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Bitter Bidder Better Stand? *Bloom Lake, G.P.L. (Arrangement of)*, 2015 QCCS 1920

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In May 2010, Justice Gascon of the Superior Court of Québec issued an important decision in *AbitibiBowater Inc. (Arrangement relatif à)*[1]. The context was that of a motion for authorization of the sale of assets owned by AbitibiBowater, following the latter's restructuring under the *Companies' Creditors Arrangement Act* (hereinafter the CCAA). The Court notably reflected on the rejected bidder's standing to intervene in order to contest the fairness of the sale process and its approval. Lavery published its observations on the decision in a July 2010 publication, "Bitter Bidder Bites the Dust"[2].

A bitter bidder is an unsuccessful bidder in a sale process under the CCAA who will seize the courts to denounce the approval of the sale and call for a new tendering process. When assessing a given sale process under Section 36 CCAA, courts will look at certain criteria, including[3]:

> Was there sufficient effort to obtain the best price? le meilleur prix ?
> Was the process conducted effectively and with integrity?
> Were the interests of the parties involved considered?
> Was the sale process fair?[4]

However, the mere standing of the bitter bidder, and its capacity to contest the sale process and its approval, is a matter of its own. Often, the courts will assess the fairness and appropriateness of the sale process under the CCAA before entertaining the issue of the bitter bidder's standing to contest it, if they ever do. Indeed, the rapidity with which the insolvency cases are dealt with makes it difficult for judges to extensively dissert on the issue of standing when they could simply address the legitimacy issue head-on.

In Canadian jurisprudence, *Skyepharma*[5] is the leading authority on the disgruntled bidder's standing to contest the sale process that saw them lose the bid. In this 2000 Ontario Court of Appeal case, Justice O'Connor, writing for the court, states that:

> " [i]f an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.[6]"

Justice O'Connor proposes the following reasons which explain why this is so. First, a prospective purchaser has not acquired any legal or proprietary right in the thing being sold. There is no requirement that a certain offer be accepted, and the receivers have discretion to accept the offer that best suits those with an interest in the proceeds of the sale, mainly the creditors. As such, the involvement of unsuccessful prospective purchasers can distract the court from this central issue.

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The bitter bidder has no interest in the proceeds of the sale and as such, the insertion of other issues within the motion could undermine the interests of the other parties.

Thus, there are policy reasons for restricting the involvement of prospective purchasers in motions for sale approval:

> "There is often a measure of urgency to complete court-approved sales. [...] When unsuccessful purchasers become involved, there is potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands of a disappointed would be purchaser which could be counterproductive to the interests of those for whose benefit the sale is intended.[7]"

In *AbitibiBowater*, although the standing of the bitter bidder had become a theoretical issue, Justice Gascon nevertheless thought some remarks were warranted, especially since Quebec courts never seemed to address nor analyse the standing issue of the disgruntled bidder with the contestation of sale approval motions[8].

Justice Gascon drew from Justice O'Connor's reasons in *Skyepharma*. He underscored the fact that none of the creditors supported the bitter bidder's contestation of the sale process, and that its sole interest was commercial, to close the deal and reap the profits. Furthermore, the contestation did, in this case, cause delays in the approval of the sale and "brought uncertainty in a process where the interested parties had a definite interest in finalizing the deal without further delays.[9]" This was, according to Justice Gascon, a good example of the policy reasons that question the bitter bidder's standing in sale approval motions.

Shortly following *AbitibiBowater*, Justice Mongeon of the Superior Court of Québec very succinctly dealt with the bitter bidder's standing issue in *White Birch*[10]. He stated that while the bitter bidder may have standing as a stakeholder, it may not have any as a disgruntled bidder. On this point, Justice Mongeon noted that he was "impressed" by Justice Gascon's comments in *AbitibiBowater.*.

More recently, Justice Hamilton of the Superior Court of Québec dealt with the "Bitter Bidder" issue in *Bloom Lake g.p.l. (Arrangement of)*[11]. A brief overview of the facts is useful. In February 2015, a letter of intent between Cliff, the seller, and Noront, the purchaser, was executed. While they were negotiating the Share Purchase Agreement, CDM submitted three letters of intent, all of which were considered, then rejected. The initial Share Purchase Agreement between Cliff and Noront was thus executed in March 2015.

In April 2015, CDM made an unsolicited offer with a purchase price higher than the one agreed to with Noront in the initial Share Purchase Agreement, which provided a "Superior Proposal" mechanism that allowed the sellers to accept an unsolicited and superior offer from a third party. CDM's proposal was deemed such a "Superior Proposal" by the Monitor, who then supported the establishment of a Supplemental Bid Process. Both Noront and CDM participated in this supplementary bid process and, at the end, Noront's bid was the highest and the sellers accepted its offer. As the sale approval motion was submitted to the Court, CDM, as Intervener, contested the sale on the grounds that:

> The sellers were required to accept their Superior Proposal, as specified in the initial purchase agreement; le meilleur prix ?
> The Supplemental Bid Process did not treat both bidders fairly;
> The Monitor's support of the process should not be determinative of its validity.

Finally, CDM submitted that it had sufficient interest to intervene in the CCAA proceedings and contest the motion[12].

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Justice Hamilton dismissed CDM's objections regarding the validity of the Supplemental Bid Process. He reminded CDM that the criteria set forth in Section 36 of the CCAA are not cumulative, nor exhaustive, and that the courts must look at the transaction as a whole to determine whether the process was fair, reasonable and appropriate[13]. Referring to *White Birch* and *AbitibiBowater*, Justice Hamilton added that the Court should additionally give credit to two other elements: the "business judgement" rule and the Monitor's recommendation. Indeed, courts should refrain from second guessing the commercial and business judgement of the sellers and of the Monitor, and the latter's role and expertise in insolvency proceedings. As court-appointed officer, the Monitor's recommendations, especially when supported by the stakeholders, should be given great weight.

Justice Hamilton then reviewed the sale process in light of these factors, and dismissed CDM's objections. As such, he did not have to address the issue of CDM's standing to intervene in the proceedings and contest the motion. He nevertheless chose to do so in light of the parties' extensive pleadings on this matter.

Justice Hamilton confirmed that the Ontario authorities do not grant a bitter bidder any interest or standing to challenge approval motions, and that these authorities were followed in Quebec[14]. He agrees that a losing bidder often has no interest but its own to promote, and that " [i]t will seek to raise these issues, not because it has any particular interest in fairness or integrity, but because it lost and it wants a second kick at the proverbial can.[15]"

Nevertheless, Justice Hamilton sees a certain disconnect between the Court's duty of assessing the reasonableness, fairness and integrity of the sale process and the exclusion of the disgruntled bidder from the proceedings:

> [85] However, if the losing bidder is excluded from the process, who will raise the issues of fairness and integrity? The creditors will not do so, because their interest is limited to getting the best price. Where there is a subsequent higher bid, their interest will be in direct conflict with the integrity of the sale process[16].

Justice Hamilton attempts to reconcile the reasons why the bitter bidders should be excluded from the process – lack of interest, distraction – and the problems this causes in assessing the reasonableness of a sale. He proposes that if losing bidders are excluded from the proceedings, at least they should be able to voice their complaints to the monitor who, in turn, would have to report these objections to the court. In the case before him, however, he admits that CDM's intervention in the proceedings helped the Court assess the reasonableness of the sale under Section 36 CCAA[17]. He concludes by saying that although he dismisses the objections raised by CDM, he does not do so on grounds of lack of interest or standing[18].

Thus, Justice Hamilton's observations on the standing of the bitter bidder appear somewhat critical of the judges' reasoning in *Skyepharma*, *AbitibiBowater* and *White Birch*. While not denying the validity of the policy reasons which weighed heavily in these other cases, Justice Hamilton proposes a new approach to disputes surrounding contested sale approval motions, which begs the question: does the bitter bidder better stand, now?

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1 2010 QCCA 1742.
2 https://www.lavery.ca/en/publications/our-publications.
3 Para 37, *AbitibiBowater*.
4 *Ibid*.
5 47 O.R. (3d) 234.
6 Para 24, *Skyepharma*.
7 Para 30, *Skyepharma*.
8 Para 81, *AbitibiBowater*.
9 Para 87, *AbitibiBowater*.
10 2010 QCCS 4915.

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[11] 2015 QCCS 1920, motion for leave to appeal dismissed, 2015 QCCA 754.
[12] Para 23.
[13] Para 26.
[14] Para 82, *Bloom Lake*.
[15] Para 84, *Bloom Lake*.
[16] Para 85, *Bloom Lake*.
[17] Para 86, *Bloom Lake*.
[18] Para 89, *Bloom Lake*.

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