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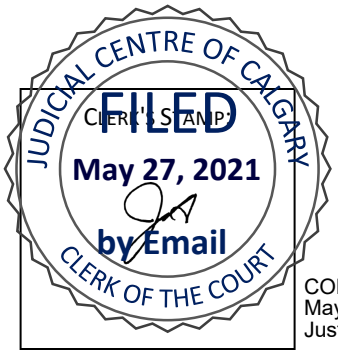


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Justice Mah

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| COURT FILE NUMBERS | B201 731795<br>B201 731797<br>B201 731799 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |
| MATTERS | IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL UNDER THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, OF<br><br>INTERNATIONAL FITNESS HOLDINGS INC.<br><br>INTERNATIONAL FITNESS HOLDINGS LP<br><br>WORLD HEALTH NORTH LP |
| APPLICANTS | INTERNATIONAL FITNESS HOLDINGS INC., INTERNATIONAL FITNESS HOLDINGS LP and WORLD HEALTH NORTH LP |
| DOCUMENT | **BENCH BRIEF OF THE APPPLICANTS IN SUPPORT OF AN APPLICATION FOR A SALE APPROVAL AND VESTING ORDER AND SEALING ORDER** |
| ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT | **STIKEMAN ELLIOTT LLP**<br>4300 Bankers Hall West<br>888 – 3rd Street S.W.<br>T2P 5C5<br><br>Solicitor: Karen Fellowes, Q.C. / Elizabeth Pillon<br>Phone Number: (403) 724-9469 / (416) 869-5623<br>Email: kfellowes@stikeman.com / lpillon@stikeman.com<br>Fax Number: (403) 266-9034<br>File No.: 137923-1006<br><br>**Counsel for the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP** |

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**INDEX**

## I. INTRODUCTION

1. On April 23, 2021, the International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP (collectively, the "**Applicants**") each filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to subsection 50.4(1) of the *Bankruptcy and Insolvency Act* (the "**BIA**", and such proceedings, the "**NOI Proceedings**") and KPMG Inc. was appointed as proposal trustee (the "**Proposal Trustee**").

2. As a result of filing the NOI, all proceedings against the Applicants and their assets were automatically stayed for an initial period of thirty (30) days (i.e. until May 23, 2021) (the "**Stay Period**").

3. On May 5, 2021, this Honourable Court (the "**Court**") pronounced an order (the "**Initial Order**"), which, *inter alia,* (i) extended the Stay Period for an additional period of five (5) days (i.e. until May 28, 2021), and (ii) authorized the Applicants to obtain and borrow under a debtor-in-possession credit facility from First Canadian Cardio-Fitness Clinics Ltd. in an amount of up to $10,000,000.00 (the "**DIP Facility**").[1]

4. This brief of law is submitted on behalf Applicants in support of its application filed on May 21, 2021 (the "**Application**") seeking, among other things, the following relief:

   (a) an order (the "**SAVO**") approving the Asset Purchase Agreement dated April 23, 2021, as amended (the "**APA**")[2], between the Applicants and Spa Lady (West) Inc. (as vendors) and Ayrfit West Inc., Ayrfit Alberta Inc. and Ayrfit Edmonton Inc. (the "**Purchasers**") and authorizing the Applicants and the Proposal Trustee to take any and all such steps as are necessary or advisable to implement and closing the transaction contemplated by the APA (the "**Transaction**");

   (b) ordering that, upon delivery by the Proposal Trustee to the Purchaser of the certificate contemplated in the SAVO, all of Applicants' right, title and interest in and to the Purchased Assets shall vest in the Purchasers, free and clear of all Claims (as defined in the SAVO);

   (c) extending the stay of proceedings, as ordered and defined in paragraph 3 of the Initial Order, for an additional period of thirty-three (33) days (i.e. until June 30, 2021) (the "**Stay Extension**"); and

   (d) granting a sealing order with respect to the unredacted copy of the APA appended as Exhibit "B" (the "**Confidential Exhibit**") to the Affidavit No. 3 of Peter Melynchuk, sworn May 21, 2021 ("**Melynchuk Affidavit No. 3**") and the First Confidential Supplemental Report (the "**Confidential Supplemental Report**") to the second report of the proposal trustee, KPMG Inc. (the "**Proposal Trustee**") until three months after the closing of the Transaction contemplated in the APA.

5. Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the APA.

6. The APA represents the best and highest offer received by the Applicants following a strategic marketing and sales process undertaken prior to the commencement of these NOI Proceedings, and is in the best interests of stakeholders as it preserves the Applicants' business as a going concern.

7. The Applicants submit that the relief sought herein is reasonable and appropriate in the circumstances and at this stage of these proceedings.

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[1] Initial Order, granted by the Honourable Madam Justice L.B. Ho on May 5, 2021.
[2] Melychuk Affidavit No. 3 at Exhibits "B" and "C", respectively.

## II. STATEMENT OF FACTS

8. This brief is principally intended to set out the law governing the relief sought by the Applicants and the applicable facts in a summary fashion. As such, and for the sake of efficiency, only a high-level recitation of the background facts is included in this section. A detailed background of the Applicants' business and activities leading up to this Application are more fully described in the Affidavit No. 1 of Peter Melynchuk, sworn April 30, 2021 (the "**Melynchuk Affidavit No. 1**") and Melynchuk Affidavit No. 3.

### *A. BACKGROUND*

9. The Applicants are part of an enterprise which operated twenty-one (21) fitness centres in Edmonton and Calgary (the "**IFH Group**"). Since the onset of the COVID-19 pandemic in February and March 2020 and the various closures of its facilities mandated by provincial and municipal closures, the IFH Group's ability to conduct its business and generate revenue have been considerably impacted.[3]

10. In response to the significant strain on its business, the IFH Group implemented numerous strategies to mitigate its losses, all of which were aimed at positioning it to reopen once provincial health restrictions were eased. These efforts include, but are not limited to:

    (a) renegotiating its leases and negotiating deferral arrangements with landlords of its facilities;

    (b) reducing staff and streamlining its operations; and

    (c) accessing the Canada Emergency Wage Subsidy program ("**CEWS**") and the Canada Emergency Commercial Rent Assistance Program.[4]

11. Additionally, the Applicants engaged the services of MNP Ltd. ("**MNP**") to lead a strategic process, including for the possible sale of the IFH Group's assets, which steps included:

    (a) performing analyses and developing a list of potential purchasers of the Applicants' assets;

    (b) contacting 120 potential purchasers; and

    (c) providing non-disclosure agreements, confidential information memorandums and access to an electronic data room to 25 potentially interested parties.[5]

12. A total of four parties submitted letters of interest for the purchase of the Applicants' assets by the November 11, 2020 deadline (the "**Interested Parties**"). Negotiations from November 12, 2020 to February 24, 2021 with Interested Parties yielded only one potential viable transaction with the Purchasers.[6]

### *B. RESTRUCTURING EFFORTS POST-NOI FILING*

13. Since the commencement of these NOI Proceedings, the Applicants have taken significant steps to advance the restructuring of its affairs leading to the execution of the APA on April 23, 2021 with the Purchasers, including:

    (a) consulting with the Proposal Trustee and its legal advisors on the various cost-saving

[3] Melynchuk Affidavit No. 1 at paras 4-5, 14-17.
[4] Melynchuk Affidavit No. 3 at paras 10-11; Melynchuk Affidavit No. 1 at paras 24-28.
[5] Melynchuk Affidavit No. 1 at para 29-30.
[6] *Ibid.*

measures available to the Applicants in the context of a formal restructuring process;

(b) finalizing discussions with the Purchaser in connection with the APA, which contemplates the sale of substantially all of the Applicant's business on a going concern basis;

(c) working with the Purchaser to identify those leases which the Purchaser intends to assume, and liaising with the Purchaser and various landlords regarding new lease agreements for certain fitness locations where the Purchaser intends to carry on business, and disclaiming leases for eight (8) locations (the "**Disclaimed Locations**");

(d) communicating with sub-tenants of the Disclaimed Locations;

(e) working with the Lender in respect of cashflows and advances under the DIP Facility;

(f) working with the Proposal Trustee and counsel to prepare a cash flow projection and to identify issues with respect to their financial condition and the status of their creditors;

(g) engaging with the IFH Group's employees, including holding a town hall meeting on April 25, 2021, regarding the NOI Proceedings, providing weekly updates, and scheduling another town hall meeting on May 28, 2021;

(h) working with the Purchasers to develop new employee compensation plans for those employees of the IFH Group anticipated to enter into employment agreements with the Purchasers following the closing of the Transaction;

(i) streamlining operations;

(j) communicating with IFH Group's members regarding the status of their memberships and the operation of its fitness centres, and with further communication to members on May 28, 2021;

(k) continuing to engage with governmental authorities in connection with the CEWS and CECRA programs; and

(l) communicating with various lienholders and claimants regarding the status of their claims against the Applicants under the present NOI Proceedings.[7]

14. Since the Initial Order, the Applicants have borrowed from the Lender a total of $500,000 under the DIP Facility in order to continue operations during the stay extension period, and in order to support the fees of the Proposal Trustee and counsel involved in the restructuring process.[8] Pursuant to terms of amended DIP Facility, the Applicants will have resources necessary to continue operations through June 30, 2021.

### *C. THE APA*

15. On April 23, 2021, the Applicants entered into the APA, as amended on May 20, 2021, pursuant to which the Purchasers will acquire certain of the Applicants' assets as a going concern sale of the IFH Group business. With respect to the Applicants' leases, the Purchasers have disclaimed leases at the Disclaimed Locations; have or are in the process of negotiating new leases, or assumption and amending agreements, for certain other locations; and anticipate requiring a further order of this Court for the forced assignment of up to three (3) leases.

[7] Melynchuk Affidavit No. 3 at para 12.
[8] *Ibid* at para 13.

16. The key terms of the APA include:

(a) the purchase price consists of cash considerations, a promissory note, Purchaser consideration shares, and the value of assumed liabilities under the APA. As outlined in greater detail below, the Applicants respectfully request a sealing order pursuant to which the particulars of the purchase price (including the mechanism by which the Purchase Price is determined), would be releasable three (3) months following the closing of the Transaction;

(b) the APA has a closing date of June 18, 2021 (the "**Closing Date**");

(c) on the Closing Date the Purchasers will acquire certain of the Applicants' assets as a going concern and free and clear of all encumbrances, including personal property, equipment, inventories, accounts receivable, intellectual property, books and records, good will of the Applicants, contact information for the Applicants' members, and all rights to deposits and prepaid expenses;

(d) the Purchasers will also assume all of the Applicants' liabilities under certain leases and contracts, and all amounts owing by the Applicants under the DIP Facility less any adjustments calculated pursuant to the terms of the APA;

(e) excluded assets from the Transaction include all outstanding loans to the Applicants' management investors; all employment contracts and benefit plans offered to employees; certain loan agreements with management and other investors described at Schedule 2.2 of the APA; promotional and certain corporate memberships; and personal training contracts;

(f) the conditions of closing include that:

(i) the Purchasers waive all conditions in respect of the certain leases by May 19, 2021, which the Purchasers have so waived; and

(ii) the Court approves the APA, vesting the purchased assets in the Purchaser free and clear of any encumbrances;

(g) the Purchasers are finalizing their review of employee requirements for the locations being assumed pursuant to the APA, which allows the Purchasers the option to make new offers of employment to the Applicants' employees within five (5) days of the Closing Date.[9]

## III. ISSUES

17. The issues to be determined by this Court are whether it is appropriate and reasonable in the circumstances to:

(a) approve and authorize the Transaction contemplated by the APA and grant a vesting order in respect thereof;

(b) grant the Stay Extension; and

(c) grant a sealing order with respect to the Confidential Exhibit and the Confidential Supplemental Report.

[9] Melynchuk Affidavit No. 3 at para 14.

## IV. ARGUMENT

### *A. THE PROPOSED TRANSACTION MEETS THE SOUNDAIR PRINCIPLES*

18. In *Royal Bank v Soundair Corp*., the Ontario Court of Appeal articulated the principles governing sale approval applications by receivers, which have been held to apply equally to sale approval applications under the BIA:

    (a) whether the Applicants have made sufficient effort to get the best price and has not acted improvidently;

    (b) the interests of all parties;

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

    (d) whether there has been unfairness in the working out of the process.[10]

19. The *Soundair* principles should not be applied formulaically. Rather, the Court should consider the facts and circumstances of each case, including such things as the prevailing economic environment, and the risk/reward associated with an extended or additional sales process.[11]

20. Section 65.13(4) of the BIA sets out six non-exhaustive factors that must be considered in approving a sale of assets outside the ordinary course, which are applied in conjunction with the *Soundair* principles:

> 65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.
> …
>
> (4) In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the trustee approved the process leading to the proposed sale or disposition;
>
> (c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and

[10] *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 OLR (41") 76 ["*Soundair"*] at para 16 [TAB 1]; *Feronia Inc.* (Re), 2020 BCSC 1372 ["*Feronia"*] at para 39 [TAB 2].
[11] See e.g., *Sanjel Corp*, Re, 2016 ABQB 257 ["*Sanjel*"] at paras 70–71, 112 [TAB 3].

fair, taking into account their market value.[12]

21. The Transaction satisfies the *Soundair* principles, meets the statutory requirements for approval by this Court, and is in the best interests of the Applicants' stakeholders generally.

***i. The marketing process by MNP was reasonable, efficient, and did not lack integrity, a sufficient effort was made to get the best price, and the Applicants have not acted improvidently***

22. Prior to the commencement of the NOI Proceedings, the Applicants worked closely with MNP and their secured lenders over the course of many months and thoroughly canvassed the market for buyers. The Applicants through their advisors approached in excess of 120 potential purchasers and undertook a process which was robust, and similar to steps which would have been undertaken by the Applicants, their advisors and Proposal Trustee during the course of these proceedings.

23. At the initial hearing, the Applicants advised stakeholders of their intentions to return to the Court for the approval of the Transaction immediately following the commencement of the NOI.

24. The Applicants did not conduct a Court-supervised sales process for the Purchased Assets, as an extensive sales process was conducted with MNP prior to the NOI filing (the "**Marketing Process**"), and the Applicants did not have the financial resources or the time to run an additional process post-NOI filing.[13] Moreover, due to the special nature of the Applicants' business, and especially due to the current conditions during the global pandemic and its particular effect on the fitness industry, it did not obtain a formal valuation of its business, other than a liquidation analysis of the used fitness equipment in its facilities.[14]

25. The Applicants submit that through the efforts of MNP and extensive negotiation of the APA with the Purchasers, the price to be paid for the Purchased Assets represents the best indication of the value of the underlying business, and the best offer available in the circumstances.

26. The Proposal Trustee is supportive of the Transaction and is of the opinion that Marketing Process leading to the APA was fair and reasonable in the circumstances and will yield a greater benefit for the Applicants' stakeholders than through an assignment into bankruptcy.[15]

27. A sales process is only required to be reasonable – it is not required to be perfect.[16] In *Sanjel,* Madam Justice Romaine was asked to approve a sale in the context of a so-called "pre-pack" filing, whereby a sales and solicitation process ("**SISP**") had already occurred and the resulting agreement entered into prior to the originating court filing (in that case, the proceedings were commenced under the CCAA).[17] In reaching her conclusion Justice Romaine considered the implications of conducting a pre-filing sales process:

> [70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA [the equivalent of s. 65.13 of the BIA] and must be considered against the *Soundair* principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was

[12] BIA, Section 65.13 [TAB 4].
[13] Melynchuk Affidavit No. 3 at para 15.
[14] *Ibid* at para 16.
[15] Confidential Supplemental Report, filed.
[16] *Bloom Lake, g.p.l. (Arrangement relatif à),* 2015 QCCS 1920 ["*Bloom Lake*"] at para 39 [TAB 5].
[17] *Sanjel,* at paras 69-71 and 77-80.

> conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.
>
> [71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.[18]

28. Nevertheless, Justice Romaine accepted the monitor's recommendation and approved the SISP, explaining her conclusion in that regard as follows:

> [77] While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.
>
> [78] I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.
>
> [79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.
>
> [80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.[19]

29. Based on the foregoing, the Applicants submit that the Marketing Process undertaken by MNP and the Applicants, was fair, objectively reasonable and adequately canvassed the market for the Applicants' assets, and the purchase price for the Purchased Assets as set forth in the unredacted APA is provident for this Court to accept.

***ii. The Applicants' creditors were consulted and are in support of the Transaction.***

30. The secured lenders that hold the vast majority of the Applicants' debt have actively participated in the pre-filing sales process and strategy to monetize the Applicants' assets. The secured lenders, who are owed in excess of $72 million, and who will be suffering a significant shortfall on their secured debt, support the Transaction being approved by this Court.[20]

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[18] *Ibid.*
[19] *Sanjel* at paras 77-80.
[20] Melynchuk Affidavit No. 3 at para 19; Melynchuk Affidavit No. 1 at para 13.

***iii. The Transaction will have a positive effect on the Applicants' stakeholders and creditors, and the consideration to be paid for the assets is fair in the current market circumstances.***

31. As a result of the Transaction, it is anticipated at least twelve (12) of the Applicants' fitness facilities will remain open, which will result in the continued employment of certain of Applicants' employees. Additionally, the Applicants' permanent (i.e. non-promotional) members will retain their membership status with the Purchasers.[21]

32. Furthermore, given that the Transaction is a going concern sale of certain of the Applicants' assets and business, it is a positive outcome for many of Applicants' stakeholders and other parties with which the Applicants have commercial relationships, including certain landlords, service providers, suppliers and vendors. Additionally, as noted the Applicants' secured lenders, who are owed in excess of $72 million, and who will be suffering a significant shortfall on their secured debt, support the Transaction.[22]

33. Based on the forgoing, the Applicants submit that the *Soundair* and statutory criteria under the BIA have been satisfied and this Court should grant an Order approving and ratifying the APA.

34. The Applicants do not have the financial resources to re-market their assets. In the event the APA is not approved, the Applicants would have no other option but to make an assignment into bankruptcy whereby it would cease operations and its assets would be liquidated on a piecemeal basis, to the prejudice of all stakeholders. In accordance with the Proposal Trustee's second report, the liquidation value of the assets would be less than the net realizations under the current Transaction.

### *B. EXTENSION OF STAY PERIOD*

35. Should this Court approve the Transaction and SAVO sought in this application, the Applicant will require a further extension of the Stay Period to June 30, 2021 in order to close the Transaction. Presently, the Stay Period is set to expire on May 28, 2021.

36. Under Section 50.4(9) of the BIA, this Court has discretion to make an order extending the stay of proceedings granted in an initial order. Specifically, Section 50.4(9) states:

> 50.4(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that
>
> (a) the insolvent person has acted, and is acting, in good faith and with due diligence;
>
> (b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and
>
> (c) no creditor would be materially prejudiced if the extension being applied for were granted.[23]

37. In order to close the transaction contemplated by the APA, the Applicants are seeking the Stay

[21] *Ibid* at para 17.
[22] *Ibid* at para 18-20.
[23] BIA, Section 50.4(9) [TAB 6].

Extension to June 30, 2021 and respectfully submit that the extension ought to be approved for, among others, the following reasons:

(a) the Applicants have been acting in good faith and with due diligence as described in paragraph 13 above and there is no evidence before this Court of any lack of good faith, lack of honesty and lack of due diligence by the Applicants;

(b) the Applicants have engaged with the Proposal Trustee and its stakeholders throughout the NOI Proceedings;

(c) the Applicants anticipate returning before the Court prior to June 30th to address potential assignment order relating to various leases, as well as dealing with distribution order; and

(d) the Proposal Trustee supports the Stay Extension.[24]

38. In addition to the above, the Applicants' cash flow forecast projects that it will have sufficient cash to fund its projected operating costs until the week of June 30, 2021 to facilitate remaining wind down activities[25], which is a relevant factor in considering whether a stay period should be extended.[26]

39. In consideration of the above, the Applicants submit it is in the best interests of the Applicants and all of its stakeholders that the Stay Period be extended, no creditors will be materially prejudiced by the requested extension of the Stay Period, and it is appropriate in the circumstances to extend the Stay Period.

40. In the event the Stay Period is not extended, the Transaction will not close and the Applicants will be required to make an assignment into bankruptcy, to the prejudice of all stakeholders.

### *C. SEALING ORDER*

41. In addition to the above relief sought, the Applicants seek an order sealing the Confidential Exhibit and Confidential Supplemental Report. The Court's authority to grant sealing orders is contemplated under Rule 6.28 and Division 4 of Part 6 of the Alberta Rules of Court.[27]

42. The seminal case of *Sierra Club of Canada v Canada (Minister of Finance)* provides the guiding principles in granting sealing orders and publications bans. Justice Iacobucci for the Court accepted that a confidentiality or sealing order could be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.[28]

43. It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc v Look Mobile Corporation*, Justice Newbould explained the reasons for such confidentiality:

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[24] Melynchuk Affidavit No. 3 at paras 21-24; Confidential Supplemental Report.
[25] *Ibid* at para 25-28.
[26] *US Steel Canada Inc. (Re),* 2016 ONSC 4838 at para 13 [TAB 7].
[27] *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28 [TAB 8].
[28] *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41 at para 45 [TAB 9].

> [17] It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd*, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.[29]

44. The Confidential Exhibit will contain an unredacted copy of the APA. The APA contains information of a highly sensitive commercial nature, namely the Purchase Price and personal information. The Confidential Supplemental Report also contains highly sensitive commercial information regarding the Marketing Process and efforts that MNP undertook prior to the Applicants' filing of the NOI.[30]

45. The Applicants submit that publication of the Purchase Price and Marketing Process before the approval and closing of the Transaction could result in serious commercial damage to the Applicants as it could prejudice any future sales process, in the event that the Transaction does not close, to the detriment of the Applicants' stakeholders. The Applicants further submit that salutary effects of a sealing of the Confidential Exhibit and Confidential Supplemental Report outweigh any deleterious effects that may be caused by the sealing. [31]

46. The sealing of the Confidential Exhibit and Confidential Supplemental Report are essential to the Applicants' satisfying the *Soundair* principles as required by this Court, and therefore it is both reasonable and appropriate for the Court to seal the Confidential Exhibit and Confidential Supplemental Report on the Court Record until three months after the closing of the Transaction.

47. On May 21, 2021, the Applicants submitted a "Notice to Media of Application to Restrict Media Access" in respect of the sealing order being sought in the within Application.[32]

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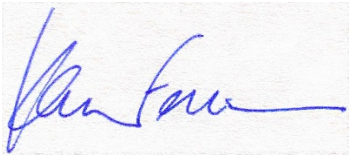
[29] *Look Communications Inc v Look Mobile Corporation,* 2009 CanLII 71005 [TAB 10].
[30] Melynchuk Affidavit No. 3 at para 29.
[31] Melynchuk Affidavit No. 3 at paras 30-31.
[32] Notice to Media – Application to Restrict Access email, dated May 21, 2021 [Tab 11].

## V. RELIEF CLAIMED

48. Based upon the materials filed and the foregoing submissions, the Applicants respectfully request that this Court grant the relief sought in the Application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 26th day of May, 2021

**STIKEMAN ELLIOTT LLP**



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**Counsel for the Applicants, International Fitness Holdings Inc., International Fitness Holdings LP and World Health North LP**

File No.: 137923-1006

## VI. TABLE OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 OLR (41) 76
2. *Feronia Inc.* (Re), 2020 BCSC 1372
3. *Sanjel Corp*, Re, 2016 ABQB 257
4. BIA, Section 65.13
5. *Bloom Lake, g.p.l. (Arrangement relatif à),* 2015 QCCS 1920
6. BIA, Section 50.4(9)
7. *US Steel Canada Inc. (Re),* 2016 ONSC 4838
8. *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28
9. *Sierra Club of Canada v Canada (Minister of Finance),* 2002 SCC 41
10. *Look Communications Inc v Look Mobile Corporation,* 2009 CanLII 71005
11. Notice to Media – Application to Restrict Access, email dated May 21, 2021

# TAB #1

**Most Negative Treatment:** Distinguished
**Most Recent Distinguished:** PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

1991 CarswellOnt 205, [1991] O.J. No. 1137, 27 A.C.W.S. (3d) 1178,
46 O.A.C. 321, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76

# ROYAL BANK OF CANADA (plaintiff/respondent) v. SOUNDAIR CORPORATION (respondent), CANADIAN PENSION CAPITAL LIMITED (appellant) and CANADIAN INSURERS' CAPITAL CORPORATION (appellant)

Goodman, McKinlay and Galligan JJ.A.

Heard: June 11, 12, 13 and 14, 1991
Judgment: July 3, 1991
Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman* , for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.
*J. T. Morin, Q.C.* , for Air Canada.
*L.A.J. Barnes* and *L.E. Ritchie* , for plaintiff/respondent Royal Bank of Canada.
*S.F. Dunphy* and *G.K. Ketcheson* , for Ernst & Young Inc., receiver of respondent Soundair Corporation.
*W.G. Horton* , for Ontario Express Limited.
*N.J. Spies* , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency
**Related Abridgment Classifications**
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
**Headnote**
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
**Held:**
The appeal was dismissed.

 

10 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.

11 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.

12 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?

13 I will deal with the two issues separately.

**1. Did the Receiver Act Properly in Agreeing to Sell to OEL?**

14 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.

15 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.

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

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

2. It should consider the interests of all parties.

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

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

17 I intend to discuss the performance of those duties separately.

**1. Did the Receiver make a sufficient effort to get the best price and did it act providently?**

18 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

  

# TAB #2

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Feronia Inc. (Re),*
2020 BCSC 1372

Date: 20200915
Docket: B200352
Registry: Vancouver



**In the Matter of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, C. B-3, As Amended**

And

**In the Matter of the Notice of Intention to Make a Proposal of Feronia Inc., of the City of Vancouver, in the Province of British Columbia**

Before: The Honourable Mr. Justice Milman

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Applicant, Feronia Inc.: | M.C. Sennott<br>K.B. Plunkett |
| Counsel for the Proposal Trustee, Ernst & Young Inc.: | C.M. Cheuk<br>E. Newbery |
| Counsel for the Attendee, Feronia KKM: | E. Lamek |
| Counsel for the Attendee, Gregory Steers: | L. Williams<br>J. Enns |
| Counsel for the Attendee, Mafuta Investment Holding Ltd.: | A.E. Kauffman |
| Counsel for the Attendee, CDC Group PLC: | E. Cobb |

| | |
|---|---|
| Counsel for the Attendees, Nederlandse Financierings-Maatschappij Voor Ontwikkelingslanden N.D., Nederlandse Financiernigs-Maatschappij Voor Ontwikkelingslanden N.V., Deutsche Investitions- und Entwicklungsgesellschaft mbH, Societe Belge D'Investissement Pour Les Pays en Development Sa, and Emerging Africa Infrastructure Fund Ltd.: | B. Burland |
| Place and Date of Hearing: | Vancouver, B.C.<br>September 3, 2020 |
| Place and Date of Judgment: | Vancouver, B.C.<br>September 15, 2020 |

> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.
>
> Related persons
>
> (6) For the purpose of subsection (5), a person who is related to the insolvent person includes
>
> (a) a director or officer of the insolvent person;
>
> (b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and
>
> (c) a person who is related to a person described in paragraph (a) or (b).
>
> …

[39] In *Veris Gold Corp. (Re)*, 2015 BCSC 1204, Fitzpatrick J. had occasion to consider a similar application under s. 36(3) of the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 , the provision in that statute that parallels s. 65.13 of the *BIA*. After setting out that legislation, she described the principles emerging from the related jurisprudence as follows, at paras. 23-25:

> [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.

[40] In the discussion that follows, I will consider each of the statutory factors enumerated in ss. 65.13(4), as well as those in ss. 65.13(5), given that the proposed purchaser in this case is clearly a "related person" as that term is defined in s. 65.13(6).

### A. Was the sales process reasonable in the circumstances?

[41] Mr. Steers' criticisms of the sales process focus on two main concerns: its relatively short duration and the degree to which it failed to expose the assets sufficiently to the niche market that may exist for them.

[42] With respect to the duration of the process, it is not disputed that the 30-day time limit was driven primarily by the terms of the Sponsor Support Agreement. Mr. Steers argues that Feronia did not explore other restructuring alternatives before committing to the draconian strictures of that agreement. In that regard, he cites *Komtech Inc. (Re)*, 2011 ONSC 3230, as an example of a case in which an asset sale was approved under s. 65.13 of the *BIA* on the stated basis that, among other things, the debtor had "made reasonable efforts in search of alternate financing, equity partnership or a purchaser of the business" (at para. 9) – something he argues is entirely missing here.

[43] I do not find that argument persuasive.

[44] If the Sponsor Support Agreement had imposed the 30-day time limit arbitrarily, for no apparent reason, then Mr. Steers' argument would be more persuasive. In fact, however, the timelines were kept short because PHC had run out of cash and had been losing more than US$1.4 million every month in the months immediately preceding the finalisation of that agreement.

[45] In those circumstances, the parties had to balance the cost of allowing for additional time to sell the assets against the likely benefit that would flow from any such extension. It was not necessarily unreasonable to allow the sales process to run only for so long as the business could continue to operate with the cash available. While one can argue, as Mr. Steers does, that the sponsors should have

# TAB #3

# Court of Queen's Bench of Alberta

**Citation: Sanjel Corporation (Re), 2016 ABQB 257**

**Date:** 05162016
**Docket:** 1601 03143
**Registry:** Calgary



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

**And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC**

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**Reasons for Decision of the Honourable Madam Justice B.E. Romaine**

---

## I. Introduction

[1] The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

[2] The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

[3] After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

## II. Facts

[4] On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.

[5] Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the *Alberta Business Corporations Act* in 1980, and its principal executive and registered office is located in Calgary. Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

[6] The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

[7] Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately $415.5 million. The Syndicate has perfected security interests over substantially all of the assets of the Sanjel Group, and is the principal secured creditor of the Sanjel Group in these CCAA proceedings.

[8] On June 18, 2014, Sanjel Corporation issued US $300 million 7.5% Callable Bonds due June 19, 2019. Interest is payable on the Bonds semi-annually on June 19 and December 19. The Bonds are unsecured. Nordic Trust ASA (the "Trustee") is the trustee under the Bond Agreement.

[9] The Sanjel Group has been severely impacted by the catastrophic drop in global oil and gas prices since mid-2014. Over the last 18 months, the Sanjel Group has taken aggressive steps to cut costs, including by reducing staffing levels by more than half. However, by late October, 2015, Sanjel Corporation was in breach of certain covenants under the Bank Credit Facility. By late December, 2016, the Syndicate was in a position to exercise enforcement rights. In addition, an interest payment of USD $11,250,000 was due on the Bonds on December 19, 2015. Since late 2015, the Sanjel Group has been in negotiations with both the Syndicate and two bondholders, Ascribe Capital LLC and Clearlake Capital Group L.P., (the "Ad Hoc Bondholders"). The Ad Hoc Bondholders hold over 45% of the Bonds.

[10] In the fall of 2015, Sanjel Corporation engaged Bank of America Merrill Lynch ("BAML") to identify strategic partners and attempt to raise additional capital for the Sanjel Group. BAML contacted 28 private equity firms; 19 non-disclosure agreements were executed and 9 management presentations were made. However, the BAML process did not result in a successful transaction.

[11] In December, 2015, the Ad Hoc Bondholders retained a New York law firm, Fried Frank, as their legal advisor and Moelis & Company as their financial advisor.

[12] On December 10, 2015, Fried Frank conveyed a proposal from the Ad Hoc Bondholders to Sanjel. Under this proposal, Sanjel would be required to pay the USD $11,250,000 interest payment. Provided that the interest payment was made, the bondholders would agree to a standstill agreement for the same period as may be agreed with the Syndicate. In return, the Ad Hoc Bondholders would lend back their pro rata share of that interest payment to Sanjel in return for secured notes ranking *pari passu* with the Bank Credit Facility, bearing interest at the same rate as the Bank Credit Facility plus 2%. The new notes would not be repaid until the Bank Credit Facility was repaid.

[13] The Ad Hoc Bondholders indicated that they would consider acting as standby lenders to Sanjel for the remainder of the interest payment and would offer the other bondholders the option of lending back their pro-rata share to Sanjel on the same basis. If they agreed to be standby lenders, the Ad Hoc Bondholders would receive a commitment fee equal to 10% of their standby commitment, payable in new notes.

[14] The proposal letter indicated that the Ad Hoc Bondholders were aware that Sanjel had been engaged in a process to address liquidity and leverage issues over the past few months, including attempting to raise equity to sell assets. In their view, Sanjel had exhausted those efforts, and the only remaining option was a deal negotiated with the bondholders. However, the Ad Hoc Bondholders would only embark on such a process if the December 19, 2015 interest payment was made.

[15] Sanjel rejected the proposal on December 14, 2015. It is noteworthy that the Bank Credit Facility includes a negative covenant prohibiting Sanjel from granting a security interest over its assets. The Syndicate advised Sanjel that the Ad Hoc Bondholders' proposal to have their existing unsecured position elevated to rank *pari passu* with the Bank Credit Facility was unacceptable, and that it would not provide its consent.

[16] On December 15, 2015, the Ad Hoc Bondholders advised counsel to the Syndicate that they wished to work towards a restructuring, which they envisaged would involve paying down a portion of the Syndicate's debt "in an amount to be mutually agreed on". They also suggested that Sanjel would implement a rights offering to holders of Bonds and then to existing equity, with a conversion of the Bonds into new debt and equity.

[17] On or about December 15, 2015, the Ad Hoc Bondholders sent Sanjel a draft waiver and standstill agreement, which required the payment of part of the December 19 interest payment by December 23, 2015 and the payment of the fees and disbursements of Fried Frank and Moelis in return for arranging for a bondholder meeting to be called to consider a period of forbearance to March 31, 2016.

[18] Fried Frank and Moelis executed Non-Disclosure Agreements ("NDAs") on December 24, 2015, but the Ad Hoc Bondholders did not, thus not restricting their right to trade the Bonds. Fried Frank and Moelis were granted access to a Sanjel virtual database ("VDR") on January 9, 2016.

[19] By January, 2016, given the prolonged downturn in oil and gas prices, Sanjel's liquidity was limited. Events of default under the Bank Credit Facility that had occurred as of October 31, 2015 were exacerbated by a cross-default based on the non-payment of interest under the Bond

Agreement. As of January 31, 2016, the Sanjel Group had total consolidated liabilities of approximately $1.064 billion.

[20] Sanjel was facing very significant negative cash flow projections over the next few months. As of early January, 2016, Sanjel's projected cash flows showed that its cash position would deteriorate by more than half as of the first week of April, 2016, and would be further reduced by anticipated forbearance payments.

[21] In the circumstances, Sanjel agreed with the Syndicate to implement a Sales and Investment Solicitation Process ("SISP"). Sanjel states that it hoped that if a SISP was implemented, it might find a transaction that preserved the business as a going concern, which would maximize stakeholder value and preserve goodwill and jobs.

[22] In mid-January, 2016, Sanjel engaged PWC as a proposed Monitor in the event it would become necessary to file under the CCAA.

[23] The SISP was commenced on behalf of Sanjel by its financial advisors, PJT Partners Inc. ("PJT") and Credit Suisse Securities (CANADA), Inc. ("CS") on January 17, 2016. The advisors contacted prospective bidders, many of whom had already been identified through the BAML process of late 2015.

[24] The process of soliciting non-bidding indications of interest ran from January 17, 2016 to February 22, 2016. On January 26, 2016, the advisers updated and opened a VDR available to anyone who had signed a NDA. A teaser letter was distributed and meetings and conference calls were held with bidders. A process letter was distributed on January 28, 2016. Nine indications of interest were submitted on or about February 22, 2016.

[25] Before and during the SISP process, Sanjel was negotiating with both the Syndicate and the Ad Hoc Bondholders with respect to separate forbearance agreements, and with the Ad Hoc Bondholders with respect to NDAs to be signed by the Ad Hoc Bondholders. The Ad Hoc Bondholders complain that there was a delay of almost a month before Sanjel's counsel responded to a mark-up of a NDA provided by Fried Frank, but negotiations were stymied by the Ad Hoc Bondholders' insistence that the December interest payment be paid. Until this issue was settled, there was no reason to finalize the NDAs. In addition, it was not until January 29, 2016 that representatives of the Ad Hoc Bondholders advised Sanjel that they were prepared to be restricted from trading and therefore able to receive confidential information. During this period of time, the Ad Hoc Bondholders refused to meet with Sanjel management when they travelled to New York on January 20, 2016.

[26] On February 1, 2016, counsel to Sanjel sent counsel to the Ad Hoc Bondholders a copy of the draft forbearance agreement between the Syndicate and Sanjel, which set out the key dates of the SISP, including the completion of definitive purchase and sales agreements by March 24, 2016. It would have been clear to the Ad Hoc Bondholders from this draft that Sanjel was proceeding on a dual track basis, considering both a potential stand-alone restructuring of the company and a sales process.

[27] The Ad Hoc Bondholders made a second proposal to Sanjel on February 2, 2016, very shortly after the NDAs were signed. This proposal involved the Syndicate recovering a portion of its loan from Sanjel's existing cash reserves and a rights offering backstopped by the Ad Hoc Bondholders. A portion of the Bonds would be converted into equity. The December interest payment would have to be paid. Sanjel's management team met with the Ad Hoc Bondholders

and their advisors in New York on February 3, 2016 and Sanjel's team, the Syndicate and its advisors and the Ad Hoc Bondholders met on February 8, 2016.

[28] Sanjel delivered an indicative restructuring term sheet to the Ad Hoc Bondholders on February 12, 2016, as required by the forbearance agreement that the parties were negotiating. The restructuring term sheet emphasized that a bondholder-led restructuring would require significant new money, a significant capital commitment and ongoing capital, with a significant pay-down of the Syndicate's debt.

[29] Commencing on February 15, 2016, Sanjel allowed representatives of Alverez and Marsal ("A&M"), advisors to the Ad Hoc Bondholders, to attend in Calgary and conduct due diligence.

[30] On February 18, 2016, Sanjel uploaded to its VDR the final, unsigned versions of the Syndicate Amending and Forbearance Agreement and the Bondholders Forbearance Agreement.

[31] Under the SISP, preliminary, non-binding indications of interest were delivered to the advisors and the company by February 22, 2016. Six such indications of interest were received, all of which were materially superior to the Ad Hoc Bondholders proposal of February 2, 2016. The Ad Hoc Bondholders have admitted that they were aware of the milestones under the SISP and the Bank Forbearance Agreement by mid-February, 2016, although it is clear that their advisors would have been aware of these milestones from February 1, 2016.

[32] As part of finalizing the form of Bond Forbearance Agreement, counsel for Sanjel and for the Ad Hoc Bondholders had negotiated a form of summons that would be used to call a bondholder meeting to consider the agreement. The only item for consideration to be considered at the meeting was to be the Bond Forbearance Agreement. The plan was to have 2/3 of the bondholders approve and execute the Bond Forbearance Agreement, and then to hold a bondholders meeting.

[33] Instead, on February 25, 2016, the Ad Hoc Bondholders caused the Trustee to issue a summons for a meeting on March 10, 2016 to consider and vote on a) whether to declare the Bonds in default, accelerate them and exercise remedies, including commencing involuntary bankruptcy proceedings against Sanjel under Chapter 11 of the *United States Bankruptcy Code*, including claims against the MacDonald family and MacBain Properties Ltd., which owns the business premises that are leased by the Sanjel Group or b) approve the Bond Forbearance Agreement.

[34] On March 2, 2016, the Ad Hoc Bondholders submitted a restructuring proposal to Sanjel. This proposal provided no cash recovery to the Syndicate. Instead, a portion of the debt owed to the Syndicate would be converted to a new loan and the remainder extinguished, with the Syndicate receiving warrants in a reorganized company. There would be a Chapter 11 filing and the bondholders would provide a debtor-in-possession ("DIP") facility to rank *pari passu* with the Syndicate debt. Bondholders who contributed to the DIP would receive new 2nd lien notes for part of their previous notes, the remainder being extinguished. The DIP facility would be converted into 100% of the equity of the reorganized company. Sanjel would be required to appoint a Chief Restructuring Officer ("CRO") designated by the Ad Hoc Bondholders.

[35] On March 4, 2016, in a follow-up letter to a telephone meeting on March 3, 2016, US counsel to the Syndicate wrote to Fried Frank requesting that the March 10 bondholders meeting

be adjourned to March 31, 2016. Canadian counsel to Sanjel made the same request of the Trustee.

[36] Also on March 4, 2016, a template Asset Purchase Agreement ("APA") for SISP bidders was posted on the VDRs, which disclosed a CCAA/Chapter 15 filing with PWC as designated Monitor. This template agreement was available to the Ad Hoc Bondholders and their advisors.

[37] Counsel for the Ad Hoc Bondholders replied on March 5, 2016 that they would advise the Trustee to postpone the March 10 meeting subject to:

a) a response to their March 2 proposal by March 10, 2016;
b) full disclosure of company records for A&M's representative, "so that [that representative] is ready and best positioned to commence his duties as Chief Restructuring Officer for the Company".
c) payment by March 7, 2016 of roughly USD $2.2 million in fees and disbursements for the Ad Hoc Bondholders' legal and financial advisors.

[38] After some negotiation, Sanjel agreed to these terms for an adjournment, other than with respect to a small deduction in fees and disbursements. Sanjel made it clear that it reserved all rights with respect to the appointment of a CRO and a filing under Chapter 11, which it would not agree to at that time. On March 8, 2016 the Trustee confirmed that the meeting would be postponed to March 31.

[39] On March 9, 2016, second round bids under the SISP were received. Five bids were received, all of which were materially superior to the Ad Hoc Bondholders' March 2, 2016 proposal in terms of cash recovery for the Syndicate.

[40] An information update conference for bondholders was scheduled to be held on March 11, 2016, at which Sanjel, the Trustee and the Ad Hoc Bondholders would provide an update to any bondholder that wished to call in. This was rescheduled by the Trustee to March 31, 2016.

[41] On March 11, 2016, the Syndicate sent the counter-offer required by the postponement of meeting agreement to the Ad Hoc Bondholders. This counter-proposal made it clear that there would be a CCAA/Chapter 15 process, rather than a Chapter 11 process. While this counter-proposal is confidential, it is fair to say that the parties were far apart in their negotiations, particularly with respect to treatment of the Syndicate indebtedness.

[42] Also on March 11, 2016, a representative of Sanjel met with A&M's representative and discussed Sanjel's intention to disclaim certain leases in the anticipated CCAA proceedings.

[43] Following receipt of the second round bids, Sanjel and its advisors identified the top three bidders and began negotiations with them with the goal of finalizing due diligence and being in a position to execute final APAs on March 24, 2016, as indicated in the Bank Forbearance Agreement.

[44] In the meantime, Sanjel continued meetings with the A&M representative, who asked for, and was provided with:

a) access to the newly created VDR for second stage bidders/investors in the SISP on March 12, 2016.

b) draft materials relating to the CCAA filing, including current drafts of cash flow projections and drafts of stakeholder communication regarding the CCAA, on March 21, 2016.

[45] On March 20, 2016, the Ad Hoc Bondholders provided Sanjel and the Syndicate with a third restructuring proposal. This one provided for some paydown of the Syndicate's debt, but involved less than half of that recovery in new money, about the same amount in debt secured by accounts receivable and a substantial amount of bank debt rolled over into a new loan. It also provided for a DIP facility to rank *pari passu* with a new bank credit facility in the event of a liquidation and the conversion of some bondholder debt into secured notes.

[46] On March 23, 2016, counsel for Sanjel requested that the Trustee postpone the bondholder meeting scheduled for March 31, 2016 to April 14, 2016. He also proposed to set up the requested informational update on March 31, 2016. On March 25, 2016, counsel for the Trustee consented to this request.

[47] In the SISP, final bids were received from the three top bidders on March 24, 2016, with negotiations to continue on final APAs. On the same day, Sanjel and its advisors hosted a call with A&M and Moelis, during which they walked through a 13 week cash forecast.

[48] On March 31, 2016 the Syndicate and the Ad Hoc Bondholders had discussions with respect to the Ad Hoc Bondholders' March 20 proposal. In previous correspondence, the Syndicate's counsel had questioned the adequacy of the proposed DIP financing in the proposal and noted Sanjel's significant cash needs following exit from an insolvency proceeding, as opposed to the proposal's assumption that there would be better cash flow. At the conclusion of the call, the Ad Hoc Bondholders indicated that they would provide further modelling with respect to their proposal.

[49] On April 3, 2016, Sanjel entered into final APAs with the proposed purchasers, STEP and Liberty. On April 4, 2016, the Sanjel Group filed for CCAA protection. Counsel for Sanjel Group disclosed that the application was made without notice to the Ad Hoc Bondholders He submitted that notice would imperil the CCAA proceedings as the bondholders may, with notice, have pre-empted the CCAA filing by an involuntary filing under Chapter 11. There is no requirement to give notice to unsecured creditors of a CCAA filing. There are circumstances, and this was one of them, where it is appropriate to seek an initial order on an ex parte basis:

> This may be an appropriate – even necessary – step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("Rescue!"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7

[50] On April 11, 2016, the Ad Hoc Bondholders presented their fourth proposal for restructuring, not to Sanjel but to the Syndicate. This proposal increases the amount the bondholders would contribute to Sanjel for new equity, which would be used to repay a portion of the Syndicate's loan.

[51] According to Fried Frank, the Syndicate's counsel responded on April 13, 2016 advising that while they appreciated the work done by the Ad Hoc Bondholders, the Syndicate preferred the sale route. The Syndicate proposed alternatives that it might consider involving a higher pay-

out of the Syndicate's debt than offered by the April 11, 2016 proposal. The Ad Hoc Bondholders have not responded.

[52] The Sanjel Group apply for an order approving the sales transactions generated through the SISP, being a sales agreement between Sanjel and STEP Energy Services Ltd., including an assignment of the sale of the debtor's cementing assets in favour of 1961531 Alberta Ltd., and a sales agreement between Sanjel and Liberty.

[53] The Trustee applied for an order dismissing the application for approval of these transactions, allowing the Ad Hoc Bondholders to propose a plan of arrangement, lifting the stay to allow the Trustee to commence a Chapter 11 filing and directing a new Court-monitored SISP, among other applications

## III. Applicable Law

[54] Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

(a) whether the process leading to the proposed sale was reasonable in the circumstances;
(b) whether the Monitor approved the process leading to the proposed sale;
(c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
(d) the extent to which the creditors were consulted;
(e) the effects of the proposed sale on creditors and other interested parties; and
(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

[55] In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

[56] Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?

b) Were the interests of all parties considered?

c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?

d) Was there unfairness in the working out of the process?

*Royal Bank v Soundair*, 1991 Carswell Ont (Ont CA) at para 20.

[57] Gascon, J. (as he then was) suggested in *Re AbitibiBowater, Inc*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the

monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and

b) the weight to be given to the recommendation of the monitor.

[58] As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

## IV. Analysis

[59] The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

A. The Trustee submits that the CCAA can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the CCAA provides scope for greater recoveries than would be available on a bankruptcy.

[60] Most of the cases relied upon by the Trustee with respect to this submission predate the 2009 enactment of section 36 of the CCAA. While prior to this change to the CCAA, there was some authority that questioned whether the CCAA should be used to carry out a liquidation of a debtors' assets, there was also authority that accepted this as a proper use of the statute .

[61] An analysis of the pre-section 36 state of the law on this issue, and support for the latter view, is well summarized in *Re Nortel Networks Corp*., [2009] O.J. No. 3169. As noted by Morawetz, J. at para 28 of that decision, the CCAA is a flexible statute, particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests. This is such a case.

[62] Section 36 now provides that a CCAA court may authorize the sale or disposition of assets outside the ordinary course of business if authorized to do so by court order. There is thus no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement.

[63] Morawetz, J in *Re Target Canada Co*., 2015 ONSC 303 at paras 32 and 33, describes the change brought about by section 36:

> Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.
>
> The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.
>
> See also *Re Brainhunter Inc.,* 2009 CarswellOnt 8207 at para 15.

[64] Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

[65] What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

[66] As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

[67] The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

[68] In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

[69] It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

[70] A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

[71] Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in

advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

[72] Similar issues were considered in *Re Nelson Education Ltd.*, 2015 ONSC 5557 at paras 31-32, and in *Re Bloom Lake,* [ p.1], 2015 QCCS 1920 at para 21.

[73] The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

[74] While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

[75] The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

[76] Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

[77] While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

[78] I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

[79] Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

[80] Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am

satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

[81] These are serious allegations, but they are not supported by the evidence.

[82] As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

[83] These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

[84] The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

[85] The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

[86] The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate. It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

[87] In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all

unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defendable justifications.

[88] The Ad Hoc Bondholders describe their proposal as a "germ" of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISP.

[89] The Trustee also submits that the Court should not be deterred by the Syndicate's rejection of the proposal, insisting on its value and citing cases where a creditor's stated intention not to accept a plan did not prevent a CCAA filing from proceeding. This is a different situation: the Ad Hoc Bondholder's proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate's rejection of such a plan, even if inclined to do so.

[90] The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the "Demand Acceleration and NOI") on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

[91] This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

[92] The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group's revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure and the integration of its business in its initial filing, including the fact that the Sanjel Group's "nerve centre", management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group's COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

[93] The Trustee's most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders' meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA .

[94] Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the

Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

[95] The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of "prospective enforcement action as proposed for consideration at the scheduled bondholders meeting," as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

[96] The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

[97] The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate "to the serious and material prejudice of the Bondholders" and other unsecured creditors.

[98] The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

[99] The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Limited (Re),* 2009 CarswellOnt 4471 (SCJ) at para 43.

[100] Section 6 of the CCAA requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective "veto" over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co, Re***,** 2009 ABQB 490 at para 22.

[101] A noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no, agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

[102] The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder's proposals would even provide sufficient

operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

[103] The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the *United States Bankruptcy Code*, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

[104] While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

(a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;

(b) Sanjel could confirm a plan without the consent of the Syndicate; and

(c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

[105] Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

[106] This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

[107] The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

[108] What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

[109] The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

[110] The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct

negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

[111] The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

## V. Conclusion

[112] I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbably that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence

and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

## VI. Postscript

[113] On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

[114] The letter asserts the following:

a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;

b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;

c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;

d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";

e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

[115] The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients herby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such

claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

c) "... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts."

[116] The letter comments that "(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order."

[117] The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

[118] On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

[119] The Monitor was satisfied by its rapid but thorough investigations that:

a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;

b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC's fundraising efforts or fund deployment and he has no ownership interest in ARC;

c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;

d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;

e) The senior Mr. MacDonald has not had an active role in Sanjel's management for years, was not involved in the SISP and does not own shares in STEP or ARC;

f) Mr. Hooker's involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;

g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;

i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

[120] This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

[121] When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

[122] The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

[123] The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

[124] This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

[125] Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

[126] With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

[127] Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

[128] I accept the Monitor's advice on this issue.

[129] With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

[130] The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale if it is satisfied that:

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the debtor company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale: CCAA section 36(4).

[131] A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

[132] There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

[133] Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

[134] In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

[135] The issue of who should bear the cost of the investigation into these allegations is reserved.

Heard on the 28th day of April, 2016.

**Dated** at the City of Calgary, Alberta this 16th day of May, 2016.

**B.E. Romaine**
**J.C.Q.B.A.**

**Appearances:**

Chris Simard/Alexis Teasdale
for the Sanjel Group

Robert Anderson Q.C./Emily Paplawski
for the Trustee

Josef Kruger Q.C./Robyn Gurofsky/Jessie Cameron
for the Monitor

Kelly Bourassa/Kelly Peters
for the Syndicate

David Mann
for the Canadian Purchasers

Sean Collins/Walker Macleod
for the US Purchasers

Daniel Gilborn
for the TR Transport Inc.

Katherine Reiffenstein
for Aspen Air Corp. and Aspen Air US Corp.

Brian Davison/Ryan Algar/Karen Fellowes
for MacBain Properties Ltd. and MacBain Group

Melanie Gaston
for TAQA

Caireen Hanert
for Weir Group PLC

Heather Ferris
for GCC of America Inc.

Jennifer Davis
for CT Logics

Mary Buttery
for ARI Fuel Services

# TAB #4

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to May 4, 2021

Last amended on November 1, 2019

À jour au 4 mai 2021

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### Order to disclose information

**(5)** On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

### Unrevised collective agreements remain in force

**(6)** For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

### Parties

**(7)** For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

### Restriction on disposition of assets

**65.13 (1)** An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) 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.

### Individuals

**(2)** In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

### Notice to secured creditors

**(3)** An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

### Ordonnance visant la communication de renseignements

**(5)** Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

### Maintien en vigueur des conventions collectives

**(6)** Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

### Parties

**(7)** Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

### Restriction à la disposition d'actifs

**65.13 (1)** Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

### Personne physique

**(2)** Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

### Avis aux créanciers

**(3)** La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

**Factors to be considered**

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

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

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

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

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

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

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

**Additional factors — related persons**

**(5)** If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

**(a)** good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

**(b)** the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**Related persons**

**(6)** For the purpose of subsection (5), a person who is related to the insolvent person includes

**(a)** a director or officer of the insolvent person;

**(b)** a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

**(c)** a person who is related to a person described in paragraph (a) or (b).

**Facteurs à prendre en considération**

**(4)** Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

**a)** la justification des circonstances ayant mené au projet de disposition;

**b)** l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

**c)** le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

**d)** la suffisance des consultations menées auprès des créanciers;

**e)** les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

**f)** le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

**Autres facteurs**

**(5)** Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

**a)** d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

**b)** d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

**Personnes liées**

**(6)** Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

**a)** le dirigeant ou l'administrateur de celle-ci;

**b)** la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

**c)** la personne liée à toute personne visée aux alinéas a) ou b).

### Assets may be disposed of free and clear

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

### Restriction — employers

**(8)** The court may grant the authorization only if the court is satisfied that the insolvent person can and will make the payments that would have been required under paragraphs 60(1.3)(a) and (1.5)(a) if the court had approved the proposal.

### Restriction — intellectual property

**(9)** If, on the day on which a notice of intention is filed under section 50.4 or a copy of the proposal is filed under subsection 62(1), the insolvent person is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (7), that sale or disposition does not affect the other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2005, c. 47, s. 44; 2007, c. 36, s. 27; 2018, c. 27, s. 266.

### Insolvent person may disclaim or resiliate commercial lease

**65.2 (1)** At any time between the filing of a notice of intention and the filing of a proposal, or on the filing of a proposal, in respect of an insolvent person who is a commercial lessee under a lease of real property or an immovable, the insolvent person may disclaim or resiliate the lease on giving thirty days notice to the lessor in the prescribed manner, subject to subsection (2).

### Lessor may challenge

**(2)** Within fifteen days after being given notice of the disclaimer or resiliation of a lease under subsection (1), the lessor may apply to the court for a declaration that subsection (1) does not apply in respect of that lease, and the court, on notice to any parties that it may direct, shall, subject to subsection (3), make that declaration.

### Autorisation de disposer des actifs en les libérant de restrictions

**(7)** Le tribunal peut autoriser la disposition d'actifs de la personne insolvable, purgés de toute charge, sûreté ou autre restriction, et, le cas échéant, est tenu d'assujettir le produit de la disposition ou d'autres de ses actifs à une charge, sûreté ou autre restriction en faveur des créanciers touchés par la purge.

### Restriction à l'égard des employeurs

**(8)** Il ne peut autoriser la disposition que s'il est convaincu que la personne insolvable est en mesure d'effectuer et effectuera les paiements qui auraient été exigés en vertu des alinéas 60(1.3)a) et (1.5)a) s'il avait approuvé la proposition.

### Restriction à l'égard de la propriété intellectuelle

**(9)** Si, à la date du dépôt de l'avis d'intention prévu à l'article 50.4 ou du dépôt d'une copie de la proposition prévu au paragraphe 62(1), la personne insolvable est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans la disposition d'actifs autorisée en vertu du paragraphe (7), cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2005, ch. 47, art. 44; 2007, ch. 36, art. 27; 2018, ch. 27, art. 266.

### Résiliation d'un bail commercial

**65.2 (1)** Entre le dépôt d'un avis d'intention et celui d'une proposition relative à une personne insolvable qui est un locataire commercial en vertu d'un bail sur un immeuble ou un bien réel, ou lors du dépôt d'une telle proposition, cette personne peut, sous réserve du paragraphe (2), résilier son bail sur préavis de trente jours donné de la manière prescrite.

### Contestation

**(2)** Sur demande du locateur, faite dans les quinze jours suivant le préavis, et sur préavis aux parties qu'il estime indiquées, le tribunal déclare le paragraphe (1) inapplicable au bail en question.

# TAB #5

# SUPERIOR COURT
**Commercial Division**



CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-048114-157

DATE: April 27, 2015

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**PRESIDED BY: THE HONOURABLE STEPHEN W. HAMILTON, J.S.C.**

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

**BLOOM LAKE GENERAL PARTNER LIMITED**
**QUINTO MINING CORPORATION**
**8568391 CANADA LIMITED**
**CLIFFS QUÉBEC IRON MINING ULC**
Petitioners
And
**THE BLOOM LAKE IRON ORE MINE LIMITED PARTNERSHIP**
**BLOOM LAKE RAILWAY COMPANY LIMITED**
Mises-en-cause
And
**FTI CONSULTING CANANDA INC.**
Monitor
And
**9201955 Canada inc.**
Mise-en-cause
And

**EABAMETOONG FIRST NATION**
**GINOOGAMING FIRST NATION**
**CONSTANCE LAKE FIRST NATION and**
**LONG LAKE # 58 FIRST NATION**
**AROLAND FIRST NATION**
**MARTEN FALLS FIRST NATION**
Objectors

financial sector participants, local strategic partners, and market participants, as well as parties who had previously expressed an interest in the Ring of Fire.

[33] Moelis began contacting the potential interested parties to solicit interest in purchasing the Ring of Fire project. It sent a form of non-disclosure agreement to fifteen parties. Fourteen executed the agreement and were given access to certain confidential information.

[34] Negotiations ensued with seven of the interested parties, and six were given access to the data room that was established in November 2014.

[35] By January 21, 2015, non-binding letters of intent were received from Noront and from a third party. There were also two verbal expressions of interest, but neither resulted in a letter of intent.

[36] The Noront letter of intent was determined by the sellers in consultation with Moelis and the Monitor to be the better offer. Moelis then contacted all parties who had indicated a preliminary level of interest to give them the opportunity to submit a letter of intent in a price range superior to the Noront letter of intent, but no such letter was received.

[37] Negotiations continued with Noront and a letter of intent was executed with Noront on February 13, 2015.[20]

[38] With respect to this portion of the process, CDM does not raise any issue but the First Nations bands complain that they were not included in the list of potential interested parties and were not otherwise consulted.

[39] The Court will discuss the special status of the First Nations bands in the next section of this judgment. At this stage, it is sufficient to note that the sale process must be reasonable, but is not required to be perfect. Even if the initial list of eighteen potential buyers and strategic partners omitted some potential buyers, this is not a basis for the Court to intervene, provided that the sellers, with Moelis and the Monitor, took reasonable steps.[21] The Court is satisfied that this test was met.

### *(2) From letter of intent to initial SPA*

[40] Between February 13, 2015 and March 22, 2015, the sellers negotiated the SPA with Noront and signed the initial SPA. In that same period, CDM expressed an interest in the Ring of Fire interests and sent three separate offers, all of which were refused by the sellers.

[41] CDM does not contest the reasonability of the sellers' actions in this period. In fact, CDM did not contest the original motion to approve the initial SPA, but chose instead to make a new offer.

### *(3) The initial SPA and the "Superior Proposal"*

[42] The initial SPA with Noront dated March 22, 2015 provided for a purchase price of US $20 million.

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[20] Exhibit R-9.

[21] *Terrace Bay Pulp Inc. (Re)*, 2012 ONSC 4247, par. 48.

# TAB #6

CANADA

CONSOLIDATION

CODIFICATION

# Bankruptcy and Insolvency Act

# Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to May 4, 2021

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**(a)** the insolvent person has acted, and is acting, in good faith and with due diligence;

**(b)** the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

**(c)** no creditor would be materially prejudiced if the extension being applied for were granted.

**Court may not extend time**

**(10)** Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

**Court may terminate period for making proposal**

**(11)** The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

**(a)** the insolvent person has not acted, or is not acting, in good faith and with due diligence,

**(b)** the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

**(c)** the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

**(d)** the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

**Trustee to help prepare proposal**

**50.5** The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

**Order — interim financing**

**50.6 (1)** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

**a)** la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

**b)** elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

**c)** la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

**Non-application du paragraphe 187(11)**

**(10)** Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

**Interruption de délai**

**(11)** À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

**a)** la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

**b)** elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

**c)** elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

**d)** le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

**Préparation de la proposition**

**50.5** Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

**Financement temporaire**

**50.6 (1)** Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

**Individuals**

**(2)** In the case of an individual,

**(a)** they may not make an application under subsection (1) unless they are carrying on a business; and

**(b)** only property acquired for or used in relation to the business may be subject to a security or charge.

**Personne physique**

**(2)** Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

**Priority**

**(3)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

**Priorité — créanciers garantis**

**(3)** Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

**Priority — previous orders**

**(4)** The court may order that the security or charge rank 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.

**Priorité — autres ordonnances**

**(4)** Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

**Factors to be considered**

**(5)** In deciding whether to make an order, the court is to consider, among other things,

**(a)** the period during which the debtor is expected to be subject to proceedings under this Act;

**(b)** how the debtor's business and financial affairs are to be managed during the proceedings;

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

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

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

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

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

**Facteurs à prendre en considération**

**(5)** Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

**a)** la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

**b)** la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

**c)** la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

**d)** la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

**e)** la nature et la valeur des biens du débiteur;

**f)** la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

2005, c. 47, s. 36; 2007, c. 36, s. 18.

# TAB #7

**CITATION:** U.S. Steel Canada Inc. (Re), 2016 ONSC 4838
**COURT FILE NO.:** CV-14-10695-00CL
**DATE:** 20160729



**SUPERIOR COURT OF JUSTICE - ONTARIO**

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

**AND IN THE MATTER OF** A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

**BEFORE:** Mr. Justice H. Wilton-Siegel

**COUNSEL:** *Paul Steep* and *Heather Meredith*, for the Applicant U.S. Steel Canada Inc.

*Robert Staley* and *Kevin J. Zych*, for the Monitor Ernst & Young Inc.

*Alan Mark* and *Gale Rubenstein*, for the Province of Ontario

*Max Starnino* and *Karen Jones*, for the United Steel Workers International Union and the United Steel Workers International Union Local 8782

*Sharon White*, for the United Steel Workers International Union, Local 1005

*Andrew Hatnay*, Representative Counsel for the non-unionized active employees and retirees

*Michael E. Barrack, Jeff Galway* and *Kiran Patel*, for United States Steel Corporation

*Sonja Pavic*, for Brookfield Capital Partners Ltd.

**HEARD:** July 27, 2016

## ENDORSEMENT

[1] The applicant, U.S. Steel Canada Inc. (the "applicant"), has brought a motion seeking (1) an extension of the stay of proceedings granted pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"); (2) authorization, and approval, of the second amending and extension agreement dated as of July 15, 2016 (the "Second Extension Agreement"), which amends and extends the amended and restated DIP financing term sheet between the applicant and Brookfield Capital Partners Ltd. (the "DIP Lender") dated November 4, 2015; and (3) approval of a second key employee retention plan (the "KERP"). The United Steel Workers International Union (the "USW"), USW Local 8782 and USW Local 1005 and Representative Counsel for the non-unionized employees and retirees (the "Representative

the applicant or another stakeholder, to achieve such a decision. However, I do not believe that a court-ordered deadline, whether firm or "evidence-based", is either necessary or would be useful to the restructuring process at the present time for the following reasons.

[9] First, and most important, significant progress has been made since the termination of Phase II of the SISP. Discussions and negotiations are on-going between the bidders and the key stakeholders. There is a target date of August 5, 2016 for completing this activity. After that, the applicant will be in a position to assess the options before it – which are basically to work toward completion of a going-concern transaction with a bidder it selects or to consider alternative transactions involving the applicant's assets on a more limited basis. That decision will have a significant impact on the next phase of these restructuring proceedings.

[10] At the present time, however, without knowing which road the applicant will be going down, it is premature to try to craft conditions to the requested stay extension order. It is obvious that the imposition of a deadline of August 12, 2016 is impracticable. It may not be a reasonable time frame for the applicant to conclude its immediate deliberations regarding the form of the restructuring. It would certainly be unreasonable in terms of any expectation of completing all the principal terms of any proposed reorganization transaction with a selected bidder. More generally, under either restructuring scenario currently contemplated, more time will be required for the applicant to complete any transaction that the applicant resolves upon.

[11] Second, in extending the stay extension to November 30, 2016, the Court is not renouncing its authority to impose an earlier deadline if required by the restructuring process. In this sense, the issue of the stay extension and the supervisory role of the Court in respect of the restructuring process engage separate issues.

[12] Third, it is also important for a successful going-concern restructuring to support the applicant's continued operations on a "business-as-usual" basis to the extent possible to further the prospects of a going-concern restructuring. In this regard, the imposition of short-term milestones, beyond which the circumstances of the applicant remain subject to a determination of the Court, would be counter-productive. It could easily raise unwarranted concerns on the part of third parties dealing with the applicant in the SISP and require the diversion of the applicant's limited resources away from maintaining and growing the business of the applicant as an independent entity.

[13] Fourth, on this extension motion, the financial position of the applicant, as reported upon by the Monitor in its Twenty-Eighth Report, indicates that the applicant has experienced results in line with the Independent Business Plan approved by the Court pursuant to its order dated October 9, 2015 through May 31, 2016 and has experienced better results since then. The forecast cash flows of the applicant for the stay extension period reflect a generally stable cash balance throughout the period despite the anticipated seasonal increase in inventory in the autumn of 2016. Accordingly, there does not appear to be any material prejudice to the security position of any of the creditors who assert secured claims in this proceeding.

[14] Lastly, the monthly reporting and information flow from the Monitor, as well as the case conferences in this proceeding, provide the key stakeholders with on-going information regarding the status of the SISP as well as the financial state of the applicant. Accordingly, the key stakeholders, including but not limited to USS, are in a position to respond as they see fit to

# TAB #8


# ALBERTA
# RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 23/2021

VOLUME ONE

Published March 1, 2021

## Division 4
## Restriction on Media Reporting and Public Access to Court Proceedings

### Application of this Division

**6.28** Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

### Restricted court access applications and orders

**6.29** An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

### When restricted court access application may be filed

**6.30** A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

### Timing of application and service

**6.31** An applicant for a restricted court access order must, 5 days or more before the date scheduled for the hearing, trial or proceeding in respect of which the order is sought,

(a) file the application in Form 32, and

(b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

### Notice to media

**6.32** When a restricted court access application is filed, a copy of it must be served on the court clerk, who must, in accordance with the direction of the Chief Justice, give notice of the application to

(a) the electronic and print media identified or described by the Chief Justice, and

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

**Judge or master assigned to application**

**6.33** A restricted court access application must be heard and decided by

(a) the judge or master assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,

(b) if the assigned judge or master is not available or no judge or master has been assigned, the case management judge for the action, or

(c) if there is no judge or master available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020

**Application to seal or unseal court files**

**6.34(1)** An application to seal an entire court file or an application to set aside all or any part of an order to seal a court file must be filed.

**(2)** The application must be made to

(a) the Chief Justice, or

(b) a judge designated to hear applications under subrule (1) by the Chief Justice.

**(3)** The Court may direct

(a) on whom the application must be served and when,

(b) how the application is to be served, and

(c) any other matter that the circumstances require.

**Persons having standing at application**

**6.35** The following persons have standing to be heard when a restricted court access application is considered

(a) a person who was served or given notice of the application;

(b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

**No publication pending application**

**6.36** Information that is the subject of the initial restricted court access application must not be published without the Court's permission.

AR 124/2010 s6.36;143/2011

# TAB #9

**Atomic Energy of Canada Limited** *Appellant*

*v.*

**Sierra Club of Canada** *Respondent*

and

**The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada** *Respondents*

**Énergie atomique du Canada Limitée** *Appelante*

*c.*

**Sierra Club du Canada** *Intimé*

et

**Le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada** *Intimés*



**INDEXED AS: SIERRA CLUB OF CANADA *v.* CANADA (MINISTER OF FINANCE)**

**Neutral citation: 2002 SCC 41.**

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.

**RÉPERTORIÉ : SIERRA CLUB DU CANADA *c.* CANADA (MINISTRE DES FINANCES)**

**Référence neutre : 2002 CSC 41.**

Nº du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.*

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

*Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.*

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to

droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d'ordonner des interdictions de publication n'est pas assujetti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l'essence de l'article premier de la *Charte* et le critère *Oakes* dans l'analyse applicable aux interdictions de publication. Comme le même objectif s'applique à l'affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l'accusé à un procès équitable) de manière à fournir un guide à l'exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression « bonne administration de la justice » doit être interprétée

# TAB #10

**COURT FILE NO.:** 08-CL-7877
**DATE:** 20091218



**SUPERIOR COURT OF JUSTICE – ONTARIO**
**COMMERCIAL LIST**

**RE:** IN THE MATTER OF LOOK COMMUNICATIONS INC.

Applicant

LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P.

Respondent

AND IN THE MATTER OF AN APPLICATION BY LOOK COMMUNICATIONS INC. UNDER SECTION 192 OF *THE BUSINESS CORPORATIONS ACT*, R.S.C. 1985, c. C.44, AS AMENDED

**BEFORE:** Justice Newbould

**COUNSEL:** *John T. Porter*, for Look Communications Inc.

*Aubrey E. Kauffman*, for Inukshuk Wireless Partnership

**DATE HEARD:** December 17, 2009

## E N D O R S E M E N T

[1] Look Communications Inc.(Look) moves for an order extending a sealing order under which bids made in a court approved sales process were sealed. The order is opposed by Inukshuk Wireless Partnership which is a joint venture between Rogers Communications Inc. and Bell Canada.

[16] Look points out that it is not a private company. It is a public company with stakeholders, being public shareholders. It is not the kind of private corporation that Iacobucci J. was discussing in *Sierra*.

[17] It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd*, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

[18] This case is a little different from the ordinary. Some of the assets that were bid on during the sales process were not sold. However, because the assets that were sold constituted substantially all of the assets of Look, the arrangement under section 192 of the CBCA was completed. Those assets that were not sold remained, however, to be sold and it is in the context of that process that Rogers has been discussing purchasing one or more of these assets from Look.

[19] In this case, had the closing of the sale of the Spectrum and the License been drawn out to the maximum three year period provided for in the sale agreement, these remaining assets in all likelihood would have been sold before the maximum period ran out and during a period of time in which the Receiver's First Report remaining sealed. In those circumstances the effect of the sealing order would have been to protect the later sale process, a process which originally involved a sale of all of the assets of Look. While the remaining sales will not take place under

# TAB #11

**From:** Court of Queen"s Bench of Alberta
**To:** Tony Blais
**Subject:** Notice to Media - Application to Restrict Access
**Date:** Friday, May 21, 2021 5:33:23 PM

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**Notice:**
The Applicant intends to apply for an order restricting publication of or public access to Court proceedings or records. You have the right to state your side of this matter before the judge. To do so, you must be present in Court when the application is heard on the date and at the time and place indicated in the Details of Hearing, below.

**Details of hearing**

| Details of hearing | |
|---|---|
| Court File Number | B201-731795; B201-731797; B201-731799 |
| Plaintiff Name(s) | International Fitness Holdings Inc.; International Fitness Holdings LP; World Health North LP |
| Name (s) of Accused(s), Defendant(s), Respondent(s) | N/A |
| Court Location | Calgary |
| Court Date and Time | May 27, 2021, at 11 a.m. |
| Details of Application | |
| Applicant Type | Plaintiff |
| Applicant's Name | International Fitness Holdings Inc.; International Fitness Holdings LP; World Health North LP |
| Applicant's Lawyer | Stikeman Elliott LLP; Attention: Karen Fellowes, Q.C. and Jakub Maslowski |
| Email Address | kfellowes@stikeman.com; jmaslowski@stikeman.com |
| Details of restriction applied for | Applying for a Sealing Order regarding commercially sensitive information regarding the purchase and sale of the Applicants' assets to an arm's-length purchaser. |

Please do not reply to this e-mail. For further information, please contact the email address provided in Details of Application, above.