



Clerk's Stamp

COURT FILE NUMBER

1803-13761

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE

EDMONTON

PLAINTIFF

ROYAL BANK OF CANADA

DEFENDANTS

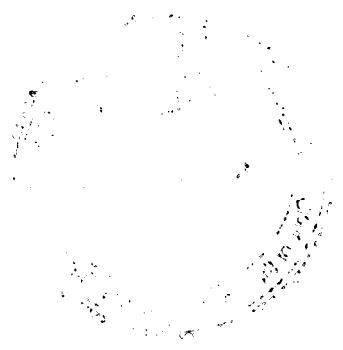
EDMONTON SOUTH ANIMAL HOSPITAL LTD., PRIME VET CORPORATION, PRIME VET HOLDING CORP., LAKEVIEW ANIMAL HOSPITAL LTD., CUMBERLAND VETERINARY SERVICES LTD., IGNACIO YAP TAN and AMANDA RAE TAN

DOCUMENT

BRIEF OF LAW FOR ORDER APPROVING AND VESTING SALE AND OTHER RELIEF

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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I. INTRODUCTION

1. This brief of law is submitted on behalf of MNP Ltd. (the "**Receiver**") in its capacity of the court-appointed Receiver and Manager of Edmonton South Animal Hospital Ltd., Prime Vet Corporation, Prime Vet Holding Corp., Lakeview Animal Hospital Ltd., Cumberland Veterinary Services Ltd. (collectively, the "**Debtor**") in support of its application (the "**Application**") for, among other things, an Order approving the agreement between the Receiver in its capacity as receiver of the Debtor (and not in its personal or corporate capacity) and VetCan Corp. ("**VetCan**") for the purchase and sale of certain assets of the Debtor in relation to the ESAH Clinic herein defined (the "**Assets**") on certain terms offered to and accepted by the Receiver (the "**VetCan APA**") on behalf of the Debtor and vesting the Equipment with VetCan.
2. The Application has been brought in accordance with paras 3(h), (k), (l), and (m) of the Order of the Honourable Associate Chief Justice K.G. Nielsen of the Court of Queen's Bench of Alberta (the "**Court**") granted June 21, 2019 (the "**Receivership Order**"), which authorized the Receiver to, among other things, execute, assign, issue and endorse documents of whatever nature in respect of any of the Property (as defined in the Receivership Order) for any purpose pursuant to the Receivership Order and market any or all of the Property, sell the Property or any parts thereof, and apply for any vesting order necessary to convey the Property or any parts thereof, free and clear of any liens of encumbrances.¹
3. The Receiver has reviewed and determined that the VetCan's offer is fair and reasonable and in the best interest of the Debtor, the creditors, and shareholders. As set out below, the Receiver has met the test for this Honourable Court to grant the Order approving and ratifying the VetCan APA.
4. In addition to the Sale and Vesting Order with respect to the VetCan APA, the Receiver seeks, among other things:
 - (a) an Order sealing the Confidential Addendum (collectively, the "**Confidential Addendum**") to the First Report of the Receiver dated November 6, 2019 (the "**Receiver's First Report**"); and

¹ *Consent Receivership Order*, granted by the Honourable Associate Chief Justice K.G. Nielsen on June 21, 2019 QB Action No. 1803-13761 [*Consent Receivership Order*] [TAB 1] para 3.



(b) an Order approving the Interim Distribution herein defined.

5. The Receiver submits that the relief sought is reasonable and appropriate in the circumstances and at this stage of these proceedings.

II. BACKGROUND

6. A detailed background of the Debtor and the Receiver's activities leading up to the Application is more fully described in the Receiver's First Report. A brief overview of these proceedings is set out below.

A. The Debtor

7. The Debtor is a body of affiliated corporations operating and carrying on the business of three veterinary clinics in the City of Edmonton, Alberta. The three clinics carried on business under the names of the Lakeview Animal Hospital (the "**Lakeview Clinic**"), the Edmonton South Animal Hospital (the "**ESAH Clinic**"), and the Terra Losa Animal Clinic (the "**Terra Losa Clinic**").

B. Indebtedness and Security

8. On June 21, 2019, Royal Bank of Canada ("**RBC**") applied to appoint a receiver over the current and future assets, undertakings and properties of the Debtor.
9. RBC has registered various security agreements against each of the entities of the Debtor. Each entity of the Debtor granted RBC a security interest in its Property, including security interests in all of the Debtor's present and after acquired personal property ("**AIIPAAP**"). RBC has obtained guarantees from each of the Debtor's entities for the obligations and liabilities of the other entities owed to RBC.
10. CWB National Leasing ("**CWB National**") has registered security interests against certain pieces of the Assets described as follows:
- (a) All Veterinary Medical Equipment-CTX MID, Laser Cart, Laser Bin of every nature or kind described in Lease Number 2942571; and
 - (b) All Veterinary Medical Equipment-Companion Therapy Compact Laser Fiber Delivery System, Integrated Handpiece, Mobile Medical Cart of every nature or kind described in Lease Number 2704566.



11. Incom Leasing Inc. ("**Indcom**") has also registered a security interest against certain pieces of the Assets described as an Idexx Imagevue DR40 System including all accessories and attachments.

C. Offer to Purchase by VetCan

12. On July 15, 2019, as more thoroughly described in the Receiver's First Report, the Receiver commenced an en bloc sales process which included the assets of the ESAH Clinic (the "**Sales Process**").
13. In accordance with the Sales Process, the Information Summary (as provided in the Receiver's First Report) was distributed as follows:
 - (a) The Information Summary was sent to approximately 600 MNP LLP partners nationwide;
 - (b) A LinkedIn advertisement was created which received 298,777 impressions and 143 views;
 - (c) The Information Summary was sent via direct email to 74 veterinary practices throughout Alberta, in addition to certain major veterinary consolidators across Canada; and
 - (d) The Sales Process was advertised through the Alberta Veterinary Medical Association.
14. In response, eighteen (18) different parties signed confidentiality agreements and were granted access to an online data room, confidential information, and other relevant financial information made available through the online data room.
15. The Receiver concluded its invitation for offers on August 15, 2019.
16. The offers received by the Receiver through the Sales Process and the Receiver's negotiations with the offerors is more thoroughly discussed in the Confidential Addendum.
17. Following the close of the invitation for offers, the Receiver received an additional, unsolicited, offer to purchase from VetCan as more thoroughly described in the Confidential Addendum to the First Report. After further negotiations with VetCan, the



Receiver accepted an offer from VetCan and entered into the VetCan APA subject to Court approval.

III. ISSUES

18. The issues to be determined by this Honourable Court are whether it is appropriate and reasonable in the circumstances to:
- (a) approve the VetCan APA;
 - (b) approve of Interim Distribution (as defined below); and
 - (c) grant a sealing order with respect to the Confidential Addendum.

IV. SUBMISSIONS

A. Approval of Sale and Vesting of Assets

19. The *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 permits the Court to appoint a receiver to do any of the following:
- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;
 - (b) exercise any control that the Court considers advisable over the property and over the insolvent corporation's business; and
 - (c) take any other action that the Court considers advisable.²
20. In carrying out its duties and exercising its powers, a receiver has an obligation to deal with an insolvent company's property in a commercially reasonable manner.³

B. Soundair Criteria

21. The criteria to be applied when considering the approval of a sale were first set out by the Ontario Court of Appeal in *Royal Bank v Soundair Corp.*⁴ When considering whether

² *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), s. 243(1) [TAB 2]

³ *BIA*, s. 247 [TAB 3]

⁴ *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76 [*Soundair*] [TAB 4].



an offer accepted by a receiver should be approved and ratified by the Court, the Court is to consider and determine:

- (a) whether the receiver 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.
22. The Alberta Courts have adopted these criteria and have applied them in receivership proceedings on numerous occasion.⁵
23. It has been further acknowledge that the Court must place a great deal of confidence in the actions taken and in the opinions formed by a receiver, and should assume that a receiver is acting properly unless the contrary is clearly shown.⁶
- i. Sufficient Effort***
24. The Receiver submits that it has made sufficient effort to market the Assets.
25. Given the extensiveness of the marketing undertook in the Sales Process, the Receiver is of the opinion that further marketing of the Assets may not necessarily attract a better offer than the VetCan APA, and that further efforts to market the Assets may not be considered commercially reasonable.
26. The Receiver has received several offers for the Assets to give it a reasonable idea as to what the market is willing to pay for the Assets. Further, the Receiver after negotiation with offerors, the Receiver believes that is has obtained the best price for the Assets through the VetCan APA.
27. After reviewing the appraised value of the Assets, as more thoroughly discussed in the Confidential Addendum, and considering the additional costs of continuing the operation

⁵ *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726 at para 3 [TAB 5].

⁶ *Soundair supra*, [TAB 4] at para 14.



of the ESAH Clinic, the Receiver is of the opinion that stakeholders of the Debtor would best be served by acceptance of the VetCan APA.

28. The Receiver submits that it has made reasonable and sufficient efforts to obtain the best price for Assets by entering into the VetCan APA and such a transaction is commercially reasonable.

ii. Interest of All Parties

29. Courts have acknowledged that a receiver's primary concern should be to protect the interests of the debtor's creditors.⁷
30. In considering the "interests of all parties", Courts have recognized that a receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, a receiver must consider the interest of all creditors and then act for the benefit of the general body.⁸
31. The Debtor's largest secured creditor, RBC, supports the Receiver's acceptance of the VetCan APA. The Receiver expects that RBC will suffer a shortfall in respect of its indebtedness following the final distribution in this receivership.
32. Indcom and CWB National, which hold purchase money security interests with respect to certain equipment included in the Assets, will be paid out of their respective security interest in full from the proceeds of the sale of the Assets.
33. The Receiver is of the opinion that the VetCan APA provides for the highest estimated net realization of the Assets and the highest potential recovery for the creditors of the Debtor.
34. In these circumstances, it is commercially reasonable and in the best interest of the Debtor's stakeholders that the VetCan APA receive Court approval.

⁷ See *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766 [TAB 6]

⁸ *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 [*Elaborate Homes*] at para 61 [TAB 7] citing *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 NSR (2d) 34.



iii. The Efficacy and Integrity of the Process

35. When dealing with property of an insolvent corporation, the Court should assume that a receiver has acted properly unless the contrary is clearly demonstrated.⁹
36. The Receiver submits that there is nothing improper about the acceptance of the VetCan APA.
37. While VetCan's offer was an unsolicited offer and submitted after the deadline to submit offers, the lateness of the offer does not prejudice the other offerors nor does it give VetCan an unfair advantage. There is no reason that the Receiver should not have considered VetCan's offer and choose to accept it. The Receiver is encouraged be pragmatic in dealing with the Property of the Debtor to obtain the best price.¹⁰
38. Except for the purposes of consultation with RBC, the VetCan's offer has been held in confidence.
39. The Receiver has conducted itself with integrity and in good faith in considering and negotiating with VetCan and ultimately entering into the VetCan APA.

iv. Unfairness in the Process

40. The Receiver submits that it acted reasonably, prudently, fairly, and not arbitrarily in accepting VetCan's offer and entering into the VetCan APA.
41. No party was materially prejudiced or disadvantage by the Receiver negotiating and accepting the VetCan's offer.
42. Based on the forgoing, the Receiver submits that the *Soundair* criteria have been satisfied by the Receiver and that the Receiver has acted in a commercially reasonable manner in entering into the VetCan APA.
43. The Court should therefore grant an Order approving the Receiver's acceptance of the VetCan APA and vesting the Assets with VetCan on closing of the transaction.

⁹ See *Crown Trust Co. et al Rosenberg et al* (1986), 60 OR (2d) 87 (Ont HC), especially paras 65, 66, 77 and 84 [TAB 8].

¹⁰ *Salima Investments Ltd. v Bank of Montreal*, 1985 ABCA 191, 1985 CarswellAlta 332 at para 11-12 [TAB 9]

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C. Interim Distribution

44. The Receiver seeks an order for an interim distribution of the proceeds realized on the sale of the Assets in order to pay Indcom and CWB National the amount they are respectively owed and is secured against the Assets.
45. Indcom and CWB National have provided final payout statements for their respective collateral as more thoroughly discussed in the First Report. With approval of this Court, the Receiver anticipates paying out the final payout amounts as provided by Indcom and CWB National. (the “**Interim Distribution**”).

D. Sealing Order

46. In addition to an Order approving the VetCan APA and vesting title of the Assets with VetCan, the Receiver seeks a sealing order with respect to the Confidential Addendum of the Receiver’s First Report.
47. 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*.¹¹
48. 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.¹²
49. In the insolvency context, it is common when assets are being sold pursuant to a court process to seal various bids and other commercially sensitive material, such as

¹¹ *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28 [TAB 9].

¹² *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [TAB 10].

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valuations, in case a further bidding process is required should the transaction being approved falls through.¹³

50. The Ontario courts have further noted that sealing orders in this context are normally granted to maintain fair play so that competitors and potential purchasers do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources.¹⁴
51. In *Alberta Treasury Branches v Elaborate Homes Ltd.*, Justice K.G. Neilsen (as he was then) accepted the reasons and rational of the Ontario Courts and acknowledged that it is common practice in the insolvency context that information relating to the sale of the assets of an insolvent corporation be kept confidential until after the sale is completed pursuant to a court order.¹⁵
52. The Receiver submits that in these circumstances it is necessary to seal Confidential Addendum to prevent a real and substantial risk of harm to commercial interest. The Confidential Addendum contains appraisals with respect to the Assets and other Property of the Debtor. If such information was to be made public, any subsequent sales process conducted by the Receiver, could be compromised to the detriment of the Debtor, the Debtor's creditors, and VetCan.
53. Release of the information prior to the conclusion the Receiver's sales and marketing efforts of the Property may cause irreparable harm to the fairness of any sales process the Receiver may conduct. This would negatively impact the stakeholders of the Debtor, who have an interest in ensuring the highest value possible is received for the Property.
54. The Receiver further submits that salutary effects of a sealing of the Confidential Addendum outweigh any deleterious effects that may be caused by the sealing.
55. The sealing of the Confidential Addendum is essential to the Receiver satisfying the *Soundair* principles as required by this Court, and therefore it is both reasonable and appropriate for the Court to seal the Confidential Addendum on the Court Record.

¹³ *Look Communications Inc v Look Mobile Corp*, 2009 CarswellOnt 7952 (Ont SCJ [Commercial List] at para 17 [TAB 11].

¹⁴ 887574 *Ontario Inc v Pizza Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112 [TAB 12] at para 6.

¹⁵ *Elaborate Homes supra.* at para 54 [TAB 7].

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V. RELIEF CLAIMED

56. Based upon the materials filed and the foregoing submission, the Receiver respectfully requests, among other things:


- (a) An Order approving the VetCan's offer and the VetCan APA and vesting title of the Assets with VetCan on closing of the transaction;
- (b) An Order approving the Interim Distribution;
- (c) An Order sealing the Confidential Addendum of the Receiver's First Report on the Court record until the Receiver has completed its sales process of the Property of the Debtor;
- (d) An Order approving the activities of the Receiver as set out in the First Report;

Such further or other relief as may be requested of the Court by the Receiver.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS ^{12TH} 6TH DAY OF NOVEMBER, 2019

MILLER THOMSON LLP

Per: _____


Stephanie A. Wanke
Spencer Norris
Counsel for the Applicant,
MNP LTD. in its capacity as Receiver of
EDMONTON SOUTH ANIMAL HOSPITAL
LTD., PRIME VET CORPORATION,
PRIME VET HOLDING CORP.,
LAKEVIEW ANIMAL HOSPITAL LTD.,
CUMBERLAND VETERINARY SERVICES
LTD.,



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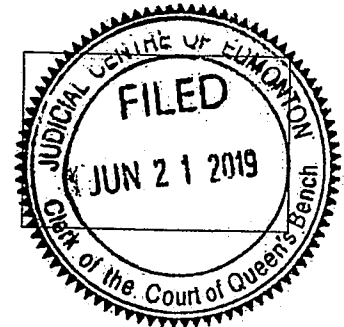
TABLE OF AUTHORITIES

TAB

1. *Receivership Order* granted by Associate Chief Justice K.G. Nielsen dated June 21, 2019.
2. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 243(1).
3. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 247.
4. *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76.
5. *Computershare Trust Company of Canada v Venti Investment Corporation*, 2011 ABQB 726, 2011 CarswellAlta 2304.
6. *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766, 2000 CarswellAlta 1211.
7. *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350, 2014 CarswellAlta 921.
8. *Crown Trust Co. et al Rosenberg et al* (1986), 60 OR (2d) 87 (Ont HC).
9. *Salima Investments Ltd. v Bank of Montreal*, 1985 ABCA 191, 1985 CarswellAlta 332.
10. *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28.
11. *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, 2002 CarswellNat 822.
12. *Look Communications Inc v Look Mobile Corp*, 2009 CarswellOnt 7952 (Ont SCJ [Commercial List]).
13. *887574 Ontario Inc v Pizza Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112.

TAB 1

Clerk's Stamp:



COURT FILE NUMBER: 1803-13761

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE EDMONTON

PLAINTIFF ROYAL BANK OF CANADA

DEFENDANTS EDMONTON SOUTH ANIMAL HOSPITAL LTD., PRIME VET CORPORATION, PRIME VET HOLDING CORP., LAKEVIEW ANIMAL HOSPITAL LTD., CUMBERLAND VETERINARY SERVICES LTD., IGNACIO YAP TAN, and AMANDA RAE TAN

DOCUMENT:

RECEIVERSHIP ORDER

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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 Phone: 780.969.3500
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 Attention: Dana M. Nowak / Mandi Deren-Dubé
 Solicitors for Royal Bank of Canada
 File: 1480-150

I hereby certify this to be a true copy of the original.

[Signature]
Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED: Friday, June 21, 2019

NAME OF JUDGE WHO MADE THIS ORDER: The Honourable Associate Chief Justice Nielsen

LOCATION OF HEARING: Edmonton, Alberta

UPON the application of Royal Bank of Canada ("**RBC**") in respect of Edmonton South Animal Hospital Ltd., Prime Vet Corporation, Prime Vet Holding Corp., Lakeview Animal Hospital Ltd., and Cumberland Veterinary Services Ltd. (collectively the "**Debtors**"); **AND UPON** having read the Application, the Affidavit of Josh Coonan, the Transcript of Cross-Examination on the Affidavit of Josh Coonan, the Schedule of Undertakings given by Josh Coonan, and the Affidavit of Service of Ameena Quazi, filed; **AND UPON** reading the consent of MNP Ltd. to act as receiver and manager ("**Receiver**") of the Debtors, filed; **AND UPON** hearing counsel for RBC and all other interested parties present;



IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of application for this order (the "Order") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), and sections 13(2) of the *Judicature Act*, R.S.A. 2000, c.J-2, **MNP LTD.** is hereby appointed Receiver, without security, of all of the Debtors' current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate, including all proceeds thereof, and specifically including the following lands described as:

Condominium Plan 162 0625
Unit 6
And 758 Undivided One Ten Thousandth Shares In The Common Property
Excepting Thereout All Mines and Minerals

(collectively the "Property").

RECEIVER'S POWERS

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:
 - (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property, which shall include the Receiver's ability to abandon, dispose of or otherwise release any interest in any of the Debtors' real property, or any right in any immovable, and any license or authorization issued by the Alberta Energy Regulator, or any other similar government authority, in respect of such interest in real property or immovable, including pursuant to section 14.06(4) of the BIA, notwithstanding the provisions of the *Oil and Gas Conservation Act*, RSA 2000, c O-6, the *Pipeline Act*, RSA 2000, or any other similar provincial legislation;
 - (b) to receive, preserve and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;



- (c) to manage, operate and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts of the Debtors;
- (d) to engage veterinarians, veterinary technologists, veterinary assistants, consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- (g) to settle, extend or compromise any indebtedness owing to or by the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;
- (i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtors;
- (j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;
- (k) to market any or all the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business;



- (i) without the approval of this Court in respect of any transaction not exceeding \$100,000.00 provided that the aggregate consideration for all such transactions does not exceed \$250,000.00; and
- (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 or any other similar legislation in any other province or territory shall not be required.

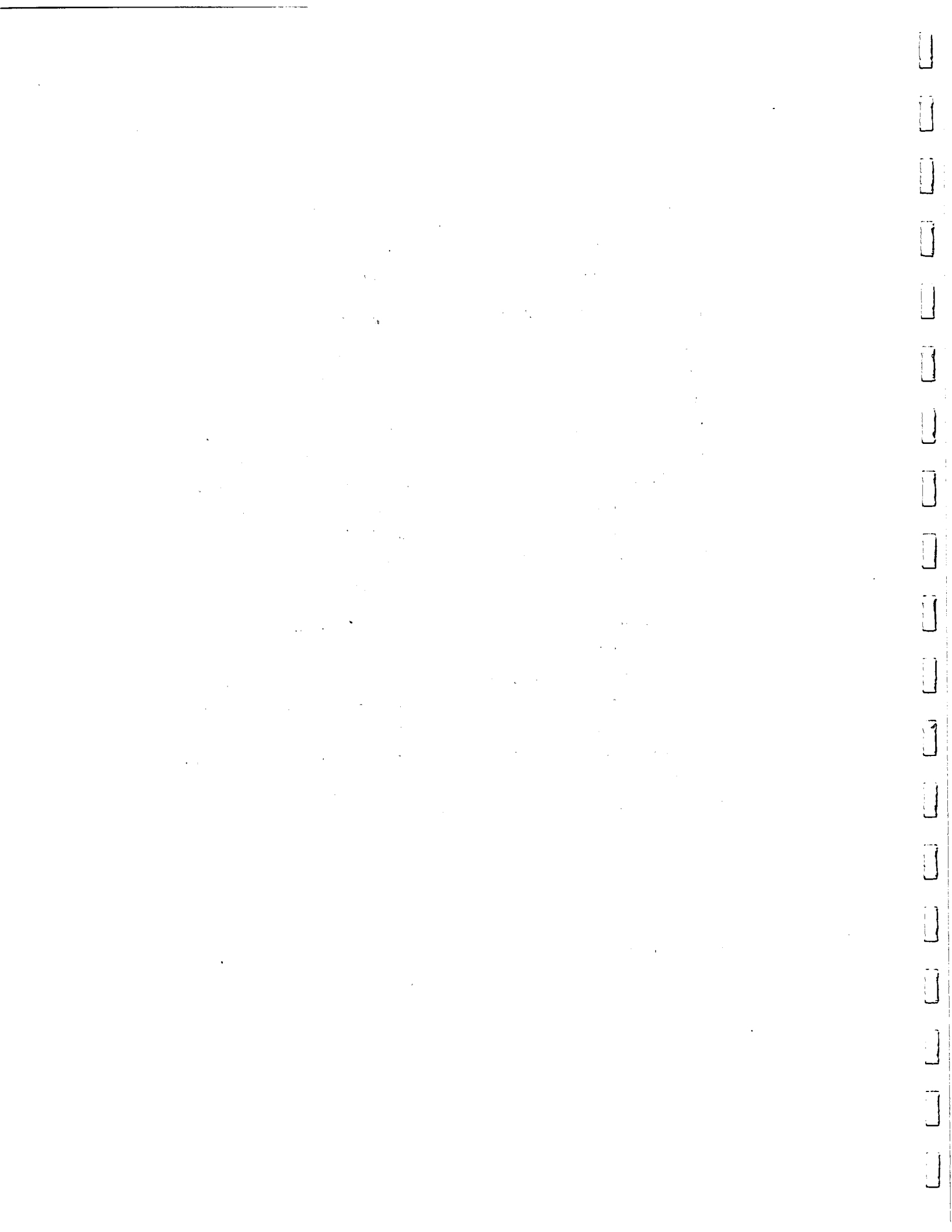
- (m) to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;
- (o) to register a copy of this Order and any other orders in respect of the Property against title to any of the Property, and when submitted by the Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of Alberta, or any other similar government authority, notwithstanding Section 191 of the *Land Titles Act*, RSA 2000, c. L-4, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the Receiver in its capacity as Receiver of the Debtors and not in its personal capacity;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and



- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;
- (t) *to assign the Debtors into bankruptcy.* *WJL*
and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including the Debtors, and without interference from any other Person (as defined below).

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. (i) The Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order including the Alberta Veterinary Medical Association, the Alberta Ministry of Agriculture and Forestry and any insurance company insuring or having insured the Debtors (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependent on maintaining possession) to the Receiver upon the Receiver's request.
5. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph or in paragraph [6] of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.
6. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion



deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names, and account numbers that may be required to gain access to the information.

7. The Receiver is authorized to contact, make any necessary inquiries and obtain information pertaining to the Debtors from the Alberta Veterinary Medical Association and the Alberta Ministry of Agriculture and Forestry and any insurance company insuring or having insured the Debtors. Such entities are authorized and directed to provide the requested information to the Receiver.

NO PROCEEDINGS AGAINST THE RECEIVER

8. No proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. No Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph; and (ii) affect a Regulatory Body's investigation in respect of the Debtors or an action, suit or proceeding that is taken in respect of the Debtors by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a Province.

NO EXERCISE OF RIGHTS OF REMEDIES

10. All rights and remedies of any Person, whether judicial or extra-judicial, statutory or non-statutory (including, without limitation, set-off rights) against or in respect of the Debtors or the Receiver or affecting the Property are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, including, without limitation, any



rights or remedies or provisions in any agreement, construction, ownership and operating agreement, joint venture agreement or any such similar agreement or agreements to which the Debtors is a party that purport to effect or cause a cessation of operatorship as a result of the occurrence of any default or non-performance by or the insolvency of the Debtors, the making or filing of these proceedings or any allegation, admission or evidence in these proceedings and under no circumstances shall the Debtors be replaced as operator pursuant to any such agreements without further order of this Court provided, however, that this stay and suspension does not apply in respect of any "eligible financial contract" (as defined in the BIA), and further provided that nothing in this Order shall:

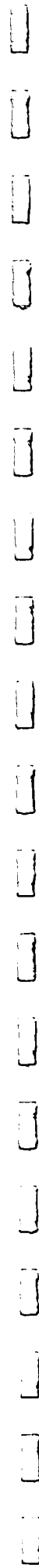
- (a) empower the Debtors to carry on any business that the Debtors is not lawfully entitled to carry on;
 - (b) prevent the filing of any registration to preserve or perfect a security interest;
 - (c) prevent the registration of a claim for lien; or
 - (d) exempt the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment.
11. Nothing in this Order shall prevent any party from taking an action against the Applicant where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH THE RECEIVER

12. No Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, except with the written consent of the Debtors and the Receiver, or leave of this Court. Nothing in this Order shall prohibit any party to an eligible financial contract (as defined in the BIA) from closing out and terminating such contract in accordance with its terms.

CONTINUATION OF SERVICES

13. All persons having:
- (a) statutory or regulatory mandates for the supply of goods and/or services; or
 - (b) oral or written agreements or arrangements with the Debtors, including without limitation all computer software, communication and other data services, centralized banking



services, payroll services, insurance, transportation, services, utility or other services to the Debtors

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Debtors or exercising any other remedy provided under such agreements or arrangements. The Debtors shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Debtors in accordance with the payment practices of the Debtors, or such other practices as may be agreed upon by the supplier or service provider and each of the Debtors and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

14. All funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further order of this Court.

EMPLOYEES

15. Subject to employees' rights to terminate their employment, all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtors' behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, S.C. 2005, c.47 ("**WEPPA**").
16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property



(each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:
- (i) before the Receiver's appointment; or
 - (ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.
- (b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.
- (c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,
- (i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:
 - A. complies with the order, or
 - B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;



- (ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,
 - A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or
 - B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or
- (iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

18. Except for gross negligence or wilful misconduct, as a result of its appointment or carrying out the provisions of this Order the Receiver shall incur no liability or obligation that exceeds an amount for which it may obtain full indemnity from the Property. Nothing in this Order shall derogate from any limitation on liability or other protection afforded to the Receiver under any applicable law, including, without limitation, Section 14.06, 81.4(5) or 81.6(3) of the BIA.

RECEIVER'S ACCOUNTS

19. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to the benefits of and are hereby granted a charge (the "Receiver's Charge") on the Property, which charge shall not exceed an aggregate amount of \$200,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Receiver and such counsel, both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.
20. The Receiver and its legal counsel shall pass their accounts from time to time.
21. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its

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counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

22. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$250,000 (or such greater amount as this Court may by further order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.
23. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.
24. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "A" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.
25. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.
26. The Receiver shall be allowed to repay any amounts borrowed by way of Receiver's Certificates out of the Property or any proceeds, including any proceeds from the sale of any assets without further approval of this Court.

ALLOCATION

27. Any interested party may apply to this Court on notice to any other party likely to be affected, for an order allocating the Receiver's Charge and Receiver's Borrowings Charge amongst the various assets comprising the Property.

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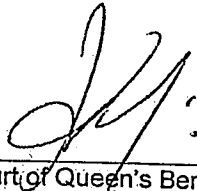
GENERAL

28. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.
29. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Receiver's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.
30. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.
31. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Receiver in any foreign proceeding, or to assist the Receiver and its agents in carrying out the terms of this Order.
32. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
33. The Plaintiff shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Plaintiff's security or, if not so provided by the Plaintiff's security, then on a substantial indemnity basis, including legal costs on a solicitor-client full indemnity basis, to be paid by the Receiver from the Debtors' estates with such priority and at such time as this Court may determine.
34. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

FILING

35. The Receiver shall establish and maintain a website in respect of these proceedings at mnpdebt.ca/en/corporate/engagements (the "Receiver's Website") and shall post there as soon as practicable:
- (a) all materials prescribed by statute or regulation to be made publicly available; and
 - (b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.
36. Service of this Order shall be deemed good and sufficient by:
- (a) serving the same on:
 - (i) the persons listed on the service list created in these proceedings or otherwise served with notice of these proceedings;
 - (ii) any other person served with notice of the application for this Order;
 - (iii) any other parties attending or represented at the application for this Order; and
 - (b) posting a copy of this Order on the Receiver's Website
- and service on any other person is hereby dispensed with.



Justice of the Court of Queen's Bench of Alberta

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

SCHEDULE "A"
RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT

\$ _____

1. THIS IS TO CERTIFY that **MNP Ltd.**, the interim receiver and receiver and manager (the "**Receiver**") of all of the assets, undertakings and properties of Edmonton South Animal Hospital Ltd., Prime Vet Corporation, Prime Vet Holding Corp., Lakeview Animal Hospital Ltd., and Cumberland Veterinary Services Ltd., appointed by Order of the Court of Queen's Bench of Alberta and Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (collectively, the "**Court**") dated the _____ day of _____, _____ (the "**Order**") made in action numbers 1803-13761, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of \$ _____, being part of the total principal sum of \$ _____ that the Receiver is authorized to borrow under and pursuant to the Order.
2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily] [monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.
3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property (as defined in the Order), in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.
4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at _____.
5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.
6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.
7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

MNP Ltd., solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____

Name: _____

Title: _____

TAB 2



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 February 14, 2019

À jour au 14 février 2019

Last amended on May 23, 2018

Dernière modification le 23 mai 2018

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Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

243 (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;

b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;

c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :



(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

Definition of receiver

(2) Subject to subsections (3) and (4), in this Part, *receiver* means a person who

(a) is appointed under subsection (1); or

(b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under

(i) an agreement under which property becomes subject to a security (in this Part referred to as a “security agreement”), or

(ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or receiver-manager.

Definition of receiver — subsection 248(2)

(3) For the purposes of subsection 248(2), the definition *receiver* in subsection (2) is to be read without reference to paragraph (a) or subparagraph (b)(ii).

Trustee to be appointed

(4) Only a trustee may be appointed under subsection (1) or under an agreement or order referred to in paragraph (2)(b).

Place of filing

(5) The application is to be filed in a court having jurisdiction in the judicial district of the locality of the debtor.

Orders respecting fees and disbursements

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or

a) que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;

b) qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de séquestre

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), *séquestre* s'entend de toute personne qui :

a) soit est nommée en vertu du paragraphe (1);

b) soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie, ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant, la totalité ou la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires.

Définition de séquestre — paragraphe 248(2)

(3) Pour l'application du paragraphe 248(2), la définition de *séquestre*, au paragraphe (2), s'interprète sans égard à l'alinéa a) et aux mots « ou aux termes d'une ordonnance rendue sous le régime de toute autre loi fédérale ou provinciale prévoyant ou autorisant la nomination d'un séquestre ou d'un séquestre-gérant ».

Syndic

(4) Seul un syndic peut être nommé en vertu du paragraphe (1) ou être habilité aux termes d'un contrat ou d'une ordonnance mentionné à l'alinéa (2)b).

Lieu du dépôt

(5) La demande de nomination est déposée auprès du tribunal compétent dans le district judiciaire de la localité du débiteur.

Ordonnances relatives aux honoraires et débours

(6) Le tribunal peut, relativement au paiement des honoraires et débours du séquestre nommé en vertu du paragraphe (1), rendre toute ordonnance qu'il estime indiquée, y compris une ordonnance portant que la réclamation de celui-ci à l'égard de ses honoraires et débours est garantie par une sûreté de premier rang sur tout ou partie des biens de la personne insolvable ou du



disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

Meaning of *disbursements*

(7) In subsection (6), *disbursements* does not include payments made in the operation of a business of the insolvent person or bankrupt.

1992, c. 27, s. 89; 2005, c. 47, s. 115; 2007, c. 36, s. 58.

Advance notice

244 (1) A secured creditor who intends to enforce a security on all or substantially all of

- (a) the inventory,
- (b) the accounts receivable, or
- (c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

Period of notice

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

No advance consent

(2.1) For the purposes of subsection (2), consent to earlier enforcement of a security may not be obtained by a secured creditor prior to the sending of the notice referred to in subsection (1).

Exception

(3) This section does not apply, or ceases to apply, in respect of a secured creditor

- (a) whose right to realize or otherwise deal with his security is protected by subsection 69.1(5) or (6); or
- (b) in respect of whom a stay under sections 69 to 69.2 has been lifted pursuant to section 69.4.

failli, avec préséance sur les réclamations de tout créancier garanti; le tribunal ne peut toutefois déclarer que la réclamation du séquestre est ainsi garantie que s'il est convaincu que tous les créanciers garantis auxquels l'ordonnance pourrait sérieusement porter atteinte ont été avisés à cet égard suffisamment à l'avance et se sont vu accorder l'occasion de se faire entendre.

Sens de *débours*

(7) Pour l'application du paragraphe (6), ne sont pas comptés comme débours les paiements effectués dans le cadre des opérations propres aux affaires de la personne insolvable ou du failli.

1992, ch. 27, art. 89; 2005, ch. 47, art. 115; 2007, ch. 36, art. 58.

Préavis

244 (1) Le créancier garanti qui se propose de mettre à exécution une garantie portant sur la totalité ou la quasi-totalité du stock, des comptes recevables ou des autres biens d'une personne insolvable acquis ou utilisés dans le cadre des affaires de cette dernière doit lui en donner préavis en la forme et de la manière prescrites.

Délai

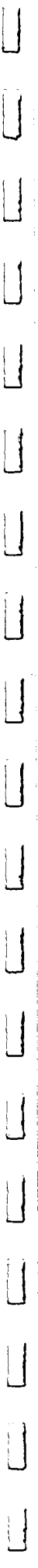
(2) Dans les cas où un préavis est requis aux termes du paragraphe (1), le créancier garanti ne peut, avant l'expiration d'un délai de dix jours suivant l'envoi du préavis, mettre à exécution la garantie visée par le préavis, à moins que la personne insolvable ne consente à une exécution à une date plus rapprochée.

Préavis

(2.1) Pour l'application du paragraphe (2), le créancier garanti ne peut obtenir le consentement visé par le paragraphe avant l'envoi du préavis visé au paragraphe (1).

Non-application du présent article

(3) Le présent article ne s'applique pas, ou cesse de s'appliquer, au créancier garanti dont le droit de réaliser sa garantie ou d'effectuer toute autre opération, relativement à celle-ci est protégé aux termes du paragraphe 69.1(5) ou (6), ou à l'égard de qui a été levée, aux termes de l'article 69.4, la suspension prévue aux articles 69 à 69.2.



TAB 3



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 February 14, 2019

Last amended on May 23, 2018

À jour au 14 février 2019

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Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Good faith, etc.

247 A receiver shall

(a) **act honestly and in good faith; and**

(b) **deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.**

1992, c. 27, s. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.



TAB 4

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 J.J.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

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.

Per Galligan J.A.: 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. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.



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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales. Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

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

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

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

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

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

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

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



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

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

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

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

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

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 negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In doing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by



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

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

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

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), at p. 11 [C.B.R.]:

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

[Emphasis added.]

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

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

[Emphasis added.] I am convinced that the decision made was a sound one in the circumstances faced by the receiver on March 8, 1991.

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



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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

34 The 922 offer provided for \$6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of \$3 million. The OEL offer provided for a payment of \$2 million on closing with a royalty paid on gross revenues over a 5-year period. In the short term, the 922 offer is obviously better because there is substantially more cash up front. The chances of future returns are substantially greater in the OEL offer because royalties are paid on gross revenues, while the royalties under the 922 offer are paid only on profits. There is an element of risk involved in each offer.

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account.



While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

3. Consideration of the Efficacy and Integrity of the Process by which the Offer was Obtained

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

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

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

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

44 In *Salina Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372, 21 D.L.R. (4th) 473 at p. 476 [D.L.R.], the Alberta Court of Appeal said that sale by tender is not necessarily the best way to sell a business as an ongoing concern. It went on to say that when some other method is used which is provident, the court should not undermine the process by refusing to confirm the sale.

45 Finally, I refer to the reasoning of Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 124 [O.R.]:

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

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith,



bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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



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

55 Further evidence of the lack of prejudice which the absence of an offering memorandum has caused 922 is found in CCFL's stance before this court. During argument, its counsel suggested as a possible resolution of this appeal that this court should call for new bids, evaluate them and then order a sale to the party who put in the better bid. In such a case, counsel for CCFL said that 922 would be prepared to bid within 7 days of the court's decision. I would have thought that, if there were anything to CCFL's suggestion that the failure to provide an offering memorandum was unfair to 922, that it would have told the court that it needed more information before it would be able to make a bid.

56 I am satisfied that Air Canada and CCFL have, and at all times had, all of the information which they would have needed to make what to them would be a commercially viable offer to the receiver. I think that an offering memorandum was of no commercial consequence to them, but the absence of one has since become a valuable tactical weapon.

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

(58) There are two statements by Anderson J. contained in *Crown Trust Co. v. Rosenberg*, supra, which I adopt as my own. The first is at p. 109 [O.R.]:

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

The second is at p. 111 [O.R.]:

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

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

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

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

I agree.



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

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

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

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

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

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

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

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

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



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

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act*, R.S.O. 1980, c. 137, and the *Environmental Protection Act*, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

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

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

McKinlay J.A. :

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.). While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

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



Goodman J.A. (dissenting):

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

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

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.), Berger J. said at p. 30 [C.B.R.]:

Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

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

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

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

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

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



was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

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

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

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

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

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

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

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

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. H-12 [C.B.R.]:

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

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



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

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

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

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

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

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

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of \$18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April

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30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

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

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

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

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

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of \$3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions

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of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

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

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

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

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept

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an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

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

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

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

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

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

116 In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 [C.B.R.]:

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to

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be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March



8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

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

Appeal dismissed.

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TAB 5

2011 ABQB 726
Alberta Court of Queen's Bench

Computershare Trust Co. of Canada v. Venti Investments Corp.

2011 CarswellAlta 2304, 2011 ABQB 726, 213 A.C.W.S. (3d) 203, 86 C.B.R. (5th) 71

Computershare Trust Company of Canada (Plaintiff) and Venti Investments Corporation, Shariff Chandran and Qualia Real Estate Investment Fund VI Limited Partnership (Defendants)

B.E. Romaine J.

Judgment: November 25, 2011

Docket: Calgary 1101-03154

Counsel: Kevin E. Barr for MNP Ltd. in its capacity as Court-appointed Receiver
Ryan P. Pelletier, Richard Billington, Q.C. for Venti Investment Corporation
David Wood, Jared Spindel for Computershare Trust Company of Canada
Terry L. Czechowskyj for Proposed Purchaser
Michael B. Niven, Q.C. for Durum Real Estate Holdings Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

Debtors and creditors --- Receivers --- Conduct and liability of receiver --- General conduct of receiver
Receiver brought application to approve sale of property --- V Corp. brought cross-application for order rejecting any agreement of sale, directing that it was entitled to redeem arrears on mortgage on property in question or make such payments as were necessary to bring mortgage back into good standing, directing hearing to set amount of arrears, and discharging receiver --- Application granted; cross-application dismissed --- Receiver made more than sufficient effort to get best price for property and had not acted improvidently --- Sale price was not low in relation to appraised value, there was plenty of time for bids and adequate notice of sale process --- As to interests of parties, sale was supported by major creditor --- It was also important and appropriate to note interests of proposed purchaser, which tendered its bid in good faith and presumably at some expense and which opposed V Corp.'s cross-application --- No issue with respect to efficacy and integrity of process by which offers were obtained --- Certain objection of V Corp. concerning possibility of unfairness in working out of process had to be viewed in context --- There was nothing in history in issue that cast doubt on fairness of process or role of receiver --- To accept V Corp.'s proposal would be unfair to parties who participated in bidding process in good faith, and proposed purchaser who entered bona fide into agreement with receiver --- It would lead to kind of chaos referred to in certain case law and would be unwarranted interference with properly-run process conducted by receiver --- V Corp. had plenty of time in last 21 months to bring arrears up to date and avoid sale, and what it offered now was too little and too late --- Submission that there was no urgency about application was not accepted.

APPLICATION by receiver to approve sale of property; CROSS-APPLICATION by company for order rejecting any agreement of sale, directing that it was entitled to redeem arrears on mortgage on property in question or make such payments as were necessary to bring mortgage back into good standing, directing hearing to set amount of arrears, and discharging receiver.

B.E. Romaine J.:

1 This was an application to approve a sale of property brought by the Receiver of the assets and property of Venti Investment Corporation and Qualia Real Estate Investment Fund VI Limited Partnership. Venti cross-applied for an order rejecting any agreement of sale, directing that it is entitled to redeem the arrears on a mortgage on the property



in question or make such payments as are necessary to bring the mortgage back into good standing, directing a hearing to set the amount of the arrears and discharging the Receiver.

2 Despite efforts to characterize the application as a sale in foreclosure proceedings, this was a sale within a receivership that resulted from a consent order granted on March 4, 2011. I find that the consent order is correctly characterized as a liquidating order. This order first appointed MNP Ltd. as a Monitor to oversee the sale of the property under an existing agreement of sale and purchase. When the proposed sale terminated in April, 2011, MNP became the Receiver under the order, authorized by its terms to complete the sale of the property and to enter into a replacement agreement of purchase and sale. It has now done so.

(3) The criteria to be applied when considering the approval of a sale recommended by a receiver were first set out by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The *Soundair* principles have been applied many times by this Court.

4 When deciding whether a receiver who has sold a property has acted properly, a court is to consider and determine:

- (a) whether the receiver has made a 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.

5 In considering whether the Receiver has made a sufficient effort to get the best price, I note that there has been a thorough and extensive process undertaken to sell the property, and the agreement of purchase and sale finally executed by the Receiver represents a sale at or above fair market value. However, Venti submits in essence that the Receiver acted improvidently on the basis of information Mr. Chandran, the principle of Venti, says was obtained from the sale and leasing agent retained by the Receiver that the Receiver's report in support of the application failed to include material information. Mr. Chandran submits through his counsel that there have been two undisclosed written offers to lease the property in question that would affect approximately half of the vacant space in the building and that could dramatically affect its appraised value.

6 Given the nature of the application, its urgency and the allegations made, I took the unusual step of inviting counsel for the Receiver to respond to this allegation by having the Receiver testify and be subject to cross-examination on this limited issue. I accept the Receiver's testimony, corroborated by that of the Receiver's leasing agent, that he was informed the morning of the application that an existing tenant was expressing some unwritten, informal interest in leasing approximately 2,000 to 4,000 additional square feet. This is not material information that either should have been disclosed in the report or that would affect fair market value. At any rate, the Receiver's conduct is to be examined in light of the information the Receiver had at the time it agreed to accept the offer, which was November 8, 2011. I find that the Receiver made more than a sufficient effort to get the best price for the property and has not acted improvidently. The sale price is not low in relation to the appraised value, there was plenty of time for bids and adequate notice of the sale process.

7 With respect to the interests of the parties, the sale is supported by the major creditor, Computershare Trust Company of Canada. Venti submits that it should not matter to Computershare if a sale of the property is the result of this application or if Venti is able to bring the mortgage into good standing, but Computershare has made it clear that it has lost faith in Venti and that it has a reasonable and valid preference for a sale rather than merely allowing Venti to extinguish the arrears. It points out that the cash flow from the property is insufficient to cover the monthly mortgage payments, and Venti has offered no more than to bring the arrears up to date and cover future mortgage payments for an indeterminate period.

8 It is also important and appropriate to note the interests of the proposed purchaser of the property, which tendered its bid in good faith and presumably at some expense and which opposes Venti's cross-application: *Soundair* at para. 40.

9 There is no issue with respect to the efficacy and integrity of the process by which offers were obtained.

10 With respect to the possibility of unfairness in the working out of the process, Venti suggests that the Receiver was deficient in failing to control or intervene with respect to what it characterizes as unfair behaviour by Computershare in communicating to Venti the amount it would cost to bring the arrears up to date.

11 This objection must be viewed in context. This became a receivership on April 12, 2011. On August 31, 2011, Venti enquired of the Receiver through counsel as to amount necessary to bring the mortgage back into good standing, and "in theory" discharge the Receiver.

12 On September 2, 2011, the Receiver's counsel advised of a figure of about \$850,000, subject to adjustment, additional interest, additional legal and other expenses, implementation of a realty tax reserve and payment of all receivership costs.

13 On September 29, 2011, in anticipation of a meeting requested by Venti to discuss a possible reorganization, Computershare notified Venti that the amount required to bring the mortgage into good standing would be \$1.07 million, plus certain processing and assumption fees, plus additional costs with respect to the receivership, the listing of the property, the property manager and the lender's counsel and subject to additional interest, the implementation of a monthly tax escrow amount and payment of the Silvercrest lease obligation.

14 It was only on October 24, 2011, having received the September 29, 2011 estimate (which was clearly characterized as an estimate) and advice from the Receiver on that date that the Receiver was dealing with interested parties and expected a binding agreement of sale shortly, that Venti's counsel expressed the intention of bringing the mortgage up to date "this week". This email from Venti's counsel repeats the September 29, 2011 estimate, with its references to additional costs.

15 On October 26, 2011, Computershare provided its revised estimate, which incorporated the items that had previously been referenced, including the costs of the receivership, the Silvercrest lease obligation, the costs of the listing and leasing agent, the immediate amount of tax escrow and updated payments due.

16 Computershare advised that Venti should confirm that it would pay these amounts that week. Instead, on October 27, 2011, Venti disputed the amount payable. On November 3, 2011, Computershare provided its explanation of the amounts owing, and reduced the previous amount said to be immediately owing by \$65,000.

17 On November 7, 2011, the Receiver received a reorganization proposal from a third party which included the concept of bringing the mortgage into good standing, and considered this proposal together with the two other proposals it had received. On November 8, 2011, the Receiver executed a purchase and sale agreement with the proposed Purchaser.

18 It was not until November 10, 2011 that Venti sent Computershare's counsel \$1 million towards the arrears, and then only under unacceptable trust conditions. While another \$700,000 was promised to be available during the course of the hearing, it did not materialize.

19 There is nothing in this history that casts doubt on the fairness of the process or the role of the Receiver. The first estimate of payout cost was clearly subject to upward adjustment, and subsequent estimates identified why the payout figure increased over time. Venti had the opportunity to payout the mortgage prior to the Receiver entering into a binding offer subject only to court approval on November 8, 2011, and plenty of warning that the sales process was unfolding and nearing completion.

20 At page 19 of *Soundair*, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers". That concern for the integrity of the process has been expressed in many cases

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in Alberta, including by our Court of Appeal: *Bank of Montreal v. River Rentals Group Ltd.*, [2010] A.J. No. 12 (Alta. C.A.) at para. 18.

21 While the concern for the integrity of the process is often expressed in terms of whether it is appropriate to consider a last-minute higher offer to purchase, it is equally important here, where the debtor is not offering a higher amount for the property, nor even to redeem the entire debt, but only to bring the arrears up to date. Venti does not even accept the amount of arrears set by the mortgagee, but asks that there be a subsequent hearing to establish that amount. To accept Venti's proposal would be unfair to the parties who participated in the bidding process in good faith, and the Proposed Purchaser who entered *bona fide* into an agreement with the Receiver. It would lead to the kind of chaos referred to in *Soundair* at para. 30 and would be an unwarranted interference with a properly-run process conducted by the Receiver. Venti had plenty of time in the last 21 months to bring the arrears up to date and avoid the sale, and what it offers now is too little and too late.

22 Venti submits that there is no urgency about this application. I must disagree. As I indicated when I refused an adjournment, I agree with Computershare that there is no reason to delay the application, and considerable prejudice in terms of mounting arrears, a limited recourse loan and little or no equity.

23 Given the decision I have reached, it is not necessary that I consider whether Venti is in effect seeking relief from forfeiture, and if so, whether it is entitled to such relief.

24 The Receiver's application is granted and Venti's cross-application is dismissed.

25 This decision was originally scheduled to be delivered orally the day after the application was heard. At that time, counsel for Venti indicated that his client had changed his position and was prepared to consent to the application. I advised the parties that I would grant an order of sale and would issue subsequent written reasons.

26 If the parties are unable to agree on costs, they may make submissions on that issue.

Application granted; cross-application dismissed.

TAB 6

2000 ABQB 766
Alberta Court of Queen's Bench

Cobrico Developments Inc. v. Tucker Industries Inc.

2000 CarswellAlta 1211, 2000 ABQB 766, [2000] A.J. No. 1295, [2001] A.W.L.D. 349, 273 A.R. 297

**Cobrico Developments Inc., Plaintiff and Tucker
Industries Inc. and Tucker Enterprises Corp., Defendants**

Lee J.

Heard: October 25, 2000

Judgment: November 1, 2000

Docket: Edmonton 0003-17053

Proceedings: additional reasons at 2000 ABQB 817 (Alta. Q.B.)

Counsel: *Richard N. Billington*, for Receiver/Manager.

Barry M. King and *Kevin Ozubko*, for Unnamed party, Ritchie Bros. Auctioneers (Canada) Ltd.

Thomas R. Benson, for Unnamed party, All Peace Auctions Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Personal property security --- Remedies — Sale or realization — Miscellaneous issues

Receiver was appointed with respect to property and assets of T Inc. and T Corp. — Receiver approached three auction houses to submit proposals for public sale of assets — R Ltd. was unsuccessful and A Ltd. was chosen — Receiver brought application for order permitting disposition of T Inc. and T Corp.'s assets by way of public sale — R Ltd. objected to bid process and receiver's conclusions — Application granted — Receiver's discretion should not be lightly interfered with without strong evidence — R. Ltd. did not bring forward anything that would vitiate or interfere with wide powers granted to receiver — Receiver acted in good faith and in commercially reasonable manner — Creditor who held General Security Agreement and PMSI holders supported auction and receiver's recommendation of A Ltd. — A Ltd. guaranteed that it would recover amount at least sufficient to pay out PMSI indebtedness and R Ltd. did not — R Ltd. was not creditor of T Inc. or T Corp. and did not have standing to object to receiver's exercise of discretion.

Receivers --- Conduct and liability of receiver — General conduct of receiver

Receiver was appointed with respect to property and assets of T Inc. and T Corp. — Receiver approached three auction houses to submit proposals for public sale of assets — R Ltd. was unsuccessful and A Ltd. was chosen — Receiver brought application for order permitting disposition of T Inc. and T Corp.'s assets by way of public sale — R Ltd. objected to bid process and receiver's conclusions — Application granted — Receiver's discretion should not be lightly interfered with without strong evidence — R. Ltd. did not bring forward anything that would vitiate or interfere with wide powers granted to receiver — Receiver acted in good faith and in commercially reasonable manner — Creditor who held General Security Agreement and PMSI holders supported auction and receiver's recommendation of A Ltd. — A Ltd. guaranteed that it would recover amount at least sufficient to pay out PMSI indebtedness and R Ltd. did not — R Ltd. was not creditor of T Inc. or T Corp. and did not have standing to object to receiver's exercise of discretion.

APPLICATION by receiver for order permitting disposition of assets by public sale.

Lee J.:

1 On September 7, 2000, my colleague, Lefsrud, J., appointed Myers Norris & Penny Limited (hereinafter referred to as the "Receiver") to be the Receiver and Manager with respect to the property and assets of the Defendants Tucker Industries Inc. and Tucker Enterprises Corp. (hereinafter referred to as ("Tucker").

2 On Wednesday, October 25, 2000, the Receiver made an Application before me for an Order pursuant to s. 60 of the *Personal Property Security Act* (hereinafter referred to as the "PPSA") permitting the disposition by public sale of assets of the Defendants, and for an Order pursuant to s. 60(15) of the *Act* permitting the disposition of collaterals secured by a charge under the *Act* without notice to the debtor, or to any person with an interest in the collateral.

3 Cobrico Developments Inc. ("Cobrico") was the petitioning creditor in this matter

4 Ritchie Bros. Auctioneers (Canada) Ltd. [hereinafter referred to as "Ritchie Bros."] was one of the three auction houses that had been approached by the Receiver/Manager to submit a proposal with respect to Tucker on approximately October 13, 2000. Their proposal with respect to Tucker, dated October 17, 2000, provides for a gross guarantee of two million dollars, a 12% commission of \$240,000.00, for a net of \$1.76 million dollars. With respect to proceeds over two million dollars, 88% would go to the debtor's estate, and 12% would be retained by Ritchie Bros.

5 Ritchie Bros. and Century Sales Inc. were the unsuccessful public auction houses not chosen to dispose of the debtor's estate. All Peace Auctions Ltd. [hereinafter referred to as "All Peace"] based in Grande Prairie was the successful auction house chosen by the Receiver/Manager.

6 Ritchie Bros. now comes before this Court and objects to both the bid process used by the Receiver/Manager and to the conclusions it reached, and wishes to submit a revised bid based on a fair process that it submits was not present in the first place.

7 Ritchie Bros. alleges that certain material information was not supplied to it (that was supplied to All Peace), and submits that as a result of this, the creditors of Tucker will not benefit as much as they could if the present proposed Order sought by the Receiver/Manager is granted. Ritchie Bros. also argues that the Receiver's Grande Prairie office provides accounting and audit services over many years to All Peace constituting a real or apparent conflict of interest on the part of the Receiver/Manager.

8 The Receiver/Manager strongly objects to Ritchie Bros.'s intervention, describing it as nothing more than "vexatious intermeddler", for the purposes which include determining essentially what the competing auction house bids were. The Receiver/Manager submits that Ritchie Bros. has absolutely no standing in this matter and should not be heard.

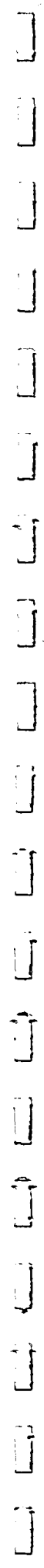
9 The General Manager of All Peace, Kevin Tink, disputed many of Ritchie Bros.'s claims with respect to the bidding process, and described their state of preparedness for the proposed mid-November, 2000 public auction in an Affidavit filed October 27, 2000. Further, Mr. Tink claimed that Ritchie Bros. was also involved in a similar last-minute intervention, or inter-meddling, with respect to a Calgary matter that was similar to the present Application before me, in the matter of Serval Corporation.

10 The Receiver/Manager argues that any delay in this matter would be very prejudicial to all parties involved (with the possible exception of Ritchie Bros.) because of the fact that the equipment of Tucker essentially is oil and gas drilling equipment for which there is primarily a market before drilling season commences. Therefore, the mid-November auction of this equipment is essential. It is estimated that approximately ten million dollars will be received from this auction.

The Law

11 Ritchie Bros. submits *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) to support its argument that it has standing before me. At paragraph 18, Hart JA indicates that there is no merit to the suggestion that the unsuccessful bidders have no standing:-

A preliminary question was raised as to whether Mr. Treby or Mr. Cameron had any right to appear at the original hearing before Burchell, J., or any status which would enable them to appeal from his decision, but, in my opinion, there is no merit



in such a suggestion. Both parties were persons to be affected directly by the decision of the court and, in my opinion, were proper parties to the proceedings.

12 *Cameron*, supra, was followed by the Alberta Court of Appeal in *Salima Investments Ltd. v. Bank of Montréal* (1985), 21 D.L.R. (4th) 473 (Alta. C.A.). *Salima* involved an appeal of an Order approving the sale of property by a receiver. The appellant had submitted the highest tender and, subject to court approval, the receiver had agreed to convey the property to the appellant. A higher offer was submitted by another party prior to the motion for approval. The motion was adjourned and the appellant and two other parties submitted bids. The chambers judge directed the receiver to complete the sale to the party that submitted the highest offer.

13 Kerans, J.A. concluded that the Court had jurisdiction to consider other offers on the motion to approve the sale, and could conduct what was, in essence, a judicial auction. No issue was raised as to the standing of *Salima Investments Ltd.*, as an unsuccessful bidder, to appeal.

14 Ritchie Bros. submits that the *Salima* case makes it clear that the Court has jurisdiction to exercise judicial discretion and consider other offers as well as to direct an alternative process. In *Salima*, Kerans J.A. states the following at pages 466-467:-

We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the court may consider. As Macdonald J.A. said in the *Cameron* case at pp. 11-2:

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

15 It is submitted that this is not a total catalogue of those factors which might lead a court to refuse to approve a sale. In *Salima*, supra, the Court concluded the following at page 477:-

We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver - while always in good faith - had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 The factors in the case at bar that Ritchie Bros. object to as against the Receiver/Manager include:-

- (a) The longstanding accountant/client relationship between the Receiver/Manager and All Peace raises an appearance or potential of conflict on the part of the Receiver;
- (b) All Peace had an advantage in terms of access to information, the assets and to the Receiver/Manager;
- (c) The Receiver/Manager may have made the decision to engage All Peace prior to receipt of the proposal of Ritchie Bros.;
- (d) The asset and equipment list used by the Receiver/Manager to request proposals appears to have varied from case to case and has not yet been finalized; and
- (e) The instructions by the Receiver/Manager to All Peace and Ritchie Bros. with respect to preparation of proposals appear to have been inconsistent and were capable of multiple interpretations which effected the integrity of the proposals and the process.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

17 The Receiver/Manager rely on the case of *Skyepharm PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), a decision of Farley, J. of the Commercial List of the Ontario Superior Court of Justice which deals with a fact situation that is somewhat similar to the case at bar.

18 In *Skyepharm*, supra PWC as Court appointed receiver of Hyal made a motion on October 15, 1999 for an Order approving and authorizing the Receiver's acceptance of an Agreement of Purchase and Sale with Skye designated as Plan C. Ground, J. expressed some doubt in Oral Reasons as to the activity of the Receiver.

19 Certain confidential information was not available to Ground, J., as it is not available to me in the case at bar.

20 In *Skyepharm*, Farley, J. concluded that as a result of that confidential information and the complexity of what was available for sale by the receiver, there were various other potentially important considerations surrounding the asset sale and/or sale of shares.

21 Eventually the confidential lists were distributed, and one of the arguments for re-opening the bid auction process would be to put all potential bidders on an equal footing, knowing what everyone else's present position was. It was argued in *Skyepharm* that the best offer would, therefore, be improved, and whatever procedural defects existed would be remedied.

22 Farley, J. concluded as follows:-

3 Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back doored in some way. See *Soundair* at pp. 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg et al.* (1986), 60 O.R. (2d) 87 (H.C.J.). The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated: see *Soundair* of pp. 5 and 11. Specifically the court's duty is to consider as per *Soundair* at p. 6:

- (a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the receiver obtained offers; and
- (d) whether the working out of the process was unfair.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Soundair* at p. 7. A receiver's duty is not to obtain the best possible price but to do everything reasonable possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur*, [1994] O.J. No. 2465 (Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonable low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Soundair* at pp. 9-10.

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

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

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

See also *Soundair* at p. 8. Obviously if there are conditions in offers, they must be analysed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

6 Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoil line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Soundair* at p. 12 and *Re Central Capital Corporation* (1996), 38 C.B.R. (3d) 1 at pp. 31-41 (per Weiler, JA) and pp. 50-53 (Laskin, JA).

7 Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that effect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Soundair* at p. 14 and *Crown Trust* at p. 109.

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

23 *Skyepharm* was taken to the Ontario Court of Appeal and their Reasons are reported at (2000), 47 O.R. (3d) 234 (Ont. C.A.). The Ontario Court of Appeal's Reasons, issued on February 18, 2000, dealt with the appeal by BP plc with respect to the Approved Sale Order made by Farley, J., which appeal the Receiver moved to have quashed on the ground that the Court did not have jurisdiction. The Receiver submitted that a potential purchaser does not have any legal or any proprietary right that is affected by the Court's approval of a sale and accordingly the potential purchaser does not have standing to challenge the Order approving the sale.

24 The Ontario Court of Appeal held:-

...the question raised by the receiver's motion to quash was whether BP plc had a right that was finally disposed of by the sale approval order.

25 The Ontario Court of Appeal held that there was no such right for two reasons:-

First, a prospective purchaser has no legal or proprietary right in the property being sold. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court. Second, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors, and an unsuccessful purchaser has no interest in that issue.

26 Continuing on, the Ontario Court of Appeal then stated as follows:



[8] On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realization for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and time-frames contained in other offers. The receiver said that these risks were not immaterial.

[9] At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

[10] It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hal in the amount of \$40,000.

[11] The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

[22] I adopt both his reasoning and his conclusion. At p. 118, he said:

The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its' only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.

Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1)-which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

Conclusion

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

27 The *Skyepharma* case was cited with approval in *Sonoma, Re*, decided by Lovecchio, J. on October 6, 2000 in Calgary (Action No. 0001-06953).

28 Further, the Alberta Court of Appeal has favoured preserving the integrity of the process and allowing the Receiver to exercise its discretion without fetter from the Court in the case of *Royal Bank v. Fracmaster Ltd.* (1999), 209 W.A.C. 93 (Alta. C.A.) approving (1999), 245 A.R. 138 (Alta. Q.B.). Paperny J. wrote at paragraph 58:-

This court appointed the Receiver based on its experience and expertise. It is the Receiver's function to do the business analysis necessary to develop a disposition strategy, to analyse the proposed offers and to make a recommendation to the Court. As Anderson, J. stated in *Crown Trustco v. Rosenberg* (Supra) the Court ought not: "enter into the marketplace" ... the Court out not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise.. The Court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

29 Paperny J.'s decision was expressly upheld by the Court of Appeal. At paragraph 32 the Alberta Court of Appeal considered the *Salima* decision, but reiterated the provisions of the *Soundair* [*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)] decision which were quoted by Farley, J., in the *Skyepharma* case, supra at page 4. At paragraph 33 they deferred to the recommendation of the Receiver/Manager.

30 The *Salima* case specifically did not deal with the standing issue of *Salima Investments*, as an unsuccessful bidder, to appeal.

31 The *Cameron* decision referred to in *Salima* dealt with a Nova Scotia rule which permits intervenor status [paragraph 12 of *Cameron*] which does not exist here.

32 Based on the Reasons as discussed in the two *Skyepharma* [*Skyepharma, Skyepharma*] decisions and *Royal Bank v. Fracmaster Ltd.*, I conclude that:-

- (a) wide latitude is afforded to the Receiver;
- (b) disappointed bidders generally have no standing; and
- (c) the Court does not wish to sanction a process that will result in chaos and confusion at the approval motion.

33 The Receiver/Manager set out a bid process in this matter, and its discretion should not be lightly interfered with without strong evidence. Here the allegations by Ritchie Bros. are disputed, and some of the allegations do not appear to be that serious in any event.

34 If there was strong evidence of serious problems in the bid process the Court would exercise its inherent jurisdiction and discretion. I would be been prepared to allow Ritchie Bros. to put forward another proposal for the potential benefit of the creditors. The Court's supervisory jurisdiction requires this in the appropriate clear-cut case otherwise it would just be a rubber stamp for the Receiver/Manager.

35 The Court also must ensure generally that the Receiver/Manager acts in accordance with its enabling Order, and carries out these functions properly under the provision of S. 66(1) of the *PPSA* which reads:-

66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

[Emphasis added]



36 In the result however, I conclude that Ritchie Bros. has not brought forward anything that would vitiate or interfere with the wide powers that were granted by this Court to the Receiver/Manager on September 7, 2000 which include:-

At paragraph 1

The Receiver is given authority to "manage and operate the businesses and undertakings";

At paragraph 2

It is hereby acknowledged and declared that the Receiver is an officer of this Honourable Court and is assisting in the preservation and, as appropriate, the orderly sale and realization of the property, undertaking and assets of the Defendant for the benefit of all creditors and claimants, including the Plaintiff, as a secured creditor.

At paragraph 7

The Receiver shall be at liberty to employ such assistants, agents, employees, auditors, advisers and counsel, including legal counsel as it may consider necessary for the purpose ... of realizing the undertaking, property and assets of the Defendants...

At paragraph 8

The Receiver be and is hereby granted leave to take such steps as in its judgement are necessary or desirable for the preservation, protection and realization of the business...

At paragraph 9

The Receiver is authorized to sell, on credit or otherwise, the undertaking, assets and property of each of the Defendants ... or any part or parts thereof out of the ordinary course of business, at public auction, by public tender or by private sale on such terms and conditions as it deems appropriate, provided any such sales over \$100,000.00 shall be subject to approval of this Court.

37 While Ritchie Bros. submits that the Receiver/Manager made some errors in its process and procedures, I conclude that it has acted "in good faith and in a commercially reasonable manner."

38 In the initial Order appointing the Receiver/Manager, Lefsrud J. gave Meyers Norris & Penny Limited wide latitude to dispose of the assets of the Defendants, on behalf of the creditors of the Defendants. That latitude provides the Receiver/Manager with a variety of options, including that the Receiver/Manager may choose to sell some or all of the assets by public auction. The Receiver/Manager may choose to sell none by auction, and proceed with other methods of realization.

39 In this case, Cobrico holds General Security Agreements over the Defendants, who are both insolvent. The Defendants will be unable to fully pay the indebtedness owed to the Plaintiff. It is therefore clear that there will be no recovery for unsecured creditors.

40 Certain secured parties hold purchase money security interests ("PMSI") which afford them with priority security over certain of the chattels of the Defendants. Of those chattels, some have an equity sufficient to fully redeem the PMSI secured indebtedness, while other chattels will have insufficient value to fully repay the indebtedness owed to the PMSI holder. In the latter case, it is the desire of the Receiver/Manager to recognize that the decision to be made as to how best to realize on that particular chattel should be left to the PMSI holder, and the Receiver/Manager has no wish to engage in the sale of that chattel, unless specifically instructed to do so by the holder of the PMSI.

41 The Receiver/Manager knows that certain of the chattels have sufficient equity to fully pay out the secured party who holds a PMSI with respect to each such chattel. The Receiver/Manager, however, is not qualified to assess the value of the chattels, or to determine if they have such equity. For that reason the Receiver/Manager submitted the same list of equipment

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

to three auction houses and asked them to appraise each item so that a determination could then be made of the value of that equipment, and if that value exceeded the indebtedness owed to the respective PMSI holder for each such chattel.

42 Three auction houses were requested to submit proposals and valuations. All Peace Auctions and Century Sales Inc. did so. Ritchie Bros. did not submit valuations on each individual piece.

43 With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy, who will act as receivers, receiver/managers, monitors, trustees or as privately appointed receivers, are often affiliated with chartered accountancy practices which engage in accounting, audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are regulated professionals who in the course of the realization on assets may be employing the services of experts, or who may be selling assets to persons, any of whom may have affiliation with the receiver.

44 However, generally that does not constitute a conflict of interest, nor generally does the marketplace of potential advisers or of potential purchasers have any legal standing to interfere with the performance of the receiver. That standing is generally reserved by law to those persons whose indebtedness is being protected by the receivership.

45 In the case at bar, those persons are the secured parties, being the PMSI holders and the Plaintiff. Indeed it is the Plaintiff whose interest is most immediately affected by the realization process. Any act which increases the value of the assets (at least those assets whose value is sufficient to satisfy the PMSI indebtedness) will be to the benefit of the Plaintiff. Any act which decreases the value of the assets will be at the Plaintiff's cost.

46 In this case the Plaintiff and the PMSI holders have been given notice of the list of assets which the Receiver/Manager proposes to sell by public auction. They support that auction and the recommendation of the Receiver/Manager to sell the chattels at the November 15, 2000 All Peace auction because of its strategic advantages of size and timing. They support it because All Peace complied with the request to provide an appraisal of each asset, and has guaranteed that it will pay to the Receiver/Manager an amount sufficient to pay off the PMSI indebtedness on each asset which eliminates risk and uncertainty. They support the decision to not select Century Sales Inc. which complied with the Receiver/Manager's stated requirements, and they support the decision to not select Ritchie Bros. which did not comply with the Receiver/Manager's stated requirements.

47 Ritchie Bros. now complains that it has not received the same "Final List" of assets from the Receiver/Manager as did the other auction houses. The "Final List" of assets never existed in the form contemplated by Ritchie Bros.. The Receiver/Manager gave the three auction houses the same inventory list of assets which was compiled by the Receiver/Manager, which exceeds 100 pages, and asked them to provide an appraisal for each of the assets, and a bid amount for the assets which each auction house *in their own discretion and judgement* considered to have an equity sufficient to pay off the PMSI indebtedness. The same statement of pay out amounts (the "Master List") was given to each auction house, and that has not changed. It listed the items secured by PMSI. It was up to the auction houses to each assess how successful they could be at recovering equity on each item. Any items which increase the total bid submitted by All Peace over the total bid submitted by Ritchie Bros. are not significant because they increase the total bid. Rather, they are significant because All Peace has guaranteed the Receiver that it will recover at least an amount sufficient to pay out the PMSI indebtedness secured by that chattel, whereas Ritchie Bros. have been unable or unwilling to do so.

48 The auction houses were each given access to the equipment to inspect the same. The Receiver/Manager's decision to proceed in this fashion is commercially reasonable and prudent (unlike the sale in *Salima*) and is supported by the creditors.

49 Further Ritchie Bros. have given no notice to the secured creditors, most particularly the Plaintiff, and are not supported by any of the secured creditors. They engage in a move to effectively enjoin the sale at the APA auction by the Receiver/Manager, but have not complied with any of the tripartite test for an injunction, nor have they posted an undertaking in damages.

50 The motion by the Receiver/Manager is to permit it to dispose of the assets listed in the proposed Order by public auction. Even by granting Ritchie Bros. status and standing, there is no serious reason to upset the Receiver/Manager's discretion, which is supported by the various secured creditors whose interests are of greater importance.



51 Further, there are certain procedural requirements imposed upon a person wishing to take action against the companies or by extension, the Receiver/Manager which Ritchie Bros. has not complied with Paragraph 6 of the initial Order states:-

That no legal actions, administrative proceedings, self-help remedies or other acts or proceedings shall be taken or continued against the Receiver of either of the Defendants' assets without leave of this Court first had and obtained upon 2 days prior notice to the Receiver....

52 The Receiver/Manager may therefore exercise its authority in any way it considers to be commercially reasonable, subject only to the requirement imposed by paragraph 9 to obtain Court approval for sales over \$100,000.00.

53 Ritchie Brothers are not creditors of either Tucker Industries Inc. or Tucker Enterprises Corp.. While the Receiver/Manager has extended contractually the time in which Ritchie Brothers was entitled to make its bid for auction rights, Ritchie Brothers has no standing to object to the exercise of discretion by the Receiver/Manager. Ritchie Bros. has also not established conclusively that anyone, other than themselves would benefit from the Court's intervention in this case.

54 The Receiver/Manager is authorized to dispose of the assets by public auction conducted by All Peace. Notice of Intention to dispose of the assets as required by the PPSA is dispensed with upon the debtor since there will be no remaining assets left for its benefit in any event.

Application granted.



TAB 7

2014 ABQB 350
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Elaborate Homes Ltd.

2014 CarswellAlta 921, 2014 ABQB 350, [2014] A.W.L.D. 3322, [2014]
A.W.L.D. 3353, 14 C.B.R. (6th) 199, 243 A.C.W.S. (3d) 80, 590 A.R. 156

**In the Matter of the Insolvency of Elaborate
Homes Ltd. and Elaborate Developments Inc.**

Alberta Treasury Branches, Plaintiff and Elaborate Homes Ltd., Elaborate
Developments Inc., Manjit (John) Nagra, Jaswinder Nagra, Defendants

K.G. Nielsen J.

Heard: May 14, 2014

Judgment: June 11, 2014 *

Docket: Edmonton 1103-02937

Counsel: Robert M. Curtis, Q.C. for Alco Industrial Inc.
Michael J. McCabe, Q.C. for PriceWaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings --- Proceedings against bankrupt --- Before discharge of trustee --- Granting of leave

Company E went into receivership, with P being appointed as receiver --- Corporation A held second mortgage on condominium property owned by E, before bankruptcy --- Secured creditor held first mortgage on this property --- P accepted bid from numbered company, to purchase assets of E --- P submitted this bid for court approval, as they were required to do --- Approval was given by court --- However, A claimed they were not properly notified of this proceeding --- A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests --- A brought motion for leave to file action against P --- Motion dismissed --- Threshold was low to allow for leave --- However, A did not demonstrate that service was improper --- Service by e-mail was proper and should have come to attention of A and its principal --- It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P --- P followed necessary steps in sale of assets --- P made best efforts to obtain best price, and did not act improvidently --- A did not have evidence to show that P acted against its interests in sale of assets --- Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Debtors and creditors --- Receivers --- Conduct and liability of receiver --- Duties --- General principles

Company E went into receivership, with P being appointed as receiver --- Corporation A held second mortgage on condominium property owned by E, before bankruptcy --- Secured creditor held first mortgage on this property --- P accepted bid from numbered company, to purchase assets of E --- P submitted this bid for court approval, as they were required to do --- Approval was given by court --- However, A claimed they were not properly notified of this proceeding --- A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests --- A brought motion for leave to file action against P --- Motion dismissed --- Threshold was low to allow for leave --- However, A did not demonstrate that service was improper --- Service by e-mail was proper and should have come to attention of A and its principal --- It was principal's actions that caused A to be unaware of proceeding; not any misconduct on part of P --- P followed necessary steps in sale of assets --- P made best efforts to obtain best price, and did not act improvidently --- A did not have evidence to show that P acted against its interests in sale of assets --- Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

MOTION by corporation for leave to file action against receiver, in bankruptcy matter.

K.G. Nielsen J.:

I. Introduction

1 PriceWaterhouseCoopers Inc. (PWC) was appointed as receiver of all current and future assets and property of Elaborate Homes Ltd. and Elaborate Developments Inc. (collectively referred to as Elaborate).

2 Alco Industrial Inc. (Alco) seeks leave to commence proceedings against PWC in relation to matters arising in the receivership.

II. Background

3 Alco held a second mortgage (the Mortgage) in the amount of \$1,075,000 on, *inter alia*, property (the Condo) owned by Elaborate Homes Ltd., legally described as:

Condominium Plan 0520263 Unit 4 and 905 undivided 1/10,000 shares in the common property Excepting thereout all mines and minerals.

4 Alberta Treasury Branches was a secured creditor of Elaborate. It held, *inter alia*, a first mortgage on the Condo.

5 PWC was appointed as the receiver of Elaborate Homes Ltd. pursuant to a Consent Receivership Order dated February 22, 2011 (the Receivership Order). Pursuant to a separate Receivership Order, also dated February 22, 2011, PWC was named as receiver of Elaborate Developments Inc., a company related to Elaborate Homes Ltd.

6 On March 3, 2011, PWC sent notice to Alco, pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) of the receivership of Elaborate. This was sent by regular mail to the address indicated on the registration of the Mortgage on the Certificate of Title to the Condo. In the Brief filed in this application on behalf of Alco, it is acknowledged that Alco was served with a copy of the Receivership Order.

7 On or about April 5, 2011, an assistant with legal counsel for PWC (not the counsel for PWC on this application) obtained certain contact information with respect to Alco. While the assistant could not recall with whom she spoke at Alco or the exact conversation, she deposed that she believed she followed her typical practice when speaking to creditors which was as follows:

(a) she identified herself to the creditor and advised that she was calling from counsel for the receiver with respect to the receivership of the debtor company;

(b) she advised the creditor that the receiver required certain information from the creditor with respect to the receivership; and

(c) she requested contact information for the individual within the creditor's organization who would be best suited to receive correspondence with respect to the receivership.

8 In the discussions that ensued with the individual at Alco following this typical practice, she was advised that the owner of Alco was Bob Taubner and she was given his email address. This information is confirmed in a handwritten note made by the assistant. At all material times, Mr. Taubner was the President of Alco.

9 PWC took steps to market Elaborate's assets and property pursuant to the provisions of the Receivership Order. As a result of the marketing efforts, a number of offers were received for individual assets of Elaborate. PWC also received a number of "*en bloc* offers" to purchase all of Elaborate's assets. One of those *en bloc* offers was received from 1601812 Alberta Ltd. (the 160 Offer).

10 In accordance with its obligations, PWC reported to the Court with respect to the offers received in its Second Report, filed May 26, 2011. The Second Report contained a Bid Summary of all of the offers. PWC wished to keep the information in the Bid Summary confidential, and to release it to the public only after the Court had approved a sale. However, parties could obtain a copy of the Bid Summary on signing and sending to PWC a Confidentiality Letter, which provided that anyone signing it would be provided with the Bid Summary, but would be barred from acting as a purchaser in any way in respect of Elaborate's assets.

11 As outlined in the Second Report, PWC was of the opinion that the 160 Offer would lead to the highest net recovery for the creditors of Elaborate, as opposed to accepting other offers for specified or individual assets. PWC formed this view based on the combined value of the cash and assumption of liabilities components of the 160 Offer.

12 PWC accepted the 160 Offer subject to Court approval. PWC recommended to the Court that the 160 Offer be approved on the basis that it was higher than other offers and was preferable from the perspective of all of the creditors of Elaborate as a whole. Compared to all of the other *en bloc* offers, the 160 Offer would produce the highest net recovery on the Condo. Based on its analysis of the 160 Offer, PWC concluded that accepting the 160 Offer would allow for recovery of all of the indebtedness of Elaborate to Alberta Treasury Branches, but would not allow for the full recovery of the indebtedness of Elaborate to another secured creditor, Servus Credit Union. Following discussions with PWC, Servus Credit Union agreed with PWC's recommendation to accept the 160 Offer. PWC had no discussions with Alco with respect to the offers received.

13 The 160 Offer required Court approval by June 3, 2011. By an email dated May 26, 2011, counsel for PWC forwarded to Elaborate's creditors, including Alco, copies of the following:

- (a) the Application for an Order Approving Sale and Vesting Order returnable June 3, 2011 (the Application);
- (b) the Second Report;
- (c) a copy of a letter directed to the Court; and
- (d) a copy of the Confidentiality Letter.

14 On June 3, 2011, Belzil J. heard the application for approval of the sale of Elaborate's assets and property pursuant to the 160 Offer. Belzil J. granted a Sale Approval and Vesting Order approving the acceptance of the 160 Offer by PWC (the Sale Order). Belzil J. also granted a Sealing Order which sealed the Bid Summary until such time as the sale transaction had closed and a letter had been filed with the Clerk of the Court confirming that fact (the Sealing Order).

15 On June 3, 2011, counsel for PWC served the Sale Order and the Sealing Order by email on the listed creditors, including Alco.

16 Mr. Taubner, the President of Alco, has deposed that while he received the email of May 26, 2011 enclosing the Application, and 19 other emails with respect to this receivership, he did not use the email address which had been given to counsel for PWC or any other email address at the material time. He deposed that he was unfamiliar with computers and he did not anticipate that he might receive communications from PWC in such a fashion.

17 On cross-examination on his Affidavit, Mr. Taubner testified that he would occasionally request email communications, some of his employees would communicate with him by email, he would read such emails, and the group accountant for Alco had access to his emails. There is no evidence that any of the emails forwarded to Alco with respect to the Elaborate receivership at the address given, were rejected or returned as undeliverable.

18 The sale of Elaborate's assets and property proceeded pursuant to the 160 Offer, and Alco ultimately received the sum of \$90,553.09 net of costs in relation to the security which it held on the Condo. This recovery was insufficient to pay out the Mortgage.

19 PWC reported in its First Report, filed April 20, 2011, that an appraisal of the Condo had been conducted in August 2010, reflecting a market value of \$785,000. The Bid Summary indicated that the appraised value of the Condo on a forced liquidation was \$505,750. The value assigned to the Condo pursuant to the 160 Offer was \$432,000. This was the highest value assigned to the Condo in any of the *en bloc* offers. An offer had been received on the Condo only. This offer was in the amount of \$529,444.

20 The value assigned to the Condo in the 160 Offer represented 85% of the forced liquidation valuation. Only two other assets had higher returns compared to their valuations. The lowest allocation to an asset in the offers received was 24% of that asset's valuation.

21 Andrew Burnett, Vice President of PWC, was involved in this receivership. He filed an Affidavit in response to Alco's Application and was examined on it. With respect to the 160 Offer, Mr. Burnett deposed as follows:

Page 30, lines 17 to 22:

Q Was there ever any conversation with the offeror about modifying its offer in respect of the office condo [the Condo] because of the position of Alco?

A No, there was never discussion with them about changing their position on any of the other pieces of property other than the Althen One [unrelated to the Condo].

Page 33, lines 25 to 27 and Page 34, lines 1 to 11:

Q One of the bids that PWC did receive for the office condo alone was over \$500,000, correct?

A Correct.

Q When that bid came in, do I take it that the sole consideration was that it was a standalone bid whereas you wanted to have *en bloc* bids?

A No.

Q What consideration was given to possibly accepting that bid?

A We went back to all the purchasers that had more than one item on there and asked them whether we could carve out pieces, saying okay, you're the highest on this, but you're lower on this, can we just take that?

Page 36, lines 15 to 20:

Q What did Studio Homes [formerly 1601812 Alberta Ltd.] specifically advise with respect to their position on the office condo at the time, not in January of 2014, but at the time?

A At the time, and I won't say it's just on the office condo, we asked whether they would pull any of their other parcels out and they advised no.

III. Terms of the Orders

A. Receivership Order

22 The following provisions of the Receivership Order are relevant to this application:

...2. Pursuant to sections 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-03 (the "*BIA*"), 13(2) of the *Judicature Act*, RSA 2000, c. J-2, 99(a) of the *Business Corporations Act*, RSA 2000, c. B-9 and 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, PriceWaterhouseCoopers Inc. is hereby appointed Receiver (the

"Receiver"), without security, of all of the Debtor current and future assets, undertakings and properties real and personal of every nature and kind whatsoever, and wherever situate, including all proceeds thereof ("the Property").

3. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

...(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

(l) To sell, convey, transfer, lease or assign the Property (the "Disposition") or any part or parts thereof: ...

7. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

16. The Receiver shall incur no liability or obligation as a result of its appointment or carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the WEPPA. Nothing in this order shall derogate from the protection afforded to the Receiver by s. 14.06 of the BIA or any other applicable legislation.

B. Sale Order

23 The following provisions of the Sale Order are relevant to this application:

1. Service of the notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service is abridged to that actually given.

2. The Receiver's acceptance of the Purchaser's offer to purchase the Lands and Personal Property dated May 6th, 2011 as clarified and extended by the letter from the Receiver dated May 13, 2011, the e-mail from the Purchaser's legal counsel to the Receiver's legal counsel dated May 19, 2011, the letter from legal counsel for the Receiver to legal counsel for the Purchaser dated May 20, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 24, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 25, 2011, and the letter from the Receiver to the Purchaser dated May 26, 2011 (the "Offer"), which Offer is summarized at paragraphs 20 to 32 of the Receiver's Second Report, and [sic] is hereby approved and ratified.

15. Service of this Order may be effected upon those persons (directly or through legal counsel) on the Service List by facsimile or electronic mail, and such service shall constitute good and sufficient service. Service on any person other than as specified in the Service List is hereby dispensed with.

C. Sealing Order

24 The following provision of the Sealing Order is relevant to this application:

1. ... the Clerk of the Court is hereby directed to seal the Bid Summary (the "Confidential Documents") on the Court file until the sale of the Lands and Personal Property to 1601812 Alberta Ltd. has been closed in accordance with the Offer Terms and the filing of a letter with the Clerk of the Court from PriceWaterhouseCoopers Inc. confirming the sale of the Lands and Personal Property has been closed. ...

IV. Positions of the Parties

25 Alco argues that leave should be granted to file the Statement of Claim appended to its Application. Alco submits that it has a claim against PWC for gross negligence or wilful misconduct in serving the Application by email on May 26, 2011, and selling the Condo for less than its appraised value, thereby preferring the interests of other creditors to those of Alco.

26 PWC argues that there is no basis for a claim against it, as all documents were properly served on Alco by email, and all steps taken by it were in accordance with its obligations to act in the best interests of the creditors of Elaborate as a whole. Therefore, it was neither grossly negligent, nor did it wilfully misconduct itself.

V. Issue

27 The sole issue before the Court is whether Alco should be granted leave to file the Statement of Claim against PWC.

VI. Applicable Rules

A. Alberta Rules of Court, Alta Reg 124/2010

28 The following Rules of the *Alberta Rules of Court* are relevant to this application:

9.15(1) On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made

(a) without notice to one or more affected persons, or

(b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.

(2) Unless the Court otherwise orders, the application must be made within 20 days after the earlier of

(a) the service of the judgment or order on the applicant, and

(b) the date the judgment or order first came to the applicant's attention.

...

11.21(1) A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and

(a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and

(b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.

(2) Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.

(3) In this rule, "electronic" and "electronic agent" have the same meanings as they have in the *Electronic Transactions Act*.

B. Bankruptcy and Insolvency General Rules, CRC, c 368

29 The following *BIA* Rules are relevant to this application:

3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

6.(1) Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

VII. Law

A. Threshold Test for Leave

30 The Supreme Court of Canada in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) confirmed that the threshold is low on an application for leave to commence an action against a receiver or trustee:

55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact...

57 In the leading case of *Mancini*, the Court of Appeal summarized the accepted principles as being the following:

1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

31 Conrad J. (as she then was) considered this issue in her decision in *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 90 A.R. 173 (Alta. Q.B.), at 177-78, [1988] 6 W.W.R. 156 (Alta. Q.B.):

...In *Royal Bank of Canada v. Vista Homes Ltd. et al* (1985) 63 B.C.L.R. 366 (B.C.S.C.), Mr. Justice MacDonald stated at p. 374:

...the obtaining of an order to sue should not be a perfunctory process... The court should examine with some care the foundation of the alleged claim with a bias against exposing its appointed officer to unnecessary or unwarranted litigation. On the other hand, there is not an onus on the applicant to prove its case against the receiver-manager at this stage.

I am satisfied the test to be applied by this court is to determine whether it is perfectly clear that there is no foundation for the claim or whether the action is frivolous or vexatious. It is not for this court to deal with the merits of either party's position or to gauge the probability of success should the action proceed to trial. Leave should be granted if

the evidence presented discloses that there is some foundation for the claim and that the claim is not merely frivolous nor vexatious.

Indeed, while the Court may by its order want to protect its appointed officer from unnecessary and unwarranted litigation, I do not take that to mean they are entitled to protection against proper actions simply because they are court appointed.

32 Therefore, the proposed plaintiff must have supplied "facts to support the claim sought to be asserted"; or "some foundation for the claim". Both of these cases make it clear that there must be some factual basis for the claim, a court should not grant leave for frivolous, vexatious or unmeritorious claims, and it is not appropriate at the leave stage for the court to make a final assessment of the merits of the claim or possible defences to the claim.

33 While the threshold for granting leave is low, the process of reviewing the proposed claim is not to be perfunctory. Therefore, I will analyze in some detail the basis for the claims alleged by Alco against PWC.

B. Gross Negligence and Willful Misconduct

34 Clause 16 of the Receivership Order provides that PWC will incur liability only in circumstances of "gross negligence or wilful misconduct on its part". The starting point, therefore, is to consider what constitutes gross negligence or willful misconduct.

35 *Black's Law Dictionary*, 9th ed (St Paul, MN: West, 2009) defines gross negligence as, *inter alia*:

A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.

...As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous...have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof...But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind...

36 The *Dictionary of Canadian Law*, 4th ed (Scarborough, Ont: Thomson Carswell, 2011) provides the following definition:

Conduct in which if there is not conscious wrongdoing, there is a very marked departure from the standard by which responsible and competent people...habitually govern themselves...a high or serious degree of negligence...

37 The Supreme Court of Canada has considered these terms in the context of tort litigation. In *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.), at 145, [1942] S.C.J. No. 7 (S.C.C.), Duff C.J. observed:

... All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves: ...

38 In *Société Telus Communications v. Peracomo Inc.*, 2014 SCC 29, [2014] S.C.J. No. 29 (S.C.C.), Cromwell J. for the majority commented on "wilful misconduct":

57 In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference"; "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": *R. v. Boulanger*, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing *Attorney General's Reference (No. 3 of 2003)*, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an

insightful article, Peter Cane states that "[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take": *Mens Rea in Tort Law* (2000), 20 *Oxford J. Legal Stud.* 533, at p. 535.

58 These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know...

39 Therefore, in order for Alco to establish PWC's liability arising from the receivership at an eventual trial, it must show that PWC demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

40 Against this backdrop, I will consider Alco's complaints regarding PWC's conduct.

VIII. Analysis

A. Email Service

41 Alco argues that service of the Application was not effective, as Alco had not specifically provided an address to which information or data in respect of the receivership action might be transmitted to it.

42 Nothing in the material before the Court supports this allegation. Clearly, the assistant for counsel at PWC contacted a representative of Alco who provided an email address for the president of Alco. It is reasonable to infer that whoever provided the email address to the assistant for counsel at PWC was not aware that Mr. Taubner would not access his email account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

43 PWC derived its authority from the Receivership Order which specifically references the *BIA*. Rule 6(1) of the *BIA Rules* requires that every notice or other document pursuant to the *BIA* or the *BIA Rules* be "served, delivered personally or sent by mail, courier, facsimile or electronic transmission". Both the Application and the Sale Order were sent by electronic transmission to an email address provided by Alco. There is nothing in the material before the Court to suggest that service was not effected in compliance with Rule 6(1) of the *BIA Rules*.

44 In contrast, *BIA* Rule 124 provides that a notice pursuant to s. 244(1) of the *BIA* by a secured creditor who intends to enforce a security on all or substantially all property of an insolvent may be "sent, if agreed to by the parties, by electronic transmission". Neither s. 245 regarding the initial notice of the receiver, nor general Rule 6(1) imposes a similar requirement.

45 The *Alberta Rules of Court* supplement the *BIA Rules* to the extent that they are not inconsistent with the *BIA* or the *BIA Rules*. Rule 11.21 requires that the recipient has specifically provided an address. Arguably, this is more onerous than Rule 6(1), and therefore inconsistent with it. However, even if Rule 11.21 of the *Alberta Rules of Court* applies, there is nothing in the material before the Court to suggest that the requirements of Rule 11.21 were not met in this case.

46 I also note that if Alco wished to pursue the position that the Sale Order had been obtained without notice to it, it could have availed itself of Rule 9.15 of the *Alberta Rules of Court* which provides a mechanism to seek to vary or discharge a judgment or order on that basis. Such an application must be made within 20 days after the earlier of service of the order on the applicant, or the date the order first came to the applicant's attention.

47 The Sale Order was, of course, also served by email on Alco. Therefore, Alco would argue that the Sale Order was not properly served upon it. However, on the record before me it is clear that Alco was aware of the Sale Order by

January 11, 2012 at the latest, when it resisted the apportionment of receivership costs as against the proceeds from the sale of the Condo. Alco took no timely steps to set aside the Sale Order for lack of service upon becoming aware of it.

48 Further, the Sale Order makes it clear that service of the Application was declared to be good and sufficient and that service of the Sale Order could be effected upon all affected persons by way of facsimile or electronic mail, and such service was constituted to be good and sufficient. Therefore, it appears that Belzil J. considered the matter of both service of the Application and the Sale Order. Again, Alco could have either appealed the Sale Order, or sought to set it aside on the basis of a lack of notice. It took neither of these steps.

49 I would add that in today's world, electronic service is a reflection of practical realities. The *Alberta Rules of Court* and the *BIA Rules* recognize this reality. Perhaps there is no area of practice where electronic service of documents is more appropriate than the bankruptcy and insolvency area. I say this because of the volume of documents that are often produced in such matters, and the need for receivers, trustees, monitors and counsel to act expeditiously and often in the face of very short deadlines. Given the commercial and legal realities of bankruptcy and insolvency matters, there is an obvious need to exchange documents electronically. In my view, a party involved in such matters cannot ignore these realities by refusing to move effectively into the electronic age.

50 In summary, I find nothing in the material before the Court to suggest that PWC through its counsel did not properly effect service of both the Application and the Sale Order on Alco by emailing those documents to Mr. Taubner at Alco. There is no factual basis to suggest that PWC was either grossly negligent, or that it wilfully misconducted itself, in effecting service of the documents by email.

B. Sale Transaction

51 Alco also alleges that PWC breached its duties to Alco in the manner in which it conducted the sale of Elaborate's assets. Specifically, Alco alleges that PWC concealed the Bid Summary, and sold the Condo for an amount which was below its appraised value.

52 The Second Report indicated that PWC preferred that the Bid Summary remain confidential until such time as the sale transaction had closed. Upon signing the Confidentiality Letter, the Bid Summary would be disclosed to the signatory on the basis that the information disclosed in the Bid Summary would not later be used by the signatory as a potential purchaser of Elaborate assets.

53 Alco argues that PWC should not have required it to give up any right to make an offer on the Condo. Alco submits that its rights "ought not to have been extorted away under threat that otherwise the information necessary for it to respond to a court application would be kept hidden from view".

54 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 Corp.*, 2009 CarswellOnt 7952, [2009] O.J. No. 5440 (Ont. S.C.J. [Commercial List]), Newbould J. explained the reasons for such confidentiality:

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.

55 Alco alleges that PWC and its counsel ignored Alco, hid the Bid Summary and cloaked their activities in the receivership with secrecy. However, there is nothing in the material before the Court to suggest that PWC's preference to keep the Bid Summary confidential until the sale transaction had been approved and closed was for any purpose other than to ensure the integrity of the marketing process, and to avoid misuse of the information in the Bid Summary by a subsequent bidder to obtain an unfair advantage in the event it was necessary to remarket Elaborate's assets. Further, there is nothing to suggest that Belzil J. granted the Sealing Order for any other reason.

56 Alco may have been in a unique position given that it held a second mortgage on the Condo. Given that unique position, it may very well have been entitled to receive information with respect to the offers received in relation to the Condo and, therefore, could have suggested revised terms to any required confidentiality agreement. However, Alco's position does not render PWC's actions inappropriate. There is nothing to suggest that PWC's actions in this regard were not in accordance with common, prudent and reasonable practice in receiverships, or that they reflect or resulted from gross negligence or wilful misconduct on the part of PWC.

57 With respect to the manner in which the sale of the Condo was conducted, Alco submits that PWC breached a "fundamental duty of Receivers" in that it failed to act with an even hand towards classes of creditors and in accordance with recognised lawful priorities. Again, the law and the material before the Court do not support this contention.

58 The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at paras 27-29, Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

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

59 Galligan J.A. recognized that in considering a sale by a receiver, a court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver, and should assume that the receiver is acting properly unless the contrary is clearly shown. He summarized the duties of the court when deciding whether a receiver who has sold property acted properly as follows (at para 17):

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.

60 In *Skyepharm PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]) at para 4, Farley J. cited *Soundair* with approval, holding that a receiver's conduct is to be reviewed

in light of the objective information the receiver had and not with the benefit of hindsight. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver acted improvidently in accepting it.

(61) In *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 N.S.R. (2d) 34 (N.S. S.C.), the receiver was of the view that the best realization of the assets in question would come from a sale *en bloc*. Hood J. held that the receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, the receiver must consider the interests of all creditors and then act for the benefit of the general body.

62 PWC accepted the 160 Offer and recommended that the acceptance be approved by the Court on the basis that it was higher than other *en bloc* offers and was preferable from the overall perspective of Elaborate's creditors. The 160 Offer provided for the highest net recovery on the Condo of all of the *en bloc* offers and represented a recovery of 85% of the forced liquidation valuation of the Condo. Only one other offer in the marketing process undertaken by PWC assigned a purchase price for the Condo which was higher than the price assigned in the 160 Offer. This was an offer with respect to the Condo only.

63 The law is clear to the effect that the receiver must not consider the interests of only one creditor, but must act for the benefit of the general body of creditors. PWC was under a duty to act in the interests of the general body of creditors and to conduct a fair and efficient marketing process.

64 The excerpts from the cross-examination of Mr. Burnett on his Affidavit indicate that PWC did attempt to maximize the recovery on all of Elaborate's assets as it conducted negotiations with the various bidders in this regard.

65 There is nothing before the Court to suggest that PWC did not make sufficient efforts to obtain the best price for the assets, nor that it acted improvidently. Alco has not put forward any factual foundation to support an inference that PWC did not act for the benefit of the general body of creditors.

66 Alco submits that had it attended the hearing on June 3, 2011 before Belzil J., it would have been successful in arguing that Alco was deprived of a statutory right to recover its secured debt against the Condo. However, the contents of the Second Report undermine the argument that PWC's acceptance of the 160 Offer would not have been approved in the circumstances as known when the matter proceeded before Belzil J. Further, given my findings on the email service issue, PWC cannot be blamed for Alco's non-attendance at the hearing on June 3, 2011.

67 Therefore, I conclude that Alco has not established a factual basis for the claim that PWC was either grossly negligent or wilfully misconducted itself in the manner that it marketed Elaborate's assets or in its reporting to the Court.

IX. Conclusion

68 The threshold test for leave in this case is low. However, PWC would only be liable if it acted with gross negligence or wilful misconduct. I have found no factual basis to suggest that PWC was either grossly negligent or wilfully misconducted itself as alleged by Alco.

69 PWC is not entitled to protection against proper actions simply because it was court appointed. However, I am mindful of the bias against exposing a court appointed officer to unnecessary or unwarranted litigation. In my view, granting leave to Alco to proceed with the claim against PWC would expose it to a manifestly unmeritorious action.

70 Therefore, Alco's application for leave to file the Statement of Claim against PWC is dismissed.

X. Costs

71 If the parties cannot otherwise agree on costs, they may appear before me within 60 days of the filing of these Reasons for Judgment.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on June 23, 2014 has been incorporated herein.

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TAB 8

1986 CarswellOnt 235
Ontario Supreme Court, High Court of Justice

Crown Trust Co. v. Rosenberg

1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note)

**CROWN TRUST COMPANY, SEAWAY TRUST COMPANY
and GREYMAC TRUST COMPANY v. ROSENBERG et al.**

Anderson J.

Judgment: November 6, 1986

Docket: No. 1380/83

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers — Sale of debtor's assets — Approval by court — Court discussing obligations in determining whether to approve sale.

On a motion by a court appointed receiver and manager to approve the sale of certain properties, the duties of the court are to consider: whether the receiver has made a sufficient effort to get the best price and ensure he has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process.

The court has the power and responsibility to disregard the recommendation of the receiver and to approve another offer or offers. On the other hand, the court ought not to enter into the market place or sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which his decision has been reached. Furthermore, the court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance or proceed against the recommendations of its receiver except in special circumstances or where the necessity and propriety of doing so are plain. It is only in exceptional circumstances that a court will intervene and proceed contrary to the receiver's recommendations if satisfied that the receiver has acted reasonably, prudently and fairly, and not arbitrarily.

It is necessary to keep in mind not only the function of the court but the function of the receiver. The receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets. However, the court is not to apply an automatic stamp of approval to the decision of the receiver. The court has power to come to a different decision and a discretion to exercise which must be exercised judicially.

The courts have recognized that they are not making a decision in a vacuum; that they are concerned with the process not only as it affects the case at bar, but as it stands to affect situations of a similar nature in the future. The delicate balance of competing interests is relevant and material.

Anderson J., (orally):

1 This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

2 A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

3 In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

4 In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them during the course of my reasons, although they will form part of the reasons should they be transcribed.

5 On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

6 On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

7 On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

8 This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

9 Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest bidder. The extent of the difference I will discuss in a moment and I will also discuss the reasons advanced by Clarkson for not recommending it.

10 On the return of the motion Larco moved to be added as an intervenor under rule 13.01. I dismissed that application on the following day. The reasons for that ruling are an appendix to these reasons. (See App. I [not reproduced]).

11 On Wednesday, October 27th, Larco presented during the hearing of the motion an entirely new offer in a still higher amount. On Thursday, October 23rd, I made a ruling that I would not consider that offer. My reasons for that ruling are likewise an appendix to these reasons. (See App. II [not reproduced]). On the argument of the motion no criticism was advanced of any of the offers recommended by the Receiver. The only criticism that was advanced on behalf of some defendants was that the Larco bid should have been recommended and in any event should be approved by the court. The plaintiffs in the action supported the recommendation of the Receiver.

12 Before dealing with the elements of the ensuing dispute, I turn to a consideration of the nature of the motion which is before me and of the duty of the court in the disposition of such a motion. The duties of the court I conceive to be the following, and I do not put them in any order of priority:

I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently. Authority for that proposition is to be found in a judgment of the Alberta Court of Appeal, *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58. The [D.L.R.] headnote is of assistance, as is the judgment delivered by Kerans J.A. and particularly that portion which appears at p. 476. The questions with which the court was dealing were similar to those with which I am now concerned.



The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court in an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In *Canada Permanent Trust Co. v. King Art Developments Ltd. et al.* (1984), 12 D.L.R. (4th) 161, [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.

II. The court should consider the interests of all parties, plaintiffs and defendants alike.

That is made apparent by the judgment of this court in *Ostrander v. Niagara Helicopters Ltd. et al.* (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5, although the conclusion appears rather by indirection and as a statement *obiter* to judgment.

III. The court must consider the efficacy and integrity of the process by which the offers are obtained.

The first authority which is of assistance in that regard is the judgment of Saunders J. in *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C. Bkcy.). There, in dealing with the question of approval, he has this to say in his reasons at p. 246:

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

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1 at p. 11 (C.A.), where he said:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property. Also, if there were circumstances which indicated a defect in the

sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

A further authority for that proposition is to be found in *Bank of Montreal v. Maitland Seafoods Ltd. et al.* (1983), 57 N.S.R. (2d) 20 at p. 23, 46 C.B.R. (N.S.) 75 (N.S.S.C.):

If any efficacy is to be given to the tender system, then it requires that ... a person, whether insider or guarantor, who obtains full information of the amounts of the tender ought not, at the last moment, be entitled to make a somewhat higher offer and obtain the property. To permit this would create "chaos in the commercial world". Not only would there be uncertainty ... but it could lead to the situation where there might be no bidders.

IV. The court should consider whether there has been unfairness in the working" out of the process.

The authority for that is the case to which reference was made by Saunders J., *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1. The [C.B.R.] headnote again is useful as is, in this connection, the language at the concluding portion of the judgment where this is said:

Misleading a bidder, even unintentionally, by a receiver must always be a sufficient ground for a court to refuse to approve an agreement of purchase and sale.

That case is also authority, if authority were needed for the proposition that in a proper case the court has the power to disregard the recommendation of the Receiver and to approve another offer.

13 It is with those areas of responsibility in mind that I proceed to deal with the motion. I have already said that no criticism is made of the offers which are recommended. Likewise no criticism has been made of the process by which the offers were obtained.

14 Attention has focused on the different economic returns which it is anticipated would flow from the recommended offers on the one hand and the Larco offer on the other. Depending upon whose data and calculations are accepted, that difference may be as high as \$7 million odd, or as low as \$1 million odd. I do not propose to analyze the data or the calculations which have been advanced, because in the view which I take of the matter they are not material.

15 The central issue is whether the court should disregard the recommendations of the Receiver and approve the higher bid. Indeed at the end of the day that is the only real issue. This requires first some review of the reasons advanced by the Receiver for rejecting or at any rate not recommending the Larco bid. This is dealt with in the motion record in the Receiver's report in para. 38, at pp. 51-67 of the record:

38. Clarkson did not accept Enterprises' ¹ Offer, and does not recommend its acceptance and approval by this Court, for the following reasons:

(a) Clarkson's concern to maintain the integrity and fairness of the tender process embodied in the Invitation to Tender, and Clarkson's conviction that the evident success of the marketing and tender process as reflected both in the quantity and quality of the offers which were received was due in large measure to the faith and trust of prospective purchasers that they would each be afforded a fair and equal opportunity to purchase, have been discussed at length above. Clarkson and Cogan were advised on August 14, 1986 by representatives of Enterprises that Enterprises shared those concerns as a result of an unsuccessful tender recently made by Enterprises in respect of certain other properties, and particular emphasis was placed by the said representatives of Enterprises on their need to understand the tender rules, that the rules not be changed, and that they expected everyone to adhere to such rules.

Nevertheless, Clarkson does not believe that Enterprises' Offer as supplemented by the letters delivered after the Bid Deadline was in acceptable form or in accordance with the rules of the tender process established by and embodied in the Invitation to Tender in that, inter alia,



(i) the above-mentioned mechanism for determining the price at which Clarkson would be required to sell the Note might be said to have afforded Enterprises the opportunity to change the cash purchase price offered for the subject Properties, after the Bid Deadline, although no objection could be raised to a change in such cash purchase price if the percentage to be stipulated by one of the designated financial institutions was determined by such financial institution solely on the basis of objective market interest rate criteria; Clarkson and Fraser & Beatty, following the Bid Deadline, therefore repeatedly requested confirmation from The Royal Bank of Canada that the percentage set out in its said letter dated September 15, 1986 was determined by such bank based upon objective market interest rate criteria alone, but no such confirmation was received by Clarkson;

(ii) Enterprises or persons acting on its behalf changed or attempted to change or might have changed, after the Bid Deadline, material terms and conditions of Enterprises' Offer; namely

(A) price by means of the Note purchase mechanism;

(B) the financing condition in Enterprises' Sealed Bid referred to in paragraph 34 above was included in such sealed bid despite repeated statements by Clarkson, Cogan and Fraser & Beatty to representatives of and to the solicitors for Enterprises prior to the Bid Deadline that this would represent a serious negative feature of any offer submitted; by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson (a copy of which is annexed hereto as Schedule H (Appendix III [not reproduced]) and received by Clarkson the following day, nine days after the Bid Deadline, this condition was purportedly waived;

(C) as mentioned in paragraph 36 above, Clarkson did not receive, on or before September 17, 1986, the purchase undertaking from one of the designated financial institutions in accordance with Enterprises' Sealed Bid, and in lieu thereof the solicitors for Enterprises, by means of the aforesaid letter dated September 18, 1986, a copy of which is annexed hereto as Schedule H, purported to amend Enterprises' Offer to provide that Enterprises would cause the Note to be purchased on closing "on the same terms and conditions as contemplated in [Sealed Bid Schedule 3] paragraph 8";

(D) Clarkson and Fraser & Beatty had indicated to Enterprises and its solicitors following the Bid Deadline that Clarkson had difficulty in properly evaluating Enterprises' Offer until it knew what mortgages Enterprises intended to require be discharged. While the amount payable by Enterprises would increase dollar for dollar for each dollar spent to obtain a mortgage discharge, the effect of the aforesaid Note purchase mechanism would be to satisfy such amount (including dollars expended to obtain mortgage discharges) at 81.2 cents per dollar. Fraser & Beatty therefore asked Enterprises' solicitors to confirm in writing to Clarkson what mortgages Enterprises' solicitors believed Enterprises was entitled to request a discharge of under the terms of Enterprises' Offer, it being a fair assumption that a request for a discharge of as many mortgages as possible would be received by Clarkson given the aforesaid discount achieved by means of the Note purchase mechanism. Instead, by letter dated September 21, 1986, a copy of which is annexed hereto as Schedule I, (Appendix IV [not reproduced]) Enterprises' solicitors purported to further amend Enterprises' Offer in this regard; and

(E) notwithstanding the clear provisions of the Invitation to Tender, as late as September 17, 1986 and again on September 18, 1986 a representative of Enterprises requested that Clarkson agree to negotiate a reduction in the amount of the required deposits, which request was denied, and then requested that Clarkson agree to a reduction in the amount of the further deposit to be provided within 5 days of acceptance of any offer, which further request was also denied by Clarkson;

(b) despite repeated requests by Clarkson and Fraser & Beatty for an explanation of the commercial reason for the use of the Note purchase mechanism (which on its face only serves to reduce the purchase price for the subject Properties from a high nominal value to a lower real value), in the view of Clarkson and Fraser & Beatty no clear and consistent

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reasons were given. Accordingly, a written explanation was requested and a reason was cited in the letter annexed hereto as Schedule I, but Clarkson did not and does not regard the explanations received as satisfactory;

(c) Clarkson was concerned and remains concerned, particularly given the history of the subject Properties and the attention they have attracted in federal, provincial and municipal political circles and with the tenants thereof and those representing such tenants, with the appearance of the proposed transaction in the minds of the tenants, the media, the politicians and the public at large, some of whom might be expected to question seriously whether the inflated nominal purchase price was being used to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. In the absence of definitive evidence to the contrary, Clarkson believes that this aspect raises perceptible risks of intervention of some kind which might imperil a successful closing of the proposed transaction with Enterprises;

(d) as was mentioned above, Enterprises failed to cause the Note purchase undertaking from Citibank to be delivered to Clarkson on or before September 17, 1986 as provided in Enterprises' Sealed Bid, and Clarkson was concerned and remains concerned with the acceptance of any offer in respect of which the offeror, before Clarkson has even had a reasonable opportunity to accept the same, has already failed to perform a material term thereof; and

(e) Clarkson was not satisfied, notwithstanding all of the foregoing, that Enterprises' Offer was capable of acceptance, and believed that certain aspects thereof would have to be successfully negotiated prior to any such acceptance, including in particular:

(i) the waiver of the financing condition which, as noted above, was purportedly effected by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson despite the relevant provisions of Enterprises' Offer in respect of amendments and despite the statement of Enterprises' solicitors, with which Fraser & Beatty agreed, in a telephone conversation between such solicitors that this and any other matter pertaining to the terms of Enterprises' Offer should be in the name of and executed by Enterprises;

(ii) the substitution of Enterprises' agreement to cause the Note to be purchased on closing "on the same terms and conditions as contemplated in paragraph 8", which again was purportedly effected by the letter dated September 18, 1986 and therefore suffered from the same difficulties as the purported waiver plus the additional difficulty that it is unclear what such "same terms and conditions" are; in Clarkson's view, it is totally unsatisfactory for a transaction of this magnitude, which contemplates an unsecured note in the order of \$375,000,000, to hinge on such vague and uncertain wording;

(iii) in connection with the aforesaid purchase of the Note on closing, reference was made in paragraph 34 above to the provision in Enterprises' Sealed Bid that the Note was to be purchased "at the closing at the said [price] as part of the escrow arrangements herein provided", but in view of the uncertainty as to the intent and effect of these words, clarification would be required to ensure that there was no misunderstanding in this respect; and

(iv) the amendment to Enterprises' Offer purportedly effected by the aforesaid letter dated September 21, 1986 from Enterprises' solicitors addressed to Clarkson in respect of the mortgages to be discharged on closing and the effect thereof on the ultimate purchase price realized by Clarkson, which at the very least suffers from the same difficulties as the aforesaid purported waiver.

Apart altogether from its concern to maintain the integrity and fairness of the tender process, Clarkson concluded that, even if it were prepared to attempt such negotiations in an effort to put Enterprises' Offer into acceptable form, the time constraints imposed by the tender rules and the fact that all offers would expire on September 25, 1986 and the difficulties encountered in resolving outstanding questions to date raised a serious question as to the successful outcome of such negotiations. In view of the risks to the entire sales process if that had happened, Clarkson decided not to attempt such negotiations but to accept the offers in hand that were capable of acceptance as they stood.

16 The motion was brought on in the usual way on a written report of the Receiver signed by Mr. S.R. Shaver, a vice-president of Clarkson, and unsworn.

17 Counsel for the Receiver submitted at the opening of the motion that for reasons pertaining to the importance of the matter and its public interest, he proposed to lead the evidence of Mr. Shaver *viva voce* although it is something of an exception in the disposition of a motion of this kind. I acceded to that submission. I confess to having had moments during the subsequent proceedings when I doubted the wisdom of that decision. The inevitable result was that evidence was called by the defendants who were advancing a different position, and a considerable amount of time was spent. Notwithstanding my doubts, I think that for the reasons advanced by the Receiver, and because an element of catharsis is involved, perhaps the hearing of *viva voce* evidence was appropriate in all the circumstances.

18 I have made references to the Disposition Strategy Report which lay behind the negotiations which produced the offers which are now before the court for consideration. It is a voluminous and detailed document comprising, without its various appendices and schedules, some 98 pages. It was pursuant to that strategy report that the order of Catzman J. in July of this year set in motion the sequence of events leading to the report and motion which are now before me.

19 Throughout that sequence of events, the Receiver has had the benefit and assistance of the advice of eminent solicitors and counsel and of an eminent real estate consultant appointed for the purpose.

20 In the motion which is before me some 15 counsel appeared at various times, eight for most of the time, representing various interests. The evidence consumed seven full days and final argument a further day. Most of the principal participants in the sequence of events made their appearance in the witness-box. The ponderous chain of happenings which followed the order of Catzman J. and culminating in the motion and the nature and extent of that motion are both matters of consequence to which I will refer subsequently.

21 Events were set in train by a letter written by Clarkson to potential purchasers which is dated July 28, 1986. It is found in the motion record at p. 124:

On July 25, 1986 Mr. Justice Catzman approved the final stages of the disposition process which include the following:

1. A negotiation stage culminating on September 3, 1986 with an offer as between the Interim Receiver and Manager and prospective purchasers wherein all terms and conditions respecting the transaction, exclusive of the final offering price, are settled ("Approved Offers").
2. After the Approved Offers are settled prospective purchasers wishing to bid on individual Properties, groups of Properties or all of the Properties are directed to forward Sealed Bids to the Office of the Registrar of the Supreme Court of Ontario addressed to the Interim Receiver and Manager. The Sealed Bids must be submitted to the Registrar on or by 3:00 p.m. September 10, 1986 (Bid Deadline Date).
3. After reviewing and analyzing the Sealed Bids, in context with the Approved Offers, bidders will be notified whether or not their offers are accepted within 15 days of the Bid Deadline Date.
4. The Standard Form of Offer and the Invitation to Tender stipulate that offerors must submit with their Sealed Bids deposits amounting to the greater of \$100,000 or 2 $\frac{1}{2}$ % of the price offered in the Sealed Bid in the form of a certified cheque or bank draft.

For greater certainty and clarity we request that you carefully review the Invitation to Tender, Sealed Bid form and Standard Form of Offer in order that all aspects of the above outlined disposition process are understood and, more importantly, closely adhered to so that no one is disadvantaged throughout this process.

We urge each of you to convene meetings with us at the earliest possible date to ensure that all of your queries and concerns are adequately addressed. These meetings should assist you in preparing and submitting an Approved Offer on or by September 3, 1986. To this end, we have prepared all of the schedule for each Property to be affixed to the offer(s) including financial information and rent rolls as of June 30 and July 1, 1986 respectively.

There will be one and only one opportunity to bid. Because of the nature of the process, prospective purchasers will be automatically encouraged to submit their highest and best offers. Please be cognizant of the fact that all offers will be evaluated on a "cash equivalent" basis to ensure a fair and equitable evaluation process.

A prospective purchaser's chance to be the successful bidder will be enhanced relative to another purchaser, assuming equal "cash equivalent" offers are received, if:

1. the Approved Offer contains fewer onerous and time consuming conditions.
2. the prospective purchaser establishes his "credit worthiness". This aspect can best be established if conclusive third party evidence of the purchaser's ability to arrange the necessary financing to close the transaction is provided; and
3. Property inspections are completed in advance of the final Bid Deadline Date, September 10, 1986.*

22 The invitation to tender is an exhibit on these proceedings. Again, its contents are material. I do not intend to read them but they will be included in the reasons. (See App. V [not reproduced])

23 I said when referring to the portion of the report which set out the reasons by the Receiver for not recommending the Larco offer that I did not propose to deal in detail with each of the points raised. The objections upon which emphasis was particularly placed were the following:

1. the use of the promissory note and the related problems of the discount rate and the sale and purchase of that note;
2. the inclusion in the sealed bid of a financing condition which had not been provided in Larco's formal offer;
3. the identification and amount of the mortgages which Larco would require to be discharged upon closing, and
4. relating to the financing condition, the ultimate waiver of that condition.

24 The uncontentious history of the Larco offer is that prior to its being made there was a meeting in August of 1986 attended by representatives of Larco and representatives of Clarkson when the prospective offering and bidding procedure were discussed.

25 On September 3rd offers were submitted. On September 8th Clarkson replied in writing with certain comments. Between September 3rd and September 9th there were meetings and telephone conversations between the representatives of Larco and representatives of the Receiver. On September 10th there were consultations and there was a subsequent exchange of correspondence. When the final decision of the Receiver was announced September 25th the Larco offers were not recommended.

26 I have already indicated that the difference between the competing offers figured largely in the hearing and blow-by-blow accounts were given by the various participants of the exchanges between representatives of Larco and representatives of the Receiver. These exchanges must be explored to some extent, though not with the attention to detail which they received during the hearing.

27 I do not intend to deal *seriatim* with each of the Receiver's objections as was done by counsel for the defendants, Green Door and Walton, and I trust that he will not feel that his argument was slighted or not considered because I do not do so. I do intend to mention some of the major points.

28 The first of those was the note mechanism. In the preliminary discussions between representatives of Larco and the Receiver there had been some mention of the use of a note or debenture to finance a portion of the price. I think nothing turns on the contents of those precise discussions. The actual mechanism was not fully disclosed until the bid deadline and the submission of the sealed bid.

29 It is appropriate I think to consider that, in the offer which was submitted on September 3rd, para. 3 dealing with payment, after setting out provisions with respect to deposit and the taking back of mortgages, concluded with the following subparagraph:

30 And the balance of the price for the Properties shall be paid subject to adjustments to the Interim Receiver on the Escrow Closing by certified cheque or bank draft payable to the Interim Receiver drawn on or by a Canadian chartered bank or by another Canadian financial institution acceptable to the Interim Receiver.

31 When the sealed bid was submitted the note mechanism, a phrase which I shall adopt although it is not in all respects a happy one, was in the form which appears at p. 136 of the record, this by way of amendment to the offer to which I have just referred:

8. Paragraph 3 of the Form of Offer shall be amended by adding thereto the following paragraphs:

The balance of the price referred to in paragraph 3 of the Form of Offer shall be paid by Offeror to the Interim Receiver by Offeror's delivering to the Interim Receiver a promissory note ("Citibank Guaranteed Note") in that amount, which note shall be unsecured by any charge against the Properties, but which shall be absolutely and unconditionally guaranteed by one of Citibank Canada, Royal Bank of Canada or another financial institution reasonably acceptable to the Interim Receiver (which financial institution is herein referred to as "Citibank"). The said promissory note shall require equal monthly payments of principal and interest sufficient to fully amortize the said sum at the rate of 8.222% per annum over a term of thirty (30) years. Offeror shall arrange a conventional mortgage loan with Citibank or its designee (which party is herein called ("Lender") which shall be secured by a charge against the Properties which shall be subject and subordinate in all respects to the existing loans which are assumed by Offeror on the date of Closing.

The Interim Receiver shall sell the Citibank Guaranteed Note on the date of Closing to Lender for cash purchase price determined as follows:

on or before Monday, September 15th Citibank shall report in writing to the Interim Receiver stating the cash price (the "Cash Purchase Price") for the Citibank Guaranteed Note as of Wednesday, September 10, 1986. On or before Wednesday, September 17, 1986 the Interim Receiver shall have received in form satisfactory to Interim Receiver acting reasonably an undertaking from Citibank to purchase or cause to be purchased the Citibank Guaranteed Note at the Closing at the said Cash Purchase Price as part of the escrow arrangements herein provided, subject only to the acceptance of this Offer and such reasonable warranties and representations from the Interim Receiver that he has not encumbered or accepted payment on the said note as Citibank may require. Any such sale of the Citibank Guaranteed Note by the Interim Receiver will be on a nonrecourse basis.

Any Court approval of this Agreement to be effective and acceptable to the Offeror shall also include approval of the sale by the Interim Receiver of the Citibank Guaranteed Note as herein provided.

32 The concerns of the Receiver to which this aspect of the transaction gave rise are set out, as I have indicated, in para. 38 of the report. It was, I think it is fair to say, a complicated mechanism and had some elements of novelty. In its very nature it gave rise to questions, particularly perhaps having regard for the history of these properties in the recent past. It gave rise to questions as to the reasons for its use and also as to its possible effect on the price. In my view, the questions raised by the Receiver were reasonable questions and they were not answered promptly, frankly or fully.

33 The position of Larco, in part made explicit and in part to be inferred from conduct and from the evidence, was that this was largely none of the Receiver's business. Larco was perfectly entitled to take that position. I should say by way of

digression that if in any previous ruling or in these reasons I appear to be critical of what was done by Larco, it is within the limited framework of the process with which I am concerned and not otherwise. Larco is not a charitable organization. It is a commercial corporation entitled, within the limits of the law, to carry on its commercial affairs as those having the charge of those affairs deem appropriate. But if in some respects it produced adverse reactions in the Receiver, and adverse consequences for the reception of its offer, it cannot be heard to complain.

34 The next contentious item to which I propose to make reference was what has been called in the evidence the "Financing Condition". This was not part of the draft offer but was contained in the sealed bid and was set out in the following terms by way of amendment to that offer:

Notwithstanding any other provision of this Offer, the obligation of the Offeror to proceed with this transaction shall be conditional upon the Offeror's obtaining written commitments, reasonably acceptable to Offeror, for the Citibank Guaranteed Note and the conventional mortgage loan from the Lender no later than twenty (20) days after Acceptance of this Offer. If Offeror does not obtain the written commitments from Citibank and the Lender within the time period of twenty (20) days, Offeror may terminate this Agreement, in which case, the Interim Receiver shall return the deposits and interest thereon to Offeror promptly following demand.

35 In my view, such a provision given the mechanism and procedure, the process which was being followed, ought to have been part of the Larco offer and subject to negotiation at the proper time and not at the 11th hour.

36 The evidence of Mr. Shiraz Lalji was to the effect that he considered the offer as merely a format for the transaction and that the real substance was to be in the sealed bid. He also testified that he had been led to believe that conditional offers would be at no disadvantage. I find it difficult to accept that evidence. The financing condition was a provision so material and of such obvious advantage to the purchaser and a commensurate disadvantage to the vendor that it went to the very root of the transaction. Indeed, as the apprehension of the Receiver indicated, it converted what purported to be an offer into what was in substance an option. I shall have to discuss further in a moment the reasons that I cannot accept Mr. Lalji's evidence in that regard. I can only say for the present that if he entertained the view which he expressed with respect to the form of offer it was a mistaken view and should have been recognized as mistaken having regard particularly for the form of the invitation to tender and of the converting letter with which that invitation went out. Whether this deferral of a term so critical was deliberate or inadvertent, I need express no conclusion. It operated, however, to the detriment of Larco in the consideration of its offer by the Receiver.

37 Eventually it was recognised by Larco that the financing condition was likely to be seriously prejudicial, if not fatal. Steps were set in train to address its removal. That removal entailed a financial cost and risk to Larco which it had sought to avoid. Approval of its board of directors was required and that approval was obtained early on the morning of September 18th, 10 days after the bid deadline. Written confirmation of that waiver is found in sch. 8 to the report, at p. 179, in a letter from Messrs. Weir & Foulds, Solicitors to Clarkson Gordon Inc. which says after some reference of a preliminary nature to the sealed bids: "Our client has instructed us to waive, and we hereby waive, the benefit of paragraph 10 to Schedule 3."

38 The evidence indicated that Mr. Carthy apparently wanted some assurances from Larco before writing that letter; an apprehension which is not difficult to understand. The Receiver has taken the position that the waiver should have come direct from Larco and not from its solicitors. I do not propose to determine as a matter of law whether the purported waiver was effectual or not, although invited in argument to do so. I do not consider it any necessary part of my function on this motion. What is to be considered is the reaction of the Receiver.

39 In a transaction of such magnitude and pertaining to a condition so material, I do not consider it in any way unreasonable that the Receiver looked upon it as one of the unfavourable elements which ultimately tipped the scales against the Larco bid. Solicitors, of course, have certain general and accepted authority to bind their clients. But the annals of law are not wanting in cases where the authority and its exercise have become a topic of litigation. And there is a maxim well-known among businessmen that no one wants to buy a lawsuit. All of this dealing with the form of the waiver I say, without any reflection upon or lack of respect for the eminently capable and reliable firm of solicitors who offered it.

40 I turn now to the question of the mortgages to be discharged which proved to be a bone of contention. In view of the mechanism of the promissory note, which was to be sold at a discount, it was essential for the Receiver to know the mortgages to be discharged in order to know the real price. The final position of Larco in this regard is contained in a letter dated September 21st from Weir & Foulds which is contained at p. 181 of the record:

4. Assumed Mortgages

By letter dated September 16, 1986, provided you with a letter explaining the "Estimated Assumed Loans" in connection with 's bids. As you may know, we have not had the opportunity to fully review all of the existing mortgages which affect the properties and make a final decision as to which existing mortgages will be assumed at closing by hereby agrees that the "Reconciled Contract Price" set forth in 's letter for each of 's bids shall be the exact cash equivalent price which the Receiver shall receive at closing from . For example, if the actual assumed mortgages are less than the amount stated by in his letter, the shortfall shall be paid by in cash at closing in order to maintain the "Reconciled Contract Price" as stated in 's letter. On the other hand, if the actual assumed mortgages are more than the amount stated by in his letter, the "Face Value of Vendor Note at Closing" will be adjusted downward in such a manner as to maintain the stated "Reconciled Contract Price" as stated by in his letter.

If further clarifications of the offers are required, please advise the undersigned.

41 It does not respond in exactly the terms in which the Receiver had put its inquiries but instead provided a mechanism for possible adjustment with respect to the mortgages assumed. Again, I do not propose to consider whether this was a satisfactory response or not. It was another complication, another blemish on the Larco offer, another factor which the Receiver not unreasonably considered to be adverse and to weigh against approval.

42 There is a further matter dealing with the utilization of the note. As I have indicated, the precise mechanism made its appearance in the sealed bid and I have already read the relevant paragraph. I do not propose to review all of the evidence, which was considerable, bearing on this topic. It is sufficient to say that the final solution unilaterally proposed by Larco is as found in the record at p. 179 in the letter from Weir & Foulds of September 18th to which I have already referred in another context. The concluding paragraph of that letter reads:

Enterprises Inc. hereby agrees to cause the Citibank Guaranteed Note to be purchased on closing on the same terms and conditions as contemplated in paragraph 8.

No reference is made to the Royal Bank who at one time had been proposed as a potential purchaser or to any other purchaser. The covenant of Larco has been substituted for that of Citibank, and as I have indicated, no purchaser has been provided or even proposed.

43 It is the position of Larco, as put in argument and in evidence, that from a commercial standpoint the purchase of the note became irrelevant once Larco had demonstrated credit capacity adequate for the transaction, as it did by a letter from Citibank dated September 9th. Larco was then, it is said, in the same position as other tenderers, obliged to pay on closing or otherwise make good. Ignoring any frailties which may be inherent in that argument, it is undeniable that it did not put the Receiver in the position which it had originally been proposed of having a bank liable to make good.

44 It has been submitted by counsel supporting the Larco offer that the requirement for a purchaser of the note had been waived by the Receiver. Again, I do not propose to dispose of waiver or estoppel as matters of law. I refer to the episode as yet another problem for the Receiver and its counsel and a problem which militated against the Larco offer.

45 In outlining initially the obligations of the court on a motion of this kind, I adverted to the question of whether the Receiver has in any way misled a bidder. It is clear that if a bidder has been misled that may constitute a circumstance upon which the court will intervene upon the motion for approval. Though it was not passed in argument, there was clear indication

in the evidence, particularly that of Mr. Shiraz Lalji, that Larco had been misled as to the acceptability of a conditional offer. This was relevant to the much discussed financing condition.

46 Any suggestion that Larco was misled in this respect must be approached with a measure of skepticism. Larco is apparently a large sophisticated enterprise and those charged with its affairs appear expert in matters of contract negotiation and finance. It was advised in and about this transaction not only by members of its own board of directors but by an attorney of Seattle, Washington, Mr. Thaddas Alston. Mr. Alston testified and was quite evidently an able and experienced lawyer with a connection of some duration with the affairs of Larco. Larco was also advised by eminently capable solicitors in Toronto. It had every advantage to review and consider every aspect of the transaction.

47 Mr. Lalji testified that early in the discussions Shaver indicated that conditional offers would be considered on a par with unconditional offers. This Shaver denies and says that all he ever said was to the effect that: "We will look at all offers." The evidence of other representatives of the Receiver was that Larco was repeatedly told that a condition would be to its disadvantage.

48 It is always difficult and distasteful to a judge to have to resolve a direct conflict of evidence between what are apparently respectable and reliable witnesses. But sometimes the duty is one which cannot be avoided, and in this instance I find myself compelled to accept the evidence of Shaver and to reject that of Lalji. I do so chiefly on what is most probable. The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it. Indeed it is a clear inference from Mr. Lalji's evidence that he recognized that it was bizarre and had it been said I doubt very much that he would have taken it seriously.

49 It was also suggested that Larco was misled into concluding at the last stages that the Receiver was not insisting on the undertaking of the bank to purchase the note. I have already made brief reference to this. It was said that Mr. Cogan, a representative of the real estate consultant advising the Receiver, had either said so or had plainly inferred it. This Cogan denies. Cogan was responsible for the real estate aspects of the transaction and not for the legal or financial ones. If Larco received such an impression from Cogan, prudence would have dictated that the matter be verified either with Mr. Shaver or with the solicitors advising the Receiver. So much Mr. Alston conceded in his evidence. It would appear that Mr. Carthy of Weir & Foulds recognized that there was a deficiency in that regard.

50 The evidence of Mr. Zimmerman, a member of the firm of solicitors advising the Receiver, confirmed by the uncontradicted evidence of Shaver, was that on September 16th Carthy and Alston were advised during a telephone conversation that the note purchase undertaking was expected by the Receiver on the following day. It was never received.

51 Taking the evidence as a whole, I am not at all persuaded that Larco was misled in any material respect.

52 In criticism of the conduct of the Receiver, criticism which I may say has been very limited in extent, it was submitted that the Receiver negotiated with other parties after the bid deadline. Specifically reference was made to the Ivordale-Maisonettes property where a discrepancy had appeared between the words and the numerals in the offer. I am not persuaded that the resolution of the problem involved negotiation, nor that if it did it offended the process or was prejudicial to Larco.

53 There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

54 A special and somewhat peculiar position in the matter was put on behalf of the defendant Maysfield Property Management Inc. Maysfield is a corporation whose shares are effectively held by receivers appointed for two other corporations. Maysfield managed and operated the subject properties before Clarkson was appointed Receiver, and by arrangement with Clarkson continued to perform that function after the receivership commenced. It employs something over 200 persons. It has substantial worth and it has substantial revenues.

55 By letter dated October 16, 1986, Larco offered to purchase the outstanding shares in Maysfield for net book value, an offer conditional upon approval of the Larco offer by the court. If the offers recommended by the Receiver are approved, there appears to be no certainty and perhaps not even any probability of the continued viability of Maysfield.

56 In a secondary submission counsel for Maysfield asked that if an order were made as sought by the Receiver, that that order should be stayed for some period of time to enable Maysfield to negotiate with the purchaser.

57 I observe by looking at the clock that I have been going for something well over an hour at the moment, and I regret to tell everyone that I am not finished yet. I propose to take 10 minutes for my benefit and perhaps for yours as well.

58 [Court recessed 11.07 a.m. and resumed 11.19 a.m.]

59 I propose now to express some factual conclusions with respect to the matter.

60 The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

61 Mr. Zimmerman very fairly conceded in his evidence that probably none of those causes was in itself fatal. I think that probably is so. They were, however, considered cumulatively by the Receiver and it was in my view legitimate and reasonable to do so.

62 In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

63 Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

64 Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

65 The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. The court ought not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. The court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.)

(66) (In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.)

67 To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

68 The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

69 It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

70 Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

71 I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

72 Reference was made in argument to *The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd.* (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

73 The decision made by the Receiver was one to which it brought its experience and expertise for the position to which it was appointed. It was a decision upon which the Receiver had the advice of solicitors and counsel and of an expert real estate consultant retained for the purpose. It was a decision from which the Receiver did not resile at the conclusion of two weeks of hearing.

74 It is clear on the one hand that the court is not to apply an automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

75 The court no doubt has power to enter into the process to any extent which appears proper in the circumstances. In *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, to which I have referred, the judge in chambers actually received bids.

76 In this case it was suggested by counsel for some of the objecting defendants that the court conduct a run-off or direct the Receiver to do so between the Larco and the recommended offerors. I have no doubt that I have the power to do so. To exercise it would, in my view, exhibit very little judgment. It would be to open a Pandora's box, the contents of which might be more unruly and unpredictable than the consequences which followed my decision to hear *viva voce* evidence in this case.

(77) (It is equally clear, in my view, though perhaps not so clearly enunciated, that it is only in an exceptional case that the court will intervene and proceed contrary to the Receiver's recommendations if satisfied, as I am, that the Receiver has acted reasonably, prudently and fairly and not arbitrarily.)

78 Much was said during the hearing about the integrity of the process, that is, the process carried through by the Receiver pursuant to the July order made by Catzman J., and whether Larco had abused or evaded or sought to abuse or evade it. The Receiver perceived, not unreasonably in my view, that that was so. Certainly it must be said that Larco fell somewhat short of coming forward promptly, openly, forthrightly and unequivocally with its best offer, an objective at which the process was directed.

79 In the arguments of counsel for the objecting defendants, particularly for the defendant Prousky, the process was very narrowly defined; virtually confined to the precise provisions of the plan approved by the court. I do not consider it appropriate to view it so narrowly or that the ambit of the Receiver's discretion should be so narrowly limited.

80 In addition to the regard which must be had for the process in this case, there is another similar factor for which I must have regard. It was adverted to by Saunders J. in the two cases of *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245, and *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237, which have been referred to in the argument. It was also reflected in the Nova Scotia Court of Appeal decision in *Cameron*. In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J. A. in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests", that is a relevant and material one.

81 In this case I am reviewing the recommendations of the Receiver. I have had the benefit of two weeks of hearing and the assistance of a dozen learned counsel, advantages which were denied to the Receiver.

82 If I were persuaded, and I am not, to conclude that as a result of this hearing the objections of the Receiver had been fully and satisfactorily met, I should still have much hesitation in rejecting the Receiver's recommendation.

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

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

85 Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are, as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

86 During the time which I have spent considering this matter, I have asked myself many times what the situation would have been had we been dealing with hundreds of thousands of dollars, rather than hundreds of millions, and a potential difference in the result potentially reduced accordingly. I have asked myself whether I would have had any difficulty in arriving at a conclusion and have found myself forced to answer that question in the negative. It is a well-worn adage among lawyers and judges that hard cases make bad law. Perhaps there is a corollary proposition that large cases have a tendency to do the same sort of thing.

87 The actual difference between the offers under consideration, I am repeating myself, is substantial. It is that alone which has really created the issue before me. While the actual difference is a factor of much weight, it must also be viewed in its relative relation to the size of the transaction. No doubt, as the cases have indicated, situations might arise where the disparity was so great as to call in question the adequacy of the mechanism which had produced the offers. It is not so here, and in my view that is substantially an end of the matter.

88 The importance of this motion, and the measure of interest which it has for the parties and for the public, might have made desirable a period under reserve of sufficient duration to permit the writing of formal reasons for judgment. The circumstances related to the prospective sales were such that prompt disposition of the motion seemed more important than elegance of expression. The worst grammatical solecisms will be massaged out in the editorial process. As to the substance of the reasons, I feel as much confidence as is possible when one is dealing with matters of difficulty, of importance and of some notoriety.

89 There will be orders as asked upon the motion approving the sales. I presume that there will be some mechanical matters to be dealt with before we all part and I invite counsel, I guess first of all Mr. Lamek, to suggest whether it would be appropriate that I adjourn for a few moments while those matters be considered and discussed, or whether I should proceed to deal with them immediately.

MR. LAMEK: I suggest a short adjournment might be useful, My Lord. On the possibility that your lordship would take the view of this matter that you have expressed this morning a revised draft order was prepared to take into account the matters that occurred during the course of the hearing. We have not been so bold as to distribute that to other counsel in advance. Having not seen the revised draft, and of course neither has your lordship, it might be helpful if we do and until your lordship has a good look at the draft.

HIS LORDSHIP: Does it make any disposition as to costs, Mr. Lamek.

MR. LAMEK: I did not, my lord.

HIS LORDSHIP: If you will be kind enough to send my copy of it through the Registrar, I will recess now for what, 15 minutes?

MR. LAMEK: I think that should be sufficient, my lord, yes. If it is not perhaps ...

HIS LORDSHIP: You can let me know?

MR. LAMEK: Thank you, my lord.

90 [Court recessed 11.45 a.m. and resumed 12.07 p.m. Counsel made submissions as to costs.]

HIS LORDSHIP: There will be no order as to costs. Mr. Strosberg's argument, as usual, makes good sense and I would be hard put to disagree that a measure of benefit has flowed from the proceedings.

91 At the same time, I think it fair to observe that the objecting defendants were not proceeding *pro bono publico*, and I see no sufficient reason that their participation should be other than at their own expense.

92 Before I depart from the matter I should, which I normally do at the outset before anybody knows whether they have won or lost, record my gratitude to counsel for their assistance in dealing with the matter and for the orderly conduct of the proceedings throughout.

93 *Motion granted.*

Footnotes

1 Enterprises was the initial name used for Larco Enterprises Inc.

TAB 9

1985 CarswellAlta 332
Alberta Court of Appeal

Salima Investments Ltd. v. Bank of Montreal

1985 CarswellAlta 332, [1985] A.W.L.D. 1418, [1985] A.W.L.D. 1419, 21 D.L.R. (4th)
473, 33 A.C.W.S. (2d) 257, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242, 65 A.R. 372

**SALIMA INVESTMENTS LTD. v. BANK OF MONTREAL, MAMMOTH
DEVELOPMENTS LTD. and BOLERO MANAGEMENT LTD.**

Laycraft C.J.A., Harradence and Kerans J.J.A.

Judgment: August 26, 1985
Docket: Calgary Nos. 17697, 17696

Counsel: *R. Dodic*, for appellant.

G. McKibben, for respondent Bank of Montreal.

Q. Smith, for respondents Mammoth Developments Ltd. and Bolero Management Ltd.

D. Barber, for third party, 304987 Alberta Ltd.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver --- Duties

Receivers — Sale of debtor's assets — Jurisdiction of court — Sale subject to court approval — Order appointing receiver giving power to sell without court approval — Court having jurisdiction to refuse to approve sale and to request and consider further bids.

A court order had been obtained empowering the receiver of the defendants to sell the defendants' property without further order of the court. However, after calling for bids on the property in question and after negotiating an increase in the price with S. Ltd., the highest bidder, the receiver, entered into an agreement to sell the property to S. Ltd., but subject to court approval since the sale price was slightly lower than the appraised value. Prior to the return of the application for court approval of the sale, a higher offer was made directly to the court by one of the previous bidders. The court adjourned the application for approval of the sale and requested further bids and on this basis later approved a sale to a bidder other than S. Ltd. S. Ltd. appealed.

Held:

Appeal dismissed.

By entering into an agreement which was subject to court approval, S. Ltd. acknowledged the possibility that the court might not approve the sale. Having refused to approve the sale, the court was then entitled to and did properly exercise its discretion in assuming conduct of the sale through a judicial auction.

Appeal from order approving sale of property in receivership.

Memorandum of judgment delivered from the bench by Kerans J.A.:

1 This is an appeal from an order approving the sale of property in receivership.

2 A Queen's Bench order made 16th April 1985 named the respondent Cooper-Lybrand as receiver-manager of the property of Mammoth Developments Ltd. and Bolero Management Ltd. on the application of a secured creditor, the Bank of Montreal. The order granted to the receiver the power, among other things, to "sell ... any ... property" including the 168-room hotel complex and a 76-unit motel.

3 The receiver advertised the property widely, and called for tenders. The tender notice indicated that the receiver considered the tenders as only a first step and that it was prepared to negotiate the sale.

4 Seven tenders were received. The highest was from the appellant, Salima Investments Ltd., at \$4,400,000. The others were much lower. The tender of 304987 Alberta Ltd. also involved \$300,000 less cash. The appraised value of the property for forced sale on terms was \$4,593,000.

5 The receiver decided to negotiate further with Salima and opened negotiations on 24th July, six days after tenders were opened. A bargain was made the next day, and the receiver at once notified the other tenderers that their tenders were rejected and that the receiver was dealing with somebody else. When asked before us why the receiver did not approach other tenderers for further negotiations, counsel for the receiver replied that the receiver was of the view that the Salima tender was substantially better than all of the others and, in any event, that it was not appropriate to negotiate with more than one prospective purchaser at the same time.

6 The bargain with Salima involved an increase of \$50,000 from the tendered price, and an increase in the deposit from \$150,000 to \$400,000. Further, the negotiated sale was made subject to court approval.

7 The receiver then issued a motion on 1st August, returnable 8th August, for an order approving the sale. On the morning of 8th August, before court opened, 304987 Alberta Ltd. made a new offer of \$4,533,000 through the clerk. We infer that this offer was made with knowledge of the Salima bargain, because that information was in the materials filed in support of the application.

8 Apprised of this development, and of the fact that seasonal market fluctuations made an immediate sale of great importance, the learned chambers judge adjourned the matter for one day and said that he would consider new bids. Three were received: the highest was from 2884701 Alberta Ltd., at \$4,800,000. The next highest was from 304987 Alberta Ltd. in the amount of \$4,756,000, and the third, for \$4,700,000 was from Salima. The learned chambers judge decided that, because it had the earliest completion date and offered the prospect of unbroken chain of management, the bid of 304987 Alberta Ltd. was the best offer. He directed the receiver to complete a sale. Salima appeals.

9 The first ground raises the question of jurisdiction. It is said that the learned chambers judge had no application before him to approve the sale to 304987 Alberta Ltd. It is also said that he improperly considered the other offers and other materials. The existence of the other offers was relevant on the question whether to approve the Salima sale and we see no merit to that argument. Further, we understand the events before him in this way: he first refused to approve the sale to Salima; then he decided, on his own motion and because of the urgency of the matter, to conduct summarily a court sale. He dispensed with notice of motion or other formalities. He had jurisdiction to do that which he did and there is no merit to this ground of appeal.

10 The second ground of appeal raised for Salima is that the decision of the learned chambers judge gave an unfair advantage to 304987 Alberta Ltd. over Salima. Salima has no complaint. It agreed to buy the property subject to court approval, and its contract left it exposed to the risk of something like this happening. I agree with what was said by Hart J.A. in this respect in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1 at 9-10, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.):

It is obvious that the receiver did in fact have the power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval...

This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval.

11 The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. (In *Can. Permanent Trust Co. v. King Art Dev. Ltd.*, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations.) In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

12 (We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently.) In examining that question, there are many factors which the court may consider. As Macdonald J.A. said in the *Cameron* case at pp. 11-12:

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

13 This is not a total catalogue of those factors which might lead a court to refuse to approve a sale.

14 The principal argument before us turned on the question why the receiver did not approach 304987 Alberta Ltd. to negotiate at the same time as it approached Salima.

15 We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver — while always in good faith — had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 We dismiss the appeal.

Appeal dismissed.

TAB 10



ALBERTA

RULES OF COURT

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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 a judge has authority to make a restricted court access order under an enactment or at common law.

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

TAB 11

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

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

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger and Peter Chapin*, for appellant
Timothy J. Howard and Franklin S. Gertler, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Headnote

Evidence --- Documentary evidence --- Privilege as to documents --- Miscellaneous documents

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order --- Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression --- Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal --- Salutary effects of order outweighed deleterious effects --- Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) --- Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery --- Discovery of documents --- Privileged document --- Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order --- Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression --- Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal --- Salutary effects of order outweighed deleterious effects --- Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) --- Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery --- Examination for discovery --- Range of examination --- Privilege --- Miscellaneous privileges

Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order --- Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on

freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve — Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure — Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimales sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)(b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure — Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

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The federal government provided a Crown corporation with a \$1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the

context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had

contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) *Robertson J.A. (dissenting)*

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) *The General Framework: Herein the Dagenais Principles*

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais, supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais, supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

- (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick, supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick, supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

- (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
- (b) the judge must consider whether the order is limited as much as possible; and
- (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the 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 allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) *The Rights and Interests of the Parties*

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does

not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only 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, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck, supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35 (S.C.C.), at para. 10, the open court rule only yields "where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEEA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected

Charter right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEEA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of

a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra, supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal, supra*, at pp. 1353-1354:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

TAB 12

2009 CarswellOnt 7952
Ontario Superior Court of Justice [Commercial List]

Look Communications Inc. v. Look Mobile Corp.

2009 CarswellOnt 7952, [2009] O.J. No. 5440, 183 A.C.W.S. (3d) 736

**IN THE MATTER OF LOOK COMMUNICATIONS INC. (Applicant) and 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

Newbould J.

Heard: December 17, 2009

Judgment: December 18, 2009

Docket: 08-CL-7877

Counsel: John T. Porter for Look Communications Inc.
Aubrey E. Kauffman for Inukshuk Wireless Partnership

Subject: Corporate and Commercial; Civil Practice and Procedure

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation

Corporation made plan of arrangement under Canada Business Corporations Act — Court approved sale of most of corporation's assets to joint venture — Monitor's first report was ordered sealed until sale was completed — Completion occurred much earlier than expected — Corporation meanwhile was attempting to sell remaining assets and wished to keep earlier bids confidential — Joint venture wanted information to gain advantage in bidding for remaining assets — Corporation brought motion to extend sealing order for six months — Motion granted — Court had jurisdiction under s. 137 of Courts of Justice Act to extend order notwithstanding that plan of arrangement was finalized — Corporation had commercial interest in selling its remaining assets — Extending order would not have substantial detrimental effect on core values of freedom of expression.

MOTION by corporation for order extending sealing order made in court approved sale of assets.

Newbould J.:

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.

Circumstances of Sealing Order

2 On December 1, 2008, Look was authorized by Pepall J. to conduct a special shareholder's meeting to pass resolutions (i) authorizing Look to establish a sales process for the sale of all or substantially all of its assets and to seek an order approving the sales process, and (ii) authorizing a plan of arrangement under section 192 of the CBCA which contemplated the sale of all or substantially all of Look's assets. The shareholders voted in favour of both a sales process and the arrangement.

3 On January 21, 2009, Look obtained an order approving the sales process and Grant Thornton Limited was appointed as Monitor to manage and conduct the sales process with Look. The sales process provided for bids from interested persons for five assets of Look, which were substantially all of its assets, being (i) Spectrum, being approximately 100MHz of License Spectrum in Ontario and Quebec; (ii) a CRTC Broadcast License; (iii) Subscribers; (iv) a Network consisting of two network operating centers and (v) approximately \$300 million in "tax attributes" or losses. Court approval was required for any sale.

4 Under the sales process, a bidder was entitled to bid for any or all of the assets that were being sold, or a combination thereof. Pursuant to the sales process, four bids were received and Look and the Monitor engaged in discussions with each bidder. Look eventually accepted an offer from Inukshuk for the Spectrum and Broadcast License. It is agreed that while not all of the assets of Look were sold, what was sold to Inukshuk were substantially all of the assets of Look.

5 The parties obtained a consent order on May 14, 2009 from Marrocco J. in which the sale of the Spectrum and Broadcast License to Inukshuk was approved. The order provided that the assets would vest in Inukshuk upon the Monitor filing a certificate with the court certifying as to the completion of the transaction. The sale contemplated a staged closing, with the first taking place immediately following the order of Marrocco J., the second being December 31, 2009 and the final taking place as late as what the sale agreement defined as the Outside Date, being the third anniversary of the date of the final order approving the transaction, i.e., May 14, 2012. I am told that the reason for the staged dates was that it was anticipated that the necessary regulatory approvals for the sale of the Spectrum and License could take some time.

6 As it turned out, the final closing took place much earlier than the Outside Date within a few months of the order of Marrocco J. On September 11, 2009, the Monitor filed its certificate with the Court certifying that the purchase price had been paid in full and that the conditions of closing had been satisfied. Thus the sold assets vested in Inukshuk. Under the terms of the plan of arrangement that was approved by the order of Marrocco J., once the certificate of the Monitor as to the completion of the transaction was delivered, the articles of arrangement became effective.

7 In connection with the application to Marrocco J. to approve the arrangement and the sale to Inukshuk, the Monitor filed a redacted version of its First Report, as is usual in the Commercial List for sales carried out under a court process, redacting the information about the bids received in the sales process. The order of Marrocco J. provided that an unredacted version of the First Report was to be sealed and not form part of the public record until the Monitor's Certificate after the sale was completed was filed with the Court. That certificate, as I have said, was filed with the Court on September 11, 2009. Therefore under the order of Marrocco J. the unredacted First Report of the Monitor was no longer to be sealed.

8 Look is now attempting to sell its remaining assets, which include a corporation which had been approved by the CRTC to hold a license and has \$350 million of tax losses. Look is presently in discussions for the sale of its remaining assets with some of the same parties with whom discussions were held and bids were received under the previous sales process, including Rogers.

9 In early November 2009 Inukshuk asked the Monitor for the information contained in the Monitor's First Report that was sealed under the order of Marrocco J. Look immediately obtained an *ex parte* order from Campbell J. on November 4, 2009 extending the sealing of the Monitor's First Report pending a determination of this motion.

Analysis

10 Look seeks to extend the sealing order for six months while it completes the sale of its remaining assets. It has a concern that publication of the information could impede the sale process now underway and affect the amount received. Look is concerned that if the bids were disclosed, and with Rogers being one of the parties in discussions with Look for the purchase of Look's tax losses, other players in the telecommunications industry would not bid for the remaining assets.

11 Inukshuk has filed no affidavit material as to why it is interested in the sealed information in the Monitor's First Report dealing with all of the bids that were received for all assets. Inukshuk's position in a nutshell is that the sales process previously approved by the Court is over and that the public interest in seeing an open court process should prevent any further sealing of the Monitor's First Report. Mr. Kauffman said that his clients are here in this motion "in their own interest as two members of the public" seeking access to the documents that were filed in the court process.

12 It is understandable why Rogers would want the information. It has been negotiating with Look for the purchase of one or more of Look's remaining assets. Having access to prior bids in the prior sales process in which one or more of those remaining assets may have been the subject of a bid would obviously be of benefit to Rogers it in considering what price it is prepared to offer for the company with the tax loss benefits. While Mr. Kauffman pointed out that it is Inukshuk Wireless Partnership that is opposing the order sought, and that includes Bell as well as Rogers, the fact remains that the partnership does include Rogers which is in negotiations with Look. In any event, it is unrealistic to think that Bell, through its interest in Inukshuk, is funding at least in part the opposition to the extension of the sealing order out of altruistic or public purposes.

13 Section 137 of the *Courts of Justice Act* provides that a court may order any document filed in a civil proceeding to be treated as confidential, sealed and not form part of the public record. The fact that the plan of arrangement consummated under the court proceedings under s. 192 of the CBCA has now been finalized does not in itself mean that the court does not have jurisdiction to continue with the sealing order if it is otherwise appropriate to do so. There is no limitation in section 137 limiting a sealing order to the time during which the litigation in question is ongoing.

14 In *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), it was held that sworn information to obtain a search warrant could not be made available to the public until the search warrant had been executed. In that case, Dixon J. (as he then was) for the majority noted that the case law did not distinguish between judicial proceedings which are part of a trial and those which are not, and that subject to a few well-recognized exceptions, all judicial proceedings should be in public. He held that the presumption was in favour of public access and the burden of contrary proof lay upon the person contending otherwise.

15 In *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), the court authorized a confidentiality order. It stated that an order should be granted in only two circumstances, being (i) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and (ii) when the salutary effects of the confidentiality order, including the effects on the right civil litigants to a fair trial, outweighs its deleterious effects, including the effects on the right of free expression, which includes public interest in open and accessible court proceedings. In dealing with the notion of an important commercial interest, Iacobucci J. stated:

In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)* [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".

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 887574 Ontario Inc. v. Pizza Pizza Ltd. (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]), 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 the original sale process that was conducted by Look and the Monitor, the commercial interest in seeing that the remaining assets are sold to the benefit of all stakeholders, including the public shareholders of Look, remains now as it did before.

20 The advantage to Rogers in seeing what other bidders may have bid on the assets that have remained unsold is obvious. Rogers is in negotiations with Look regarding the acquisition of one or more of those assets. If other bidders previously bid on one or more of those assets, that information would be beneficial to Rogers. If the other bidders did not bid on any of those remaining assets, that too would be of interest to Rogers. As well, Look's concern that the disclosure of the sealed information could impede other bidders from coming forward is not without some merit.

21 In *Sierra*, Iacobucci J said there were core values that should be considered in a motion such as this. *Sierra* involved an application by the Government of Canada for a confidentiality order protecting documents from public disclosure in litigation between the *Sierra* and the Government. Iacobucci J. stated that under the order sought, public access to the documents in question would be restricted, which would infringe the public's freedom of expression guarantees contained in section 2(b) of the *Charter*. He discussed the core values of freedom of expression and how they should be considered in a motion seeking confidentiality of documents. He stated:

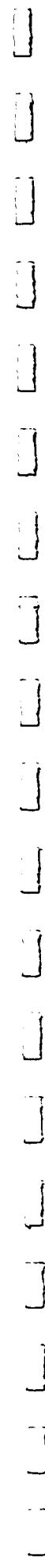
Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, [page 551] at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, per Dickson C.J. Charter jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the Charter: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to Charter principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify. (underlining added)

22 Rogers, or Inukshuk, cannot, in my view, claim that there will be a substantial detrimental effect on these core values by a continuation of the sealing order for a further six months. What Rogers will lose will be access to information that it could use against the interests of Look and its stakeholders. In my view, the salutary effects of extending the sealing order for six months to permit the sale of the remaining assets of Look outweighs the deleterious effects of such order in this case.

23 Inukshuk asks that if the extension order is made, there is no reason to seal the prior bids for the Spectrum that Inukshuk purchased and thus the order should permit that information to be made public. It is said by Mr. Kauffman that such information is of historical interest. I would not make this exception as requested by Inukshuk. Bidders under the prior sales process were entitled to bid on all of the assets either individually or together, and Mr. Porter points out that it may well be difficult to separate out the portion of any prior bid dealing with the Spectrum from a bid for other assets that are now sought to be sold. If the interest sought is only for historical purposes, a six month delay will not be of much or any consequence.

24 In the circumstances, the order sought by Look shall go. Look is entitled to its costs of the motion against Inukshuk. If costs cannot be agreed, short submissions may be made within ten days by Look and reply submissions may be made within a further ten days by Inukshuk.

Motion granted.



TAB 13

1994 CarswellOnt 1214
Ontario Court of Justice (General Division), Commercial List

887574 Ontario Inc. v. Pizza Pizza Ltd.

1994 CarswellOnt 1214, [1994] O.J. No. 3112, 23 B.L.R. (2d) 239, 35 C.P.C. (3d) 323, 52 A.C.W.S. (3d) 516

RE ARBITRATION BEFORE THE HONOURABLE R.E. HOLLAND, Q.C.

887574 ONTARIO INC., 863644 ONTARIO INC., 801409 ONTARIO INC., WESTBRIDGE FOODS LTD., 830542 ONTARIO INC., 779975 ONTARIO LIMITED, 783129 ONTARIO INC., 284055 ONTARIO INC., 946171 ONTARIO INC., 768027 ONTARIO INC., 841875 ONTARIO INC., 660840 ONTARIO LTD., BULE ENTERPRISES LIMITED, 900766 ONTARIO INC., 755950 ONTARIO LIMITED, 554135 ONTARIO INC., 769049 ONTARIO INC., 781380 ONTARIO INC., 892922 ONTARIO INC., 814591 ONTARIO INC., 925446 ONTARIO LTD., 876310 ONTARIO INC., 812138 ONTARIO INC., 880602 ONTARIO INC., 697339 ONTARIO INC., 863008 ONTARIO INC., 898201 ONTARIO INC., 989897 ONTARIO INC., 857387 ONTARIO INC., 828659 ONTARIO INC., 750242 ONTARIO LIMITED, 803767 ONTARIO INC., 910874 ONTARIO INC., 805837 ONTARIO INC., GOLD LION GROUP OF COMPANIES, 697246 ONTARIO LIMITED, 827532 ONTARIO INC., 914470 ONTARIO LIMITED, 804631 ONTARIO INC., 954270 ONTARIO INC., 686603 ONTARIO LIMITED, 741897 ONTARIO LIMITED, 675367 ONTARIO LIMITED, 809692 ONTARIO LIMITED, 681630 ONTARIO INC., 763012 ONTARIO LTD., 905933 ONTARIO INC., 945671 ONTARIO INC., 807352 ONTARIO INC. and 909206 ONTARIO INC. v. PIZZA PIZZA LIMITED

Farley J.

Oral reasons: December 14, 1994 *

Written reasons: December 27, 1994

Docket: Doc. 93-CQ-33541; Commercial Court File Doc. B85/93

Counsel: *Peter Griffin*, *Gavin MacKenzie* and *Daniel Vukovich*, for moving party (defendant).
Nancy Spies and *Timothy Mitchell*, for responding parties (plaintiffs) except 828659 Ontario Inc., 805837 Ontario Inc., 807353 Ontario Inc., and Drag Eleven Pizza Inc.
P. Waldmann, for other responding parties (plaintiffs).
B. Bruser, for Toronto Star.

Subject: Civil Practice and Procedure; Corporate and Commercial
Headnote

Judges and Courts --- Jurisdiction — Jurisdiction of court over own process

Arbitration — Commercial arbitration — Large group of franchisees and their franchisor agreeing to discontinue litigation and settle their differences through arbitration — Arbitration agreed to be subject to appeal — Franchisor appealing arbitration award and franchisees cross-appealing — Application by franchisor for order directing material filed on appeal be sealed because arbitration to be kept confidential.

Practice — Practice on appeal — Record on appeal — Application by appellant from arbitration award for order directing record to be sealed denied — No evidence adduced to support any public policy grounds to depart from rule of public accessibility to court proceedings..

In 1993, 50 franchisees commenced legal proceedings against their franchisor, PP Ltd. Later, the parties entered into minutes of settlement whereby the dispute would be mediated and/or arbitrated by H, a retired judge and highly respected private arbitrator. The minutes of settlement also provided that the parties would have a right to appeal any binding decision by H. Arbitration proceedings ensued over many months and interim awards and a final award were issued by H.

1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48 49 50 51 52 53 54 55 56 57 58 59 60 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80 81 82 83 84 85 86 87 88 89 90 91 92 93 94 95 96 97 98 99 100

He issued a confidentiality award with respect to the arbitration proceedings. This was followed by a consent order made by the judge before whom the present motion was argued confirming that the interim and final awards were to remain confidential until the final Award was filed in court.

PP Ltd. appealed four components of H's award. Six of the franchisees cross-appealed one component of the award. PP Ltd. then brought a motion seeking an order that the appeal material be sealed on the grounds that, (i) the arbitration proceedings were confidential by agreement, (ii) the parties would not have entered into the arbitration process without the condition of confidentiality, and (iii) the disclosure of the arbitration proceedings to the public could affect the competitive position of PP Ltd.

Held:

The motion was dismissed.

When a matter comes to court, the philosophy of the court system is openness. There are established exceptions to this general rule, such as actions involving infants or mentally disturbed people and actions involving matters of secrecy; however, this sealing application did not fit within any of those exceptions.

If the dispute settlement process had involved other types of alternative dispute resolution such as mediation, conciliation or neutral evaluation where the focus is on the parties' coming to a consensual arrangement, then other considerations could be brought to bear.

Curtailed public accessibility can be justified only where there is present the need to protect social values of great importance. This test is not met by wishing to keep secret the material involved in an arbitration appeal which of necessity takes the parties back into the court system with its insistence on openness, an aspect which one must assume the parties fully recognized before proceeding to appeal the award.

Motion for an order that material relating to appeal from commercial arbitration be sealed on grounds of confidentiality.

Editor's Note

This judgment, taken together with the arbitration award immediately preceding and the two reasons for judgment immediately following, forms an interesting quartet. It provides a basis for comment on several aspects of commercial arbitration in a general business setting. See the Case Comment at p. 277 post.

Farley J.:

1 At the hearing I dismissed the confidentiality/sealing motion, promising formal reasons at a later date. These are those reasons.

2 The defendant Pizza Pizza Limited ("P²") moved for an order:

(a) pursuant to Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C43 directing that the appeal materials upon the appeal to be heard on February 20, 1995 in this Honourable Court be sealed pending further order;

(b) continuing the order of the Honourable Mr. Justice Farley dated July 20, 1994.

P² submitted that the grounds for such a motion were:

1. The parties were originally before this Honourable Court by way of injunction proceedings (and extensive materials) in the spring of 1993;

2. The parties entered into Minutes of Settlement by which they submitted these issues to arbitration/mediation before the Honourable R.E. Holland;

3. Those proceedings were, by agreement and by order of the Honourable R.E. Holland, confidential;

4. The arbitration proceedings were conducted over many months involving at least 20 days of hearing time, during which a wide range of issues were canvassed;
5. The parties would not have entered into the arbitration process without the condition of confidentiality;
6. The parties have expended significant amounts of money upon the arbitration proceedings;
7. Only a handful of the myriad issues before the Honourable R.E. Holland are the subject of the appeal herein;
8. The disclosure of the arbitration proceedings to the public may affect the competitive position of the defendant and its franchisees in releasing the details of its operations to the public and competitors;
9. To fail to continue the order of the Honourable Mr. Justice Farley would discourage the attempts (and success) of the arbitration/mediation process which these parties underwent in confidence.

The aspect of item 8 was not in substance pursued. This is not in essence a situation involving trade secrets or confidential proprietary information. Further it was acknowledged that the proceedings resolved into an arbitration (versus other forms of alternative dispute resolution ("ADR")).

3 On Wednesday, June 22, 1994, the Honourable R.E. Holland, Q.C. ("Arbitrator") issued a confidentiality order. This was followed by a consent order issued by myself on July 20, 1994. Its terms provided (and clearly contemplated not only that there could be an adjustment or amendment to or cancellation of the sealing order, but also that the award would be made public when the matter was in court):

It is hereby ordered that:

1. The Interim Award of the Honourable R.E. Holland dated April 8, 1994 and the Cost Award dated May 19, 1994 (the "Awards") are, as all of the proceedings in this matter, confidential and may not be released to any party other than the parties to this proceeding and their professional advisors in this proceeding.
2. Until such time as it is filed in court, the Final Award arising from the Awards (the "Final Award") is also confidential and may only be released to those parties identified above.
- 4 The award has been appealed by P² and cross-appealed by the plaintiffs. Thus the matter is "re-entering" the court system after functionally having been in the private confidential sector before the Arbitrator. When the matter went out to the arbitration, it may have been that the parties contemplated some form of arbitration, but it was also conceivable that another form of ADR could have been employed. I think it fair to observe that a binding arbitration is a non-court equivalent to a court trial. In either case a neutral third party hears the case and makes his decision which (subject to appeal) is binding upon the parties. This differs from other forms of ADR in which the parties themselves are part of the decision-making mechanism and the neutral third party's involvement is of a facilitative nature: e.g. mediation, conciliation, neutral evaluation, non-binding opinion, non-binding arbitration. Of course, the simplest method — often overlooked — is that of non-involvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately; more to the point, I suspect it would be unusual to see a public ADR session especially where the focus is on coming to a consensual arrangement. The parties need to have the opportunity of discussion and natural give and take with brainstorming and conditional concession giving without the concern of being under a microscope. If the parties were under constant surveillance, one could well imagine that they would be severely inhibited in the frank and open discussions with the result that settlement ratios would tend to dry up. The litigation system depends on a couple of percent of new cases only going to trial. If this were doubled to several percent the system would collapse. Therefore in my view public policy supports the non-trial resolution of disputes. I note the observation of Oliver Tickell, "Shogun's Beginnings" *Oxford Today*, vol. 7, no. 1 Michaelmas Issue 1994 at p. 20 where he observed as to Professor Jeffrey Mass' view of the benefits of the first Shogunate in Japan:

... finding to [Professor Mass] surprise that its rule was based far more on efficient administration than on military heroics. "Although a warrior government, it was devoted not to the battlefield but to maintaining the peace ... It developed laws, institutions of justice, and an adversarial legal system that even today seems extraordinarily ingenious and sophisticated. Written evidence always took precedence over oral testimony, and women enjoyed their full day in court. The vendetta was illegal, as the objective was to keep people ensnared in litigation".

I also note that perhaps the legal sector in Canada has progressed a little too far in the ensnarement direction.

5 Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA) provides:

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

However when a matter comes to court the philosophy of the court system is openness: See *MDS Health Group Ltd. v. Canada (Attorney General)* (1993), 15 O.R. (3d) 630 (Gen. Div.) at p. 633. The present sealing application would not fit within any of the exceptions to the general rule of public justice as discussed in *A. (J.) v. Canada Life Assurance Co.* (1989), 70 O.R. (2d) 27 (H.C.) at p. 34: "... actions involving infants, or mentally disturbed people and actions involving matters of secrecy '... secret processes, inventions, documents or the like ...' " The broader principle of confidentiality possibly being "warranted where confidentiality is precisely what is at stake" was also discussed at the same page but would not appear applicable.

6 Mr. Griffin raised the question of reorganization material under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 or valuations submitted by a receiver for the purpose of obtaining court approval on a sale arrangement having been sealed. The purpose of that, of course, is to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information whilst others have to rely on their own resources. I would think the most appropriate sealing order in a court approval sale situation would be that the supporting valuation material remain sealed until such time as the sale transaction has closed.

7 I believe that it is obvious that if the ADR process entered into is along the mediation philosophy structure that it will be appreciated that the best and most productive results re dispute resolution will be achieved generally if such process involves a degree of confidentiality. This of course is subject to some exceptions such as when the parties agree that in a mediation of public policy issues there is a positive requirement for public exposure: see Brown and Marriott, *ADR Principles and Practice* (1993, London), Sweet & Maxwell, at p. 356. In other instances public exposure may induce a very negative reaction — e.g. if outsiders can be observers, then some (depending on their relationship to the parties involved) may become "cheerleaders", "advisors without the benefit of the facts" or "advisors without the discipline of having to live with the end result of the mediation" (which may be a non-resolution of the issues which may otherwise have been resolved). Unwanted pressure may thus be applied to one or more of the participants. Similarly a volunteer advisor-type may give "free" advice (e.g. "Don't settle; take him to court; you've got an absolute winner!") when the hidden agenda of this officious intermeddler is to foment disruption, harass the other side or pursue his own self interests. Allow me to observe that it would be unusual for anyone to feel obliged to conduct all of his negotiations (including those to settle disputes) in a fishbowl: Consider for instance one having a mild disagreement with one's mother as to where the two of you should have lunch — or a debate between a customer and a supplier over whether an order was short-shipped and, if so, what adjustment should be made (all without resort to the *Sale of Goods Act* and/or the courts).

8 While it is true that it appears in this case that the parties went private in a dispute which they could have litigated openly in the courts with a trial rather than an arbitration, I do not see that this choice would oblige the parties to make their arbitration public in and of itself. As for the confidentiality order of July 20, 1994 referring to two types of awards, an interim and a final, I now understand from counsel that the thrust of the interim award was the legal principles and of the final the damage calculation or other results flowing as opposed to the interim being a draft for comment and possible

adjustment. If the latter were the case then one would appreciate the practicality/necessity of maintaining confidentiality so as to avoid the types of unwarranted pressures aforesaid in achieving the end result. If of the other nature, I believe the same result prevails. Similarly if the process were something other than non-binding arbitration, one would also see the same type of necessity. In the instant case, the parties could have, if they had so chosen (i.e. either side), decided not to appeal the Arbitration's award. In such case, the result would have been the same as the two sides entering into settlement negotiations to end their dispute and coming to an agreement. In effect that is what they did by entering the arbitration process except that in doing so, they at the start of the piece delegated the resolution determination function to the Arbitrator for him to do so by applying legal principles to the facts as he found them. If the parties had not made the detour from the main channel of court proceedings leading to trial by going to arbitration but had merely negotiated a settlement, then with a settlement achieved they would customarily merely proceed to put on the public court record that the claim had been dismissed on consent. Details of the settlement would remain with the parties; they would be free to disclose or agree not to disclose, subject to some legal obligation to make disclosure (e.g. timely disclosure requirements under securities legislation).

9 However in this case, it appears that both sides were dissatisfied to some degree by the decision of the Arbitrator for various reasons. Perhaps counsel would be of assistance to their clients if they were able to reflect upon what may have been attempted to be communicated by the other side at the hearing before me. I state the obvious: sometimes signals are obliquely broadcast; sometimes what might be perceived as a signal is nothing more than a false hope by the recipient. However if there is truly a signal intended, it would be very unfortunate if the recipient did not pick it up because it was too oblique or worse still because the mind was closed (possibly because the mouth was open so as to block the ear passage).

10 The onus is upon P² as moving party to demonstrate sound reason for departing from the openness rule: See *MDS*, supra, at p. 633. As the factum of P² put it:

There is an overriding public interest in the 1990's especially in fostering effective Alternative Dispute Resolution ("ADR") in such a way that parties will willingly submit to it in a manner which fosters its use and development and reduces the demands for scarce court resources.

The authority for this was given as *Brown and Marriott*, supra, at p. 356; *London & Leeds Estates Ltd. v. Paribas Ltd.*, unreported decision of Mance, J. (Q.B.) of July 28, 1994 and *Hassnah Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B. [Com. Ct.]). In citing *Hassnah*, Mance, J. at p. 8 of *London* merely stated:

There is no doubt that the parties to such a previous arbitration owed each other a duty of confidence and privacy in respect of the course of and evidence given during it.

He went on to say at p. 9:

None of those authorities deals with the need to consider the rights of a witness which could arise if duties of confidentiality or privacy were owed to him or her. Despite this I see some force in the submission that it is implicit in the nature of private consensual arbitration that witnesses who give evidence, even paid and professional experts, will within certain limits be accorded the benefits of the privacy which overall attaches to this type of arbitration. The privacy of arbitration is likely to be a factor in persuading many witnesses to give evidence and a factor in encouraging them to speak, or in the case of experts, enabling them to obtain permission from other principals to speak, about matters within their experience about which otherwise they might be hesitant or unable to speak.

London of course involved a question of whether a subpoena to an expert witness should be set aside where the confidential or private documents of the expert were sought to be obtained by the subpoena. It is even clearer in *Hassnah* what the limits of confidentiality would be concerning an arbitration and the award issuing therefrom. In that case there was an arbitration between the defendant who was reinsured by the plaintiff under various reinsurance contracts which had been placed by brokers. The defendant pursued arbitration to recover under the policies; the arbitration went mainly

against the defendant which now wished to proceed in court against the placing brokers for negligence in breach of duty. Coleman, J. found as stated in the headnote: "that if it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-a-vis a third party that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it including its reasons would not be a breach of the duty of confidence (See p. 249, col. 2)".

11 However as discussed above the parties clearly contemplated the possibility of appeal pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17. Both have availed themselves of that opportunity; the court files for whatever is filed pursuant to that appeal (and cross-appeal) will be open for inspection in the same way any other appeal of whatever nature or kind would be (assuming no valid sealing-order obtained on the basis of the reasons set out above). This is not a case such as *Hassnah* where witness statements, documents and transcripts of a confidential arbitration were not to be made public for the purpose of a court action against a third person-*Hassnah* being a completely "separate" proceeding. In this case (the P² case) the court proceedings are merely the continuation of the fight between P² and the plaintiff franchisees (and not between one of them and a third person in separate proceedings), a fight which they took private but which they have now returned to the open arena of the court.

12 As Dickson, J. said at p. 186 (S.C.R.) of *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609 (and cited in *MDS*, supra, at p. 635):

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

In my view "one of these" is not to keep secret the material involved in an arbitration appeal which of its necessity takes the parties back into the court system with its insistence on openness for court proceedings, an aspect which one must assume each side fully recognized before proceeding to appeal the award.

13 I believe it well expressed by Smith, J. in *S. (P.) v. C. (D.)* (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) at p. 229 and p. 231:

It may be argued that private litigants resorting to our public justice system should have the right to do so away from the public glare. The answer, very simply put, is that secrecy can only attend a private system of justice, not a public one. Or put in a different way, publicity is a necessary consequence of the obvious benefits that are derived from a public system put in place to serve society in general, including private litigants (p. 229).

.....
There is no need to refer to the voluminous case law bearing upon the general principles of openness of Court proceedings. There is a dearth of authority on the interpretation of s. 147(2) of the *Courts of Justice Act*. Suffice it to say that it ought to be resorted to sparingly in the clearest of cases and on the clearest of material where as one instance the interests of justice would be subverted and/or the totally innocent would unduly suffer without any significant compensating public interest being served (p. 231).

14 P² has not adduced any evidence to support a sealing order pursuant to s. 137(2) CJA but rather it has relied on the court to fashion an order so as to extend the confidentiality which the parties had in their arbitration to the material in that arbitration which would otherwise be public pursuant to the appeal. I see no public policy grounds for doing so.

15 Mr. Griffin with his usual candour immediately agreed with Mr. Waldmann's proposition that if the sealing motion were dismissed then Mr. Waldmann's two clients outside the arbitration would be allowed access to the arbitration material.

16 The sealing order motion of P² is dismissed. P² is to pay \$1,000 in costs forthwith to the plaintiffs represented by Ms. Spies and Mr. Mitchell; no other costs awarded.

Motion dismissed.

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1994 CarswellOnt 1214, [1994] O.J. No. 3112, 23 B.L.R. (2d) 239, 35 C.P.C. (3d) 323...

Footnotes

- * Leave to appeal to the Ontario Court of Appeal was refused with costs on June 7, 1995, Doc. CA M15773, McKinlay, Griffiths and Doherty J.J.A. (Ont. C.A.).

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