford Motor which is yet another reason for rejecting this alleged instance of a fundamental breach.

[36] At this stage of this litigation I am not satisfied that Ford Motor has brought sufficient evidence to establish fraud or anything close to fraud on the part of Welcome Ford and Smith. Further, I do not see any convincing evidence of damage to the reputation of Ford Motor. In the result, I am not prepared to find a fundamental breach in respect to this set of assertions.

(4) Conclusion on alleged fundamental breaches

[37] After considering all of the evidence and argument as a whole in relation to the allegations of fundamental breaches I am not prepared to make such findings. As I have noted Ford Motor has taken the position from the outset that it did not want a Ford dealership operating in the Fort Saskatchewan area. It has effectively prevented the Receiver from operating the Welcome Ford dealership and it should not now be allowed to benefit from that resistance. These arguments individually and collectively are rejected and I now proceed to deal with the other major issues in this litigation which are whether there can and should be an assignment of the DSSA in these circumstances.

(B) Can and should the Trustee be allowed to assign the DSSA pursuant to s. 84.1 of the *BIA*?

(1) Introduction

[38] The issues raised on these applications require a determination of the scope of the recently enacted s. 84.1 of the *BIA* in relation to the assignability of an agreement such as the DSSA.

[39] The approach to be taken here will first outline the relevant provisions of the new legislation, enumerate the various legal sources which have been referred to the Court as being

pertinent to the interpretation of s. 84.1 and then come to a general conclusion on the purpose and scope of this new provision.

[40] I then turn to review whether the DSSA is legally capable of being assigned by the Trustee. In the course of that discussion I deal with a core issue raised by Ford Motor as to whether the DSSA is a 'personal contract' which by its 'nature' cannot be assigned. I turn finally to the other major question of whether, in these circumstances, the DSSA should be assigned to the preferred assignee put forward by the Trustee.

(2) The new legislation

[41] The *BIA* was recently amended by the addition of s. 84.1 which came into effect on December 15, 2009. Those additions are reproduced below with some emphasis added to the particularly pertinent provisions:

> 84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> [...]
>
> (3) **<u>Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature</u> or that arise under**
>
> (a) an agreement entered into on or after the date of the bankruptcy;
>
> (b) an eligible financial contract; or
>
> (c) a collective agreement.
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> **(a) <u>whether the person to whom the rights and obligations are to be assigned is able to perform the obligations</u>; <u>and</u>**
>
> **(b) <u>whether it is appropriate to assign the rights and obligations to that person.</u>**
>
> (5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement - other than those arising by reason

> only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation - will be remedied on or before the day fixed by the court.

(Emphasis and underlining added)

(3) Legal sources to aid in interpreting and applying s. 84.1 of the *BIA*

[42] Section 84.1 does not appear to have been considered by any Canadian court. A number of legal sources have been brought to my attention to assist in interpreting this provision, including:

(a) legislative commentary with respect to Bill C-55 (An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts), which formed the basis for the September 18, 2009 amendments to the BIA;

(b) a comprehensive "Briefing Book" published by Industry Canada which sets out the departmental interpretation of Bill C-55. Industry Canada: "Bill C-55 Clause by Clause Briefing Book" (available at http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/h_c100790.html) (the "Briefing Book");

(c) Report of the Standing Senate Committee on Banking, Trade and Commerce, Debtors and Creditors sharing the Burden: a review of the *Bankruptcy and Insolvency Act* and the *Companies Creditors Arrangement Act* (November 2003), Section J:"Executory Contracts";

(d) a summary of jurisprudence related to court ordered assignments of debtors executory contracts in the context of other Canadian insolvency proceedings; and

(e) analogous provisions in American bankruptcy legislation and the relevant judicial consideration thereof.

(4) Positions of the parties on the approach to interpreting and applying s. 84.1 of the *BIA*

[43] On this issue the Trustee and BMO stand together in asserting a broad interpretation of s. 84.1 of the *BIA* which provides this Court with authority to assign the type of commercial agreement represented by the DSSA. In addition to the legal sources enumerated above these parties stress, in particular, that this Court should consider analogous U.S. law in interpreting and

applying this new provision. Particular reference is made to ss. 365(f)(1) and s. 365(c)(1) of the *United States Bankruptcy Code 11 U.S.C.A.* § 365 ("*U.S. Bankruptcy Code*").

[44] The Trustee and BMO also make reference to decisions in U.S. courts which have considered those provisions of the *U.S. Bankruptcy Code* in relation to the assignability of an identical Ford dealership agreement. Specific reference is made to the case of *Re: Pioneer Ford Sales Inc.* from the U.S. Bankruptcy Court for the District of Rhode Island, which considered the assignability of a Ford dealership agreement through the mechanism of S. 365 of the US Bankruptcy Code. In that litigation a number of conclusions were reached, including:

(a) That the Ford dealer sales and service agreement at issue did not create a "special personal relationship between the parties to the contract in question other than the dealer's ability to sell the vehicles and support the operations called for under the contract";

(b) The considerations to be taken into account in an application to approve the assignment of such a contract are restricted to adequate assurance of the assignee's future performance; and

(c) There was no "applicable non-bankruptcy" law that would bar assignment.

Re: Pioneer Ford Sales Inc.; 1983 26 B.R. 116, *Re: Pioneer Ford Sales Inc*.; 1983 30 B.R. 458, and *Re: Pioneer Ford Sales Inc.*; 1983 729 F.nd 27 (US Court of Appeal, First Circuit).

[45] I observe that the operative terms of the DSSA are identical to the form of agreement which was under consideration in the *Re: Pioneer Ford Sales Inc.* litigation.

[46] Reference has also been made to the case of *Re: Wills Motors Inc.* from the US Bankruptcy Court for the Southern District of New York which concluded that a car manufacturer's wish to discontinue direct representation at a particular location was not a sufficient reason to withhold approval of a transfer of the dealership agreement, and that such a position was therefore unreasonable. *Re: Wills Motors Inc*., 1991133 B.R. 303. This decision is said to be pertinent to the issue of whether I should allow the Trustee to assign the DSSA.

[47] Ford Motor also referred to Canadian secondary source legislative commentary and makes submissions on the extent to which the U.S. Bankruptcy Code can be of assistance in interpreting the Canadian legislation. It sought to distinguish the *Pioneer Ford*, *(supra)*, *Re: Wills* and in *Re: Adelphia Communications Corp. et al.*, 359 B.R. 65 (s. (d) New York 2007) at 72 [*"Re: Adelphia"*] cases. It argues that it is not necessary to have reference to the U.S. case law and that this jurisprudence should not be considered by this Court as there is no existing gap in the Canadian jurisprudence such that a reference to decisions from U.S. jurisdictions are either necessary or appropriate.

(5) Approach to be taken

[48] From a general perspective, I observe that the intention of the recently adopted s. 84.1 is to protect and enhance the assets of the estate of a bankrupt by allowing the assignment of existing agreements to third parties for value. (Houlden, Morawetz, and Sarra**,** *Bankruptcy and Insolvency Law of Canada*, 4th ed., v. 2 (looseleaf) (Toronto: Carswell, current at 3-499). Section 84.1 is remedial legislation and should be interpreted in that context.

[49] In terms of a specific approach I conclude that an evidence based analysis which balances the interests of the Estate of the bankrupt, in this case Welcome Ford (In Bankruptcy) against those of Ford Motor as a party to the DSSA is appropriate. The following issues must be addressed by this Court in deciding whether or not an assignment pursuant to s. 84.1 should be ordered.

(a) Whether the assignment of the DSSA will benefit creditors by protecting and enhancing the value of the Estate of Welcome Ford?

(b) Whether the rights and obligations in the DSSA are assignable pursuant to s. 84.1 of the *BIA*? and

(c) Whether the proposed assignee will be able to perform the obligations under the DSSA and whether it is otherwise appropriate to assign the contractual rights and obligations contained in the DSSA to the proposed assignee.?

(6) Whether the assignment of the DSSA will benefit creditors by protecting and enhancing the value of the Estate of Welcome Ford?

[50] Resolution of this overriding issue involves the balancing of interests as between certain creditors of Welcome Ford (who seek to maximize their recovery through an *en bloc* sale of the Welcome Ford assets) and Ford Motor (which argues that the DSSA cannot be assigned and must be terminated).

[51] I am satisfied that the Receiver has acted properly in conducting the tendering process. Indeed, no strong argument is advanced by Ford Motor that the factors to be considered under *Royal Bank v. Fracmaster Ltd.*, 1999 ABQB 425, 1999 ABCA 178 have not been met in this case.

[52] The Receiver's Confidential Addendum to the Fourth Report confirms in paras. 71 and 72 that the *en bloc* sale of the assets of the Welcome Ford dealership including the DSSA will result in the full satisfaction of the indebtedness of Welcome Ford to BMO, will not prejudice the

recovery by Ford Credit in respect to its secured collateral and may make funds available for the unsecured creditors of Welcome Ford. I accept that the benefits represented to me will accrue to the secured and unsecured creditors of the Estate of Welcome Ford.

[53] Accordingly, an assignment of the DSSA will benefit the creditors and enhance the value of the Estate of Welcome Ford. However, that still leaves the questions of whether the rights and obligations contained in the DSSA are assignable 'by reason of their nature' and whether the assignment should take place.

(7) Whether the rights and obligations under the DSSA are assignable pursuant to s. 84.1 of the *BIA*?

(a) Ford Motor position

[54] Ford Motor has always taken the position that the DSSA is a personal contract which is not capable of assignment. This is also the core issue in interpreting the words "rights and obligations that are not assignable by reason of their nature" in s. 84.1(3) of the *BIA* as they might apply to the DSSA.

[55] Ford Motor argues that the nature and character of the DSSA is such that it cannot be assigned and s. 84.1 of the *BIA* is of no assistance to the Trustee in seeking to assign the rights and obligations contained in that agreement.

[56] It relies on *Blackhawk Mining Inc. v. Manitoba (Provincial Assessor),* 2002 MBCA 51 and the discussion at paras. 79 to 82 inclusive on the elements of an agreement which make it a 'personal contract'. Particular emphasis is put on the statement of the Manitoba Court of Appeal at para. 82:

> In *Campbell v. Morrison* (1987), 28 S.C.R. 228 (S.C.C.) [a.k.a. Maloney v. Campbell], a case dealing with the assignment of a mortgage debt, King J. succinctly summarized the principle (at p. 233):
>
> > <u>Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.</u>

[Emphasis added.]

[57] Ford Motor argues that support for the characterization of the DSSA as a personal contract is found in the due diligence process which Ford Motor carries out in when evaluating a prospective dealer. This process is said to involve the carrying out of extensive inquiries into the

experience (including automotive), management, capital, knowledge, character and other qualifications of a prospective dealer, including existing Ford dealers.

[58] Further, Ford Motor argues that numerous provisions in the DSSA support the conclusion that the DSSA is a personal contract and demonstrate the intention of Ford Motor to expressly reserve its rights to determine the necessary characteristics of dealers, including the provisions found in the DSSA at paras. F, 17(b)(4) and the DSSA Standard Provisions, pgs. 1 and 2.

[59] Ford Motor argues strenuously that these provisions clearly demonstrate that the DSSA is a personal contract and that the DSSA was entered into by Ford Motor on the basis of the confidence and considerations applicable to the special personal characteristics of Welcome Ford and its principal shareholder Smith.

(b) BMO position

[60] BMO takes the lead in asserting that the DSSA is assignable in this case. It accepts the statement of law in *Blackhawk* that a personal contract is one which “cannot be usefully performed to or by another”. It also acknowledges that as a matter of law the benefits (though not the burdens) of a contract may be assigned without consent except in certain defined circumstances, including where the contract is a 'personal' one based on special personal characteristics of the parties and cites *Devon Canada Corp. v. Canadian Pacific Railway*, 2009 ABQB 143 at para. 24, citing *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (C.A.) at para. 33.

[61] BMO also acknowledges that Ford Motor reserves its right to refuse to grant a franchise to an applicant who lacks the requisite character, automotive experience, management, capital and other qualifications, but argues the DSSA is not based on "special personal characteristics" and that it can "be usefully performed by another". It argues that there is neither evidence presented by Ford Motor of the "special personal characteristics" of Smith (the principal of Welcome Ford) nor that the obligations of the DSSA cannot be "usefully performed" by the preferred assignee proposed by the Trustee, an existing Ford dealer in the Edmonton region.

[62] BMO argues strongly that the DSSA is a typical commercial franchise agreement and refers to the provisions of the *Franchises Act*, R.S.A. 2000, c. F-23 and particularly the definition of “franchise” in s. 1(1)(d) as “a right to engage in a business”:

> (i) in which goods or services are sold or offered for sale or are distributed under a marketing or business plan prescribed in substantial part by the franchisor or its associate,
>
> (ii) that is substantially associated with a trademark, service mark, trade name, logotype or advertising of the franchisor or its associate or designating the franchisor or its associate, and

(iii) that involves

(A) a continuing financial obligation to the franchisor or its associate by the franchisee and significant continuing operational controls by the franchisor or its associate on the operations of the franchised business, or

(B) the payment of a franchise fee,

and includes a master franchise and a subfranchise.

[63] BMO also points to the American counterpart to s. 84.1 of the *BIA* which provide that a contract cannot be assigned where "applicable law" excuses the counterparty from accepting substituted performance. BMO accepts that the "applicable law" exception precludes the forced assignment of personal service contracts, but only in situations where the contract is truly personal and is based on a special knowledge, skill, or talent. BMO points out that the U.S. courts have on several occasions held that franchise agreements (including motor vehicle dealership franchise agreements) do not constitute personal service contracts for the purposes of the "applicable law" exception.

[64] In support of its argument that the DSSA should be characterized as a standard form of commercial franchise agreement, BMO relies on the Ontario Superior Court of Justice decision in *Struik v. Dixie Lee Food Systems Ltd.,* 2006 CarswellOnt. 4932 (S.C.J.) at para. 69 which distinguishes a commercial relationship arising from a restaurant franchise agreement from an employment or "personal service arrangement".

[65] Finally, BMO notes that the exception in s. 84.1(3) for contracts which are not assignable "by reason of their nature" does not imply an adoption of the common law with respect to the assignment of 'personal contracts'. Reference is made to the discussion in the Industry Canada Briefing Book, (*supra*), to the effect that the exception was meant to provide a court with flexibility to review "each agreement in light of the circumstances" to determine whether or not it would be appropriate to allow the assignment. As such, BMO submits that even if this Court finds that the DSSA constitutes a 'personal contract' at common law, this would not preclude the agreement's assignment pursuant to s. 84.1(3).

(c) Analysis

[66] Both Ford Motor and BMO rely on or acknowledge similar statements of the law on the subject of what elements present in a contract may lead to the characterization of an agreement as being a ‘personal’ contract. I accept the principles stated in both *Blackhawk* and *Devon* in relation to characteristics which qualify a contract as being of a personal nature. However, that leaves the question of how those legal principles might apply to the DSSA in this case.

[67] I also agree with Ford Motor that it is not necessary to place reliance on the decisions from the U.S. courts to determine the issues in this case. While those decisions are interesting, I want to make it clear that I am not adopting the reasoning from those decisions in deciding this case. Instead, I see the interpretation of s. 84.1 as requiring the application of basic principles of Canadian law to the evidence presented in this case.

[68] There are terms in the DSSA which state that it is of a "personal nature" (Para. F of the DSSA.) However, merely stating that to be the case is not conclusive. The circumstances surrounding the entering into of the contract and the performance of the contractual relationship over time must be examined. The conduct of Ford Motor under the DSSA in relation to Welcome Ford and Smith are subjects which must be looked at.

[69] In very simple terms the nature of the contractual relationship reflected in the DSSA is a purely commercial one. Ford Motor, as a manufacturer, agrees to provide automobiles to Welcome Ford. Welcome Ford agrees to purchase and pay for Ford automobiles, promote their sale and provide after market services. There does not appear to be much, if any, of a personal services flavour to this commercial relationship. Indeed, there is no evidence presented to me that Welcome Ford or Smith provided to Ford Motor any sort of personal services, such as advisory or consulting services, or any other type of typical personal service. There is no commitment by Smith in the DSSA and certainly no evidence that Smith was to devote any of his full time and attention to the business, which is a typical feature of a personal services contract. The DSSA is not an agreement involving Ford Motor paying for ‘personal services’: it is all about the sale and purchase and re-sale by Welcome Ford of goods manufactured by Ford Motor.

[70] When one views the terms of the DSSA through the prism of the definition of “franchise” contained in the *Alberta Franchises Act*, the DSSA represents a classic commercial franchise agreement and apart from the words asserting that it is of a "personal nature" has very little of a personal flavour to it.

[71] Going to the due diligence point raised by Ford Motor there is no clear evidence presented to me of any inquiries being carried out by Ford Motor in respect to Smith at the time of entering into the original DSSA (whenever that was). The DSSA was most recently renewed on August 20, 2007 after the carrying out of what I would characterize as a rather perfunctory review of the Welcome Ford dealership as reflected in the 2007 Market Representation Study (the “2007 Study”). There is no evidence that Ford Motor carried out any further surveys or inquiries in relation to the Welcome Ford dealership after the 2007 Study up to the time of the issuance of the Receivership Order. There is no evidence of any inquiry about the character of Smith prior to the renewal of the DSSA in 2007. There is no evidence of a credit check having been conducted in relation to Smith or confirmation from his bankers as to his financial status, let alone that of the dealership. In short, there is no evidence shown to me that Ford Motor carried out even the most elementary due diligence at the time of renewing the most recent DSSA.

[72] In respect to the performance of the specific provisions of the DSSA referred to in argument by Ford Motor, I do not see any evidence that Ford Motor entered into the DSSA with Welcome Ford with confidence in Welcome Ford's integrity, ability and intention to carry out its responsibilities set forth in the DSSA. There is no evidence that Ford Motor, which claims that it is important to ensure that dealerships are owned and operated by qualified individuals of good reputation, and who were able to meet the requirements of the DSSA and the challenges of the marketplace, ever did anything to take such measures. As I have noted, it did not make any investigation of Smith prior to renewing the DSSA. Ford Motor was unaware that he had relocated to the Dominican Republic until after the Receivership Order had been granted. In conclusion, it appears that there was little, if any, effort to monitor what was going on at Welcome Ford or in relation to Smith up to the time that the dealership slid into insolvency.

(d) Conclusion on assignability of the DSSA

[73] When all of the legal and evidentiary considerations present here are taken into account I conclude that the DSSA is not a 'personal contract', which by its 'nature' cannot usefully be performed by another. Instead, it is a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing. I find that the DSSA is capable of assignment and therefore the exclusion in s. 84.1(3) of the *BIA* does not apply. However, that still leaves the question of whether the DSSA should be assigned to the assignee proposed by the Trustee and whether the consent of Ford Motor is required or has unreasonably been withheld.

(8) Whether the Trustee should be allowed to assign the DSSA pursuant to s. 84.1 of the *BIA*?

(a) Introduction

[74] I approach this final set of questions in a somewhat different fashion. I begin by stating the position of the Trustee which argues for the assignment of the DSSA to the preferred bidder. I then review the points raised by BMO in support of such an assignment, followed by an attempt to summarize the many arguments advanced by Ford Motor as to why no assignment should take place without its consent. I then proceed to an analysis which is particularly focused on the application of s. 84.1(4)(a) and (b) to the circumstances present in this case.

(b) Trustee position

[75] The very succinct position of the Trustee is that the DSSA provides the criteria by which Ford Motor can exercise its discretion to approve or disapprove of any proposed purchaser of the dealership assets. Those criteria are stated to be "character, automotive experience, management,

capital and other qualifications". The Trustee argues that the two bidders recommended by the Receiver for further consideration are both well established, award winning Ford dealers. It says the evidence contained in affidavits filed by representatives of those bidders confirm that either one of them meets all of the requirements of Ford Motor. The preferred bidder is said to have particularly strong credentials on all of these criteria.

(c) BMO position

[76] BMO relies on the decision in *Playdium Entertainment Corp. (Re)* (2001, 31 C.B.R. (4th) 302 at paras. 2 - 3, 16, 19 and 22 and additional reasons (2001) 31 C.B.R. (4th) 309 Ont. S.C.J.). It submits that, as in *Playdium*, the overall remedial purpose of the *BIA* and of s. 84.1 in particular, should be considered in deciding whether to order an assignment of the DSSA. BMO asserts that many of the factual circumstances supporting the assignment of the *Playdium* contract (no viable alternative other than liquidation, potential benefit to creditors and other stakeholders, impossibility that the assignee will remedy any alleged defaults, etc.) are also present in this case.

[77] It argues that there is evidence before the Court that the proposed assignee is capable of performing the DSSA, but Ford Motor has declined to consider the Trustee's proposed assignee or conduct any investigations as to that assignee's suitability.

[78] BMO submits that that all of Ford Motor's rights and remedies pursuant to the DSSA will be preserved in the event that an assignment is ordered. It observes that such rights and remedies include, *inter alia*, the right of first refusal to purchase the Welcome Ford dealership and the right to take steps to terminate the DSSA in accordance with its terms and conditions. BMO argues that the preservation of the rights of Ford Motor and remedies under the DSSA support a conclusion that an assignment is appropriate.

[79] BMO notes that Ford Motor asserts a number of acts of default under the DSSA, but argues that defaults do not preclude an assignment of the DSSA pursuant to s. 84.1. It says that whether a contract is in default is but one factor which should be considered a court in deciding whether or not to order the assignment of an agreement pursuant to s. 84.1. BMO notes that the specific wording of s. 84.1(5) of the *BIA* clearly contemplates the possibility that an agreement sought to be assigned may be in default.

[80] BMO also states that it is not necessary for the Court in conducting the s. 84.1 analysis to assess the reasonableness of Ford Motor withholding its consent. It says that even if the reasonableness of Ford Motor is to be considered by the Court then whether Ford Motor's withholding of consent is reasonable or unreasonable is still not determinative.

[81] BMO argues that declining to consider a *bona fide* request for consent is not reasonable and relies on *Bakerview Trout Farm (1983) ltd. v. Petgus Holding Ltd.*, [1996] B.C.W.L.D. 1480 (S.C.) at para. 92.

[82] Finally, based on the evidence contained in the April 22 Turgeon affidavit BMO argues that Ford Motor has unreasonably refused its consent because it has taken the position that it need not consider the merits of the proposed assignee and will not consent to any assignment or transfer of the DSSA where a dealership has ceased operating.

(d) Ford Motor position

[83] Ford Motor advances many arguments and counter arguments as to why the DSSA should not be assigned at all and, in any event, not without its consent. Ford Motor's arguments and responses fall into a number of categories.

[84] The first bundle of arguments put forward by Ford Motor rely on terms in the DSSA which specifically state that it is not transferable, assignable or saleable by Welcome Ford (DSSA, paras. F and 17(b)(1)). Further, it says that Welcome Ford has specifically acknowledged in the DSSA that Ford Motor has the right to approve or decline to approve any transfer or change in voting control based on the character, automotive experience, management, capital and other qualifications of the acquirer of the voting control, the equity or beneficial interest of the dealership business or its main assets.

[85] Another bundle of evidence based arguments rely on the Special Analysis as support for the position of Ford Motor that it does not need any direct representation in the Fort Saskatchewan region and that taking this position is compliant with the provisions of the DSSA. Further, the Fort Saskatchewan region is an ‘open point’ and Ford Motor is entitled to decide, based on the Special Analysis and other research data in respect to Ford vehicle registrations in that area, as to whether it needs to open and operate a franchise.

[86] Ford Motor argues that *Bakerview* should be distinguished on its facts.

[87] A series of arguments around the absence of information about the proposed assignees is advanced, including an argument that any determination of whether Ford Motor should consent to any assignment or transfer of the DSSA cannot be made because Ford Motor has not received a recommendation with respect to a potential assignee. Ford Motor states that it would require some period of time, 6 to 8 weeks, to make such a determination. It argues that the affidavit evidence filed by the Trustee in respect to the proposed assignee should be ignored.

[88] Finally, Ford Motor argues that Welcome Ford is in default of many obligations under the DSSA. In response to a number of arguments put forward by the Trustee and BMO, Ford Motor observes that they seek strict compliance with the DSSA but neither Welcome Ford or the Receiver have been in compliance with the DSSA since January 10, 2010.

(e) Analysis

[89] I have determined that the DSSA is capable of being assigned and that the exemption found in s. 84.1(3) is not applicable to this contract in these circumstances. The outstanding questions are whether the proposed assignee, particularly the preferred assignee, is "able to perform the obligations" contained in the DSSA [s. 84.1(4)(a)] and whether it is appropriate to assign the rights and obligations **to that person**" (Emphasis added.) [s.84.1(4)(b)].

[90] These are factual questions which will be determined on the evidence present in this case.

[91] On the first question related to s. 84.1(4)(a), it is clear from the May 28 affidavit made by a senior officer of another Ford dealer in the Edmonton region that that preferred assignee has an excellent track record in terms of operating a profitable Ford dealership and has received many national awards from Ford Motor over the years. It carries on business in premises that meet the Millennium Standards in contrast to the dismal facilities of the bankrupt. It is reasonable to infer from this evidence that the preferred assignee has both capital and relevant experience in automotive retailing, which would enable it to operate the Welcome Ford franchise. I conclude that the preferred assignee, including its principal shareholder of that assignee, will be able to perform the obligations of the DSSA.

[92] Moving on to the second question related to s. 84.1(4)(b), I must determine whether it is appropriate to order an assignment to the preferred assignee and must decide whether 'that person' is suitable. This involves a limited inquiry and I have already indicated that there is evidence in the affidavits filed here to support the selection of the preferred assignee. However, I must also deal with the question of whether Ford Motor must consent and whether Ford Motor is unreasonably withholding its consent in respect to the assignment of the DSSA to the preferred assignee.

[93] For the purposes of this decision, I am assuming that the consent of Ford Motor to the proposed assignee is required. That said, as I have observed on other occasions in this decision, it has been clear from the outset that Ford Motor would never consent to the DSSA being assigned and maintains its refusal to consent to the specific assignment proposed by the Trustee. Indeed Ford Motor has taken the position that it need not consider the merits of the proposed assignee as it will not consent to any assignment or transfer of the DSSA where a dealership has ceased operating.

[94] Ford Motor has unreasonably refused its consent. The proposed assignee has been shown to be capable of performing obligations under the DSSA and the Trustee has made a *bona fide* request for assignment, but Ford Motor has refused to even consider that request. In refusing to consider any request for assignment of the DSSA on account of the ceasing of operations of the dealership, Ford Motor has sought to do indirectly what it has not, (because of the stay) been able to do directly, namely, to treat its obligations under the DSSA (including an obligation not to unreasonably withhold its consent to an assignment), as being at an end.

[95] Finally, in respect to the questions of default, I am satisfied on the affidavit evidence and the inferences which I have drawn from the evidence about the financial strength of the proposed assignee that any monetary defaults may be remedied by that proposed assignee. I am comfortable that the proposed sale of the Welcome Ford dealership will substantially cure the breaches of the DSSA, of which Ford Motor complains.

[96] I have found as a fact that the preferred assignee will be capable of performing the obligations imposed in the DSSA. Further, on the basis of all of the evidence present here, I conclude that the rights and remedies of Ford Motor under the DSSA will be preserved and for that reason it is appropriate to order the assignment. Such rights and remedies include among others the right of first refusal and the right to take steps to terminate the DSSA in accordance with its terms. This preservation of the rights and remedies of Ford Motor is important to me in deciding that an assignment is appropriate in these circumstances.

(9) Ford Motor request to lift the stay

[97] Ford Motor has an outstanding application to lift the stay which had been imposed when I granted the Receivership Order.

[98] In Decision No. 1 I had analyzed that question and refused to grant the remedy requested at that time. I have now reviewed additional evidence and commented on its weight in other parts of this decision. I have also dealt with the outstanding questions on which I had reserved decision in March. Ford Motor has not made a case for the lifting of the stay and I have commented above on Ford Motor's position that it would not consider an assignment under any circumstances. A decision to lift the stay is a discretionary remedy and no new evidence has been drawn to my attention which would justify the lifting of the stay and therefore I decline to do so.

III Relief

[99] The outstanding applications are resolved as follows:

(a) The Ford Motor application for a declaration that neither the Receiver nor the Trustee has any right, title and interest in or to the DSSA is refused;

(b) The Ford Motor application for a declaration that the DSSA is a ‘personal contract’ and is not capable of being assigned is refused;

(c) The alternative application by Ford Motor for an order declaring that neither the Receiver nor the Trustee can assign the DSSA or transfer the assets of Welcome Ford to any prospective purchaser without the consent of Ford Motor is dismissed;

(d) The renewed applications for an order lifting the stay of proceedings imposed by the Receivership Order and s. 69.3(1) of the *BIA*, and to allow Ford Motor to terminate the DSSA between it and Welcome Ford in accordance with its terms is dismissed,

(e) The application by the Trustee pursuant to s. 84.1 of the *BIA* for an order assigning the rights and obligations of Welcome Ford under the DSSA to the successful bidder for the assets of Welcome Ford in the Receivership proceedings is directed, and

(f) The Receiver's application/ recommendation to this Court for the *en bloc* sale of the Welcome Ford dealership is granted and confirmed.

IV. Costs

[100] Costs may be spoken to within 45 days of the issuance of this decision.

Heard on the 29th day of June, 2010.
Dated at the City of Edmonton, Alberta this 10th day of December, 2010.

D.R.G. Thomas
J.C.Q.B.A.

Appearances:

Mr. Jeremy H. Hockin
Mr. Bryan Maruyama
(Parlee McLaws LLP)
for the Receiver of Welcome Ford,
Myers, Norris, Penny Ltd.

Mr. Ken Mills
Ms. Kelly J. Bourassa
(Blake, Cassels & Graydon LLP)
for Ford Motor Company

Mr. Darren R. Bieganek
(Duncan & Craig LLP)
for the Plaintiff - Ford Credit Canada

Mr. Ray C. Rutman
(Fraser Milner Casgrain LLP)
for Bank of Montreal

Corrigendum of the Memorandum of Decision
on Various Applications
of
The Honourable Mr. Justice D.R.G. Thomas

The database citation number has been changed from: 2010 ABQB 199 (which is the number on the March 23, 2010 Ford Judgment) to 2010 ABQB 798.

TAB 11

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *West Bay SonShip Yachts Ltd. (Re),*
2009 BCCA 31

Date: 20090130
Docket: CA035080

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,

R.S.C. 1985, c. C-36

and

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57

Between:

West Bay SonShip Yachts Ltd.

Respondent
(Petitioner)

And

Gerald Esau

Appellant
(Respondent)

Before: The Honourable Madam Justice Rowles
The Honourable Madam Justice Levine
The Honourable Mr. Justice Groberman

S. Kent — Counsel for the Appellant

R.A. Millar — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
October 8, 2008

Place and Date of Judgment: Vancouver, British Columbia
January 30, 2009

Written Reasons by:
The Honourable Madam Justice Levine

Concurred in by:
The Honourable Madam Justice Rowles
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Levine:

Introduction

[1] The appellant, Gerald Esau, appeals from the order of a Supreme Court chambers judge made May 3, 2007, in the course of proceedings involving the respondent, West Bay SonShip Yachts Ltd., under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Mr. Esau claims, among other grounds of appeal, that the chambers judge erred in ruling that he was a creditor subject to the terms of the Plan of Arrangement (the "Plan").

[2] For the reasons that follow, I would dismiss the appeal.

Background

Facts

[3] On December 16, 2005, West Bay filed for protection under the *CCAA*. Mr. Esau had been an employee of West Bay since 1991. On January 17, 2006, he received notice that his employment in the position of Vice President, Production, would be terminated, effective June 6, 2006. Mr. Esau sued West Bay for damages for wrongful dismissal, but did not file a Proof of Claim in the *CCAA* restructuring. West Bay sought a declaration that Mr. Esau's claim was compromised by the Plan, and an order that the wrongful dismissal action be stayed.

The CCAA Proceedings

[4] In the initial order in the *CCAA* proceedings, made on December 16, 2005 (the "Filing Date"), the court imposed a stay of proceedings against West Bay, including any proceeding pursuant to labour or employment standards legislation (s. 2(c)). The initial order provided for West Bay to continue to pay obligations incurred by it after the Filing Date, including wages and "other monies owing to or in respect of its employees", but expressly prohibited the payment of "any amounts that are due on account of severance pay arising at law or under Statute" (s. 5). The order permitted West Bay to downsize its operations and terminate its employees. The financial consequences of downsizing were to be dealt with in the Plan to be filed (s. 6):

> 5. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, all obligations to persons who advance or supply goods or services to the Petitioner after the Filing Date (including those under purchase orders outstanding at the Filing Date but excluding any interest on the Petitioner's existing obligations incurred prior to the Filing Date) shall be paid or otherwise satisfied by the Petitioner and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, omissions, vacation pay, and other monies owing to or in respect of its employees (including any independent contractor providing employment related services to the Petitioner) irrespective of whether such obligations arose or were earned before or after the Filing Date but not including any amounts that are due on account of severance pay arising at law or under Statute (hereinafter collectively referred to as "Wages").
>
> 6. THIS COURT FURTHER ORDERS that, subject to the terms of this Order, the Petitioner shall remain in possession of its undertaking, property and assets, wherever situate (collectively, the "Assets") with full power and authority to relocate to British Columbia those Assets currently situated within other jurisdictions including, without limitation, the State of

> California, the State of Florida and the State of Washington and shall continue to carry on its business in the ordinary course, provided that:
>
> . . .
>
> (b) it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing of its business and operations ("Downsizing"), including:
>
> (i) terminating the employment of such of its employees or temporarily laying off such of its employees, as it deems appropriate;
>
> . . .
>
> all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from leased premises, and may take any Downsizing steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioner to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.
>
> [Emphasis added]

[5] By final order in the *CCAA* proceedings, pronounced June 23, 2006, the court approved West Bay's Plan. All claims falling within the definition of "Claim" in Article 1.1 of the Plan were compromised as against West Bay and others:

> **"Claim"** means a claim for an amount alleged by a person to be owed to it by the Company, or a claim in relation to any obligation, enforceable right, duty or liability, contingent, accrued, vested or otherwise, (including any claim whether contingent or accrued on behalf of Her Majesty the Queen in right of the Dominion of Canada or any Province or any municipality) against the Company which was in existence in whole or in part as of the Filing Date, including any claim in relation to any liability, loss or damage arising from any such claim after the Filing Date, or any cause of action against the Company or its assets and property calculated either as at the Filing Date, or, in the case of claims under executory contracts arising

subsequent to the Filing Date as a result of the termination of such contracts in accordance with an order of the Court made prior to the date of the Meeting, as at the date of such termination, either:

(a) as set forth in a Proof of Claim which has either:

(i) been admitted by the Company pursuant to the Plan for all purposes; or

(ii) been determined by a Court of competent jurisdiction to be a proper obligation of either or both of the Company; or

(b) for which a valid Proof of Claim could have been filed with the Company, but which Proof of Claim was not so filed prior to the Claims Bar Date;

provided that a Claim shall not include the amount due or accruing due to a Post Filing Creditor in respect of Post Filing Creditor Claims, nor shall the Claim include interest for the period subsequent to the Filing Date.

[Emphasis added]

The Reasons of the Chambers Judge

[6] The chambers judge held that Mr. Esau's claim for damages for wrongful dismissal was a "contingent liability" at the Filing Date, and, as such, fell within the definition of "Claim" in the Plan. She relied on two superior court decisions, *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 21 B.C.L.R. (3d) 91 (S.C.), and *Rizzo and Rizzo Shoes Ltd. (Re)* (1991), 6 O.R. (3d) 441 (Gen. Div.), aff'd. (on other grounds), [1998] 1 S.C.R. 27, in concluding that the claim for damages for breach of Mr. Esau's employment contract accrued from the outset of his employment, and was therefore a liability of West Bay at the Filing Date.

[7] The chambers judge ordered that Mr. Esau's claim was a "pre-filing claim" and was compromised by the Plan. She permanently stayed the action, and refused to grant Mr. Esau an extension of time to file a Proof of Claim.

[8] Her reasons may be found at *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCSC 1553, 37 C.B.R. (5th) 253.

Issues on Appeal

[9] On appeal, the parties joined issue on two alternative interpretations of the definition of "Claim" in the Plan, under which Mr. Esau's claim for damages for wrongful dismissal may be considered to be a "pre-filing claim": if it was a contingent liability at the Filing Date, or it was a claim under an executory contract.

[10] Thus, there are two issues in this appeal:

1. Is a wrongful dismissal claim a contingent liability prior to the termination of employment?
2. Is an employment contract an executory contract?

Analysis

Contingent Liability

[11] Mr. Esau takes the position that his claim for damages for breach of his employment contract did not accrue throughout his employment, but only arose when he was terminated. Thus, he argues, West Bay had no liability, contingent or otherwise, until the termination of his employment, which occurred after West Bay filed for protection under the *CCAA*. Thus, he says, his claim for damages is not compromised by the Plan.

[12] West Bay argues that while Mr. Esau's right to bring an action for damages for wrongful dismissal may not have crystallized until notice of termination was given, West Bay's obligation to pay severance was in existence "in whole or in part" as of the filing date. Thus, Mr. Esau's claim for damages for wrongful dismissal is a pre-filing claim and is compromised by the Plan.

[13] Both *Eland Distributors* and *Rizzo and Rizzo Shoes*, relied on by the chambers judge and West Bay, dealt with severance under employment standards legislation. The present case, however, involves a common law claim for damages for wrongful dismissal. As explored in three recent decisions of the British Columbia Employment Standards Tribunal, citing the decision of the Supreme Court of Canada in *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027, this distinction is significant.

[14] In *Sitter (Re)*, [2000] B.C.E.S.T.D. No. 515 at paras. 11 and 14, the adjudicator drew the following distinction between statutory and common law claims:

> Compensation for length of service payable under section 63 of the [*Employment Standards*] *Act* is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lockstep with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027).
>
> . . .

> "Wages", as defined in section 1 of the Act, includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo*, supra.) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette*, supra.). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the Act.
>
> [Emphasis added]

[15] This view was affirmed in *Rupert Title Search Ltd. (Re)*, [2003] B.C.E.S.T.D. No. 70 at paras. 25 and 32, and in *Taylor (Re)*, [2003] B.C.E.S.T.D. No. 82 at para. 11. In *Rupert Title Search*, the Tribunal described the statutory liability of an employer as "an 'earned' benefit to the employee that accumulates as the length of service of the employee increases", and distinguished this "length of service compensation" from common law damages for wrongful dismissal.

[16] *Sitter*, *Rupert Title Search*, and *Taylor* were recently approved by this Court in *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220, 66 B.C.L.R. (4th) 373 at paras. 5-7. Madam Justice Huddart, for the Court, held that the Tribunal's understanding of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, and the distinction between statutory compensation payments and reasonable notice under an employment contract "merits respect". Common law claims for damages for wrongful dismissal are distinguishable from statutory claims for severance under employment standards legislation in terms of how they arise and are calculated.

[17] It is not necessary for the purpose of this appeal to determine whether a statutory claim for severance is properly characterized as a contingent liability prior

to termination of employment. For present purposes, it is sufficient to conclude that *Eland Distributors* and *Rizzo and Rizzo Shoes* do not assist in the analysis of Mr. Esau's claim.

[18] The first step in determining whether Mr. Esau's claim for damages for breach of his employment contract represents a contingent liability is to consider the meaning of that term. This was recently discussed by the Supreme Court of Canada in *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79 at paras. 17–18, where Rothstein J. for the majority referred to the "well-accepted test for a contingent liability" as that described by Lord Guest in *Winter v. Inland Revenue Commissioners*, [1963] A.C. 235 at 262 (H.L.):

> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.

[19] Similarly, *Black's Law Dictionary*, 8th ed. 2004, defines contingent liability as a "liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event."

[20] For financial reporting purposes, threatened and pending litigation are considered to be contingent liabilities of a company: *Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981) at s. 3290; Errol C. Soriano, *Understanding Financial Analysis in Litigation* (Scarborough: Carswell, 2004) at 64-65; *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28 at para. 126 (Ont. S.C.J. [Commercial List]). That is,

threatened or pending litigation is characterized as a contingent liability. Actual liability will arise only when there is a judgment against the company.

[21] The question that arises in this case is whether the existence of a contractual obligation, and the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

[22] This conclusion finds support in the following definition of "liability" from *Royal Trust Co. v. H.A. Roberts Group Ltd.*, [1995] 4 W.W.R. 305 at para. 119 (Sask. Q.B.):

> These statutory provisions [s. 125(1) and (3) of *The Land Titles Act*] envisage three kinds of obligations that can be secured by a registrable mortgage: a debt, a loan, or a liability that is future or contingent. No case was cited to me that clarifies what is meant by these terms used in s. 125. The term "liability" is a broad term and is most often used to describe an unliquidated or unspecified legal obligation which arises due to negligence, breach of contract, etc. The term "debt" is a narrower term and means a specific kind of obligation for a liquidated or certain sum incurred pursuant to an agreement. The term "loan" is even narrower and means a specific type of debt. [emphasis added]

[23] Further support can be found in the American case of *Grant-Howard Associates v. General Housewares*, 472 N.E.2d 1 at 3-4 (N.Y. 1984), approved in *Climatrol Industries Inc. v. Fedders Corp.*, 501 N.E.2d 292 at 294-295 (Ill.App. 1 Dist. 1986), in the context of a product liability claim:

> An uninjured party simply is not a "contingent liability" in the usual sense of that term (see, e.g., Black's Law Dictionary [5th ed.], p. 291 ["A potential liability; e.g. pending lawsuit"]). There is no liability or claim before injury occurs. Granted that "contingency" invokes uncertain events, the uncertainty should be restricted to the success of asserting an existing claim, rather than expanding it to include the altogether unpredictable event that an injury will occur. [emphasis added]

[24] I conclude that the liability to pay damages if an employment contract is breached for failing to give reasonable notice of termination is not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there is no injury. The possibility of a breach of contract is not sufficient to give rise to a contingent liability.

[25] Therefore, Mr. Esau's wrongful dismissal claim did not accrue from the outset of his employment and it did not represent a contingent liability of West Bay at the Filing Date. Consequently, Mr. Esau's claim is not a pre-filing claim on this basis.

Executory Contract

[26] West Bay argues in the alternative that Mr. Esau's contract of employment was an executory contract. As a result, it maintains that his claim for damages for its termination after the Filing Date and before the date of the meeting of General Creditors to approve the Plan on June 12, 2006 (the "Meeting"), was a "Claim" within the meaning of, and compromised by, the Plan. It says that the characterization of an employment contract as an executory contract is consistent with the legal definition of executory contracts and the purpose of the *CCAA*.

[27] Mr. Esau submits that when his employment contract was terminated it was not an executory contract because the only remaining performance to be tendered was the payment of money. He cites in support of his argument *re U.S. Metalsource Corp.*, 163 B.R. 260 at 269 (Bankr. W.D. Pa. 1993), in which it was held that where the only obligation of the debtor was the obligation to pay severance pay to terminated employees, "[t]his type of contractual duty to pay a debt is insufficient to create an executory contract."

[28] If the contract was an executory contract at the Filing Date, however, a claim arising subsequent to that date as a result of termination of the contract is a "Claim" as of the date of termination. That is, if Mr. Esau's contract of employment was an executory contract at the Filing Date, his claim for damages for wrongful dismissal, arising as a result of his termination subsequent to that date and before the Meeting, became a "Claim" as of the date of termination.

[29] Thus, the question is whether a contract of employment such as Mr. Esau's, under which he promised to render services in return for West Bay's promise to pay him, was an executory contract at the Filing Date.

[30] The Alberta Court of Appeal recently considered the meaning of "executory contract" in *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273 at para. 19, 371 A.R. 339:

> A contract is said to be executory if anything remains to be done under it by any party, and executed when it has been wholly performed by all parties: *Halsbury's Laws of England*, 4th ed. reissue, vol. 9(1) (London: Butterworths, 1998) at 341, para. 606; *S. W. Mackay & Associates Ltd. v. Park Lane Ventures Ltd.* (1997), 32 B.C.L.R. (3d) 338 at para. 8 (S.C.).
>
> [Emphasis added]

[31] In "*A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals – Joint Task Force on Business Insolvency Law Reform – March 15, 2002*", the authors cited the following meanings for "executory contract":

> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:
>
>> a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.
>
> (Countryman, "Executory Contracts in Bankruptcy" (1974) 57 *Minnesota Law Review* 439 (Part 1), at 460).

[32] The authors included an employment contract as an executory contract in this sense. See also: *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, a Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, at 131, and Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at 177-178, where employment contracts were characterized as executory contracts in the context of the discussion

of insolvency laws. Professor Sarra noted (at 178-179) that damage claims resulting from termination or repudiation of executory contracts after the initial order are unsecured claims for damages.

[33] None of these sources discussed the application of the U.S. definition of executory contract for bankruptcy purposes to an employment contract. It is not clear to me, because of the nature of the employment relationship, that that definition will generally apply. As a matter of contract law, if the employee fails to provide the promised services, or the employer fails to pay for services rendered, subject to any other terms of the contract, that would ordinarily be a material breach excusing the performance of the other party. Whether that conclusion would ordinarily apply to an employment contract is, however, a question I do not need to decide for the purposes of this case. The ordinary legal definition of executory contract covers these circumstances.

[34] An ongoing employment contract, under which an employee has promised to render services in return for the employer's promise to pay for those services, is an executory contract as there are obligations on both parties that are yet to be completed. Thus, Mr. Esau's employment contract was, at the Filing Date, an executory contract.

[35] Accordingly, Mr. Esau's claim against West Bay for damages for wrongful dismissal fell within the definition of "Claim" in the Plan.

[36] That Mr. Esau's rights arising on termination of his employment contract were compromised under the Plan is consistent with the purpose of the *CCAA*, as recently

considered by this Court in *Skeena Cellulose Inc. v. Clear Creek Contracting Ltd.*, 2003 BCCA 344, (sub nom. *Skeena Cellulose Inc. (Re)*) 13 B.C.L.R. (4th) 236 at para. 34:

> ...[C]ourts appear to have given full effect to the "broad public policy objectives" of the [CCAA], which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:
>
>> Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders. Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.
>
> [Emphasis added]

[37] The Plan permitted West Bay to rationalize its business affairs with a view to a reorganization that would make it viable in the future. The stated purpose of the Plan was to allow West Bay to "settle payment of its liabilities arising both before and after the Filing Date and to compromise the indebtedness owed to Creditors of the Company on a fair and equitable basis" (Plan, s. 2.1). It needed to retain its employees in order to complete existing orders for the construction of yachts, and to use the sale proceeds from the yachts to fund payments to its creditors on a compromised basis, on the basis that all of its creditors would "derive a greater benefit from the Plan than would result from the bankruptcy of the Company and so as to allow the Company to continue in business in the future". West Bay's tangible assets were sold to a related company to provide cash to further fund payments to creditors. It was intended that the company would remain in business using a revised production financing model, using private capital raised after the effective date of the Plan.

[38] In *Skeena*, the issue addressed by the Court was whether the termination of replaceable forest contracts, which could have "disastrous consequences for many individuals, local governments and communities", supplanted the intent and purpose of the *CCAA* to stave off a bankruptcy. The Court upheld the trial judge's decision that terminated employees were not to be placed in a better position than other creditors (at para. 22), and noted that "[i]n the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights" (at para. 37). In considering whether the arrangement under the *CCAA*, as a whole, was "fair, reasonable and

equitable", the Court noted that "equity" is not necessarily "equality" and that the courts looks to all of the creditors to see if rights are compromised in an attempt to balance interests (at para. 59). The Court concluded (at para. 60):

> As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

Mr. Esau's Claim

[39] Mr. Esau's claim was thus subject to the terms of the Plan, which required creditors to file a "Proof of Claim" in accordance with the procedure and before the times set out in the relevant court orders. Mr. Esau did not file a Proof of Claim at any time. He did not receive a "Proof of Claim Package", as did other creditors, providing notice to file a Proof of Claim. However, West Bay published the notice to creditors, as ordered by the court, in the Vancouver Sun, and on its website. Mr. Esau was advised, through his counsel, that he was not entitled to bring an action against the company because of the stay of proceedings, that his claim as a creditor was compromised in the Plan, and that he could apply for an extension of time to file a Proof of Claim.

[40] In West Bay's application that is the subject of this appeal, it sought an order extending the time for Mr. Esau to file a Proof of Claim. It was only during the hearing of West Bay's application that Mr. Esau took the position that the time should be extended.

[41] The chambers judge denied the application for the extension of time, after considering the factors enumerated in *Blue Range Resources Corp. (Re)*, 2000 ABCA 285, 271 A.R. 138 at para. 26:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

[42] She concluded that the delay was significant, and was not caused by inadvertence. She further concluded that permitting the claim would result in prejudice that could not reasonably be alleviated (at paras. 32-36).

[43] The chambers judge's decision to deny an extension of time to file a Proof of Claim was discretionary, reviewable by this Court only if it was clearly wrong or has worked a substantial injustice: see *Meuller v. Coronation Insurance* (1995), 12 B.C.L.R. (3d) 90 (C.A.).

[44] Mr. Esau has not shown that the chambers judge's decision was clearly wrong, and she was in the best position, as the judge supervising the *CCAA* proceedings, to weigh the relative prejudice to all parties if his claim was allowed to be litigated while all other matters involving West Bay's creditors had been finalized.

[45] I see no basis to interfere with the chambers judge's decision not to extend the time to file the Proof of Claim.

Conclusion

[46] Mr. Esau's claim for damages for wrongful dismissal was a claim under an executory contract, and as such was stayed and compromised by the *CCAA* proceedings. There is no basis to interfere with the chambers judge's decision not to extend the time to file a Proof of Claim, nor to consider Mr. Esau's claim for misrepresentation.

[47] It follows that I would dismiss the appeal.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Rowles"

I AGREE:

"The Honourable Mr. Justice Groberman"

20

TAB 12

Office of the Superintendent of Bankruptcy Canada

Bill C-12: Clause by Clause Analysis — Clauses 61-70

An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005

Bill Clause No. 61
Section No. CCAA s.2(1)
Topic: Definitions

Proposed Wording

2.(1) "**director**" **means**, in **the case** of a company **other than an income trust, a** person **occupying the position** of director **by whatever name called** and, in **the case** of an income trust, **a person occupying the position of** trustee **by whatever named called**;

"**income trust**" means a trust that has assets in Canada **if**

> (*a*) **its** units are **listed** on a prescribed stock exchange **on the day on which proceedings commence under this Act**; **or**
> (***b***) the majority of its units are held by a trust whose units are listed on a prescribed stock **exchange on the day on which proceedings commence under this Act;**

"**shareholder**" **includes** a member of **a** company — **and, in the case of an income trust, a holder of a unit in an income trust** — to which this Act applies;

(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to **or dealing at arm's length with** a **debtor** company.

French Version only:

« **agent négociateur** » Syndicat ayant conclu une convention collective pour le compte des employés d'une compagnie.

Rationale

The definition of "**director**" is replaced by a definition substantially similar to that used in the *Canada Business Corporations Act* (CBCA). The intention is to ensure greater consistency within Canada's framework legislation. An addition is made to the definition to reflect the fact that the CCAA applies to income trusts, whereas the CBCA does not.

The definition of "**income trust**" is amended to clarify that a trust only had to be listed on the day before an insolvency proceeding commenced. The amendment is intended to address concerns that an income trust that would otherwise be entitled to use the Act would be prevented from doing so if its units are subject to a cease-trade order or if it is de-listed, both of which may occur due to financial difficulties. In addition, a second amendment is made to clarify that operating trusts may initiate a proceeding under the Act without their holding trust being subject to the proceeding. This amendment relates to the structure of income trusts, which often includes a listed holding trust holding the units of an operating trust.

The definition of "**shareholder**" is amended to provide greater clarity in subsequent provisions that deal with the rights of shareholders. The definition is made inclusive and explicitly adds holders of units of income trusts. The reference to "shareholder" was removed because it was circular and redundant. Making the definition inclusive, however, clarifies that the removal of "shareholder" is not intended to be interpreted as to exclude a holder of shares.

The French version of "**bargaining agent**" is amended to remove the concept of a collective agreement that has not expired, which was a divergence from the English version.

Subsection (2) is amended to correct an oversight in Chapter 47, which failed to address the inclusion of non-arm's -length parties in section 4 of the BIA.

Present Law

As enacted by Chapter 47, Clause 124(2):

"**shareholder**" means a shareholder, member or holder of any units of any company to which this Act applies;

As enacted by Chapter 47, Clause 124(3):

"director", in respect of a company, includes any person, however designated, acting in any

capacity that is similar to that of a director of a corporation and, in respect of an income trust, includes its trustee;

"**income trust**" means a trust

(*a*) that has assets in Canada, and
(*b*) the units of which are traded on a prescribed stock exchange;

As enacted by Chapter 47, Clause 124(5):

2.(2) For the purpose of this Act, section 4 of the *Bankruptcy and Insolvency Act* applies for the purpose of determining whether a person is related to a company.

French version only:

As enacted by Chapter 47, Clause 124(3):

« **agent négociateur** » Syndicat ayant conclu, pour le compte des employés d'une compagnie, une convention collective qui n'est pas expirée.

Bill Clause No. 62
Section No. CCAA s.11.02(3)(*b*)
Topic: Stay of Proceedings

Proposed Wording

11.02(3)(*b*) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi et continue d'agir de bonne foi et avec **la diligence voulue**.

Rationale

Paragraph (3)(*b*) of the French version of the Act is amended to replace the word "précautions" with "diligence", which better matches the English version of the Act.

Present Law

As enacted by Chapter 47, Clause 128:

11.02(3)(*b*) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre qu'il a agi — et continue d'agir — de bonne foi et avec les précautions voulues.

Bill Clause No. 63
Section No. CCAA s.11.05
Topic: Eligible Financial Contracts

Rationale

This clause is repealed as, by virtue of changes made by *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007*, which obtained Royal Asset on June 22, 2007 (Chapter 29), the treatment of an "eligible financial contract" is now addressed in section 34 of the Act (please see Clause 77 for more information). To facilitate this move, Clause 105 of Chapter 29 also repealed s.11.05 as enacted by Chapter 47.

Present Law

None.

Bill Clause No. 64
Section No. CCAA s.11.06
Topic: Member of the Canadian Payments Association

Proposed Wording

11.06 No order may be made under **this Act** that has the effect of preventing a member of the Canadian Payments Association from ceasing to act as a clearing agent or group clearer for a company in accordance with the *Canadian Payments Act* **or** the by-laws **or** rules of that Association.

Rationale

Section 11.06 is amended to clarify that a court may not make an order that affects the rights of members of the Canadian Payments Association to cease to act as a clearing agent or group clearer.

Present Law

As enacted by Chapter 47, Clause 128:

11.06 No order may be made under section 11.02 that has the effect of preventing a member of the Canadian Payments Association established by the *Canadian Payments Act* from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the bylaws and rules of that Association.

Bill Clause No. 65
Section No. CCAA s.11.1
Topic: Stays of Regulatory Bodies

Proposed Wording

11.1(**1**) In this section, "regulatory body" means **a** person or body **that** has powers, duties or functions relating to the enforcement or administration of **an** Act of Parliament or of the legislature of a province and includes **a** person or body **that is** prescribed to be a regulatory body for the purpose of this Act.

(**2**) Subject to subsection (3), no order made under section 11.02 affects a regulatory **body's** investigation in respect of the **debtor** company or **an** action, suit or proceeding **that is** taken **in respect of** the company by **or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court**.

(3) On application by the company **and on** notice to the regulatory body **and to the persons who are likely to be affected by the order**, the court **may** order that subsection (**2**) not apply in respect of **one or more of the** actions, suits or proceedings taken by **or before the** regulatory body if **in** the **court's opinion**

> ***(a)*** a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; **and**
> ***(b)*** it is **not contrary to** the public interest that the regulatory body be affected by the order made under section 11.02.

(**4**) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company **and on** notice to the regulatory body, make an order declaring **both** that the regulatory body is seeking to enforce its rights **as a creditor and that the enforcement of those rights is stayed**.

Rationale

Regulatory bodies, exercising powers for the benefit and well-being of all Canadians, should not be restricted from properly carrying out their duties as a result of an insolvency filing. Chapter 47 introduced an amendment to prevent the stay of proceedings from affecting such bodies.

Subsection (2) is amended to clarify that the prohibition against a stay on regulatory bodies extends to proceedings held in front of that body. For example, a labour board may hear grievances brought by a third party against the debtor company. A limitation is included, however, to the effect that proceedings to enforce a payment ordered by the body or a court are stayed.

Subsection (3) is amended to require notice be given to parties likely to be affected by an application to have the regulatory body stayed.

Subsection (4) is amended to clarify that an attempt by a regulatory body to enforce its rights as a creditor is stayed.

Present Law

As enacted by Chapter 47, Clause 128:

11.1(1) Subject to subsection (3), no order made under section 11.02 affects the rights of a regulatory body with respect to any investigation in respect of the company or any action, suit or proceeding taken or to be taken by it against the company, except when it is seeking to enforce any of its rights as a secured creditor or an unsecured creditor.

(2) If there is a dispute as to whether a regulatory body is seeking to enforce any of its rights as a secured creditor or an unsecured creditor, the court may, on application made by the company with notice given to the regulatory body, make an order declaring that the regulatory body is or would be so seeking to enforce its rights.

(3) Subsection (1) does not apply in respect of any or all actions, suits or proceedings taken or to be taken by a regulatory body if the court, on application made by the company with notice given to the regulatory body, makes an order declaring that a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply.

(4) The court shall not make the declaration referred to in subsection (3) if it is of the opinion that it is in the public interest that the regulatory body not be affected by the order made under section 11.02.

(5) In this section, "regulatory body" means any person or body who has powers, duties or functions relating to the enforcement or administration of any Act of Parliament or of the legislature of a province and includes any person or body prescribed to be a regulatory body for the purpose of this Act.

Bill Clause No. 65
Section No. CCAA s.11.2
Topic: Interim Financing

Proposed Wording

11.2(1) On application by a debtor company **and on notice to the secured creditors who are likely to be affected by the security or charge**, a court may make an order declaring that **all or part of** the **company's** property is subject to a security or charge — **in an amount that the court considers appropriate** — in favour of **a** person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. **The security or charge may not secure an obligation that exists before the order is made**.

(**2**) The court may order that the security or charge **ranks** in priority over the claim of any secured creditor of the company.

(**3**) The court may order that the security or charge **ranks** in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(**4**) In deciding whether to make an order, the court **is to** consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;
(*b*) how the **company's business and financial affairs are** to be **managed** during the proceedings;
(*c*) whether the company's management has the confidence of its major creditors;
(*d*) whether the loan **would** enhance the prospects of a viable compromise or arrangement being made in respect of the company;
(*e*) the nature and value of the company's **property**;
(*f*) whether any creditor **would** be materially prejudiced as a result of the **security or charge**; and
(*g*) the monitor's report referred to in paragraph 23(1)(*b*), if any.

Rationale

The potential for a successful restructuring may be enhanced by providing for interim financing during the process. Chapter 47 codified the existing practice that courts may grant interim financing lenders a priority charge over existing secured creditors. The intention was to encourage lenders to deal with the financially troubled debtor company.

Subsection (1) is amended in order to clarify that the priority charge can be granted over all or only part of the debtor's property. To prevent potential abuse, it is also clarified that the priority charge may not apply to existing debts. The practice of including pre-filing debts as part of the interim financing priority charge puts existing creditors at a disadvantage with no benefit for the debtor. In addition, since the court-ordered charge may affect existing secured creditors, subsection (1) is amended to require that notice of the court application be given to those secured creditors who are likely to be affected by the charge so that they may defend their interests.

Subsection (4) sets out the factors to be considered by the court before granting the charge. Paragraph (g) clarifies that the court should consider the reasonableness of the cash-flow statement, not simply if one has been filed.

Present Law

As enacted by Chapter 47, Clause 128:

11.2(1) A court may, on application by a debtor company, make an order, on any conditions that the court considers appropriate, declaring that the property of the company is subject to a security or charge in favour of any person specified in the order who agrees to lend to the company an amount that is approved by the court as being required by the company, having regard to its cash-flow statement,

(*a*) for the period of 30 days following the initial application in respect of the company if the order is made on the initial application in respect of the company; or
(*b*) for any period specified in the order if the order is made on any application in respect of a company other than the initial application and notice has been given to the secured creditors likely to be affected by the security or charge.

(2) An order may be made under subsection (1) in respect of any period after the period of 30 days following the initial application in respect of the company only if the monitor has reported to the court under paragraph 23(1)(*b*) that the company's cash-flow statement is reasonable.

(3) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

(4) The court may specify in the order that the security or charge ranks in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

(5) In deciding whether to make an order referred to in subsection (1), the court must consider, among other things,

(*a*) the period during which the company is expected to be subject to proceedings under this Act;
(*b*) how the company is to be governed during the proceedings;
(*c*) whether the company's management has the confidence of its major creditors;
(*d*) whether the loan will enhance the prospects of a viable compromise or arrangement being made in respect of the company;
(*e*) the nature and value of the company's assets; and
(*f*) whether any creditor will be materially prejudiced as a result of the company's continued operations.

Bill Clause No. 65
Section No. CCAA s.11.3
Topic: Assignment of Agreements

Proposed Wording

11.3(1) On application **by** a debtor company **and on notice to every party to an agreement and the monitor**, the court may make an order assigning the rights and obligations of the company under **the** agreement to any person who **is** specified by the court **and agrees** to the assignment.

(**2**) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature **or that arise** under

(*a*) **an agreement entered into on or after the day on which proceedings commence under this Act**;
(***b***) an eligible financial contract; or
(***c***) a collective agreement.

(3) In deciding whether to make **the order**, the court **is to** consider, among other things,

(***a***) whether the monitor approved the proposed assignment;
(***b***) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
(***c***) whether it would be appropriate to assign the rights and obligations to that person.

(**4**) The court may not make **the** order unless it is satisfied that all **monetary** defaults in relation to the agreement **— other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation** — will be remedied **on or before the day fixed by the court**.

(**5**) The applicant **is to send a copy of the order** to every party to the agreement.

Rationale

Recognizing that agreements entered into by the debtor company prior to a restructuring may still have value, the Chapter 47 reforms permit the assignment of these agreements. The reform should provide a better opportunity for a successful restructuring.

Subsection (1) has been amended to clarify that parties to the agreement must be given notice of the court hearing that will consider the assignment. It provides better transparency by giving the interested party an opportunity to defend its interests.

Subsection (2) is amended to clarify that those agreements entered into after the commencement of proceedings may not be assigned.

Further, by virtue of Clauses 104(1) and 105 of *An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2007*, which received Royal Assent on June 22, 2007 (Chapter 29), the definition of eligible financial contract referred to in subparagraph (2)(*b*) is now to be found in s.2 rather than in s.11.05(3). To ensure that this Act is compatible with this change, Clause 112(17) provides the new wording for s.11.3(2). The new wording is identical to that provided in Clause 65 but for the removal of the reference in subparagraph (2)(*b*) to the old location of the definition.

Subsection (3) is amended to require the court to consider, when deciding whether to make an order of assignment, if the monitor has approved of it. This amendment is to assist the court in making its determination as the approval of the monitor – being a restructuring professional and a court officer charged with maintaining the integrity of the system – will be an important consideration.

Subsection (4) is amended to ensure that the agreement may only be assigned if the court is satisfied that, if a monetary default has occurred, it will be remedied within a time frame set by the court. It also clarifies that monetary defaults do not include those that arise merely by virtue of the fact that the debtor company is insolvent or failed to perform a non-monetary obligation. This amendment is required to ensure that agreements may not be drafted so as to be rendered unassignable, or assignable only at excessive cost, thereby defeating the purpose of the provision and providing the other party to the agreement a means of obtaining greater recovery than can be expected by other creditors of the same class.

Subsection (5) is added to ensure that a copy of any court order made under this section is provided to every party to the agreement so that they may be apprised of their court-mandated obligations in regard to the agreement.

Present Law

As enacted by Chapter 47, Clause 128 and amended by Chapter 29:

11.3(1) The court may, on the application of a debtor company, make an order assigning the rights and obligations of the company under any agreement to any person, to be specified by the court, who has agreed to the assignment.

(2) The applicant must give notice of the assignment in the prescribed manner to every party to the agreement.

(3) Subsection (1) does not apply in respect of rights and obligations

(*a*) under an eligible financial contract;
(*b*) under a collective agreement; or
(*c*) that are not assignable by reason of their nature.

(4) In deciding whether to make an assignment, the court must consider, among other things,

(*a*) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
(*b*) whether it would be appropriate to assign the rights and obligations to that person.

(5) The court may not make an order assigning an agreement unless it is satisfied that all financial defaults in relation to the agreement will be remedied.

Bill Clause No. 65
Section No. CCAA s.11.4
Topic: Critical Supplier

Proposed Wording

11.4(1) On application **by** a debtor company **and on notice to the secured creditors who are likely to be affected by the security or charge**, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that **the** goods or services **that are supplied** are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that **all or part of** the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may order that the security or charge **ranks** in priority over the claim of any secured creditor of the company.

Rationale

Subsection (1) is amended to ensure that notice is given to secured creditors who would likely be affected by the security or charge so that they have an opportunity to be heard.

Subsection (3) is amended to provide the courts with greater flexibility in regard to what property of the debtor will be subject to the critical supplier charge.

Present Law

As enacted by Chapter 47, Clause 128:

11.4(1) On application by a debtor company, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that those goods or services are critical to the company's continued operation.

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

(4) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

Bill Clause No. 66
Section No. CCAA s.11.51
Topic: Directors' Indemnification Charge

Proposed Wording

11.51(1) On application **by** a debtor company **and on notice to the secured creditors who are likely to be affected by the security or charge**, the court may make an order declaring that **all or part of** the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that **they** may incur as a director or officer of the company after the commencement of proceedings under this Act.

(2) The court may order that the security or charge **ranks** in priority over the claim of any secured creditor of the company.

(3) The court **may** not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if **in its** opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's **or officer's** gross or intentional fault.

Rationale

Subsection (1) is amended to clarify that notice must be given to secured creditors whose security interests are likely to be affected by a court-ordered charge and to clarify that the court-ordered charge may be on all or only a portion of the debtor company's assets.

The amendments are intended to correct drafting oversights created in Chapter 47. Notice provisions are included to ensure that parties have an opportunity to defend their interests where the legislation provides the court with the authority to override those interests. The flexibility for the court to grant a charge over some of the assets will allow the court to determine the most appropriate security interest to grant in the circumstances.

Subsection (4) is amended to correct a drafting error by adding the word "officer".

Present Law

As enacted by Chapter 47, Clause 128:

11.51(1) The court may, on the application of a debtor company, make an order declaring that the property of the company is subject to a security or charge, in an amount that the court considers appropriate, in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that he or she may incur as a director or an officer of the company after the commencement of proceedings against the company under this Act.

(2) The court may specify in the order that the security or charge ranks in priority over the claim of any secured creditor of the company.

(3) The court shall not make the order if, in its opinion, the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or an officer if it is of the opinion that the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in the Province of Quebec, the director's gross or intentional fault.

Bill Clause No. 66
Section No. CCAA s.11.52
Topic: Third Party Costs

Proposed Wording

11.52(**1**) **On notice to the secured creditors who are likely to be affected by the security or charge**, the court may make an order declaring that **all or part of the** property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the **fees** and expenses of

(*a*) the monitor, including the **fees** and expenses of any financial, legal or other experts engaged by the monitor in the **performance** of the monitor's duties;
(*b*) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
(*c*) any financial, legal or other experts engaged by **any other interested person** if the court is satisfied that the **security or charge** is necessary for **their** effective participation in proceedings under this Act.

(2) The court may order that the security or charge ranks in priority over the claim of any secured **creditor of the company.**

Rationale

Without the assistance of professionals, it would be impossible for a debtor to restructure. Given that the financial affairs of the debtor are in turmoil, however, it is reasonable that professionals would be hesitant to devote time and resources where there is little prospect of being paid. Section 11.52 was introduced by Chapter 47 to codify the existing practice where courts provide a charge to people involved in a restructuring to ensure that their fees and expenses will be paid.

Subsection (1) has been amended in order to clarify that the priority charge can be granted over all or only part of the debtor's property. This should provide better flexibility. In addition, since the court-ordered charge may affect existing secured creditors, subsection (1) is amended to require that notice of the court application be given to those secured creditors who are likely to be affected by the charge so that they may defend their interests.

Paragraph (1)(*a*) is amended to correct a drafting error in Chapter 47. It was intended that a monitor would be entitled to the charge for their fees and expenses. The use of different language in Chapter 47 may have caused a divergence that was not intended.

Paragraph (1)(*c*) is amended to clarify that the provision only applies to interested parties who, but for the charge, would not be able to effectively participate in the proceeding. The language of Chapter 47 could be interpreted to mean that to order the charge, the court need only be satisfied that the expenses were incurred in respect of the party's participation for the court. The provision was intended to limit the charge to circumstances where the interested party could not participate if the charge was not ordered. While the purpose of the provision is to ensure that all parties have the ability to participate to defend their interests, it would be inappropriate to require the debtor to pay for the participation of all parties.

Subsection (2) clarifies that the court may order that the charge ranks ahead of secured creditors. Due to a drafting oversight in Chapter 47, this subsection was inadvertently omitted.

Present Law

As enacted by Chapter 47, Clause 128:

11.52 The court may make an order declaring that property of a debtor company is subject to a security or charge, in an amount that the court considers appropriate, in respect of

(*a*) the costs of the monitor, including the remuneration and expenses of any financial, legal or other experts engaged by the monitor in the course of the monitor's duties;
(*b*) the remuneration and expenses of any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
(*c*) the costs of any interested party in relation to the remuneration and expenses of any financial, legal or other experts engaged by it, if the court is satisfied that the incurring of those costs is necessary for the effective participation of the interested party in the proceedings under this Act.

Bill Clause No. 67
Section No. CCAA s.11.8
Topic: Monitors' Liability

Proposed Wording

11.8(1) **Despite** anything in federal or provincial law, **if** a monitor, in that position, carries on the business of a debtor company or continues the employment of **a debtor** company's employees, the monitor is not by reason of that fact personally liable in respect of **a liability, including one as a successor employer**,

(*a*) that is in respect of the employees or former employees of the company or a predecessor of the company or in respect of a pension plan for the benefit of those employees; and
(*b*) that exists before the monitor is appointed or that is calculated by reference to a period before the appointment.

(2) A **liability** referred to in subsection (1) shall not rank as costs of administration.

(2.1) Subsection (1) does not affect the liability of a successor employer other than the monitor.

Rationale

Monitors may, in some circumstances, carry on the business of a debtor company with the intention of maximizing the value of the business for the benefit of the creditors. Because going concern values generally exceed the value of a non-operating business, it is usually in the interest of the creditors as a whole, as well as the employees and the community, that a viable but financially troubled business continue to operate under the direction of a professional while a purchaser of the business is sought.

To ensure this, the CCAA provided statutory protection for insolvency professionals against liabilities of the debtor company. Judicial interpretation of a similar provision in the BIA, however, has kept the door open for arguments to be made that the professional be held personally responsible for liabilities of the debtor company. If this were to happen, it would increase litigation and slow the restructuring process, all of which increases the costs of the process to the detriment of the creditors. Further, if the arguments are successful, liability for amounts related to severance and termination pay, unremitted pension contributions or unfunded pension liabilities could become the personal responsibility of the professional. Aside from the inequity in holding a professional responsible for the debts of others, this risk of personal liability may result in professionals refusing to carry on the business, resulting in more liquidations, smaller recoveries by creditors and higher job losses.

Amendments in Chapter 47 attempted to address the concerns of professionals in a manner that would provide them with sufficient protection. The amendments, however, proved insufficient to give them the comfort necessary to act in cases where significant personal liabilities are possible.

As such, this section is being clarified to provide even greater certainty. Specifically, subsection

(1) is amended to clarify that the professional is not liable for a claim that relates to a liability that existed, or that is calculated by reference to a period, before their appointment even if the liability has not crystallized on the appointment.

Subsection (2) is amended to change "claim" to "liability" to be consistent with the amendments to subsection (1).

The addition of subsection (2.1) is intended to clarify that the liabilities are not extinguished but, rather, are passed to the eventual purchaser of the business, if any.

Present Law

***Bankruptcy and Insolvency Act*:**

11.8(1) Notwithstanding anything in any federal or provincial law, where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees, the monitor is not by reason of that fact personally liable in respect of any claim against the company or related to a requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

(2) A claim referred to in subsection (1) shall not rank as costs of administration.

Bill Clause No. 68
Section No. CCAA s.12
Topic: Deadlines

Proposed Wording

12. The court may **fix deadlines for the purposes of voting and for the purposes of distributions under a compromise or arrangement**.

Rationale

Chapter 47 codified the practice allowing courts to fix deadlines relating to claims. It was intended that the ability would extend both to voting rights and rights to distributions; however, due to a drafting oversight the section only provided for deadlines in respect of voting.

Section 12 is amended to correct the drafting error by allowing the court to set a deadline in respect of distributions.

Present Law

As enacted by Chapter 47, Clause 130:

12. The court may make an order fixing a deadline for creditors to file their claims against a company for the purpose of voting at a creditors' meeting held under section 4 or 5.

Bill Clause No. 69
Section No. CCAA s.19
Topic: Claims

Proposed Wording

19.(1) Subject to subsection (2), the only claims that may be dealt with by a compromise or an arrangement in respect of a debtor company are

> (*a*) claims that relate to debts **or** liabilities, present or future, to which the company is subject on the earlier of
>
> > (i) the day on which **proceedings commenced under this Act**, and
> > (ii) if the company filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or **commenced proceedings** under this Act with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the date of the initial bankruptcy event within the meaning of **section** 2 of that Act; and
>
> (*b*) claims that relate to debts **or** liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii).

(2) A compromise or an arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the creditor **in relation to that debt** has **voted for the acceptance of** the compromise or arrangement:

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
(*b*) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or
(ii) wrongful death resulting from an act referred to in subparagraph (i);

(*c*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in Quebec, as a trustee or an administrator of the property of others;
(*d*) any debt or liability **resulting from** obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from **an equity claim**; or
(*e*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*d*).

Rationale

Chapter 47 introduced the concept of claims that may not be compromised without the specific approval of the claim holder. Prior to that amendment, claims could be compromised if the majority of creditors in that class approved the compromise.

Chapter 47 stated that unless the plan explicitly provided for the compromise of those claims and the creditor in relation to that claim assents to it, the claim was not compromised. Concerns were expressed, however, that creditors may be deemed to assent to a plan if they do not expressly vote against it.

Therefore, subsection (2) is amended to clarify that a creditor with these claims must take the active step of voting in favour of the proposal for that claim to be compromised.

Paragraph (2)(*d*) is amended to reflect the addition of the defined term, "equity claim".

Present Law

As enacted by Chapter 47, Clause 131:

19.(1) Subject to subsection (2), in addition to deemed claims, the only claims that may be dealt with by a compromise or an arrangement in respect of a debtor company are

(*a*) claims that relate to debts and liabilities, present or future, to which the company is subject on the earlier of

(i) the day on which the initial application was made in respect of the company, and
(ii) if the company had filed a notice of intention under section 50.4 of the *Bankruptcy and Insolvency Act* or an application under this Act was made by the company with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act*, the day that is the date of the initial bankruptcy event within the meaning of subsection 2(1) of that Act; and

(*b*) claims that relate to debts and liabilities, present or future, to which the company may become subject before the compromise or arrangement is sanctioned by reason of any obligation incurred by the company before the earlier of the days referred to in subparagraphs (*a*)(i) and (ii).

(2) A compromise or an arrangement in respect of a debtor company may not deal with any claim that relates to any of the following debts or liabilities unless the compromise or arrangement explicitly provides for the claim's compromise and the relevant creditor has agreed to the compromise or arrangement:

(*a*) any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order, imposed by a court in respect of an offence;
(*b*) any award of damages by a court in civil proceedings in respect of

(i) bodily harm intentionally inflicted, or sexual assault, or
(ii) wrongful death resulting from an act referred to in subparagraph (i);

(*c*) any debt or liability arising out of fraud, embezzlement, misappropriation or defalcation while acting in a fiduciary capacity or, in the Province of Quebec, as a trustee or an administrator of the property of others;
(*d*) any debt or liability for obtaining property or services by false pretences or fraudulent misrepresentation, other than a debt or liability of the company that arises from the purchase or sale of a share or unit of the company or from the rescission of any such purchase or sale; or
(*e*) any debt for interest owed in relation to an amount referred to in any of paragraphs (*a*) to (*d*).

Bill Clause No. 70
Section No. CCAA s.20(3)
Topic: Partial Claims

Proposed Wording

Subsection 20(3) of the Act, as enacted by section 131 of Chapter 47 of the Statutes of Canada, 2005, is repealed.

Rationale

Subsection 20(3) was inadvertently included in Chapter 47. Although it exists in the BIA, it was not intended to be included in the CCAA.

Present Law

As enacted by Chapter 47, Clause 131:

20.(3) No person is entitled to vote on a claim acquired after the initial application in respect of the company, unless the entire claim is acquired.

Date Modified: 2012-02-06

TAB 13

DEBTORS AND CREDITORS SHARING THE BURDEN:

A Review of the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act*

Report of the Standing Senate Committee on Banking, Trade and Commerce

Chair
The Honourable Richard H. Kroft

Deputy Chair
The Honourable David Tkachuk

November 2003

J. Executory Contracts

Executory contracts are contracts under which something remains to be done by one or more of the parties to the contract. In essence, it is a contract where there are obligations yet to be completed. Examples include leases, intellectual property rights and employment contracts, among others. Neither the BIA nor the CCAA uses the expression "executory contract."

… the existence of [executory] these contracts in a situation of insolvency raises the question of the extent to which these private contracts – negotiated in good faith and with due consideration of risk – should be altered or terminated, under what circumstances and by whom.

Nevertheless, the existence of these contracts in a situation of insolvency raises the question of the extent to which these private contracts – negotiated in good faith and with due consideration of risk – should be altered or terminated, under what circumstances and by whom. Alteration or termination of contractual rights change expectations, reduce predictability in contracting and increase risks, which will have negative implications. As well, both contracting parties may experience harm, since the continuation of a contract may be in the best interest of both parties.

Canadian legislation in this area has existed for some time. The *Bankruptcy Act* passed in 1949 contained few restraints on completed contracts; as well, it explicitly recognized the applicability of provincial/territorial law to real estate leases. Various omnibus bills in the 1970s and 1980s, all of which died on the Order Paper, proposed that an insolvent person who wished to make a proposal could disclaim any executory contract, and the co-contracting party would have the right to file a claim in the proposal for damages; the insolvent company could continue as a going concern, while the co-contracting party to the disclaimed contract would be no worse off than if a bankruptcy had occurred.

Amendments to the BIA in 1992 provide that, after a reorganization begins, secured creditors cannot exercise their security; the termination of a lease, licensing agreement or public utility because of default was also prevented. Debtors, however, were given the ability to disclaim leases on real property.

Witnesses presented the Committee with divergent opinions on whether disclaimer of executory contracts should be allowed, with the Court's permission, by insolvency practitioners or by co-contracting parties. Some witnesses told us that a company involved in a reorganization should be permitted to renounce such contracts. This view was held, for example, by Mr. Mendelsohn, who told the Committee – in reference to the CCAA – that "reorganizing entities [do and should] have the ability to renounce executory contracts, … with appropriate judicial supervision." After noting that, under the BIA, only commercial leases of real estate where the reorganizing entity is the lessee can be renounced, he argued that a coherent system of restructuring must permit the entity to renounce other executory contracts as well. He informed us that "[i]f executory contracts have to be renounced, they have to be renounced whether … [the] company [is big or small]."

Mr. Mendelsohn also shared the view that a bankruptcy trustee should be able to assign and transfer executory contracts to third parties, including licensing arrangements and leases of premises. He believed that "a trustee in bankruptcy should be given the right to realize, for the benefit of creditors, whatever economic value resides in the assets, including executory contract assets."

The Joint Task Force on Business Insolvency Law Reform also spoke about the ability to disclaim executory contracts and assignment to third parties. In the Joint Task Force's opinion, "[t]here should be a general right to disclaim (reject) executory contracts (including real property leases) in all bankruptcy and reorganization proceedings." Although it does not believe that insolvent organizations or the trustee in bankruptcy should require Court approval in order to disclaim these contracts existing at the date of commencement of proceedings, the Joint Task Force argued that "the legislation could impose some pre-conditions to the exercise of the disclaimer power either generally, or with respect to certain types of contracts."

Regarding the ability to assign executory contracts, the Joint Task Force informed the Committee that "trustees in bankruptcy and court-appointed receivers should have the power to assign executory contacts (not including eligible financial contracts) both in connection with going concern transactions and on a liquidation basis," subject to a number of limitations. It went on to note, however, that "[t]here should be provision for the court to prohibit an assignment if [the non-bankrupt party to the contract] establishes that the proposed assignee does not meet, in a material way, criteria reasonably applied by [it] before entering into similar agreements … or the proposed assignee is less creditworthy than [the bankrupt] was when the executory contract was entered into and reasonable assurances of payment have not been provided with respect to any credit required to be extended to the assignee by [the non-bankrupt party] under the executory contract after the assignment."

The Canadian Bankers Association, however, told the Committee that "[i]nsolvency law constraints on contracts can affect pre-insolvency contracting behaviour and may reduce credit availability. The new economy dictates that companies must be innovative and dynamic. In order to finance such new enterprises, financiers must be able to rely on the negotiated terms of their contracts."

A particular executory contract – a collective agreement – was discussed by several witnesses, including representatives of organized labour. In general, their view is that the Court should not be able to terminate a collective agreement, in whole or in part. The CAW-Canada told the Committee that "the CCAA offers no authority to a Court to abrogate a collective agreement. Nor should it do so. Still, some counsel and commentators believe that Superior Courts in Canada have an 'inherent jurisdiction' to issue an order pursuant to the CCAA which suspends or temporarily cancels one or more terms of a collective agreement. We fundamentally disagree."

A particular executory contract – a collective agreement – was discussed by several witnesses, including representatives of organized labour.

In the union's opinion, "[t]here can be no dispute that if the preservation of the status quo is a key objective of the CCAA, then the terms and conditions of employment defined in a collective agreement at the time of the issuance of a CCAA order must be maintained subject to the parties' mutual authority to negotiate changes." From this perspective, the

CAW-Canada told the Committee that "[t]he CCAA should … make clear that it is not open to a Court, in exercising its 'inherent jurisdiction' to alter, waive, or override the provisions of a collective agreement without the consent of the employer and the relevant trade union."

A similar view was presented to the Committee by the United Steelworkers of America, which told us that "the Courts should not be entitled, under the guise of a CCAA proceeding, to interfere with the operation of freely negotiated collective agreements which affect the rights of many workers. … [U]nions have demonstrated, in times of legitimate economic crisis, that they are capable of acting responsibly and in the best interests of their membership to agree to amendments to a collective agreement which may be necessary to enable the employer to survive. This cooperative approach is to be preferred to an approach which would eliminate workers (sic) rights with the stroke of a pen and subvert the primacy of collective bargaining."

Moreover, the Canadian Labour Congress differentiated collective agreements from other executory contracts, and indicated to the Committee that "[j]ust as employees are not like other creditors, collective agreements are not like other contracts. … [T]he bankruptcy and CCAA courts should not be accorded any jurisdiction over collective bargaining agreements. … Unlike other creditors, workers are not in a position to negotiate the terms upon which they may become creditors of their employer. Unlike other creditors, they are not in a position to assess the risks that they are required to bear. Unlike other creditors, they are not able to guarantee their employer's obligation by way of a secured charge. And unlike senior executives, they are not in a position to have their termination entitlements, including golden parachutes, set aside in trust accounts and thereby protected from bankruptcy proceedings."

The labour federation also informed the Committee that it does not support disclaimer of collective agreements. In its view, "[t]he debtor company and the union are in the best position to evaluate the needs of the company and are also the parties with the greatest interest in preserving the company as a going concern; they are, therefore, the appropriate parties to determine any changes to the collective agreement. The key incentive for the parties to reach an agreement is the threat that a failure to do so will lead to the bankruptcy of the debtor. … Neither the courts nor the monitor or receiver should have the power to vacate or amend a collective bargaining agreement that was arrived at within the provincial or federal statutory framework." The Canadian Labour Congress, however, went farther, and argued that "the value of each concession should be assigned unsecured creditor status with no less priority of valuation than any other unsecured creditor."

In support of the views of organized labour, Professor Sara commented that "treating collective agreements as commercial executory contracts that can be unilaterally set aside … is highly problematic."

From the perspective of intellectual property rights, the Intellectual Property Institute of Canada indicated its preference for an approach that would limit the right of disclaimer to "unprofitable," rather than "executory," contracts, since there is "too much uncertainty as to what types of agreements would be found to be 'executory'." The Institute also made other suggestions for change.

For example, the Institute recommended that: the time limit for the exercise of the right of disclaimer be three months; the Court have the discretion to maintain the contract if the disclaimer would cause undue hardship not compensable in damages; the Court be permitted to make an order discharging the agreement and ordering payment for damages for non-performance by the trustee; aggrieved persons be given the status of a creditor of the bankrupt, to the extent of any loss suffered by reason of the disclaimer; and, where the bankrupt is a licensor of intellectual property rights, the licensee have the right to elect – within one month after receipt of the notice of disclaimer – to retain the licence. Recommendations were also made by it with respect to patents, trademarks and trade secrets.

[The Committee received testimony] with respect to patents, trademarks and trade secrets.

… we urge relevant parties to engage in the discussion needed to ensure a satisfactory resolution to the full range of issues identified to us by the Intellectual Property Institute of Canada.

Similarly, Mr. Baird, Q.C., spoke to the Committee about intellectual property issues and noted the debate that has existed for some years about "whether a trustee in bankruptcy or a bankrupt licensor or a debtor under the protection of the CCAA has the right to repudiate licences issued by the bankrupt or the insolvent debtor." In supporting a recommendation made by the Insolvency Institute of Canada, he said that "the BIA and the CCAA [should] be amended to provide protection for a licensee of a right to intellectual property similar to that provided in the United States."

The Writers' Union of Canada also commented on copyright, noting the absence of copyright issues in the CCAA and the extent to which "the *Bankruptcy and Insolvency Act* less frequently applies – or doesn't apply initially. … When [it] does apply, it provides writers with very limited protection and often too late. A receiver or trustee in bankruptcy may already have assigned his or her rights and sold the inventory, short circuiting a possible statutory reversion of rights, depriving the author of possible revenues from sales by the trustee, and interfering with the author's future opportunities for republication." It also recommended that a trustee not be permitted to transfer or assign the copyright, or any interest in it, since the relationship between a writer and his or her publisher is personal; the writer should be permitted to make any alternative arrangements in the event of his or her publisher's insolvency. Finally, the Union commented that there is a lack of clarity about whether a publishing agreement is a partial assignment of copyright or a licensing agreement under which the author retains the copyright.

While we believe that there are a variety of unresolved issues related to the insolvency of a licensor or a licensee in the context of an intellectual property licence, intellectual property law is a highly specialized area and we feel that the limited examination given by the Committee to this particular aspect of insolvency does not enable us to make any meaningful recommendations for change. Nevertheless, we urge relevant parties to engage in the discussion needed to ensure a satisfactory resolution to the full range of issues identified to us by the Intellectual Property Institute of Canada.

More generally, the Committee supports the concept of permitting disclaimer of all executory contracts, since we believe that the flexibility to take this action increases the probability of successful reorganization and thereby – in some sense – a fresher, if not fresh, start for the business. We also feel, however, that the parties to executory contracts should meet in good faith with a view to negotiating mutually acceptable changes to their contract that would enable them to meet their goals and permit the contract to continue, albeit in a changed form. We strongly believe that, in most cases, the parties will be able to come to a successful resolution; however, it is likely that situations will arise in which the parties cannot reach agreement, and in these cases we believe that disclaimer should be permitted by the Court. Nevertheless, disclaimer should only be allowed where certain conditions are met, including good faith attempts to negotiate mutually acceptable changes to the contract and serious hardship in restructuring without the disclaimer. Believing that this approach would enhance fairness, predictability and effectiveness, the Committee recommends that:

… the Committee supports the concept of permitting disclaimer of all executory contracts, since we believe that the flexibility to take this action increases the probability of successful reorganization and thereby – in some sense – a fresh, if not fresher, start for the business.

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit disclaimer of executory contracts in existence on the date of commencement of proceedings under the Acts. This disclaimer should apply to all executory contracts, provided a number of conditions are met. In particular: the debtor should be obliged to establish inability or serious hardship in restructuring the enterprise without the disclaimer; the co-contracting party should be permitted to file a claim in damages in the restructuring; and, where a collective agreement is being disclaimed, the debtor should also have the burden of establishing that post-filing negotiations have been carried on, in good faith, for relief of too onerous aspects of the collective agreement and should establish in Court that the disclaimer is necessary in order to allow for a viable restructuring.

Moreover, the Committee is of the view that trustees, Court-appointed receivers and monitors should be able to assign executory contracts where doing so would enhance the value of the assets and, thereby, moneys available for distribution to creditors. We recognize that while this circumstance would not permit the co-contracting party to choose its commercial partner, we feel that if the co-contracting party is no worse off financially, it would suffer no prejudice. As well, efficiency and effectiveness – two principles that we believe should characterize our insolvency system – would be enhanced. From this perspective, the Committee recommends that:

The *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* be amended to permit trustees, Court-appointed receivers and monitors, if authorized by judgment, to assign executory contracts when appropriate, in connection with going concern transactions and on a liquidation basis, provided that two conditions are met: the proposed assignee is at least as credit worthy as the debtor was at the time the contract was entered into; and the proposed assignee agrees to compensate the other party for pecuniary loss resulting from the default by the debtor or give adequate assurance of prompt compensation.

TAB 14

Court File No.: CV-16-11527-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	**THURSDAY, THE 27TH**
	)	
JUSTICE NEWBOULD	)	**DAY OF OCTOBER, 2016**

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND GOLF TOWN GP II INC.

Applicants

ASSIGNMENT ORDER

THIS MOTION, made by Golf Town Canada Holdings Inc., Golf Town Canada Inc. ("**GT Canada**"), Golf Town GP II Inc., Golf Town Operating Limited Partnership ("**Golf Town LP**") and Golfsmith International Holdings LP (collectively, the "**Golf Town Entities**"), pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") for an Order approving the assignment of certain real property leases (the "**Assignment**") to Golf Town Limited (formerly 9918167 Canada Inc.) (the "**Purchaser**") as contemplated by a Purchase Agreement dated as of September 14, 2016 (the "**Purchase Agreement**") between GT Canada and Golf Town LP (together, the "**Vendors**") and the Purchaser was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavits of David Roussy sworn September 13, 2016 and October 21, 2016, the affidavit of Robert White sworn September 23, 2016 and the third report (the "**Third Report**") of FTI Consulting Canada Inc., in its capacity as monitor of the Golf Town Entities (the "**Monitor**") in the within proceedings, and on hearing the submissions of counsel for the Golf Town Entities, the Purchaser, certain landlords in respect of the Assigned Leases, the Monitor and such other counsel as were present and wished to be heard:

SERVICE AND DEFINITIONS

1. **THIS COURT ORDERS** that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.

2. **THIS COURT ORDERS** that capitalized terms used and not otherwise defined herein shall have the meanings given to them, as applicable, in the Approval and Vesting Order granted in these proceedings on September 30, 2016 (as amended, the "**Approval and Vesting Order**") or the Purchase Agreement.

ASSIGNMENT OF AGREEMENTS

3. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate referred to in the Approval and Vesting Order (the "**Monitor's Certificate**"), all of the rights and obligations of the Vendors under the real property leases set out in Schedule "A" hereto, including all associated or related agreements, schedules, appendices, addendum, amendments, supplements, restatements or other modifications (each an "**Assigned Lease**" and collectively, the "**Assigned Leases**") shall be assigned to the Purchaser pursuant to section 11.3 of the CCAA.

4. **THIS COURT ORDERS** that upon delivery of the Monitor's Certificate, the Purchaser shall be entitled to all of the rights and benefits and subject to all of the obligations and restrictions as tenant pursuant to the terms of the Assigned Leases and registrations thereof and may enter into and upon and hold and enjoy each such premises contemplated by the Assigned Leases and, if applicable, any renewals thereof, for its own use and benefit, all in accordance with the terms of the Assigned Leases, without any interruption from the Vendors, any landlord under an Assigned Lease or any other person claiming through or under the Vendors or a landlord under the Assigned Leases.

5. **THIS COURT ORDERS** that the assignment of the Assigned Leases to the Purchaser pursuant to this Order is valid and binding upon all of the counterparties to the Assigned Leases

notwithstanding any restriction or prohibition contained in any such Assigned Leases relating to the assignment thereof, including, without limitation, any provision requiring the consent of any party to the assignment.

6. **THIS COURT ORDERS** that the Vendors' right, title and interest in and to the Assigned Leases shall vest absolutely in the Purchaser as Purchased Assets in accordance with the provisions of the Approval and Vesting Order, provided that, except as may otherwise be agreed to by the Purchaser and the applicable counterparty to an Assigned Lease (a "**Landlord**"), nothing in the Approval and Vesting Order shall affect the rights and remedies of such Landlord against the Purchaser that may exist or arise under or in respect of an Assigned Lease.

7. **THIS COURT ORDERS** that each Landlord is prohibited from exercising any right or remedy as against the Purchaser by reason of any defaults thereunder arising from the assignment of the Assigned Lease, the insolvency of the Vendors, the commencement of these CCAA proceedings or proceedings in respect of affiliates of the Vendors pursuant to chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 ("**Chapter 11**"), or the Vendors having breached a non-monetary obligation under the Assigned Lease, unless such non-monetary breach arises or continues after the Assigned Lease is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser, and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the Assigned Lease. For clarification purposes, no Landlord shall rely on a notice of default sent to the Vendors to terminate an Assigned Lease as against the Purchaser.

8. **THIS COURT ORDERS** that all monetary defaults in relation to an Assigned Lease existing prior to Closing, if applicable, other than those arising by reason only of the insolvency of the Vendors or their affiliates, the commencement of the CCAA or Chapter 11 proceedings, or the failure to perform a non-monetary obligation under the Assigned Lease, shall be paid to the applicable Landlord no later than three (3) business days following the delivery of the Monitor's Certificate.

9. **THIS COURT ORDERS** the Vendors to send a copy of this Order to each Landlord to an Assigned Lease.

10. **THIS COURT ORDERS** that, notwithstanding anything contained in this Order, nothing shall derogate from the obligations of the Purchaser to assume the Assumed Liabilities and to perform its obligations in respect of the Assigned Leases pursuant to the Purchase Agreement.

11. **THIS COURT ORDERS** that the Monitor is hereby authorized and directed to take such actions as it deems necessary or appropriate in the circumstances to assist the Vendors in the assignment and transfer of the Assigned Leases.

GENERAL

12. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada, the United States, or in any other foreign jurisdiction, to give effect to this Order and to assist the Golf Town Entities, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Golf Town Entities and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding or to assist the Golf Town Entities and the Monitor and their respective agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

OCT 2 7 2016

PER / PAR:

SCHEDULE A
ASSIGNED LEASES

Store No.	City and Province	Address	Lease Date	Landlord / Notice Party
503	Woodbridge, ON	55 Colossus Dr., Unit 122	Feb. 7, 2000	RioTrin Properties (Vaughan 2) Inc. c/o RioCan Real Estate Investment Trust
504	Calgary, AB	47 Shawville Blvd. SE	Sept. 23, 2000	Telsec Property Corporation and Dallas Development Corporation.
505	Edmonton, AB	1940 99th St. NW	Jan. 11, 2001	Riokim Holdings (Alberta) Inc. c/o Riocan Management Inc.
507	Richmond, BC	9751 Bridgeport Rd., Unit 130	Apr. 9, 2001	Airport Gateway Plaza Ltd. c/o Cape Developments Corp.
515	St. Hubert, QC	1571 Boulevard des Promenades	Apr. 10, 2003	Capital Property Development CPD Inc.
519	Montreal, QC	6745 Metropolitaine Est	July 4, 2000	Marche de la Tour St-Leonard
525	London, ON	1250 Fanshawe Park Rd. W, Unit B3	Mar. 28, 2005	Calloway REIT (London N) Inc., Calloway REIT (SW Ontario) Inc., and Canadian Property Holdings (Ontario) Inc. c/o Smart Centres Management Inc.
527	Calgary, AB	11450 Sarcee Trail	May 15, 2006	Trinity Properties Alberta Limited and 2113362 Ontario Limited c/o RioCan Property Services
536	Saskatoon, SK	3015 Clarence Ave. S, Unit 110	Nov. 3, 2006	Saskashop Centres Inc. c/o Smart Centres Management Inc.
549	Toronto, ON	147 Laird Dr., Unit 600	Dec. 22, 2006	Calloway REIT (Leaseside) Inc.
560	Edmonton, AB	5000 Emerald Dr., #300	Sept. 26, 2011	1445006 Alberta Ltd. c/o One Properties Limited Partnership

Court File No: CV-16-11527-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF GOLF TOWN CANADA HOLDINGS INC., GOLF TOWN CANADA INC. AND GOLF TOWN GP II INC.

Applicants

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
Proceeding commenced at Toronto

ASSIGNMENT ORDER

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Lawyers for the Applicants

TAB 15

2011 ABCA 158
Alberta Court of Appeal

Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.

2011 CarswellAlta 883, 2011 ABCA 158, [2011] 8 W.W.R. 221, [2011] A.W.L.D. 2361, [2011] A.J. No. 592, 44 Alta. L.R. (5th) 81, 505 A.R. 146, 522 W.A.C. 146, 77 C.B.R. (5th) 278

Ford Motor Company of Canada, Limited (Appellant / Applicant) and Welcome Ford Sales Ltd. and Royle Smith (Respondents / Respondents)

Ford Motor Company of Canada, Limited (Appellant / Applicant) and Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Myers Norris Penny Ltd. and Bank of Montreal (Respondents / Respondents)

Keith Ritter, Peter Martin, Myra Bielby JJ.A.

Heard: March 4, 2011
Judgment: May 27, 2011
Docket: Edmonton Appeal 1003-0089-AC, 1003-0362-AC

Proceedings: affirming *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.* (2010), 2010 ABQB 199, 2010 CarswellAlta 2518 (Alta. Q.B.)

Counsel: K.B. Mills, K.J. Bourassa for Appellant
J.H. Hockin, B.P. Maruyama for Respondents, Welcome Ford Sales Ltd., Royle Smith, Welcome Ford Sales Ltd., by its Receiver, Manager and Trustee in Bankruptcy, Meyers Norris Penny Ltd.
R.C. Rutman, A.L. Murray for Respondent, Bank of Montreal

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

Related Abridgment Classifications

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

Debtors and creditors

VII Receivers
VII.7 Actions involving receiver
VII.7.e Practice and procedure
VII.7.e.iv Miscellaneous

Headnote

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — General principles

Bankruptcy trustee was granted permission to sell auto dealership agreement to third party over objections of other party to agreement, auto manufacturer — Manufacturer appealed — Appeal dismissed — Manufacturer would receive benefits parties intended to receive when agreement was created — All other rights and obligations under assigned dealership agreement were to remain unchanged but for change in identity of dealer — Chambers judge reasonably concluded that manufacturer unreasonably withheld its consent.

Table of Authorities

Cases considered:

Alberta Health Services v. Networc Health Inc. (2010), 28 Alta. L.R. (5th) 118, 2010 ABQB 373, [2010] 11 W.W.R. 730, 2010 CarswellAlta 1017 (Alta. Q.B.) — considered

Bank of Montreal v. Phoenix Rotary Equipment Ltd. (2007), 53 R.P.R. (4th) 233, 72 Alta. L.R. (4th) 321, 2007 CarswellAlta 172, 2007 ABQB 86, 31 C.B.R. (5th) 201 (Alta. Q.B.) — referred to

Black Hawk Mining Inc. v. Manitoba (Provincial Assessor) (2002), [2002] 7 W.W.R. 104, 2002 CarswellMan 213, 2002 MBCA 51, 163 Man. R. (2d) 215, 269 W.A.C. 215, 29 M.P.L.R. (3d) 163 (Man. C.A.) — considered

Campbell v. Morrison (1897), (sub nom. *Maloney v. Campbell)* 28 S.C.R. 228, 1897 CarswellOnt 18 (S.C.C.) — considered

Canadian Western Bank v. 702348 Alberta Ltd. (2009), 472 A.R. 297, 2009 ABQB 271, 2009 CarswellAlta 641, 55 C.B.R. (5th) 298, 8 Alta. L.R. (5th) 162, [2009] 9 W.W.R. 305, 81 R.P.R. (4th) 288 (Alta. Q.B.) — considered

De Lage Landen Financial Services Canada Inc. v. Royal Bank (2010), 2010 ABCA 394, 2010 CarswellAlta 2428, 73 C.B.R. (5th) 22 (Alta. C.A.) — referred to

Kelly v. Watson (1921), 61 S.C.R. 482, [1921] 1 W.W.R. 958, 57 D.L.R. 363, 1921 CarswellAlta 97 (S.C.C.) — referred to

Shelanu Inc. v. Print Three Franchising Corp. (2003), 64 O.R. (3d) 533, 172 O.A.C. 78, 226 D.L.R. (4th) 577, 38 B.L.R. (3d) 42, 2003 CarswellOnt 2038 (Ont. C.A.) — considered

Struik v. Dixie Lee Food Systems Ltd. (2006), 2006 CarswellOnt 4932 (Ont. S.C.J.) — referred to

Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd. (2005), 2005 ABQB 324, 2005 CarswellAlta 587, 15 C.B.R. (5th) 154, 382 A.R. 383 (Alta. Q.B.) — referred to

Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways) (2010), 397 N.R. 331, [2010] 1 S.C.R. 69, 281 B.C.A.C. 245, 475 W.A.C. 245, 315 D.L.R. (4th) 385, 2010 CarswellBC 296, 2010 CarswellBC 297, 2010 SCC 4, 86 C.L.R. (3d) 163, 65 B.L.R. (4th) 1, [2010] 3 W.W.R. 387, 100 B.C.L.R. (4th) 201 (S.C.C.) — considered

Transamerica Life Canada Inc. v. ING Canada Inc. (2003), [2004] I.L.R. I-4258, 68 O.R. (3d) 457, 2003 CarswellOnt 4834, 41 B.L.R. (3d) 1, 234 D.L.R. (4th) 367 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 84.1 [en. 2005, c. 47, s. 68] — considered

s. 84.1(3) [en. 2005, c. 47, s. 68] — considered

s. 84.1(4) [en. 2005, c. 47, s. 68] — considered

Landlord's Rights on Bankruptcy Act, R.S.A. 2000, c. L-5

s. 8(2) — considered

APPEAL by manufacturer from judgment reported at *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.* (2010), 2010 ABQB 199, 2010 CarswellAlta 2518 (Alta. Q.B.).

***Per curiam*:**

Introduction

1 This appeal was dismissed from the bench with reasons to follow.

2 This was an appeal from a decision granting permission to a bankruptcy trustee to sell an auto dealership agreement to a third party over the objections of the other party to the agreement, an auto manufacturer, pursuant to the provisions of the relatively new s. 84.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA").

3 Welcome Ford, owned by Royale Smith ("Smith"), operated a franchise dealership with the Appellant, Ford Motor Company of Canada, Limited ("Ford") in Fort Saskatchewan, Alberta pursuant to the terms of a written dealership agreement. The dealership ceased operations on January 13, 2010 after Ford Credit Canada Ltd. ("Ford Credit"), while conducting a physical audit on its premises, discovered a large defalcation apparently made by a senior employee of the dealership. The following day, the chambers judge, acting as *de facto* case manager, appointed Myers Norris Penny ("MNP") the Receiver of Welcome Ford on the application of Ford Credit.

4 Ford Credit tendered evidence in support of that application showing that over $3.7 million to which it was entitled had been misappropriated. At that time, Welcome Ford owed Ford Credit approximately $7.7 million and owed the Bank of Montreal ("BMO") approximately $2.7 million. Ford Credit had priority in relation to the vehicle inventory, while BMO had a priority claim to all other assets. As a result, Ford Credit seized and removed all vehicles over which it had security. It is an unsecured creditor for any shortfall on its debt remaining after the sale of those vehicles.

5 The order appointing the Receiver stayed all rights and remedies against Welcome Ford; in particular, it ordered that no agreements then in place, including the dealership agreement, be terminated without consent of the court. Ford advised as early as January 29, 2010 that it would not consent to the assignment/sale of the dealership agreement to any party. However, on March 23, 2010, the chambers judge granted an order authorizing MNP to market the dealership while adjourning Ford Credit's application to lift the stay so as to be able to terminate the dealership agreement ("the March order").

6 On May 19, 2010, BMO obtained an order placing Welcome Ford into bankruptcy with MNP as trustee, which had the effect of making the administration subject to the BIA, including s. 84.1 of that statute.

7 MNP marketed the dealership to existing Ford dealers only, receiving offers to purchase from the ultimate purchaser and two others. Ford maintained its refusal to consent to a sale, even to one of its own dealers, notwithstanding that the offer made by the ultimate purchaser, the highest bidder, would have produced sufficient funds to retire the debt to BMO in its entirely and produce a further $570,000 (before professional fees) to be distributed among the unsecured creditors. In comparison, liquidation of the assets without sale of the dealership agreement was expected to produce a far smaller sum, one which would leave more than $1 million of the debt to BMO unpaid and produce nothing for any other creditor.

8 On December 10, 2010, the chambers judge approved MNP's application to assign the rights and obligations of Welcome Ford under the dealership agreement to the ultimate purchaser pursuant to s. 84.1 of the BIA. At the same time, he dismissed Ford's application for a declaration that the dealership agreement could not be assigned without its consent and to lift the stay ("the December orders"). This appeal was then brought against each of the March and December orders.

9 The BIA was amended on December 15, 2009 by the addition of s. 84.1, which allows a court, upon being satisfied that certain prerequisites are met, to grant an order assigning the rights and obligations of the bankrupt under any agreement to a purchaser, even without the consent of the counter-party to the agreement.

10 The Respondents argued that the dealership agreement was properly assignable to the ultimate purchaser under this section, even absent Ford's consent. Ford argued that the dealership agreement had been terminated as a result of a fundamental breach occurring before the granting of the receivership order such that there was nothing left to assign to the ultimate purchaser. It, alternatively, argued that the dealership agreement is not assignable by reason of its nature and, as such, the issues of whether the ultimate purchaser is able to perform the obligations under it and whether it is appropriate to assign it are irrelevant.

11 The issues raised on appeal are:

(A) Has the dealership agreement terminated because of fundamental breach?

(B) How is s. 84.1 of the BIA to be interpreted?

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

(ii) Are the rights and obligations imposed by the dealership agreement not assignable by reason of their nature because:

(a) the estate will not benefit from the assignment?; or

(b) they are personal in nature?

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?

Standard of Review

12 The standard of review to be applied to the interpretation of s. 84.1 of the BIA, a question of law, is that of correctness. The chambers judge's findings of fact and application of facts to the law are subject to deference absent palpable and overriding error. The application of deference is amplified when, as here, the decision was not issued by a chambers judge in the normal course but by a case management judge whose decision is part of a series of decisions in relation to the same matter: see *De Lage Landen Financial Services Canada Inc. v. Royal Bank*, 2010 ABCA 394 (Alta. C.A.) at para. 13.

Analysis

(A) Has the dealership agreement terminated because of fundamental breach?

13 Ford argued that Welcome Ford "fundamentally breached" the dealership agreement before the appointment of the Receiver, with the result that the agreement came to an end such that nothing remained for the trustee to assign to the ultimate purchaser. It submitted the acts amounting to "fundamental breaches" include the abandonment of the business on January 13, 2010 and Smith's failure to properly supervise employees.

14 We note the decision of the Supreme Court of Canada in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.) to the effect that the concept of fundamental breach no longer exists, at least in relation to exclusion clauses. The Court stated at 62:

> On the issue of fundamental breach in relation to exclusion clauses, my view is that the time has come to lay this doctrine to rest, ..."

and at 82:

> On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. ...

15 As no party raised this issue, and the breaches in question here were not of exclusion clauses, we will proceed to our analysis on the basis of the case as argued. That said, it may well be that the simple answer to the issue of whether the dealership agreement was terminated as a result of fundamental breach must be "no" because no such breach was possible.

16 Ford agreed the test for fundamental breach and its application to a franchise agreement is that relied upon by the chambers judge, established in *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (Ont. C.A.) at paras. 113 and 114 as follows:

> [113] In *Majdpour v. M & B Acquisition Corp.* (2001), 56 O.R. (3d) 481, 206 D.L.R. (4th) 627 (C.A.), the event alleged to have triggered a fundamental breach of the franchise agreement by the franchisor was a bankruptcy. Because the franchisee was able to carry on the commercial purpose of the agreement intact after the bankruptcy, MacPherson J.A. dismissed the franchisee's claim [sic] it was discharged from further performance. That reasoning is equally applicable in this case.
>
> [114] In dismissing the claim for fundamental breach, MacPherson J.A. noted that the test was a restrictive one, namely, whether the conduct of one party deprived the other party of "substantially the whole benefit of the contract" as stated by Wilson in *Hunter Engineering*, *supra*. This is the classic formulation of the test as set out by Diplock L.J. in *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 1 All E.R. 474, [1962] 2 Q.B. 26 (C.A.) at p. 66 Q.B.:
>
> > [D]oes the occurrence of the event deprive the party who has further undertakings still to perform of substantially the benefit which it was the intention of the parties as expressed in the contract that he should obtain in consideration for performing those undertakings?

17 In application of this test to the facts in this case, the question becomes whether the "abandonment" of the business or Smith's failure to supervise employees, leading to the defalcation, deprived Ford of the ability to carry on the commercial purpose of the dealership agreement.

18 The chambers judge concluded that the reason Welcome Ford had not operated since mid-January, 2010 was not for lack of trying by the Receiver, but rather because it was met at every step by resistence from Ford. Without receipt of new product and manufacturer's support of that product, the Receiver could not operate the dealership. He found that the proposed sale of the dealership including the dealership agreement would substantially, if not entirely, cure all of the alleged defects under that agreement.

19 It is not clear from the evidence that the dealership business was "abandoned", as suggested by the Appellant. Rather, Ford Credit arrived unannounced to conduct an audit in early January, 2010. The manager, Greg Duffy, sent the staff home on January 13. He remained on the premises both that day and the next, when the receivership order was obtained. He advised the Receiver that he had been involved in improprieties relating to cars, money or business arrangements on the premises for the past eight years and that the owner of the dealership had for years been residing in the Dominican Republic.

20 MNP did not reopen the dealership. It pressed Ford for its consent to a sale/assignment of the dealership agreement. On January 29, 2010, Ford advised that it would not consent, a position it consistently maintained thereafter. It advised by letter dated February 12, 2010 that it had no obligation under the dealership agreement to do business with the

Receiver or its assignee. Ford Credit removed the vehicles upon which it had security. For the first time on February 24, 2010, Ford took the position that there had been a fundamental breach of the dealership agreement.

21 Ford argued the dealership agreement provided that a closure of the business for seven days constituted an event allowing for termination of the agreement (see clause 17(b)(3)(ii)). However, clause 17(b) of that agreement also provides that termination is only effective upon such an event occurring where Ford elects to terminate and gives the dealer 15 days written notice of its intention to do so. In this case, the first notice of termination given by Ford was six weeks after the Receiver was appointed, well after Ford had taken the position it would not cooperate with any assignment.

22 Ford argued this situation is akin to that faced by Yamauchi, J. in *Canadian Western Bank v. 702348 Alberta Ltd.*, 2009 ABQB 271, 472 A.R. 297 (Alta. Q.B.), commonly known as the *Guild* decision, where he found fundamental breach of various leases of a commercial building in relation to a builder who went into receivership prior to the completion of construction. The Receiver did not have sufficient funding to complete construction and did not do so. Justice Yamauchi declared that two of the tenants had properly terminated their leases, finding fundamental breach had occurred because of the indefinite delay in construction. The Receiver had provided no evidence as to when a potential purchaser might recommence construction.

23 The chambers judge properly distinguished *Guild* by noting that there the Receiver decided not to remedy the lease breaches through completion of construction, whereas here Ford advised the Receiver early on that it would not consent to the Receiver's operation of the dealership. Here, in other words, it was the counter-party to the agreement who refused performance rather than the Receiver. He found that it was Ford which was blocking the breach from being remedied by refusing to cooperate with the reopening of the business by the Receiver.

24 In *Guild*, it was not clear when, if ever, the buildings which were the subject of the leases in question would be completed (i.e., when the tenants would obtain the commercial benefit they were intended to receive under the leases). Here, Ford would obtain the commercial benefit under the dealership agreement immediately upon its consenting to the Receiver operating it or, alternately, to its sale to a party who could operate it. Ford's refusal to cooperate was the only reason the agreement could not be performed. It, as franchisee, was capable of carrying on the commercial purpose of the dealership agreement; it simply chose not to do so, which falls far short of meeting the test for fundamental breach established in *Shelanu*.

25 In relation to the argument that Smith failed to properly supervise his employees with the result that the defalcation occurred, Ford tendered a Statement of Claim which maintained that a Welcome Ford manager misappropriated over $1.2 million by way of fraud. The chambers judge noted the lack of evidence that Smith was involved in the fraud or any convincing evidence of resulting damage to Ford's reputation. Needless to say, the manager in question was no longer employed by the time the sale was approved. There was no evidence before the chambers judge to support the suggestion that the manager's alleged prior activities would cast a pall over the operation of a Ford dealership in Fort Saskatchewan in the future.

26 The ultimate purchaser stood ready to reopen the dealership for business upon receiving court approval of the purchase. Any deficiencies in Smith's supervision disappeared with his removal from the business. Upon the reopening of the dealership, there is nothing to suggest that Ford would not be able to carry on the commercial purpose of the dealership agreement. It would not be deprived of the benefits it was intended to receive; indeed, the sooner the sale was effected, the sooner the flow of those benefits would resume.

27 The chambers judge concluded at para. 95 of the December decision: "I am comfortable that the proposed sale of the Welcome Ford dealership will substantially cure the breaches of the [dealership agreement], of which Ford Motor complains". The proposed sale cured the effect of those breaches in that it put a financially sound, experienced person in charge of the resumed operation in the form of a new business operating outside of the receivership. The chambers judge also expressly observed that Ford's rights and remedies will continue unchanged, including the right of first refusal and the right to take steps to terminate the dealership agreement if the purchaser defaults in the future.

28 The standard of review in relation to the chambers judge's findings of fact and application of facts to the law are subject to deference absent clear and palpable error. The application of deference is amplified when, as noted above, the judge is a case management judge whose decision is part of a series of decisions. His decision that no fundamental breach of the dealership agreement had occurred was reasonable and is entitled to our deference. Indeed, had we been required to consider the issue of correctness, we would have concluded his decision to be correct. The ultimate purchaser will be able to perform the dealers obligations under the agreement such that its commercial purpose will be effected. Ford will receive the benefit the parties intended it to receive when that agreement was created.

(B) How is s. 84.1 of the BIA to be interpreted?

29 The position at common law was always that if one party breached a condition (and not a mere warranty) in a contract, the other party to that contract had an election, either to treat the contract as continuing and insist on future performance, or to accept the repudiation and bring the contract to an end. In the latter case certain obligations survived the termination depending upon the construction of the contract.

30 The effect of s. 84.1 of the BIA is to override the common law unilateral right of the innocent party to the contract to accept the repudiation and end the contract. It has been designed to preserve the value of the estate as a whole, even if the contractual rights of some creditors, such as Ford in this case, are compromised. Therefore, even if Ford otherwise had the right to terminate the dealership agreement for breach of condition, and its assignment clause was not one which survived the termination, s. 84.1 nonetheless allows the trustee to apply to the Court for permission to assign the contract so long as the provisions of the statute are met.

31 Ford argues that the provisions of s. 84.1 which are prerequisite to granting permission to assign have not been met.

32 Section 84.1 reads in part:

> (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.
>
> . . .
>
> (3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature ...
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
>> (a) whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
>>
>> (b) whether it is appropriate to assign the rights and obligations to that person.

33 The Appellant did not argue, nor did the chambers judge find, that s. 84.1 expressly excludes auto dealership agreements from its operation. Indeed, the word "agreement" found in that section is wide enough to cover this type of agreement. The chambers judge correctly concluded, therefore, that he had jurisdiction under s. 84.1 to order the assignment (sale) in the proper circumstances.

34 Ford argued, rather, that those proper circumstances did not exist, as discussed below.

(i) Is s. 84.1(3) to be interpreted without reference to s. 84.1(4)?

35 Ford argued that whether the rights and obligations of an agreement are assignable "by reason of their nature" pursuant to s. 84.1(3) must be decided before, and independently of, any consideration under s. 84.1(4) as to whether the

proposed assignee is capable of performing the obligations and it is appropriate to assign the rights and obligations. If so, it is irrelevant that the ultimate purchaser is an otherwise approved dealer and a proven performer. The issue of whether the nature of the agreement precludes its assignment would thus have to be resolved independently of any consideration of whether the agreement's commercial purpose would be achieved in the hands of the proposed assignee.

36 This interpretation is not supported by the literal words found in s. 84.1 which do not make a determination under s. 84.1(3) an independent precondition to a determination under s. 84.1(4). Legislative intent may be taken into account as an aide to interpretation only in the case of ambiguity in the words of the statute. Even if such an ambiguity existed here, and one is not apparent, Parliament's intent does not support Ford's interpretation. The chambers judge concluded that s. 84.1 should be interpreted in light of Parliament's intention that the provision be used to protect and enhance the assets of the estate of a bankrupt by permitting the sale/assignment of existing agreements to third parties for value: see Houlden, Morawetz and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., looseleaf (Toronto: Carswell, 2009) vol. 2 at 3-499. He purported to interpret s. 84.1 in the context of its role as remedial legislation.

37 Prior to the coming into force of s. 84.1 in 2009, a trustee in bankruptcy could not assign (sell) a contract to a third party where the counter-party to that contract opposed the assignment. As a result, a bankrupt estate was vulnerable to losing the benefit of a valuable contract to the detriment of the estate and often to the detriment of third parties.

38 The estate of a bankrupt may include various forms of property. Sometimes the most valuable property in an estate will be the contractual rights possessed by the bankrupt as of the date of bankruptcy. Those rights may be embodied in, for example, a franchise agreement, a purchase agreement, a license agreement, a lease, a supply agreement or an auto dealership agreement.

39 The clear intent of Parliament in enacting s. 84.1 of the BIA was to address this vulnerability; it made a policy decision that a court ought to have the discretion to authorize a trustee to assign (sell) the rights and obligations of a bankrupt under such an agreement notwithstanding the objections of the counter-party.

40 A statutory provision analogous to s. 84.1 is that of s. 8(2) of the *Landlord's Rights on Bankruptcy Act*, R.S.A. 2000, c. L-5. It provides that, notwithstanding the legal effect of a provision in a lease purporting to terminate the lease upon the tenant becoming bankrupt, the trustee in bankruptcy may elect to retain the leased premises for some or all of the unexpired term of the lease. The trustee may then, upon payment of all overdue rent, assign the lease to a capable third party upon securing an order to that effect from the Court of Queen's Bench. The purpose of the legislation is to enable the trustee to maximize realization without putting the landlord in any worse position that it would have been under the lease before the bankruptcy: see *Bank of Montreal v. Phoenix Rotary Equipment Ltd.*, 2007 ABQB 86 (Alta. Q.B.) at para. 51, (2007), 72 Alta. L.R. (4th) 321 (Alta. Q.B.).

41 Similarly, s. 84.1 of the BIA allows a court to approve the assignment (sale) of any agreement to obtain maximum benefit for creditors upon payment of any monetary breaches and upon concluding that the rights and remedies of the counter-party will be preserved.

42 Ford suggested the contrary, offering an extract from the Briefing Book placed before Parliament when it considered this amendment. The Briefing Book gives as a reason for the enactment of the language "not assignable by reason of its nature" (then subsection 3(d)) that it "is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment". It further states, "[s]ubsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations". These stated purposes are not, however, mutually exclusive.

43 Rather, to the extent that legislative intent is at all relevant, it is as described by the chambers judge as well as Justice Romaine of the Alberta Court of Queen's Bench in *Alberta Health Services v. Networc Health Inc.*, 2010 ABQB 373 (Alta. Q.B.) at para. 20, (2010), 28 Alta. L.R. (5th) 118 (Alta. Q.B.):

> The BIA is remedial legislation. It is clear that it should be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": *Interpretation Act*, R.S.C., 1985, c. I-21 at section 12. In *Mercure v. A. Marquette & Fils Inc.*, [1977] 1 S.C.R. 547 at 556, the Supreme Court commented:
>
> > Before going on to another point it is perhaps not inappropriate to recall that the *Bankruptcy Act*, while not business legislation in the strict sense, clearly has its origins in the business world. Interpretation of it must take these origins into account. It concerns relations among businessmen, and to interpret it using an overly narrow, legalistic approach is to misinterpret it.

44 Ford has suggested no business reason to support its interpretation of s. 84.1(3) and (4). There is no apparent reason as to why appropriateness of the assignment or the capability of the proposed assignee would not be relevant to determining whether the rights and obligations are assignable by their nature. Rather, the opposite would appear to be true.

45 Therefore, I conclude that s. 84.1(3) is to be interpreted upon considering, among other things, the capacity of the proposed assignee and whether it is appropriate to assign the rights and obligations as set out in s. 84.1(4).

(ii)(a) Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because the estate will not benefit from the assignment?

46 Ford argued that a court should not exercise its discretion under s. 84.1 to override the Appellant's clear contractual rights to withhold consent to the sale of the dealership in the absence of very clear evidence that the bankrupt estate will benefit: see *Teragol Investments Ltd. v. Hurricane Hydrocarbons Ltd.*, 2005 ABQB 324 (Alta. Q.B.) at para. 11, (2005), 382 A.R. 383 (Alta. Q.B.); *Kelly v. Watson* (1921), 61 S.C.R. 482 (S.C.C.) at 490, [1921] 1 W.W.R. 958 (S.C.C.). However, unlike the Courts in these two cases, the chambers judge here was not asked to re-write or make the parties' contract by implying missing terms in the existing contract. All other rights and obligations under the assigned dealership agreement were to remain unchanged but for the change in the identity of the dealer from Welcome Ford to the ultimate purchaser.

47 Ford suggested that the chambers judge lacked clear evidence that the proposed assignment would benefit the estate. However, he described the supporting evidence at para. 52 of the December decision, which he found in the addendum to MNP's fourth report. Concluding that an assignment of the dealership agreement would benefit the creditors and enhance the value of the estate, the addendum confirmed that an *en bloc* sale of the assets of Welcome Ford which included the dealership agreement would result in full satisfaction of its indebtedness to BMO, would not prejudice Ford Credit's recovery on its secured collateral, and might make funds available for the unsecured creditors. Ford submitted that this evidence is nonetheless inadequate, criticizing MNP's method of marketing the land on which the dealership was located and the fact that the proposed sale would not, as a certainty, assure any recovery for the unsecured creditors.

48 This criticism falls far short of being persuasive given that the alternative, termination of the dealership agreement, would not generate sufficient funds to satisfy even the secured creditors. The chambers judge's conclusion that the proposed assignment (sale) would benefit the estate is therefore reasonable and deserving of deference.

(ii)(b) Are the rights and obligations established by the dealership agreement not assignable by reason of their nature because they are personal?

49 The dealership agreement expressly provides, among other things, that:

> (a) Ford reserves the sole discretion to determine, from time to time, the numbers, locations and sizes of its franchised dealers;
>
> (b) The dealership agreement is personal in nature and Ford expressly reserves the right to execute dealership agreements with individuals and others specifically selected and approved by it;

> (c) Ford has the right to approve or decline to approve any transfer or change in voting control of a dealer based on the character, automotive experience, management, capital and other qualifications of the acquirer of the voting control, or the equity or beneficial interest, or the dealership business or its principal assets;
>
> (d) Ford acknowledges a responsibility to ensure that dealers are owned and operated by qualified individuals of good reputation who are able to meet the requirements of the dealership agreement and the challenges of the marketplace;
>
> (e) The dealership agreement may be terminated upon the happening of a number of events, including any transfer or attempted transfer by the dealer of any interest, right, privilege or obligation under the dealership agreement, or transfer by operation of law or otherwise of the principal assets of the dealer without the consent of Ford which "shall not be unreasonably withheld"; and
>
> (f) Where there is a change in voting control of the principal owners of the dealership or a transfer of the dealership business or its principal capital assets, Ford's written approval is required; in declining any such approval (not to be unreasonably withheld), Ford has the right to consider the character, automotive experience, management capital and other qualifications of the proposed acquirer.

50 Ford argued that these provisions characterize the dealership agreement as "personal" to the parties who executed it, and therefore non-assignable notwithstanding the express provision permitting assignment with Ford's permission. The chambers judge concluded otherwise. The dealership agreement was not a "personal contract" which by its "nature" could not usefully be performed by another. Instead, he described it as "a rather standard commercial franchise which could be performed by virtually any business person and entity with some capital and experience in automotive retailing" (para. 73). As such, it did not fall within the s. 84.1(3) exception.

51 The dealership agreement is the same type of agreement as that found to be distinguishable from an employment or "personal service arrangement" by the Ontario Superior Court of Justice in *Struik v. Dixie Lee Food Systems Ltd.*, 2006 CarswellOnt 4932 (Ont. S.C.J.) at para. 69.

52 Parties to a contract cannot insulate it from the effect of s. 84.1 simply by including a clause describing it as creating "personal" obligations where the contract is, in fact, a commercial one which could be performed by many others than the contracting parties.

53 Ford correctly pointed out that s. 84.1(3) does not speak of a personal contract as being the only type of contract which contains rights and obligations that are not assignable by their nature. It argued that the above terms of the dealership agreement evidence that it is not assignable by reason of its nature even if it is not a personal contract.

54 However, those express provisions — including those which describe it as personal in nature as well as Ford's reservation of the right to execute dealership agreements with those specifically selected and approved by it — are not sufficient to attract the application of s. 84.1(3) if other circumstances suggest the contrary. Otherwise, s. 84.1(4) would have no meaning, if a simple contractual provision to the effect that it was not "by reason of its nature" capable of unilateral assignment would be enough to make that so.

55 Ford accepted that the test to be applied to determine if the dealership agreement contains rights and obligations which by their nature are not assignable is that set out in *Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)*, 2002 MBCA 51 (Man. C.A.) at paras. 79, 81- 82, [2002] 7 W.W.R. 104 (Man. C.A.). At para. 82 of *Black Hawk Mining*, the Manitoba Court of Appeal cited *Campbell v. Morrison* (1897), 28 S.C.R. 228 (S.C.C.) at 233 as follows:

> Agreements are said to be personal in this sense when they are based on confidences, or considerations applicable to special personal characteristics, and so cannot be usefully performed to or by another.

56 Ford argued that it requires its dealers to have special personal characteristics, including specific requirements of knowledge, capital and experience. It led evidence that the value of a dealership is based primarily on the ability of the person operating it. However, the test for "non-assignability" found in *Black Hawk Mining* is not that it is important to Ford who would be performing the rights and obligations of Welcome Ford in the future, but rather whether those rights and obligations cannot be performed by the proposed assignee.

57 In any event, the evidence did not support the argument that it was important to Ford to have Smith and no other act as the Welcome Ford dealer. The chambers judge relied upon the fact that there was no evidence Ford had made any inquiry in respect of Smith, the owner of Welcome Ford, before signing the original dealership agreement or its most recent renewal in 2007, even to the extent of a credit check or confirmation as to his or the dealership's financial status from their bankers. Indeed, Ford did not know that Smith had relocated to the Dominican Republic well before the receivership order was granted; there was no evidence that it monitored him or stayed in regular contact with him throughout the period he controlled Welcome Ford.

58 Ford responded that it had no ability to review the qualifications of dealers when the 2007 renewal was signed; it was the dealers alone who had the obligation of signing onto the new form or continuing with the extant form of agreement. However, Ford was presumably responsible for the drafting of the original dealership agreement signed by Smith. If it failed to provide for ongoing proof of financial and other stability, that is an indicator that Ford did not consider those factors to be important.

59 The gist of the dealership agreement is that Ford agreed to provide automobiles to Welcome Ford, who in turn agreed to purchase and pay for them, and thereafter to promote their sale and provide after-market service. The operation of this agreement unfolded in a commercial manner. The evidence did not disclose anything which Smith alone could or did provide. The conclusions of the chambers judge that nothing in the agreement rendered it unassignable, either because it was said to be "personal" or not to be assigned without Ford's consent, are reasonable and should be accorded deference.

(iii) Should the dealership agreement not be assigned because of the capacity of the proposed assignee or because it is inappropriate to assign Welcome Ford's rights and obligations under s. 84.1(4)?

60 Section 84.1(4) of the BIA directs a judge, in determining if an order approving an assignment (sale) is to be made, to consider whether the party to whom the rights and obligations are proposed to be assigned can perform those obligations in the same manner as the original dealer. If not, court approval of the assignment should be withheld.

61 Ford argued the chambers judge did not have sufficient evidence to be able to conclude that the principal of the ultimate purchaser, the proposed assignee, would be able to perform the dealership obligations in the same fashion as had Smith. Notwithstanding the fact that principal was already successfully operating another Ford dealership in the area, Ford argued there was no evidence before the chambers judge as to i) the financial capability of its principal (even though he was proposing to make the purchase without the need of financing), ii) a business plan for operating multiple dealerships, or iii) his ability to satisfy Ford's criteria for owning and operating multiple dealerships.

62 Presumably some, if not all, of this evidence would have been internally available to Ford, yet it led no evidence to show any disability on the part of the ultimate purchaser. The chambers judge expressly relied on unchallenged affidavit evidence from another local Ford dealer to the effect that the proposed assignee had an excellent track record in terms of operating a profitable Ford dealership and had received many national awards from Ford over the years; the quality of its business premises met Ford's standards, unlike those which Ford had permitted Welcome Ford to operate. From this, the chambers judge inferred that the proposed assignee had both the capital and relevant experience in automotive retailing to enable him to operate the Welcome Ford dealership.

63 Ford went on to argue that the "good faith" obligation imposed on the parties under the dealership agreement takes into account the particular dealer. It is akin to the duty of good faith found in an employment contract: see *Transamerica*

Life Canada Inc. v. ING Canada Inc. (2003), 68 O.R. (3d) 457 (Ont. C.A.) at para. 46. This means Ford would have a right of action for damages where a dealer breached the duty of fair dealing in the performance or enforcement of the dealership agreement: see Frank Zaid, *Canadian Franchise Guide*, looseleaf (Toronto: Thomson Reuters, 1992) at 2-142Z.36.

64 An assignment to any third party could conceivably increase the risk of that party not honouring its good faith obligation. However, the dealership agreement will be assigned only upon the court finding the appropriate prerequisite capability, with the resulting reduction in risk that the new dealer will be less honest than the old. Indeed, in this situation where the former dealership encountered a significant problem with employee misappropriation, these risks will likely be well reduced by the proposed assignment to an existing Ford dealer who presumably operates its other dealerships under a similar "good faith" obligation.

65 Section 84.1(4) of the BIA also directs a judge, in determining if an order approving an assignment (sale) should be made, to consider whether it is appropriate to assign the rights and obligations under the agreement.

66 The chambers judge assumed, for the purposes of his decision, that "the consent of Ford Motor to the proposed assignee is required", and that the unreasonable failure to provide that consent is a consideration in determining that it is appropriate to nonetheless assign (sell) the agreement. There is nothing in s. 84.1 which expressly requires that the consent of the contracting party be canvassed as a prerequisite to the application for approval of an assignment of an agreement. The chambers judge did not find that such canvassing was required; he simply assumed it was for the purpose of his analysis. There is no reason to interpret the section as containing such an implicit prerequisite. Rather, an unreasonable withholding of consent is simply one factor to consider in determining whether it is otherwise appropriate to assign the agreement pursuant to s. 84.1(4).

67 The chambers judge found that Ford would never consent to the assignment of this dealership agreement because it would not consent to the assignment of any dealership agreement where a dealership had ceased operation. In withholding consent, Ford had not taken into account the merits of the proposed assignee. The chambers judge therefore concluded that Ford had unreasonably withheld its consent.

68 Ford argued that a wider investigation needed to be undertaken when determining the appropriateness of assigning the dealership agreement than simply one of its refusal to consent. This investigation would canvass the terms of the agreement, the departing dealer's misconduct, the Receiver's failure to continue to operate the dealership pending approval of the proposed sale, Ford's standard criteria when considering a request to assign a dealership agreement outside of an insolvency context, and the results of an analysis it had done subsequent to the closure of Welcome Ford which concluded that future direct representation of the Ford brand was not warranted in the Fort Saskatchewan area.

69 While the chambers judge described his investigation into these issues as "limited", he did consider factors in addition to Ford's unreasonable refusal to consent. Those other factors were the uncontradicted evidence that the ultimate purchaser was up to the job, his conclusion that the proposed assignment would substantially cure the breaches which Ford argued were fundamental, and that all of Ford's rights and remedies under the dealership agreement would be preserved against the proposed assignee. There was no obligation upon the chambers judge to expressly address each additional factor which Ford argued should bear on his determination. His approval of the assignment conveys the results of his assessment of those arguments.

70 Ford argued that the chambers judge should not have considered its failure to consent to any assignment as a factor at all; to do so would amount to a limitation on access to justice in a new area in which it wished to test the effects of s. 84.1 of the BIA. Even if that is so today, it does not counteract the other reasons given by the chambers judge for concluding that it was appropriate to approve the assignment.

71 In summary, the chambers judge concluded the dealership agreement was assignable by reason of its nature based on an assessment of evidence showing the proposed assignee would be able to discharge the dealer's obligations thereunder

and upon concluding that it was appropriate to assign the agreement based on evidence that Ford unreasonably withheld its consent, that the effect of earlier breaches of the agreement would be remedied through its assignment, and that Ford's rights and remedies under the agreement would carry on unchanged. That decision was reasonable; deference should be accorded to it.

Conclusion

72 The appeal is dismissed.

Costs

73 The parties advised they had agreed each should bear their own costs of this appeal given that it involved the interpretation of a hitherto uninterpreted statutory provision. For that reason, the normal rule that the victor is entitled to costs will not be followed. Each party is to bear its own costs of this appeal.

Appeal dismissed.

End of Document

TAB 16

Bill Clause No. 128
Section No. 11.3
Topic: Assignments

Proposed Wording

11.3 (1) The court may, on the application of a debtor company, make an order assigning the rights and obligations of the company under any agreement to any person, to be specified by the court, who has agreed to the assignment.

(2) The applicant must give notice of the assignment in the prescribed manner to every party to the agreement.

(3) Subsection (1) does not apply in respect of rights and obligations

(a) under an eligible financial contract within the meaning of subsection 11.05(3);

(b) under a collective agreement; or

(c) that are not assignable by reason of their nature.

(4) In deciding whether to make an assignment, the court must consider, among other things,

(a) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(b) whether it would be appropriate to assign the rights and obligations to that person.

(5) The court may not make an order assigning an agreement unless it is satisfied that all financial defaults in relation to the agreement will be remedied.

Rationale

The intention of the reform is to protect and enhance the assets of the debtor company by allowing the debtor company to assign existing agreements to third parties for value.

Subsection (1) requires that court approval be obtained because there may be valid concerns that the party to whom the debtor company wishes to assign the agreement may not be appropriate. The court can act as a disinterested third party to make a determination of the appropriateness of the proposed assignee based on the facts of the particular case.

A court hearing will only be required in circumstances where a counter-party refuses to agree to an assignment or an assignment to a particular third party. Subsection (2) is intended to ensure that the counter-parties to the agreement have an opportunity to present their interests to the court.

Subsection (3) excludes certain agreements from the application of the section. Paragraphs (a) and (b) refer to agreements that have special treatment under the CCAA (Companies' Creditors Arrangement Act) and assignment would be contrary to that treatment. Paragraph (c) provides the court with the opportunity to extend the exclusion provision to include agreements that it considers non-assignable due to the agreements nature. The last paragraph is intended to provide flexibility to the court to review each agreement in light of the circumstances to determine whether or not it would be appropriate to allow the assignment.

Subsection (4) provides the courts with legislative guidance as to when an agreement may be assigned. The guidance is limited to enable the court to exercise its discretion to address individual fact situations.

Subsection (5) provides balance between the interests of the debtor and counter-parties to an agreement that is to be assigned. It would be unfair that the estate benefit financially by an assignment at the same time that a counter party is required to take a loss. If the agreement is in financial default, the counter-party would only have a claim against the debtor in bankruptcy.

Present Law

None.

Senate Recommendation

The reform follows Senate recommendation #31.

TAB 17

2009 CarswellOnt 8071
Ontario Superior Court of Justice

Nexient Learning Inc., Re

2009 CarswellOnt 8071, [2009] O.J. No. 5507, 183 A.C.W.S. (3d) 636, 62 C.B.R. (5th) 248

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended, And In the Matter of a Plan of Compromise or Arrangement of Nexient Learning Inc. and Nexient Learning Canada Inc.

H.J Wilton-Siegel J.

Heard: November 30, 2009
Judgment: December 23, 2009
Docket: CV-09-8257-00CL

Counsel: George Benchetrit for Nexient Learning Inc., Nexient Learning Canada Inc.
Margaret Sims, Arthi Sambasivan for Global Knowledge Network (Canada) Inc.
Catherine Francis, David T. Ullman, Melissa McCready for ESI International Inc.
Lynne O'Brien for Monitor

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.2 Initial application
XIX.2.e Proceedings subject to stay
XIX.2.e.ii Contractual rights

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Proceedings subject to stay — Contractual rights

Debtor obtained certain materials from licensor pursuant to license agreement — License agreement granted debtor exclusive and perpetual use of materials on royalty-free basis subject to certain conditions — Agreement was not assignable on stand-alone basis but could be assigned in context of major changes in ownership — Licensor was entitled to terminate agreement on basis of insolvency of debtor — Debtor successfully applied for protection under Companies' Creditors Arrangement Act ("CCAA") — Licensor unsuccessfully tried to terminate license agreement — All of debtor's assets were sold to proposed assignee — License agreement was not listed among debtor's assets but assignee wished to assume it — Debtor brought motion for order permanently staying licensor's right of termination and authorizing assignment of license agreement to proposed assignee — Motion dismissed — Court had authority to grant requested relief but only when doing so was important to reorganization process — Such relief had only been granted when sale of debtor's assets could not otherwise proceed — Underlying considerations included purpose and spirit of CCAA proceedings and effect on parties' contractual rights — In this case, asset sale had proceeded without regard to whether agreement would be assigned or not and without notice to licensor — Requested relief would currently have no impact on CCAA proceedings — Another factor was proposed assignee's decision not to assume companion agreement that debtor had with licensor — Granting requested relief at this point would amount to unfair interference with licensor's contractual rights.

Table of Authorities

Cases considered by *H.J Wilton-Siegel J.*:

Playdium Entertainment Corp., Re (2001), [2001] O.T.C. 828, 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309 (Ont. S.C.J. [Commercial List]) — followed

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — followed

Statutes considered:

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

s. 11(4) — referred to

s. 11(4)(c) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01(6) — referred to

MOTION by debtor for order permanently staying licensor's right to terminate license agreement and authorizing assignment of license agreement to proposed assignee.

***H.J Wilton-Siegel J.*:**

1 On this motion, the applicants, Nexient Learning Inc. and Nexient Learning Canada Inc. (collectively, "Nexient") and Global Knowledge Network (Canada) Inc. ("Global Knowledge"), seek an order authorizing the assignment of a contract from Nexient to Global Knowledge on terms that would permanently stay the right of the other party to the contract, ESI International Inc. ("ESI"), to exercise rights of termination that arose as a result of the insolvency of Nexient. ESI is the respondent on the motion, which is brought under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") as a result of Nexient's earlier filing for protection under that statutue.

Background

The Parties

2 Nexient Learning Inc. and Nexient Learning Canada Inc. are corporations incorporated under the laws of Canada.

3 Global Knowledge is a corporation incorporated under the laws of Ontario carrying on business across Canada.

4 ESI is a United States corporation having its head office in Arlington, Virginia.

5 Nexient was the largest provider of corporate training and consulting in Canada. It had three business lines, which had roughly equal revenue in 2008: (1) information technology ("IT"); (2) business process improvements ("BPI"); and

(3) leadership business solutions. The BPI line of business was principally comprised of three subdivisions — business analysis ("BA"), project management ("PM") and IT Infrastructure Library Training.

6 The curriculum and course materials offered by Nexient in respect of its PM programmes were licenced to Nexient by ESI pursuant to an agreement dated March 29, 2004, as extended by a first amendment dated January 16, 2006 (collectively, the "PM Agreement"). The PM Agreement granted Nexient an exclusive licence to offer the ESI PM course materials in Canada in return for royalty payments. The PM Agreement expires on December 31, 2009.

7 Similarly, the curriculum and course materials offered by Nexient in respect of its BA programmes were licenced to Nexient by ESI pursuant to an agreement dated January 16, 2006 ("BA Agreement"). The BA Agreement was executed in connection with a transaction pursuant to which ESI received the rights to BA materials from a predecessor of Nexient in return for payment of $2.5 million and delivery of the BA Agreement to the Nexient predecessor. The BA Agreement provided for a perpetual, exclusive royalty-free licence to use such BA materials in Canada.

8 ESI is a significant participant in the market for project management, business analysis, sourcing management training and business skills training. It offers classroom, on-site, e-training and professional services. To deliver its services, ESI typically enters into distributorship arrangements with distributors in countries around the world, which it describes as "strategic partnering arrangements". In Canada, ESI considers Nexient to be its "strategic partner". That arrangement is defined by the PM Agreement, the BA Agreement and, according to ESI, oral understandings and a course of dealings between ESI and Nexient that collectively constitute an "umbrella" agreement.

9 Global Knowledge Training LLC, a United States corporation ("Global Knowledge U.S."), is the parent corporation of Global Knowledge. Together with its affiliates, Global Knowledge U.S. is one of ESI's largest competitors.

Relevant Provisions Of The BA Agreement

10 Despite the grant of a perpetual licence in section 2.1, the BA Agreement provides for three "trigger" events giving rise to a right to terminate the contract. Of the three termination events, the following two are relevant:

> 6. Term and Termination
>
> 6.2 Upon written notice to [Nexient], ESI will have the right to terminate this Agreement in the event of any of the following:
>
> . . . . .
>
> 6.2.2 [Nexient] commits a material breach of any provision of this Agreement and such material breach remains uncured for thirty (30) days after receipt of written notification of such material breach, such written notice to include full particulars of the material breach.
>
> 6.2.3 [Nexient] (i) becomes insolvent, (ii) makes an assignment for the benefit of creditors, (iii) files a voluntary petition in bankruptcy, (iv) an involuntary petition in bankruptcy filed against it is not dismissed within ninety (90) days of filing, or (v) if a receiver is appointed for a substantial portion of its assets.

11 Pursuant to section 8.5, the BA Agreement is not assignable by either party except in the event of a merger, acquisition, reorganization, change of control, or sale of all or substantially all of the assets of a party's business.

12 Section 8.7 of the BA Agreement provides that the agreement is governed by the laws of Virginia in the United States. Section 8.8 provides that the federal and state courts within Virginia have the exclusive jurisdiction over any dispute, controversy or claim arising out of or in connection with the BA Agreement or any breach thereof.

Proceedings under the CCAA

13 On June 29, 2009, Nexient was granted protection under the CCAA by this Court. The initial order made on that day was subsequently amended and restated on two occasions, the latest being August 19, 2009 (as so amended and restated, the "Initial Order").

14 On July 8, 2009, the Court approved a stalking horse sales process involving a third party offeror. The sales process was conducted by the monitor RSM Richter Inc. (the "Monitor"). Both ESI and Global Knowledge participated in that process. In this connection, ESI signed a non-disclosure agreement on July 13, 2009 (the "NDA").

15 By letter dated July 24, 2009 (the "Termination Notice"), ESI purported to terminate the BA Agreement effective immediately on the grounds of breaches of sections 6.2.2 and 6.2.3 of the Agreement (the "Insolvency Defaults"). In respect of section 6.2.2, ESI alleged that the disclosure to potential purchasers of Nexient's assets of the BA Agreement, and of information relating to the BA materials offered by Nexient thereunder, constituted a breach of the confidentiality provisions of the BA Agreement. By the same letter, ESI purported to grant Nexient a temporary licence to continue acting as ESI's distributor in Canada for the BA materials solely to fulfill Nexient's existing obligations. Such licence was expressed to terminate on August 21, 2009.

16 No similar termination notice was sent in respect of the PM Agreement. As noted, the PM Agreement expires on December 31, 2009.

17 It is undisputed that Nexient owes ESI approximately $733,000 on account of royalties for the use of ESI's corporate training materials. ESI says that this amount includes royalties in respect of two BA courses that are not covered by the BA Agreement and are therefore payable in accordance with the "umbrella" agreement that governs the strategic partnership between ESI and Nexient.

18 By letter dated July 28, 2009, counsel for Nexient informed ESI of its client's view that, given the stay of proceedings in the Initial Order, the Termination Notice was of no force or effect.

19 The existence and content of the Termination Notice and the letter of Nexient's legal counsel dated July 28, 2009 were communicated orally to Brian Branson ("Branson"), the chief executive officer of Global Knowledge U.S., by Donna De Winter ("De Winter"), the president of Nexient, some time between July 28 and July 31, 2009. Both documents were sent to Global Knowledge on or about August 25, 2009.

The Sale Transaction

20 Global Knowledge was the successful bidder in the sales process. In connection with the sale transaction, Nexient and Global Knowledge entered into an asset purchase agreement dated August 5, 2009 (the "APA") and a transition and occupation services agreement dated August 17, 2009 (the "Transition Agreement").

21 Under the APA, Global Knowledge agreed to acquire all of Nexient's assets as a going concern pursuant to the terms of the APA (the "Sale Transaction"). As Global Knowledge had not completed its due diligence of Nexient's contracts, the APA provided for a ninety-day period after the closing date (the "Transaction Period") during which, among other things, Global Knowledge could review the contracts to which Nexient was a party and determine whether it wished to take an assignment of any or all of such contracts. The APA also provided that, prior to the closing date, Global Knowledge had the right to designate any or all of the contracts as "Excluded Assets" which would not be assigned at the closing but would instead be dealt with pursuant to the Transition Agreement. At the Closing, Global Knowledge elected to treat all contracts of Nexient (the "Contracts") as "Excluded Assets".

22 Significantly, section 2.7 of APA provided that the purchase price would not be affected by designation of any assets, including any Contracts, as "Excluded Assets":

2.7 Purchaser's Rights to Exclude

> Notwithstanding anything to the contrary in this Agreement, the Purchaser may, at its option, exclude any of the Assets, including any Contracts, from the Transaction at any time prior to Closing upon written notice to the Vendors, whereupon such Assets shall be Excluded Assets, provided, however, that there shall be no reduction in the Purchase Price as a result of such exclusion. For greater certainty, the Purchaser may, at its option, submit further and/or revised lists of Excluded Assets at any time prior to Closing.

Accordingly, there was no reduction in the purchase price under the Sale Transaction as a result of the exclusion of the BA Agreement from the assets that were sold and assigned to Global Knowledge at the Closing (as defined below).

23 It was a condition of completion of the Sale Transaction in favour of both parties that a vesting order, in form and substance acceptable to Nexient and Global Knowledge acting reasonably, be obtained vesting in Global Knowledge all of Nexient's right, title and interest in the Nexient assets, including the Contracts to be assumed, free and clear of all "Claims" (as defined below). As described below, the Sale Order (defined below) addressed the vesting of all Contracts that Nexient might decide to assume at the end of the Transition Period. It did not, however, include a provision that permanently stayed ESI's rights of termination based on the Insolvency Defaults.

24 Under section 4 of the Transition Agreement, Global Knowledge had the right to review the Contracts and was obligated to notify Nexient of the Contracts it wished to assume not less than seven days prior to the end of the Transition Period. Under section 14(ii), Nexient was obligated to assign to Global Knowledge all of Nexient's right, benefit and interest in such Contracts provided all required consents or waivers in respect of the Contracts to be assigned had been obtained. Upon such assignment, section 6 provided that Global Knowledge would assume all obligations and liabilities of Nexient under such Contracts, whether arising prior to or after Closing. The Transition Agreement further provided that, during the Transition Period, Global Knowledge would perform the Contracts on behalf of Nexient.

25 On or about August 17, 2009, subsequent to submitting Global Knowledge's bid and prior to the hearing of this Court to approve the Sale Transaction, Branson spoke to John Elsey ("Elsey"), the president and chief executive officer of ESI, regarding ESI's right to terminate the BA Agreement. ESI continued to assert that it was entitled to terminate the BA Agreement on the grounds of the Insolvency Defaults. Branson advised Elsey that Global Knowledge had a different interpretation of ESI's right to terminate the BA Agreement. As discussed below, it is unclear whether the parties were addressing the same issue in this and other conversations described below regarding the right of ESI to terminate the Agreement. However, nothing turns on this issue. During that conversation, Branson advised Elsey of the proposed closing date of August 21, 2009 for the Sale Transaction.

26 Branson also spoke to De Winter and Scott Williams of Nexient regarding the enforceability of the Termination Notice (in respect of De Winter, it is unclear whether this is a reference to the telephone conversation referred to above or another conversation). Branson says he was also advised by Nexient's counsel that ESI could not terminate the BA Agreement under Canadian bankruptcy law. In addition, Branson says he also spoke to a representative of the Monitor and its legal counsel. He says their view on the enforceability of the Termination Notice was consistent with the view expressed by De Winter.

27 Following this conversation, Elsey wrote a letter to Branson in which he reiterated that the parties did not agree on the legal effect of the Termination Notice. Elsey went on in that letter to extend the purported interim licence of the BA materials granted in the Termination Notice to September 30, 2009 in view of future discussions concerning possible future collaboration between ESI and Global Knowledge scheduled for the week of September 7, 2009.

Court Approval Of The Sale Transaction

28 The Sale Transaction, together with the APA and the Transition Agreement, was approved by the Court on August 19, 2009 pursuant to the sale approval and vesting order of that date (the "Sale Order"). ESI did not file an appearance in the CCAA proceedings of Nexient. Nexient did not give notice of the Court hearing to ESI. Therefore, ESI did not

receive notice of the Court hearing on August 19, 2009 nor did it receive copies of the APA or the Transition Agreement at that time. It did not attend the hearing to approve the Sale Transaction and therefore did not oppose the Order.

29 The Sale Order provided that, upon delivery of the "First Monitor's Certificate" at the time of Closing, the Nexient assets other than the Contracts would vest in Global Knowledge free and clear of any "Claims". Similarly, the Sale Order provided that, upon delivery of the "Second Monitor's Certificate" at the end of the Transition Period, the Contracts to be assigned to Global Knowledge would vest free and clear of any "Claims".

30 "Claims" is defined in the Sale Order to be all security interests, charges or other financial or monetary claims of every nature or kind. "Claims" do not, however, include any rights of termination of the BA Agreement in favour of ESI based on the Insolvency Defaults. Global Knowledge does not dispute this interpretation. Accordingly, it has brought this proceeding to seek an order directed against ESI permanently staying ESI's rights to terminate the BA Agreement on such basis after the proposed assignment to Global Knowledge.

31 The Sale Transaction closed on August 21, 2009 (the "Closing"). Global Knowledge paid the full purchase price for the Nexient assets at that time. At the same time, the Monitor delivered the First Monitor's Certificate thereby transferring the assets to Global Knowledge free of all Claims.

32 At the time of the Sale Order, the stay under the Initial Order was also extended until the end of the Transition Period. The stay and the Transaction Period were further extended until the hearing of this motion and, at such hearing, were further extended until two days after the release of this Endorsement.

33 Nexient does not intend to file a plan of arrangement under the CCAA. As a result of the completion of the Sale Transaction, it no longer has any operations and all employees as of November 1, 2009 were assumed by Global Knowledge on that date. Upon the lifting of the stay at the end of the Transition Period, it is understood that Nexient intends to make an assignment in bankruptcy.

Events Subsequent To The Closing

34 At the time that Global Knowledge and Nexient entered into the APA, Global Knowledge marketed a few BA courses in Canada, although it says its courses approached the subject-matter in a different manner from ESI's BA courses. Global Knowledge did not offer PM courses in Canada. However, it had access to PM materials from Global Knowledge U.S. that it believed it could readily adapt for the Canadian market.

35 According to De Winter, Nexient did not regard Global Knowledge as a competitor in Canada in the BA and PM product lines at that time. By acquiring the Nexient assets including the BA Agreement, however, Global Knowledge became, in effect, a new competitor in the Canadian market for BA and PM products. At the same time, as described below, ESI, which had previously marketed its products through its strategic arrangement with Nexient, also decided to enter the Canadian market in its own right.

36 Although it had not yet determined to reject the PM Agreement, on or about September 4, 2009, Global Knowledge also commenced discussions with McMaster University regarding recognition of its training facilities and eventual accreditation of its proposed PM courses. The BA and PM courses of ESI offered by Nexient were already accredited by McMaster University.

37 Subsequent to August 21, 2009, ESI and Global Knowledge had discussions regarding their possible future relationship. In a telephone conference on September 11, 2009, attended by representatives of ESI, Global Knowledge and Nexient, Global Knowledge indicated that it did not intend to acquire the PM Agreement.

38 As a result, given the anticipated competition with Global Knowledge, ESI concluded that it would need to find a new strategic partner in Canada or begin delivering its products directly in Canada. It chose to pursue the latter option. In response to ESI commencing direct operations in Canada, Global Knowledge and Nexient commenced the motions

described below seeking various orders pertaining to the BA Agreement and the NDA including injunctive relief relating to alleged breaches of these agreements.

39 In early November 2009 Global Knowledge formally advised Nexient pursuant to the Transition Agreement that it proposed to take an assignment of the BA Agreement and the NDA but did not propose to take an assignment of the PM Agreement. Its notice was unconditional — that is, it did not make such assignment conditional on receiving the requested relief in this proceeding.

40 ESI opposes the assignment of the BA Agreement to Global Knowledge on the basis sought by Global Knowledge, which would permanently stay the exercise of any termination rights of ESI based on the Insolvency Defaults.

Procedural Matters

Motions Brought By The Parties

41 Nexient commenced this motion on October 30, 2009. The notice of motion seeks a declaration that the BA Agreement and the PM Agreement remain in force and are both assignable to Global Knowledge, and an order restraining ESI from interfering with Nexient's rights under the BA Agreement and PM Agreement and from carrying on BA and PM training programmes in Canada.

42 On November 3, 2009, Global Knowledge served its own notice of motion seeking the same relief. In addition, Global Knowledge seeks a declaration that the NDA is assignable to it, an order restraining ESI from breaching certain covenants in the NDA that Global Knowledge alleges have been breached relating to ESI's commencement of direct operations in Canada since September 21, 2009, and ancillary relief related to such order.

43 ESI responded by a notice of cross-motion dated November 17, 2009 seeking an order staying or dismissing the Nexient and Global Knowledge motions to the extent the relief sought (1) relates to contracts that have not been assigned to Global Knowledge; (2) does not benefit the Nexient estate; and (3) relates to contracts subject to the exclusive jurisdiction of the courts of Virginia in the United States. ESI takes the position that the BA Agreement is not assignable to Global Knowledge, that the relief sought by Nexient and Global Knowledge benefits only Global Knowledge, and that all matters pertaining to the BA Agreement are within the exclusive jurisdiction of courts in Virginia pursuant to the exclusive jurisdiction clause in that agreement. It therefore also seeks an order staying the motions of Nexient and Global Knowledge insofar as they involve the BA Agreement pending a determination by the appropriate court in Virginia of the disputes, controversies or claims pertaining to the BA Agreement asserted by the parties in their respective motions.

Narrowing Of The Issues For The Court On This Hearing

44 As a result of the following three developments before and at the hearing of this motion, the issues for the Court on this motion have been narrowed considerably.

45 First, as mentioned, Global Knowledge has advised Nexient that it does not intend to assume the PM Agreement. Accordingly, neither Nexient nor Global Knowledge now seeks any relief in respect of the PM Agreement.

46 Second, the parties agreed at the hearing that, on the filing of the Second Monitor's Certificate, the NDA would be assigned to Global Knowledge.

47 Third, the motion of Global Knowledge for injunctive relief in respect of alleged interference with Global Knowledge's rights under the BA Agreement, and in respect of alleged breaches of the NDA, was adjourned to December 21, 2009, by which date it is intended that Global Knowledge shall have commenced a separate application for the relief it seeks against ESI apart from the declaration sought on the present motion.

48 I think it is inappropriate for the Global Knowledge motion respecting injunctive relief to be adjudicated in the Nexient CCAA proceedings. Global Knowledge's claim flows from its rights against ESI under the BA Agreement and

the NDA. This claim is entirely a matter between ESI and Global Knowledge. It therefore falls outside the Nexient CCAA proceedings, which will effectively terminate upon the lifting of the stay under the Initial Order at the end of the Transition Period. While Global Knowledge will not formally take an assignment of the BA Agreement and the NDA until such time, I accept that Global Knowledge may have a sufficient interest in these agreements at the present time to obtain injunctive relief, in view of Nexient's obligation under the Sale Agreement to assign them to Global Knowledge. However, to obtain such relief, Global Knowledge must first commence its own proceeding against ESI and move for such interim injunctive relief in that proceeding.

49 Similarly, ESI's request for a stay of the Global Knowledge motion is adjourned to the hearing of the motion on December 21, 2009. At that time, ESI is at liberty to bring any motion in the proceeding to be commenced by Global Knowledge it may choose addressing the jurisdictional issues raised in its cross-motion in the present proceeding.

Issues On This Motion

50 Accordingly, the issues that are addressed on this motion are:

1. Is the BA Agreement assignable to Global Knowledge, on its terms or by order of this Court?

2. If it is, is Global Knowledge entitled to an order in connection with such assignment that permanently stays the exercise of any rights that ESI may have to terminate the BA Agreement based on the Insolvency Defaults?

51 The issue of the assignability of the BA Agreement has two elements — the assignability of the agreement as a matter of interpretation of the contract which, as noted, is governed by the laws of the Virginia, and the authority of the Court to authorize an assignment to Global Knowledge if the contract is not assignable on its terms. In view of the determination below regarding the authority of the Court to authorize an assignment, it is unnecessary to consider the assignabilty of the BA Agreement as a matter of contractual interpretation and I therefore decline to do so.

52 I would note, however, that if I had concluded that Global Knowledge was entitled to the requested relief effectively deleting the Insolvency Defaults, I would also have concluded, for the same reasons, that Global Knowledge was entitled to an order authorizing the assignment of the BA Agreement to the extent it was not otherwise assignable under the laws of Virginia.

Applicable Law

Authority Of The Court To Grant The Requested Relief

53 The Court has authority to authorize an assignment of an agreement to which a debtor under CCAA protection is a party and to permanently stay termination of the agreement by the other party to the contract by reason of either the assignment or any insolvency defaults that arose in the context of the CCAA proceedings: see *Playdium Entertainment Corp., Re*, [2001] O.J. No. 4459 (Ont. S.C.J. [Commercial List]).

54 In *Playdium*, Spence J. grounds that authority in the provisions of section 11(4)(c) of the CCAA and, alternatively, in the inherent jurisdiction of the Court. The reasoning, which I adopt, is set out in paragraphs 32 and 42:

> So it is necessary for the order to have such positive effect if the jurisdiction of the court to grant the order under s. 11(4)(c) is to be exercised in a manner that is both effective and fair. To the extent that the jurisdiction to make the order is not expressed in the CCAA, the approval of the assignment may be said to be an exercise by the court of its inherent jurisdiction. But the inherent jurisdiction being exercised is simply the jurisdiction to grant an order that is necessary for the fair and effective exercise of the jurisdiction given to the court by statute....
>
> Having regard to the overall purpose of the Act to facilitate the compromise of creditors' claims, and thereby allow businesses to continue, and the necessary inference that the s. 11(4) powers are intended to be used to further that purpose, and giving to the Act the liberal interpretation the courts have said that the Act, as remedial legislation

should receive for that purpose, the approval of the proposed assignment of the Terrytown Agreement can properly be considered to be within the jurisdiction of the court and a proper exercise of that jurisdiction.

Consideration Of The Applicable Standard In Previous Decisions

55 However, the test that must be satisfied in order to obtain an order authorizing assignment remains unclear after *Playdium*. In that decision, it was clear that the sale of the debtor's assets could not proceed without the requested order. This would seem to suggest that demonstration of that fact was the applicable test.

56 On the other hand, in para. 39, Spence J. quotes with approval a statement of Tysoe J. in *Woodward's Ltd., Re*, [1993] B.C.J. No. 42 (B.C. S.C.) that suggests that it may not be a requirement that the insolvent company would be unable to complete a proposed reorganization without the exercise of the Court's discretion. Tysoe J. framed the test as requiring a demonstration that the exercise of the Court's discretion be "important to the reorganization process". In my opinion, this is the governing test.

57 In addition, in para. 43 of *Playdium*, Spence J. appears to grant the requested relief after determining that the relief did not subject the third party to an inappropriate imposition or an inappropriate loss of claims having regard to the overall purpose of the CCAA of allowing businesses to continue.

58 Moreover, Spence J. also considered a number of factors in assessing whether the relief was consistent with the purpose and spirit of the CCAA: whether sufficient efforts had been made to obtain the best price such that the debtor was not acting improvidently; whether the proposal takes into consideration the interests of the parties; the efficacy and integrity of the process by which the offers were obtained; and whether there had been unfairness in the working out of the process.

Standard Applied On This Motion

59 It is clear from *Playdium* and *Woodwards* that the authority of the Court to interfere with contractual rights in the context of CCAA proceedings, whether it is founded in section 11(4) of the CCAA or the Court's inherent jurisdiction, must be exercised sparingly. Before exercising the Court's jurisdiction in this manner, the Court should be satisfied that the purpose and spirit of the CCAA proceedings will be furthered by the proposed assignment by analyzing the factors identified by Spence J. and any other factors that address the equity of the proposed assignment. The Court must also be satisfied that the requested relief does not adversely affect the third party's contractual rights beyond what is absolutely required to further the reorganization process and that such interference does not entail an inappropriate imposition upon the third party or an inappropriate loss of claims of the third party.

The Specific Legal Issue Presented On This Motion

60 This motion raises an important issue concerning the extent of the authority of the Court to authorize the assignment of a contract in the face of an objection from the other party to the contract. ESI argues that a Court should not permit a purchaser under a "liquidating CCAA" to "cherry pick" the contracts it wishes to assume.

61 Insofar as the result would be to prevent a debtor subject to CCAA proceedings from selling only profitable business divisions or would prevent a purchaser from deciding which business divisions it wishes to purchase, I do not think ESI's proposition is either correct or practical. The purpose of the CCAA is to further the continuity of the business of the debtor to the extent feasible. It does not, however, mandate the continuity of unprofitable businesses.

62 However, the situation in which a purchaser seeks to assume less than all of the contracts between a debtor and a particular third party with whom the debtor has a continuing or multifaceted arrangement is more problematic. In many instances in which a purchaser wishes to discriminate among contracts with the same third party, the Court will not exercise its authority under the CCAA, or its inherent jurisdiction, to authorize an assignment and/or permanently

stay termination rights based on insolvency defaults. In such circumstances, the purchaser must assume all contracts with the third party or none at all.

63 There can be many reasons why it would be inappropriate or unfair to authorize the assignment of less than all of a debtor's contracts with a third party. In many instances, there is an interconnection between such contracts created by express terms of the contracts. Similarly, there may be an operational relationship between the subject-matter of such contracts even if there is no express contractual relationship. Courts are also reluctant to authorize an assignment that would prevent a counterparty from exercising set-off rights in contracts that are not to be assigned. In respect of financial contracts between the same parties, for example, it would be highly inequitable to permit a purchaser to take only "in the money" contracts leaving the counterparty with all of the "out of the money" contracts and only an unsecured claim against the debtor for its gross loss. It would also be inappropriate in many circumstances to permit a selective assignment of a debtor's contracts if the competitive position of the third party relative to the assignee would be materially and adversely affected, at least to the extent the third party is unable to protect itself against such result.

Analysis and Conclusions

Preliminary Observations

64 Before addressing the issues on this motion, I propose to set out the following observations which inform the conclusions reached below.

65 First, being a perpetual, royalty-free licence, the BA Agreement represents a valuable contract to **Nexient** except to the extent that ESI is entitled to terminate it. It represents part of the sales proceeds received in an earlier transaction by **Nexient** for the BA materials developed by a predecessor of **Nexient**. While there is an issue as to whether the current BA materials are still subject to the BA Agreement, that issue requires a determination of facts that cannot be made in the present proceeding. It must be addressed, if necessary, in another proceeding. For the purposes of this motion, I assume that such materials could be subject to the BA Agreement, which would therefore have significant value in **Nexient's** hands.

66 Second, Global Knowledge was well aware that ESI's position was that it had the right to terminate the BA Agreement. As a consequence, Global Knowledge was also well aware that ESI would use any means available to it to terminate the BA Agreement after it had been assigned to Global Knowledge if ESI and Global Knowledge were unable to establish a satisfactory working relationship. Global Knowledge did not, however, seek any protections against such action by ESI in either the APA or the Sale Order.

67 In particular, as mentioned, section 4.3 of the Sale Agreement provided that the obligation of the parties to close the Sale Transaction was subject to receipt of a vesting order of this Court satisfactory in form to both parties. However, the Sale Order that was actually sought by **Nexient** and Global Knowledge, and was granted by the Court, did not address deletion of any of ESI's termination rights based on the Insolvency Defaults.

68 There is no explanation in the record for the failure of the Sale Order to address this matter notwithstanding the fact that, as a matter of law as set out above, there could have been no misunderstanding as to the legal requirement for terms in the Sale Order imposing a permanent stay if, at the time of the sale approval hearing, Global Knowledge in fact intended to receive a transfer of the BA Agreement on such terms. As both parties were represented by experienced legal counsel, I assume the form of the Sale Order reflected a conscious decision on the part of Global Knowledge not to address this issue explicitly at the time of the hearing.

69 Third, while **Nexient** and Global Knowledge allege that their intention at the time of the hearing was that the BA Agreement was to be assigned on the basis that ESI's rights to terminate it on the basis of the Insolvency Defaults would be permanently stayed, there is no evidence of such intention in the record apart from Branson's bald statements to this effect in his affidavit, which is insufficient.

70 Moreover, the evidence of Branson exhibits a lack of precision regarding his understanding of the applicable law and Global Knowledge's intentions. In both his affidavit and the transcript of his cross-examination, Branson refers to his understanding that the stay in the Initial Order prevented ESI from terminating its contractual relationship with Nexient without an order of the Court. In his affidavit, he added that he understood that, as a consequence, to the extent that contracts did not contain restrictions on assignment, they could be assigned to the successful bidder and would remain in force and effect after the assignment. This implies that he thought the Initial Order would also prevent ESI from terminating its contractual relationship with Global Knowledge, as the assignee of the Nexient contracts, without a further order of the Court.

71 As *Playdium* demonstrates, there are two different issues involved here. The stay in the Initial Order did prevent ESI from terminating the BA Agreement under Ontario Law as long as the CCAA proceedings are continuing. Indeed, because delivery of the Termination Notice contravened the Initial Order, I think the Termination Notice must be regarded as totally ineffective under Ontario Law with the result that ESI could not rely on it subsequently if ESI became entitled to terminate the BA Agreement after the assignment to Global Knowledge or otherwise.

72 The stay did not, however, by itself have the consequence of staying enforcement of any right of ESI to terminate the BA Agreement based on the Insolvency Defaults after it had been assigned to Global Knowledge. That is, of course, the reason for the present motion. Any such order would constitute, in effect, a re-writing of the BA Agreement to remove ESI's rights. As *Playdium*illustrates, a further order of the Court would be required to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults. Not only did Global Knowledge not seek such an order as mentioned above, it also did not require Nexient to give ESI formal notice of the Court hearing to approve the Sale Transaction.

73 In the absence of such notice, I do not think any order of this Court to permanently stay ESI's rights to terminate the BA Agreement based on the Insolvency Defaults would have been binding on ESI, even though ESI had not filed an appearance in the CCAA Proceedings and had been orally advised as to the date of the hearing. Nexient and Global Knowledge therefore cannot argue that ESI's failure to oppose the Sale Order at the hearing constituted "lying in the weeds," which disentitles ESI to sympathetic consideration on this motion. Moreover, in addition to the fact that it is not established on the record that either Nexient or Global Knowledge specifically advised ESI of an intention to seek an order permanently staying ESI's termination rights based on the Insolvency Defaults, the Sale Order does not have that effect in any event, as mentioned above. There was, therefore, nothing for ESI to oppose on this issue even if it had appeared at the approval hearing.

74 Fourth, given the structure of the Sale Transaction, there is no impact on the Sale Transaction of an exclusion of the BA Agreement from the Contracts assigned to Global Knowledge. Global Knowledge has already paid the purchase price under the Sale Agreement. The effect of section 2.7 of the APA is that there will no adjustment to the purchase price if, as transpired, Global Knowledge was unable to reach agreement with ESI on acceptable terms for the assignment of the BA Agreement. There is similarly no material impact on Nexient's customers - the BA product will be delivered in Canada by either Global Knowledge or ESI depending upon the outcome of this litigation. As such, at the present time, the requested relief will have no impact on the CCAA proceedings, or on the distributions realized by Nexient's creditors under these proceedings.

75 Fifth, although there is no contractual connection between the subject matter of the PM Agreement and the BA Agreement, there is a significant operational relationship between the PM and BA product lines. They comprise two of the three product lines of Nexient's BPI division. Both products are licenced by Nexient from ESI. In many instances, both products are marketed to the same customers. In addition, Nexient's facilitators provide educational services in respect of both products. There may also be certain economies of scale associated with offering both products. In her cross-examination, De Winter summarized the situation succinctly in stating that "one product line can't operate without the other".

76 There is also a significant business relationship between ESI and Nexient. Nexient was the Canadian distributor through which ESI marketed and sold its BA and PM products. At the present time, Nexient owes ESI in excess of $733,000 in respect of royalties payable under the PM Agreement. ESI says that this amount also includes royalties for two BA courses that are not governed by the BA Agreement. It also asserts that the BA materials described in the BA Agreement no longer are included in the current BA materials as a result of subsequent revisions. There are, therefore, several issues relating to the provision of the BA materials currently distributed by Nexient that would remain to be resolved if the BA Agreement were transferred to Global Knowledge.

77 Sixth, in his affidavit, Branson gave three reasons for Global Knowledge's decision not to assume the PM Agreement: (1) the PM Agreement terminates on December 31, 2009; (2) Global Knowledge would have to assume the amounts outstanding under the PM Agreement; and (3) Global Knowledge has access to similar course materials for which it would pay lower or no royalties. Although Branson says that the outstanding liability under the PM Agreement was not the principal factor in Global Knowledge's decision, it would appear that it was an important consideration.

78 There is no suggestion that Global Knowledge was unaware of the amount outstanding under the PM Agreement at a time of signing the APA or at the time of Closing. Although Global Knowledge did not decide against taking an assignment of the PM Agreement until later, it appears that, from the time of signing the APA if not earlier, Global Knowledge proceeded on the basis that it was not prepared to assume the PM Agreement unless ESI agreed to significantly different terms, including a reduction in the amount owing under the agreement and a reduction in the royalties payable for the PM materials. If it had intended instead to assume the PM Agreement with its outstanding liability, or to keep open that possibility, Global Knowledge could simply have provided for a reduction in the purchase price in such amount in the event it assumed the PM Agreement.

79 This is significant because, as discussed below, the issue before the Court would have been considerably different, and simpler, if Nexient had proposed to assign, and Global Knowledge had proposed to assume, both the PM Agreement and the BA Agreement as they stand. In such event, the question of whether a purchaser could "cherry pick" contracts of a debtor with the same third party on a sale of the debtor's assets would not have arisen. Moreover, given the expiry date of the PM Agreement and Global Knowledge's need to adapt the PM courses to which it had access, it would have been able to implement essentially the same business plan as it is currently proposing to implement without the need for any Court order provided its interpretation of the conflict provisions in the BA Agreement is correct. In such circumstances, the principal effect of assuming the PM Agreement would have been the assumption of the liability of approximately $733,000 owed to ESI, which Global Knowledge alleges was not the principal factor in its decision to reject the PM Agreement.

80 Seventh, Global Knowledge seeks relief that is related solely to the BA Agreement. It treats the BA Agreement and the PM Agreement as completely unrelated to each other. This treatment is not entirely unjustified in view of the wording of these agreements. Section 6.6.1 of the BA Agreement does not expressly refer to the provision of services or products that compete with PM products delivered under the PM Agreement. Whether this interpretation is affected by the course of dealing or the alleged "umbrella" agreement between the parties is not an issue that can be addressed on this motion.

81 However, given that, on this motion, Global Knowledge and Nexient seek relief that requires the exercise of the Court's discretion under section 11(4) of the CCAA or pursuant to its inherent jurisdiction, I think the contractual arrangements between the parties, while important, are not the only factors to be considered by the Court. Instead, the Court should look to the entirety of the arrangement between ESI and Nexient and assess (1) the extent of the adverse impact on ESI of the order sought by Nexient and Global Knowledge and (2) whether there are any alternatives to the proposed relief that achieve the same result with less encroachment on ESI's rights.

Analysis and Conclusions

82 The applicants' request for relief is denied for the following three reasons.

83 First, because of the structure of the Sale Transaction, the requested relief will not further the CCAA proceedings and will have no impact on Nexient or its stakeholders. The Sale Transaction has been completed and cannot be unwound. At the present time, the only impact of the proposed relief is to adversely affect ESI's rights to terminate the BA Agreement after the proposed assignment to Global Knowledge.

84 The evidence is, therefore, insufficient to satisfy the test noted by Spence J., and adopted above, that the requested order be important to the reorganization process. The time to request such relief was either at the time of negotiation of the Sale Agreement or at the time of the Sale Order. Given the terms of the Sale Transaction - in particular, the fact that the purchase price has been paid and is not subject to adjustment in respect of any exclusion of assets - it is impossible to demonstrate that the requested order is important to the reorganization after closing of the Sale Transaction. The proposed relief also cannot satisfy the requirement that it adversely affect ESI's contractual rights only to the extent necessary to further the reorganization process. Accordingly, it also cannot be said that such interference with ESI's contractual rights does not entail an inappropriate imposition upon ESI.

85 Second, there is no evidence that Nexient and Global Knowledge intended at the time of entering into the Sale Transaction, or at the time of the approval hearing, to assign the BA Agreement to Global Knowledge on the basis of a permanent stay preventing ESI from terminating the BA Agreement based on the Insolvency Defaults. There is, therefore, no basis for an order rectifying the Sale Order to include such provisions at the present time. In reaching this conclusion, the following considerations are relevant.

86 The structure of the Sale Transaction contradicts the existence of the alleged intention. At Closing, Global Knowledge elected to treat all Contracts as "Excluded Assets". Consequently, given the structure of the Sale Transaction, Global Knowledge assumed the risk that it might be unable to reach an acceptable accommodation with ESI with whatever consequences that entailed. The evidence before the Court does not explain the thinking behind Global Knowledge's decision to take this calculated risk but the actual reason is irrelevant to the determination of this motion. It is impossible to conclude that the parties intended at the time of Closing to transfer the BA Agreement on the basis of a permanent stay given that Global Knowledge had not yet reached a conclusion as to whether it even wished to take the BA Agreement. The most that can be said is that the parties may have had an intention to transfer the BA Agreement on the basis of a permanent stay *if* Global Knowledge decided later to take an assignment. This does not constitute an intention at the time of the Court approval hearing. It also begs the question of why, even on such a conditional intention, the parties did not seek appropriate conditional relief at the time of the hearing on the Sale Order.

87 More generally, the evidence suggests that, at the time of Closing, Global Knowledge had not decided between two options — to attempt to renegotiate the BA Agreement and the PM Agreement on favorable terms, including the financial arrangements, or to assume the BA Agreement only and seek a Court order permanently staying ESI's rights of termination based on the Insolvency Defaults. Global Knowledge pursued the first option until the September 11, 2009 telephone conference, after which it appears to have decided to pursue the second. On this scenario, Global Knowledge cannot say that, at the time of Closing or of the Court approval hearing, it intended to take an assignment of the BA Agreement on the basis of a permanent stay.

88 In any event, to obtain rectification, Nexient and Global Knowledge must demonstrate that ESI shared the alleged intention, or alleged understanding, or that ESI acquiesced in the alleged intention or understanding. They cannot do so on the evidence before the Court.

89 It is impossible to infer from the relative significance of the BA Agreement to Nexient that all the parties must have understood that Global Knowledge would be receiving an assignment of the BA Agreement free of any risk of termination by ESI. The BA product line represented less than one-third of the total revenues of Nexient. There is no evidence in the record of its relative contribution to profit. The only evidence are unsupported statements in Branson's affidavit to the effect that the BA Agreement was a "highly material contract" in Global Knowledge's consideration of

its bid for the Nexient assets. There is nothing in the description of the conversation between Elsey and Branson on or about August 17, 2009 or otherwise in the record to support Branson's statement.

90 Global Knowledge submits that this intention should be inferred from the fact that the Sale Transaction was on a "going-concern" basis. Such an inference might be reasonable if Global Knowledge was, in fact, purchasing all of the Nexient assets on a "going-concern" basis. Its failure to take all of the Contracts, including the PM Agreement, however, excludes such an inference in the present circumstances.

91 Third, Global Knowledge has failed to demonstrate circumstances that would justify the exercise of the Court's discretion to order a permanent stay against ESI in respect of its rights of termination based on the Insolvency Defaults in the BA Agreement given Global Knowledge's decision not to take an assignment of the PM Agreement. In reaching this conclusion, I have taken the following factors into consideration.

92 I acknowledge that there are factors weighing in favour of authorizing an assignment of the BA Agreement on the requested terms of a permanent stay against ESI. As mentioned, the BA Agreement appears to constitute a valuable asset of Nexient. It is in the interests of Nexient's creditors that value be received for such asset by way of an assignment. In addition, the sale price for the Nexient assets, including the BA Agreement, was arrived at in a sales process previously approved by this Court. There is no suggestion that the process lacked integrity, that the price for the assets did not represent fair market value or that it was an improvident sale.

93 However, by taking an assignment of the BA Agreement but not the PM Agreement, ESI is adversely affected in two respects.

94 First, in any negotiations between Global Knowledge and ESI relating to issues under the BA Agreement, including the two issues relating to the BA materials described above and the extent to which, if at all, the conflict provisions of section 6.2.1 of the BA Agreement prevent the marketing of Global Knowledge's PM products, ESI's bargaining position has been weakened by the exclusion of its claim for royalties owing under the PM Agreement.

95 Second, and more generally, ESI will be competitively disadvantaged in the Canadian marketplace if it is unable to deliver both its PM products and its BA products either directly or through a new "strategic partner". As discussed above, the evidence in the record indicates that there is a significant benefit to having a common entity market both BA products and PM products. This was reflected in Nexient's BPI business line and in Global Knowledge's own business plan, both of which involved marketing both product lines together.

96 This raises the issue of whether the Court should refuse to exercise its discretion to order a permanent stay of ESI's rights to terminate the BA Agreement based on the Insolvency Defaults in the circumstances in which Global Knowledge does not intend to take an assignment of the PM Agreement. In my view, such order should not be granted for three reasons.

97 First, as mentioned, in the present circumstances, the purposes of the CCAA will not be furthered by the proposed relief. Given the structure of the Sale Transaction, it is unnecessary to grant the requested relief to complete the Sale Transaction at the agreed sale price. Moreover, the effect of such an order would be to destroy the overall relationship between ESI and Nexient. rather than to continue the BPI business line of Nexient in its form prior to the CCAA proceedings.

98 Second, as mentioned, whether intentional or not, Global Knowledge is seeking to use the CCAA proceedings as a means of competitively disadvantaging ESI in Canada. ESI and Global Knowledge are already competitors in the United States. ESI will be competitively disadvantaged in Canada if it can offer only its PM products and not its BA products and Global Knowledge will be correspondingly advantaged. The Court's discretion should not be invoked to competitively disadvantage a licensor to the debtor in favour of a purchaser of the debtor's assets where the licensor has bargained for protection against such event in its contract with the debtor.

99 ESI bargained for the right to ensure that its BA courses and PM courses were marketed by an entity of its own choosing after an insolvency of Nexient through the inclusion of the insolvency termination provisions in the BA Agreement and PM Agreement. I do not think that the Court's authority should be invoked to remove that right as a result of Nexient's CCAA proceedings in the present circumstances where the PM Agreement is not to be assumed by Global Knowledge. ESI cannot expect to improve its competitive position as a result of the CCAA proceedings. Conversely, the Court's discretion should not be invoked in CCAA proceedings to weaken the competitive position of ESI in favour of a competitor.

100 Third, the discretion of the Court should not be invoked after failed negotiations between the purchaser and the third party respecting the feasibility of an on-going relationship. As mentioned above, Global Knowledge excluded the BA Agreement and the PM Agreement at Closing pending not only a review of the agreements themselves but, more importantly, pending the outcome of negotiations between Global Knowledge and ESI regarding the possibility of a workable relationship. Among other things, such a relationship required a renegotiation of the financial terms of the PM Agreement to the benefit of Global Knowledge that ESI was not prepared to accept. Those negotiations were conducted on the basis that the Sale Order did not include any terms providing for a permanent stay of ESI's termination rights in respect of the BA Agreement. In entering into the APA and closing on an unconditional basis, Global Knowledge accepted the risk that such negotiations would prove unsuccessful. It is not appropriate for the Court to exercise its discretion at this stage to re-write the terms of the BA Agreement to the detriment of ESI in order to adjust the financial benefits of the Sale Transition in favour of Global Knowledge. To do so would be to change the relative bargaining positions of the parties after their negotiations had terminated.

Conclusion

101 Based on the foregoing, I conclude that, while the Court has authority to authorize an assignment of the BA Agreement to Global Knowledge notwithstanding any provision to the contrary in that agreement, it should not exercise its discretion to authorize the proposed assignment on the basis requested by Global Knowledge, which involves the issue of a permanent stay against the exercise of any rights of ESI to terminate the BA Agreement based on the Insolvency Defaults.

Costs

102 The parties shall have 30 days from the date of these reasons to make written submissions with respect to the disposition of costs in this matter, and a further 15 days from the date of receipt of the other party's submission to provide the Court with any reply submission they may choose to make. Submissions seeking costs shall include the costs outline required by Rule 57.01(6) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as amended. To the extent not reflected in the costs outline, such submissions shall also identify all lawyers on the matter, their respective years of call, and rates actually charged to the client, with supporting documentation as to both time and disbursements.

Motion dismissed.

End of Document

TAB 18

Court File No.: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE MR.	)	MONDAY, THE 11th
	)	
JUSTICE MORAWETZ	)	DAY OF JULY, 2011

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

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

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

APPROVAL AND VESTING ORDER
(Certain Patents and Other Assets)

THIS MOTION, made by Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks Global Corporation and Nortel Networks International Corporation (collectively, the "Applicants") for the relief set out in the Notice of Motion dated July 5, 2011, including the approval of a transaction pursuant a bid submitted jointly by Apple Inc. and Rockstar Bidco LP ("Rockstar" or the "Purchaser") and an asset sale agreement dated as of June 30, 2011 (the "Sale Agreement") among NNC, NNL, Nortel Networks Inc., Nortel Networks UK Limited (in administration), Nortel Networks (Ireland) Limited (in administration), Nortel Networks S.A. (in administration and liquidation judiciaire), Nortel Networks France S.A.S. (in administration) and Nortel GmbH (in administration), the other entities identified therein as sellers (collectively, the "Sellers"), Alan Robert Bloom, Stephen John Harris, Alan Michael Hudson, David Hughes and Christopher John Wilkinson Hill as Joint Administrators, and Maître Cosme Rogeau as French Liquidator and Rockstar, as purchaser for the sale of the Assets to the Purchaser and vesting in the Purchaser all of the Applicants' right, title and interest in and to the Assets (including the granting of any licenses contemplated by the Sale Agreement, the "Transaction"), was heard this day at 393 University Avenue, Toronto, Ontario.

ON READING the two affidavits of George Riedel sworn April 7, 2011 (the "First Affidavit" and the "Second Affidavit", respectively), the affidavit of George Riedel sworn July 5, 2011 (the "Third Riedel Affidavit"), the affidavit of Evan Cobb, sworn July 7, 2011 and the seventy-first report of Ernst & Young Inc. in its capacity as monitor (the "Monitor") dated July 6, 2011 (the "Seventy-First Report") and on hearing the submissions of counsel for the Applicants, the Monitor and those other parties present, no one appearing for any other person on the service list although properly served as appears from (i) the affidavits of service of Katie Legree sworn April 18, July 6 and July 8, 2011 (collectively the "Service Affidavits"); (ii) the confidential service affidavit of Robert Ferguson sworn April 13 and May 16, 2011 (iii) the confidential service affidavit of Katie Legree, sworn July 6 and 8, 2011; (iv) the confidential service affidavit of Evan Cobb sworn July 6 and 7, 2011; and (v) the confidential service affidavit and Melissa Rak sworn July 6, 2011 (collectively the "Confidential Service Affidavits"):

Service

1. **THIS COURT ORDERS** that the time for the service of the Notice of Motion, the Third Riedel Affidavit, the Seventy-First Report and/or the Motion Record on the parties and interests identified or referred to in the Third Riedel Affidavit, filed, is full and proper service of such materials for purposes of this Order and the Transaction and that the time for service of such materials be and is hereby validated and abridged so that this Motion is properly returnable today and hereby dispenses with further service thereof. Notice of the Sale Hearing was fair and equitable under the circumstances and complied in all aspects with the Bidding Procedures Order.

Interpretation

2. **THIS COURT ORDERS AND DECLARES** that

(a) capitalized terms used herein and not otherwise defined shall have the meanings given to them in the Sale Agreement; and

(b) "Initial Order" means the Order of the Honourable Justice Morawetz dated January 14, 2009, as amended and restated.

The Transaction

3. **THIS COURT ORDERS AND DECLARES** that the Transaction is approved. Subject to approval of the Sale Agreement by the United States Bankruptcy Court for the District of Delaware in the Chapter 11 Proceedings of the Chapter 11 Debtors, the execution, delivery and performance of the Sale Agreement and the other Transaction Documents by the Applicants is hereby authorized and approved, and the Applicants are hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Applicants' right, title and interest in and to the Assets to the Purchaser in accordance with the provisions of the Sale Agreement (including, the licenses under the Jointly Owned Patents, the Specified UK Patents, the Undisclosed Patent Interests and any other Patents granted by one or more of the Applicants to the Purchaser pursuant to the Sale Agreement and, effective upon receipt by the Sellers or any successor or assign or any receiver, trustee or liquidator appointed in respect of a Seller (or its Property as defined in the Initial Order) of the applicable Exercise Price pursuant to Section 5.19 of the Sale Agreement, any Undisclosed Patent Interests sought to be transferred, granted and/or assigned by the Sellers to the Purchaser pursuant to the Sale Agreement, together with all the other Assets, collectively the "Purchased Assets").

4. **THIS COURT ORDERS AND DECLARES** that, without limiting the generality of the foregoing, Closing Date License Agreement substantially in the form included in Confidential Appendix "D" to the Seventy-First Report is specifically approved and the Applicants party thereto are hereby authorized and directed to perform and comply with their respective obligations thereunder.

5. **THIS COURT ORDERS AND DECLARES** that the Applicants are authorized and directed to enter into the Sale Agreement and to perform their respective obligations under the Sale Agreement and each of the Transaction Documents.

6. **THIS COURT ORDERS AND DECLARES** that, upon the delivery of a Monitor's certificate to the Purchaser substantially in the form attached as Schedule "A" hereto (the "Monitor's Certificate"), all of the Applicants' right, title and interest in and to the Purchased Assets (except any Undisclosed Patent Interests for which the Purchaser pays the Exercise Price after Closing, in which case the provisions of the balance of this paragraph shall be effective and enforceable upon receipt by the Sellers or a successor or assign or any receiver, trustee or liquidator appointed in respect of such Seller (or its Property) of the applicable Exercise Price pursuant to Section 5.19 of the Sale Agreement for the applicable Undisclosed Patent Interest) shall vest absolutely in the Purchaser as more particularly set out in the conveyance documents delivered by the Purchaser at Closing pursuant to the Sale Agreement and any ancillary agreements, free and clear of and from:

(a) any and all liens, claims and interests, including, without limitation, all security interests (whether contractual, statutory or otherwise), equity security holders, hypothecs, mortgages, collateral assignments, pledges, deeds of trust, trusts or deemed trusts (whether contractual, statutory or otherwise), judgments, executions, options, rights, levies, charges, or other financial or monetary claims, charges, rights of first refusal, encumbrances, restrictive covenants, rights of offset or recoupment, leases or conditional sale arrangements, debts, liabilities, obligations, guarantees, contractual rights and commitments, claims and rights or causes of action, obligations, demands, restrictions, consent rights, options, indemnities, defects, offsets, recoupment and orders and decrees of any court or governmental entity; and

(b) claims and interests of any nature or kind of employees, consultants or agents or former employees, consultants or agents, of any of the Applicants arising out of the alleged invalidity, unenforceability or irregularity on any grounds of any of their assignments, transfers or waivers to or in favour of any of the Applicants, whether express or implied or by operation of contract, law or otherwise, of any or all of their right, title and interest in any of the Purchased Assets,

in each case, whether or not they have attached or been perfected, registered or filed, whether secured, unsecured or otherwise, known or unknown, choate or inchoate, filed or unfiled, scheduled or unscheduled, noticed or unnoticed, recorded or unrecorded, allowed or disallowed, arising prior to or subsequent to the date of the Initial Order but prior to Closing, whether imposed by agreement, understanding, law, statute, equity or otherwise and whether allowed or disallowed, contingent or non-contingent, liquidated or unliquidated, matured or un-matured, material or non-material, disputed or undisputed, whether asserted prior to or after Closing, (collectively, the "Claims") including, for the avoidance of doubt: (i) any encumbrances or charges created by any of the Orders made in these proceedings including the Initial Order; and (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property registry system (all of such Claims, together with Liens and Claims in the CCAA Cases, are collectively referred to as the "Encumbrances", provided however that "Encumbrances" shall not include (i) Permitted Encumbrances (other than those specifically contemplated to be discharged by virtue of this Order), (ii) the Standards Obligations (as defined below), (iii) Liens created by or through the Purchaser or any of its Affiliates, (iv) Assumed Liabilities, or as otherwise set forth in Section 2.1.1(a) of the Sale Agreement and Section 5.21 of the Sale Agreement), and (v) as provided in the Side Agreement re Nokia Contracts dated as of July 11, 2011 between the Purchaser and the Sellers. For greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets. For purposes of this Order, the "Standards Obligations" shall mean, to the extent valid and enforceable under applicable non-bankruptcy law, any promises, declarations and commitments granted, made or committed by the Sellers (or made on the Sellers' behalf by any of their Affiliates and legally binding upon the Sellers) in writing to standard-setting bodies and industry groups (including any written commitments, declarations and promises that were made by or on behalf of the Sellers to the members or participants thereof, but solely in connection with the standard-setting activities of such bodies or groups and solely to the extent legally valid and enforceable under applicable non-bankruptcy law) concerning the licensing of or the grant of rights with respect to the use of any of the Transferred Patents, Purchased Specified UK Patents, Undisclosed Patent Interests or Jointly Owned Patents acquired pursuant to the Sale Agreement (including those legally valid and enforceable commitments contained in the membership agreements, by-laws, or policies of standard-setting bodies and industry groups), whether or not listed in Section 1.1(g) of the Sellers Disclosure Schedule. For the avoidance of doubt, the licenses granted under the Subject Agreements (as defined in section 2 of the Commercial License Acknowledgement attached to the Seventy-First Report as Appendix "H", as amended pursuant to the amended and restated commercial licenses acknowledgement dated as of July 8, 2011) shall constitute Commercial Licenses under the Sale Agreement.

7. **THIS COURT ORDERS** that:

(a) effective upon Closing (or, in the case of any Undisclosed Patent Interests, effective upon receipt by the Sellers or any successor or assign or any receiver, trustee or liquidator appointed in respect of a Seller (or its Property as defined in the Initial Order) of the applicable Exercise Price pursuant to Section 5.19 of the Sale Agreement), all Government Entities maintaining records or data bases in which the Encumbrances are recorded, filed or registered are authorized and directed to strike such Encumbrances as they affect the Purchased Assets from their records and data bases; and

(b) if any Person or entity which has filed statements or other documents or agreements evidencing Encumbrances affecting the Purchased Assets shall not have delivered to the Applicants before the Closing (or, in the case of any Undisclosed Patent Interests, effective upon receipt by the Sellers or any successor or assign or any receiver, trustee or liquidator appointed in respect of a Seller (or its Property) of the applicable Exercise Price pursuant to Section 5.19 of the Sale Agreement) in proper form for filing and executed by the appropriate parties, discharge statements, instruments of satisfaction, releases of liens and easements, and any other documents necessary for the purpose of documenting the release of all Encumbrances which the Person or entity has or may assert with respect to the Purchased Assets, then the Applicants are each hereby authorized to execute and file such statements, instruments, releases and other documents on behalf of such Person or entity with respect to the Purchased Assets.

8. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims and Encumbrances, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Monitor's Certificate (or, in the case of any Undisclosed Patent Interests, effective upon receipt by the Sellers or any successor or assign or any receiver, trustee or liquidator appointed in respect of a Seller (or its Property) of the applicable Exercise Price pursuant to Section 5.19 of the Sale Agreement) all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the Closing (or in the case of Undisclosed Patent Interests immediately prior to the date of the receipt of the Exercise Price), as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the Closing (or in the case of Undisclosed Patent Interest(s) immediately prior to the receipt of the Exercise Price).

9. **THIS COURT ORDERS AND DIRECTS** the Monitor to file with the Court a copy of the Monitor's Certificate, forthwith after delivery thereof.

10. **THIS COURT ORDERS AND DECLARES** that the Transaction Documents shall be binding on the Applicants that are parties thereto, and shall not be repudiated, disclaimed or otherwise compromised in these proceedings or any subsequent receivership, bankruptcy or liquidation proceedings.

11. **THIS COURT ORDERS AND DECLARES** that, in the event that any Applicant or any of their Affiliates owns any Undisclosed Patent Interest, no Applicant shall directly or indirectly sell, transfer, assign, convey, license or sublicense such Undisclosed Patent Interest to a Third Party, other than the Purchaser, including by operation of law, in any transaction, series of related transactions or otherwise, except as expressly permitted by Section 5.19 of the Sale Agreement, and any attempted sale, transfer, assignment, conveyance, license or sublicense not

expressly permitted by Section 5.19 of the Sale Agreement shall be null and void *ab initio* and of no force or legal effect.

12. **THIS COURT ORDERS** that the Sale Agreement and the Transaction Documents and any related agreements, documents or other instruments may be modified, amended, or supplemented through a written document signed by the parties in accordance with the terms thereof without further order of this Court; provided, however, that any such modification, amendment or supplement is not materially adverse to the interests of the Applicants (it being understood, for the sake of clarity and solely for the purposes of this paragraph, that no such modification, amendment or supplement shall be deemed to be materially adverse to the Applicants to the extent that the impact does not exceed two percent of the Purchase Price); and provided further that no such modifications, amendments, or supplements may be made except following two (2) days written notice to, or with the prior consent of, the Monitor.

13. **THIS COURT ORDERS AND DECLARES** that the Applicants have complied with the License Rejection Procedure approved by this Court in the Canadian Sales Process Order dated May 2, 2011 (the "Sales Process Order").

License Non-Assignment and Non-Renewal Protections

14. **THIS COURT ORDERS** that effective from and after Closing,

(a) the Applicants shall be deemed to have affirmatively and reasonably refused to give consent (including any consent of any Applicant that may be deemed to be given as a result of inaction by such Applicant) to any renewal, extension, assignment, amendment, waiver or modification of any license under the Transferred Patents, Specified UK Patents or Jointly Owned Patents, pursuant to any Cross-License Agreement or Outbound License Agreement (excluding (i) the Commercial Licenses, (ii) the transition services agreements (the "TSAs") and intellectual property license agreements (the "IPLAs") that the Applicants entered into with the purchasers of their various business units after the Petition Date in connection with their divestitures, (iii) any intercompany Contracts with the Sellers (the "Intercompany Licenses") and (iv) the Technology License Contract between Northern Telecom Limited and Guangdong-Nortel Telecommunications

Switching Equipment Ltd., dated November 8, 1994, as amended (the "GDNT License")) (collectively, the "License Agreements", and any one, a "License Agreement") that requires the consent of any Applicant pursuant to the terms of such License Agreement and that would have the practical effect of expanding the scope or term of the licenses to the Transferred Patents, Specified UK Patents or Jointly Owned Patents thereunder (regardless of whether such renewal, extension, assignment, amendment, waiver or modification is sought prior to or after the Applicants dissolve or otherwise cease to exist), in each case unless the Purchaser shall otherwise agree in writing, in its sole discretion;

(b) the Applicants shall be deemed to have affirmatively and reasonably refused to give consent (including any consent of any Applicant that may be deemed to be given as a result of inaction by such Applicant) (i) to any amendment, modification or waiver to the GDNT License that would have the practical effect of expanding the scope or the term of the licenses under the Transferred Patents, Specified UK Patents or Jointly Owned Patents thereunder and (ii) to any assignment of the GDNT License or any rights or obligations thereunder other than to Ericsson (as defined in the Sale Agreement) or another purchaser of all or substantially all of the assets or all of the outstanding shares of Guangdong Nortel Telecommunication Equipment Company Ltd., in each case, unless the Purchaser shall otherwise agree in writing, in its sole discretion,

(c) the Applicants shall be deemed to have affirmatively and reasonably refused to give consent (including any consent of any Applicant that may be deemed to be given as a result of inaction by such Applicant) (i) to any amendment or modification to the IPLAs that would have the practical effect of expanding the scope or the term of the licenses under the Transferred Patents, Specified UK Patents or Jointly Owned Patents thereunder and (ii) to any assignment of any IPLA by the license counterparty or any rights or obligations of the license counterparty under any IPLA, in each case, unless the Purchaser shall otherwise agree in writing, in its sole discretion,

(d) the Applicants shall be deemed to have affirmatively and reasonably refused to give consent (including any consent of any Applicant that may be deemed to be given as a result of inaction by such Applicant) to any amendment, modification, renewal or extension to the TSAs that would have the practical effect of expanding the scope or the term of the licenses under the Transferred Patents, Specified UK Patents or Jointly Owned Patents thereunder beyond June 30, 2012 unless the Purchaser shall otherwise agree in writing, in its sole discretion,

(e) the Applicants shall be deemed to have affirmatively and reasonably refused to give consent (including any consent of any Applicant that may be deemed to be given as a result of inaction by such Applicant) to any amendment or modification of any Commercial License that would have the practical effect of expanding the scope or the term of the licenses under the Transferred Patents, Specified UK Patents or Jointly Owned Patents thereunder except (i) to the extent such licenses, as amended or modified, would be permitted to be granted under the Closing Date License Agreement or (ii) to the extent the Purchaser shall otherwise agree in writing, in its sole discretion,

(f) the Applicants shall be deemed to have affirmatively and reasonably refused to give consent (including any consent of any Applicant that may be deemed to be given as a result of inaction by such Applicant) (i) to any amendment or modification of any Intercompany License that would have the practical effect of expanding the scope or the term of the licenses under the Transferred Patents, Specified UK Patents or Jointly Owned Patents thereunder except to the extent such licenses, as amended or modified, would be permitted to be granted under the Closing Date License Agreement, and (ii) to any assignment of any Intercompany License by the license counterparty or any rights or obligations of the license counterparty under any Intercompany License, in each case, unless the Purchaser shall otherwise agree in writing, in its sole discretion,

(g) no Applicant shall have the right or power to transfer any of its obligations, right, title or interest in the licenses under the Transferred Patents, Specified UK Patents and Jointly Owned Patents under:

(i) any License Agreement,

(ii) the GDNT License,

(iii) any Intercompany License,

(iv) (other than in connection with the consolidation, wind-down, reorganization or restructuring of the Applicants and their affiliates, including to the Applicants under confirmed plan(s) of arrangement) any IPLA, or

(v) (other than the transfer by the Applicants of Retained Contracts or contracts relating to the disposal of Inventory, in each case to the extent a sublicense to the assignee of such contract is permitted by the Closing Date License Agreement) any Commercial License,

in each case, to any other person from and after the Closing, and any purported renewal, extension, assignment, amendment, waiver, transfer or modification of a License Agreement, Intercompany License, TSA, IPLA, GDNT License or Commercial License that would contravene the provisions of subparagraphs 14(a) through (g) hereof shall be null and void *ab initio* and unenforceable and of no force or effect, and

(h) the Purchaser is hereby irrevocably appointed (such appointment being coupled with an interest) as each Applicant's attorney-in-fact, with full authority in the place and stead of such Applicant and in the name of such Applicant, from time to time from and after the Closing in the Purchaser's sole discretion, subject to the provisions of paragraph 5.25 of the Sale Agreement, (x) to take any and all action and to execute and deliver any and all instruments that the Purchaser may deem necessary or advisable to accomplish the purposes of sub-paragraphs 14(a) through (g) of this Order and (y) regardless of whether or not any Applicant party to the applicable License Agreement is then in existence, to terminate the license under the Transferred Patents, Specified UK Patents or Jointly Owned Patents in any License Agreement (including by delivering a notice of termination on behalf of an Applicant party thereto, regardless of whether such Applicant is then in existence) upon the occurrence of any specific date or event or the existence of any specific circumstance to the extent that the occurrence of such date or event or the existence of such circumstance gives any Applicant (regardless of whether such Applicant is then in existence) a right to terminate such License Agreement pursuant to the terms thereof (the provisions set forth in subparagraphs 14(a) through (h) hereof collectively, the "License Non-Assignment and Non-Renewal Protections").

For the avoidance of doubt, the License Non-Assignment and Non-Renewal Protections shall not limit in any way the applicable Applicants' obligations to comply with the provisions of Section 5.13(b) of the Sale Agreement.

15. THIS COURT ORDERS that the License Non-Assignment and Non-Renewal Protections shall not constitute the assignment of the License Agreements, Intercompany Licenses, TSAs, IPLAs, GDNT License or Commercial Licenses to, or assumption of the License Agreements, Intercompany Licenses, TSAs, IPLAs, GDNT License or Commercial Licenses by, the Purchaser, other than as the Purchaser may otherwise agree in an assumption agreement between the Purchaser and NNL in satisfaction of the requirements of paragraph 7 of the CDMA Vesting Order.

Proceeds

16. **THIS COURT ORDERS** that all the proceeds of the Transaction, subject to the price adjustments and the Purchaser's rights under the Sale Agreement and less applicable transfer or value added taxes incurred by the Sellers, shall be deposited into an Escrow Account (as defined in the Interim Funding and Settlement Agreement entered into on June 9, 2009 (the "IFA") pursuant to an escrow agreement to be negotiated and agreed to by all of the Sellers and in accordance with Section 12.g of the IFA, and such proceeds shall not be distributed in advance of either (i) agreement by all of the Selling Debtors (as defined in the IFA) as to the distribution of such proceeds (in accordance with the IFA and subject to the requirements of Section 12.g of the IFA) or (ii) in the case where the Selling Debtors (as defined in the IFA) fail to reach such agreement, determination by the relevant dispute resolver(s) in accordance with the terms of the

Interim Sales Protocol (as such term is defined in the IFA and subject to the requirements of Section 12.g of the IFA), which Interim Sales Protocol shall be approved by this Court.

<u>Miscellaneous</u>

17. **THIS COURT ORDERS** that, notwithstanding:

(a) the pendency of these proceedings;

(b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of any of the Applicants and any bankruptcy order issued pursuant to any such applications;

(c) any assignment in bankruptcy made in respect of any of the Applicants, and

(d) any further event or circumstances in these proceedings or any other insolvency proceedings to which Applicants or their assets or estates may be subject,

the provisions of the Transaction Documents and the vesting of the Applicants' right, title and interest in and to the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of any of the Applicants and shall not be void or voidable by creditors of the Applicants, nor constitute or be deemed to be a preference, fraudulent conveyance, transfer at undervalue, or other challengeable or voidable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

18. **THIS COURT ORDERS AND DECLARES** that neither the *Bulk Sales Act* (Ontario), Sections 6(1) and (2) of the *Retail Sales Tax Act* (Ontario) nor any equivalent or similar legislation under any province or territory in Canada applies to the Transaction.

19. **THIS COURT ORDERS** that confidential Appendices "D, E and F," to the Seventy-First Report and the Confidential Service Affidavits be and are hereby sealed and shall not form part of the public record pending further order of the Court.

20. **THIS COURT ORDERS AND DECLARES** that, to the extent permitted by law, neither the Purchaser nor any permitted assignee of the Purchaser pursuant to the Sale Agreement shall be a successor to any of the Applicants and neither the Purchaser nor any permitted assignee of the Purchaser pursuant to the Sale Agreement shall assume any liability of the Applicants or in respect of the Encumbrances, other than as expressly provided for in the Sale Agreement nor shall any labour, employment or pension claims continue with respect to the Purchased Assets or be liabilities of the Purchaser.

21. **THIS COURT ORDERS AND DECLARES** that effective upon Closing, counterparties to the Unknown Licenses (as defined in the Sales Process Order) that are deemed to be terminated pursuant to the Sales Process Order shall have no right or claims against the Purchaser or the Purchased Assets.

22. **THIS COURT ORDERS** that neither the Purchaser nor the Sellers shall have an obligation to close the Transaction until all conditions precedent in the Sale Agreement to each of their obligations to close the Transaction has been met satisfied, or waived in accordance with the terms of the Sale Agreement.

23. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory, administrative or governmental body having jurisdiction in Canada, the United States, the United Kingdom or elsewhere, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory, administrative or governmental bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

24. **THIS COURT ORDERS** that each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory, administrative or

governmental body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

JUL 1 1 2011

PER/PAR:

Schedule A – Form of Monitor's Certificate

Court File No.: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

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

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

MONITOR'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable Justice Morawetz of the Ontario Superior Court of Justice (the "Court") dated January 14, 2009 (as amended and restated), Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation (collectively, the "Applicants") commenced proceedings pursuant to the *Companies' Creditors Arrangement Act* (Canada) and Ernst & Young Inc. was appointed as monitor (the "Monitor") in these proceedings.

B. Pursuant to an Order of the Court dated July 11, 2011 (the "Approval and Vesting Order"), the Court approved an asset sale transaction (the "Transaction") contemplated by an asset sale agreement dated as of June 30, 2011 (the "Sale Agreement") among NNC, NNL, Nortel Networks Inc., Nortel Networks UK Limited, Nortel Networks (Ireland) Limited, Nortel Networks S.A., the other entities identified therein as sellers (collectively, the "Sellers"), Alan Robert Bloom, Stephen John Harris, Alan Michael Hudson, and Christopher John Wilkinson Hill as Joint Administrators, and Maître Cosme Rogeau as French Liquidator, and Rockstar Bidco, LP, as purchaser (the "Purchaser") and provided for the vesting in the Purchaser all of the Applicants' right, title and interest in and to the Purchased Assets (as defined in the Approval and Vesting Order (but excluding any Undisclosed Patent Interests for which the Purchaser pays the Exercise Price after Closing (the "Closing Date Assets")) which vesting is to be effective with respect to the Closing Date Assets upon the delivery by the Monitor to the Purchaser of a certificate confirming receipt of confirmation from each of NNC, NNL and the Purchaser that:

(i) the Purchaser has paid the Purchase Price for the Closing Date Assets as set out in the Sale Agreement; (ii) the Purchaser has paid the Optioned Licenses Fees, being $●, as set out in the Sale Agreement; (iii) the Purchaser has paid the payment to the Canadian Sellers comtemplated by Section 5.27(b)(ii)(A) of the Sale Agreement; (iv) the conditions to Closing as set out in Article VII of the Sale Agreement have been satisfied or waived by the Sellers and/or the Purchaser, as applicable; and (v) the Transaction has been completed to the satisfaction of the Applicants and the Purchaser.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE MONITOR CERTIFIES the following:

1. NNC, NNL and the Purchaser have advised the Monitor that the Purchaser has paid and JPMorgan Chase Bank, N.A., as distribution agent (the "Distribution Agent") has received the Purchase Price payable for the Closing Date Assets on the Closing Date pursuant to the terms of the Sale Agreement;

2. NNC, NNL and Purchaser have advised the Monitor that the Purchaser has paid and the Distribution Agent has received the Optioned Licenses Fees, being $●, pursuant to the terms of the Sale Agreement;

3. NNC, NNL and the Purchaser have advised the Monitor that the Purchaser has paid and the Canadian Sellers have received the payment contemplated by Section 5.27(b)(ii)(A) of the Sale Agreement;

4. NNC, NNL and the Purchaser have advised the Monitor that the conditions to Closing as set out in Article VII of the Sale Agreement have been satisfied or waived by the Sellers and/or the Purchaser, as applicable;

5. NNC and NNL have advised the Monitor that the Transaction has been completed to the satisfaction of the Applicants; and

6. The Purchaser has advised the Monitor that the Transaction has been completed to the satisfaction of the Purchaser.

This Certificate was delivered by the Monitor at _________ on _________ 2011.

ERNST & YOUNG INC. in its capacity as monitor in the CCAA proceedings of Nortel Networks Corporation, et. al. and not in its personal capacity

Per:______________________________

Name: Sharon Hamilton

Title: Senior Vice-President

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

Court File No: 09-CL-7950

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

APPROVAL AND VESTING ORDER
(Certain Patents and Other Assets)

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Lawyers for the Applicants

TAB 19

In the Court of Appeal of Alberta

Citation: Remington Development Corporation v. Enmax Power Corporation, 2012 ABCA 196

Date: 20120621
Docket: 1101-0328-AC
Registry: Calgary

Between:

Remington Development Corporation

Respondent
(Plaintiff)

- and -

Enmax Power Corporation

Appellant
(Defendant)

Enmax Corporation

Not a Party to the Appeal
(Defendant)

- and -

The City of Calgary

Not a Party to the Appeal
(Defendant)

The Court:

The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice A.G. Park
Dated the 10th day of November, 2011
Filed on the 14th day of December, 2011
(2011 ABQB 694, Docket: 0801-14506)

Memorandum of Judgment

I. Introduction

[1] Enmax Power Corporation (Enmax) appeals a determination that Remington Development Corporation (Remington) was the assignee of certain agreements which granted Enmax the right to operate transmission lines on certain lands and that Remington was entitled to issue a notice terminating Enmax's interest in accordance with the agreements. The transmission lines in question represent two of the main feeds for supplying electricity to downtown Calgary and are located on lands known as the "Interlink Lands".

[2] The determination was made pursuant to an order granted under rule 7.1 of the *Rules of Court* which directed that the following Stated Issues be decided:

> (a) is the purported assignment of any of the relevant Transmission Agreements from [the Canadian Pacific Railway Company] to Remington valid, binding and enforceable as against Enmax?
>
> (b) was Remington entitled to issue a notice terminating Enmax's rights, benefits and privileges under and pursuant to one, some or all of the relevant Transmission Agreements?

[3] The order also stayed the balance of the action pending disposition of the Stated Issues, any appeals and any subsequent determination by the Alberta Utilities Commission (AUC) whether some or all of the Transmission Lines would be relocated from the Interlink Lands. It further directed that if the Stated Issues were resolved in favour of Remington, Enmax would be directed to make an application before the AUC to remove the Transmission Lines from the Interlink Lands and none of the Transmission Lines would be removed or relocated in the absence of an order by the AUC.

II. Relevant Facts

[4] The trial judge set out detailed facts in his reasons at *Remington Development Corporation v Enmax Power Corporation*, 2011 ABQB 694 (available on QL) at paras 2 - 20. The facts can be briefly summarized.

[5] In 1948, CPR granted Calgary Power Ltd. (Calgary Power) the right to place electrical towers and string wires on and over CPR's property, the Interlink lands. The agreement imposed a number of obligations on Calgary Power mainly for the benefit of CPR. The agreement provided for its termination as follows:

> 9. That this Agreement may be terminated at any time by either party giving to the other party three (3) months notice in writing, and on the day so named in such notice, this Agreement shall terminate, and all rights, obligations and privileges thereunder shall come to an end,

> except the obligation of the Applicant to remove the said towers and wires and the right of the Railway Company to do so in the event of the failure of the Applicant to remove said towers and wires as hereinafter provided.
>
> 10. And that upon the termination of this Agreement, the Applicant shall remove the said towers and wires from the property of the Railway Company at its own expense, and shall make good any damage caused to the property of the Railway Company by such removal. Provided that if the said towers and wires are not removed by the Applicant within the period of one month from the date of such termination, then the Railway Company may remove them at the expense of the Applicant, or permit them to remain, in which latter case, the Applicant shall be deemed to have abandoned them, and the said towers and wires shall then become the property of the Railway Company.

[6] In 1970, CPR and the City, the successor to Calgary Power, executed a further agreement allowing the City to install more poles and wires on the Interlink Lands. The 1970 agreement imposed similar obligations as the 1948 agreement. Three clauses provided for termination of the agreement as follows:

> 10. That the Applicant shall not assign or sublet or dispose of this Agreement, or the rights and privileges hereby granted or any part thereof, without the written consent of the Railway Company first had and obtained.
>
> 11. That this Agreement shall become effective on the date hereof and shall remain in force until terminated by either party hereto as hereinafter provided. Either party hereto may at any time terminate this Agreement by giving to the other party notice in writing of its intention so to do and naming in such notice a day, at least three (3) months after the giving of such notice upon which this Agreement shall terminate, and upon the day so named in such notice this Agreement shall terminate. Provided, however, that should the Applicant make default at any time in the payment of the rent hereby reserved or fail or neglect at any time to fully observe, perform and keep all of the covenants, terms and conditions on its part herein contained, then the Railway Company may forthwith terminate this Agreement by notifying the Applicant in writing accordingly. Provided further, that notwithstanding the termination of this Agreement in any manner herein provided for, that the Applicant shall be and remain liable to the Railway Company for all payments

> due and obligations and liabilities incurred hereunder up to the date of such termination and for the fulfilment of all obligations herein contained on the part of the Applicant to be observed or performed upon or after such termination.
>
> 12. And that upon the termination of this Agreement, the Applicant shall remove the said poles, wires and works of the Applicant from the lands and property of the Railway Company at its own expense, and shall make good any damage caused to the lands and property of the Railway Company by such removal. Provided that if the said poles, wires or works are not removed by the Applicant within the period of one month from the date of such termination, then the Railway Company may remove them at the expense of the Applicant, or permit them to remain, in which latter case, the Applicant shall be deemed to have abandoned them, and the said poles, wires and works shall then become the property of the Railway Company.

[7] In 1997, the City assigned the 1948 and 1970 agreements to Enmax with the consent of CPR.

[8] In 2002, Remington purchased three CPR properties including the Interlink Lands. Remington intended to develop the properties into an office, retail, entertainment and residential site. When Remington sought to subdivide and develop the lands, Enmax took the position that Remington required Enmax's approval for changes which could affect Enmax's installations. Remington disagreed and on March 31, 2005, by notice in writing, in accordance with the provisions in the agreements, terminated the agreements.

[9] Despite the notice of termination, Enmax has refused to remove the transmission towers and lines from the Interlink Lands and they remain in operation without Remington's permission.

[10] Remington seeks to enforce the notice of termination as its development will be severely compromised with the continued presence of the high voltage transmission towers and lines. By consent, the Stated Issues were heard at a special application before the trial judge.

III. Trial Judge's Decision

[11] The trial judge concluded the assignment of the Transmission Agreements from CPR to Remington was valid, binding and enforceable as against Enmax and that Remington was entitled to issue a notice terminating Enmax's rights, benefits and privileges under the Transmission Agreements. He determined the Transmission Agreements constituted statutory utility rights-of-way within the meaning of section 69(1) of the *Land Titles Act*, RSA 2000, c L-4, and rejected Enmax's argument that the Transmission Agreements constituted personal contracts that could not be assigned.

IV. The Appellant's Position

[12] Enmax submits that the trial judge erred in law in three ways:

> (a) in interpreting the Transmission Agreements as being assignable from CPR to Remington;
>
> (b) in interpreting the Transmission Agreements as giving rise to an easement under the *Land Titles Act*; and
>
> (c) in implying a contractual term into the Transmission Agreements that they were assignable by CPR.

V. Standard of Review

[13] The standard of review on appeals to this Court from a trial decision of a Queen's Bench Justice is correctness for errors of law, and palpable and overriding error for errors of fact, or mixed fact and law: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 325 at paras 8 - 37. The applicable standard of review on the issues raised in this appeal is correctness.

VI. Analysis

A. Are the Transmission Agreements Assignable by CPR to Remington?

[14] Enmax submits the Transmission Agreements are personal contracts that are not assignable without consent. It submits that CPR's identity as a railway company was central to Enmax's predecessors when they entered into the Transmission Agreements which contain numerous references to railway operations and CPR's status as a railway company.

[15] As a general rule, a party to a contract can assign the contractual benefits of the contract, but not the contractual obligations, without the consent of the other party or parties to the contract: *International Trust Co v Mead*, [1990] 2 SCR 410, 112 NR 1 at para 35 *per* Wilson J. This general rule is subject to certain exceptions. Even the benefits of a contract are not assignable in some circumstances, as was outlined by McLachlin JA (as she then was) in *Fredrickson v Insurance Corporation of British Columbia* (1986), 3 BCLR (2d) 145, 28 DLR (4th) 414 (BCCA) at para 44; aff'd, [1988] 1 SCR 1089:

> Today there are six categories of contracts which are considered to be unassignable. They are:
>
> 1. Contracts which expressly by their terms exclude assignment;
> 2. Mere rights of action (assignments savouring of maintenance and

> champerty);
> 3. Contracts which by their assignment throw uncontemplated burdens on the debtor;
> 4. Personal contracts;
> 5. Assignments void by public policy (public officers' wages or salary and alimony or maintenance agreements); and
> 6. Assignments prohibited by statutory provisions.
>
> (*Chitty on Contracts*, 25th ed., pp. 709-715; Treitel, *The Law of Contract*, 5th ed., at pp. 519-523; Fridman, *The Law of Contract in Canada*, pp. 442-445; and Waddams, *Law of Contracts*, 2nd ed., pp. 197-198.)

[16] The rationale underlying the principle prohibiting the assignment of personal contracts was explained by McLachlin JA in *Fredrickson* at para 53:

> I turn then to the rule against the assignment of personal contracts. As a general rule contracts for personal services cannot be assigned. The right to assign contractual rights without consent is confined to those cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it: *Tolhurst v. The Associated Portland Cement Manufacturers (1900) Ltd. et al.* [1902] 2 K.B. 660 (CA); *The Paterson Timber Co. v. The Canadian Pacific Lumber Co.* (1909), 15 B.C.R. 225, affd. (1910) 47 S.C.R. 398. Motor vehicle insurance policies are regarded as personal contracts and hence as nonassignable, because it makes a difference to the insurer who the insured is: *Peters v. General Accident & Life Assurance Corpn. Ltd.*, [1938] 2 All E.R. 628 (C.A.). Thus for example, had Mr. Fredrickson sold his car prior to the accident, he could not have assigned his policy of insurance to the purchaser.

[17] The trial judge rejected Enmax's argument that the Transmission Agreements were personal contracts. He reviewed the nature of the relationship between CPR and Enmax's predecessors and found at para 70 that "CPR did not possess any special skill, knowledge, character or other personal characteristics in allowing the transmission lines and towers to be placed on its bare land." He concluded at para 70 that Enmax's argument that CPR would be less likely to require the transmission lines to be moved or to terminate the Transmission Agreements:

> ... does not go to the personal nature of the contract but rather it looks and goes to the possible motives and intentions of CPR. Whether a person or a legal entity is more likely to enforce its legal rights is not relevant. Such a likelihood does not turn the contract into one of a

personal nature.

[18] This aspect of the trial judge's analysis is consistent with the approach outlined in *Chitty on Contracts*, vol 1, 26th ed. (London: Sweet & Maxwell, 1989) at para 1416:

> Personal Contracts. The benefit of a contract is only assignable in "cases where it can make no difference to the person on whom the obligation lies to which of two persons he is to discharge it." It is to be noted that the question whether an assignment makes any difference to the debtor must be decided by the court on objective grounds, having regard to the nature of the contract and of the subject-matter of the rights assigned. **It may in some circumstances make a great deal of difference to a debtor whether his creditor is of an indulgent character, or whether he is likely to enforce his legal rights ruthlessly, but considerations of this kind are ignored by the courts in determining whether a right is assignable or not.**

(emphasis added)

The above quote was approved in *Black Hawk Mining Inc v Manitoba (Provincial Assessor)*, 2002 MBCA 51, 163 Man R (2d) 215 at para 79.

[19] In reaching his decision, the trial judge correctly took into account the termination clause in the agreements and the asymmetrical assignment provisions in the Transmission Agreements which expressly prohibited Enmax's predecessors from assigning the agreements but were silent with respect to the CPR. The assignment by CPR of the Transmission Agreements to a non-railway company does not impose any uncontemplated burdens on Enmax. Instead, to the extent that Remington is not operating a railway or telegraph lines, Enmax's obligations are reduced as it is no longer obliged not to interfere with the telegraph lines and their operation, or the train service of the Railway Company on the Interlink Lands.

[20] The circumstances in this case are distinguishable from those in *Black Hawk Mining Inc* or *Lee v Point of View Developments (Encor) Ltd*, 2010 ABQB 558, 324 DLR (4th) 130.

[21] We agree with the trial judge that the Transmission Agreements are not personal contracts. CPR validly assigned to Remington the benefits of those agreements, which included the right of termination, and Remington was entitled to issue a notice terminating Enmax's rights, benefits and privileges under the Transmission Agreements.

B. Are the Transmission Agreements Easements Under the *Land Titles Act*?

[22] Enmax submits the Transmission Agreements were licenses rather than easements and asserts that they are, therefore, not assignable. There is nothing about a license that renders it inherently unassignable. Moreover, if Enmax was correct, it is difficult to understand how it could have any right to maintain its transmission lines on the Interlink Lands following the sale to

Remington and why it would not be trespassing. However, the Stated Issues put before the trial judge were limited to whether the assignment of the Transmission Agreements was valid and whether Remington was entitled to issue a termination notice. The trial judge correctly determined both questions in the affirmative. Whether the Transmission Agreements constitute an easement, a license, a utility right-of-way within the meaning of section 69(1) of the *Land Titles Act* or some form of hybrid interest, and what rights or obligations might apply in the absence of the assignment, need not be determined for the purposes of this appeal.

C. Did the Trial Judge Imply a Term that the Transmission Agreements Were Assignable?

[23] The assignment of the Transmission Agreements was expressly and sufficiently pled in the Statement of Claim. The determination that the Transmission Agreements are assignable does not require a term to be implied. As outlined above, the ordinary rule is that the benefits of an agreement are assignable, subject to certain exceptions, which are not applicable in this case.

VII. Conclusion

[24] The appeal is dismissed.

Appeal heard on April 3, 2012

Memorandum filed at Calgary, Alberta
this 21st day of June, 2012

Authorized to sign for: Côté J.A.

Paperny J.A.

Strekaf J.

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