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COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	BANK OF MONTREAL
DEFENDANTS	KALCO INVESTMENTS LTD., KALCO FARMS LTD., MICHAEL KALISVAART, and KAREN JANSEN
DOCUMENT	**BRIEF OF LAW IN SUPPORT OF A RESTRICTED COURT ACCESS ORDER, SALE AND APPROVAL ORDERS, AND AUTHORIZATION TO ASSIGN KALCO INVESTMENTS LTD. AND KALCO FARMS LTD. INTO BANKRUPTCY**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers & Solicitors 2700 Commerce Place 10155 - 102 Street Edmonton, AB T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Susy Trace Lawyer's Email: strace@millerthomson.com File No.: 204646.0010

BENCH BRIEF OF THE APPLICANT, THE BOWRA GROUP INC.

DATE OF HEARING: APRIL 14, 2021

BEFORE THE HONOURABLE JUSTICE J.J. GILL

INDEX

I. INTRODUCTION

1. This Brief of Law is submitted on behalf of the Applicant, The Bowra Group Inc. (the "**Receiver**") in its capacity as the Court-appointed Receiver of the undertakings, property and assets of Kalco Investments Ltd. ("**Kalco Investments**"), Kalco Farms Ltd. ("**Kalco Farms**") (collectively, "**Kalco**" or the "**Companies**"), and certain real property owned by Michael Kalisvaart ("**Kalisvaart**") and Karen Jansen ("**Jansen**") (collectively, the "**Individuals**" and together with the Companies, the "**Debtors**").

2. The Receiver applies for the following relief:

   (a) Ten (10) Sale and Approval Orders respecting the sale of eleven parcels of land, representing an aggregate amount of 1,123.37 acres located in Sturgeon County, including various improvements and chattels (the "**Kalco Lands**");

   (b) a Sale and Approval Order respecting the sale of the Companies' farming equipment, tools and machinery that has not been released to priority creditors or the priority over which the Receiver has not determined (the "**Kalco Equipment**");

   (c) A Restricted Court Access Order sealing the Confidential Appendix (the "**Confidential Appendix**") to the First Report to the Court of The Bowra Group Inc. in its Capacity as Receiver of Kalco Investments Ltd., Kalco Farms Ltd., and certain lands owned by Michael Kalisvaart and Karen Jansen, dated April 5, 2021 (the "**First Report**");

   (d) An Order permitting the Receiver to assign the Companies into bankruptcy; and

   (e) Such further or other relief as may be requested of this Honourable Court by the Receiver.

3. The Companies were in the business of producing and marketing cereal grains such as wheat, barley, and rye, as well as peas and canola (the "**Crops**"), grown on the Kalco Lands and lands leased by Kalco from third parties. The Kalco Lands consist of eleven parcels of land, which includes nine agricultural properties and two acreage properties. Three of the properties are improved with residential dwellings and associated improvements, including a grain handling system.

4. The highest and best use for the Kalco Lands are continued agricultural operations and residential uses. The Crops will need to be planted by May of this year, and therefore a potential purchaser will require possession of the Kalco Lands imminently.

5. After consulting with realtors and industry professionals, the Receiver concluded that an unreserved, online public auction of the Kalco Lands (the "**Kalco Auction**"), and a separate process to liquidate the Kalco Equipment was the best sales strategy to expose the assets to the market for a sufficient period of time to attract the highest and best price for the Kalco Lands and the Kalco Equipment in time to liquidate the property in advance of the farming season.

6. The Receiver has entered into ten (10) Real Estate and Asset Purchase Agreements with eight (8) different potential purchasers who submitted the highest bids in the Kalco Auction, all subject to this Honourable Court's approval (the "**Land APAs**").

7. The Receiver has entered into one (1) Asset Purchase Agreement to purchase the Kalco Equipment submitted by Ritchie Bros. Auctioneers (Canada) Ltd. ("**Ritchie Bros**"), subject to this Honourable Court's approval (the "**Equipment APA**").

8. The Receiver submits that the sales process has generated the highest and best price for the Kalco Lands and the Kalco Equipment, was commercially reasonable and is in the best interests of all stakeholders.

9. The Receiver further submits that a sealing order is necessary in the circumstances as the Confidential Appendix contains information such as the appraisals of the property along with the various offers and proposals submitted to the Receiver for the purchase of the property. The publication of this information before the Kalco Lands and the Kalco Equipment are liquidated could adversely affect the purchase price for the property in the event the transactions do not close.

10. Lastly, the Receiver submits that it is reasonable in the circumstances for the Court to authorize the Receiver to assign the Companies into bankruptcy to allow for the examination under oath of various parties of interest to assist in locating the Crops or their proceeds.

II. BACKGROUND

A. Appointment of the Receiver

11. Upon the Application of Bank of Montreal ("**BMO**"), on January 14, 2021, the Honourable Justice D.R. Mah appointed The Bowra Group Inc. as Receiver and manager of the Debtors (the "**Receivership Order**").

12. As at the date of Receivership Order, Kalco is indebted to BMO in the amount of approximately $16,469,257, plus interest and costs, making BMO the Debtors' largest secured creditor.[1]

13. Since the date of the Receivership Order, the Receiver took steps to identify, protect and preserve the property of the Debtors including the performance of the following tasks:

    (a) Terminating the employees of Kalco, preparing records of employment and assisting with employee claims under the *Wage Earner Protection Program Act*, SC 2005, c 47, s 1 ("***WEPPA***");

    (b) Meeting with all individuals living in the residential houses located on the Kalco Lands and providing them with either notice of the termination of their tenancies or of notice that their ability to continue living in the residences will likely be impacted due to the sale of the Kalco Lands;

    (c) Confirming and continuing the requisite insurance coverage, transferring all utility accounts into the Receiver's name, arranging for the Receiver's borrowings to pay for ongoing costs of the utilities, freezing all bank accounts for the Companies made available to the Receiver and obtaining and reviewing the books and records provided by the Companies;

    (d) Preparing a creditor listing, sending a notice of the Receivership to the known creditors and obtaining various security opinions with respect to same;

    (e) Obtaining listing proposals from three commercial brokers with respect to the sale of the Kalco Lands, engaging Harrison Bowker Valuation Group ("**Harrison Bower**") to prepare an appraisal for the Kalco Lands and engaging North 49 Home Inspections to conduct inspections of the residential houses;

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[1] The First Report at para 27.

(f) Engaging GD Auctions & Appraisals ("**GD**") to prepare an appraisal for the Kalco Equipment; and

(g) Arranging for the marketing and sales process with the aim of finding purchasers for the Kalco Lands and Kalco Equipment prior to the commencement of the 2021 farming season.[2]

B. Property of the Debtors

i. The Kalco Lands

14. The Kalco Lands consist of 11 parcels having ten Certificates of Title, each owned by one of the Companies or the Individuals.

15. Kalco Investments is the registered owner of six parcels of land, detailed as follows:

(a) PLAN 0840686
BLOCK 1
LOT 4
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 32.14 HECTARES (79.42 ACRES) MORE OR LESS
"**Lot 9**"

(b) MERIDIAN 4 RANGE 22 TOWNSHIP 56
SECTION 29
QUARTER SOUTH WEST
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 64.7 HECTARES (160 ACRES) MORE OR LESS
"**Lot 4**"

(c) MERIDIAN 4 RANGE 22 TOWNSHIP 56
SECTION 29
QUARTER SOUTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:

		HECTARES	(ACRES) MORE OR LESS
A). PLAN 8821462	DESCRIPTIVE	2.17	5.36
B). PLAN 0524670	ROAD	0.454	1.12

EXCEPTING THEREOUT ALL MINES AND MINERALS
AND THE RIGHT TO WORK THE SAME
"**Lot 5**"

(d) PLAN 0922546
BLOCK 2

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[2] First Report at paras 21-22.

LOT 2
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 31.3 HECTARES (77.34 ACRES) MORE OR LESS
"**Lot 6**"

(e) PLAN 1723349
BLOCK 1
LOT 5
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA:16.22 HECTARES (40.08 ACRES) MORE OR LESS
"**Lot 8**"

(f) PLAN 0840686
BLOCK 1
LOT 2
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 1 HECTARES (2.47 ACRES) MORE OR LESS
"**Lot 10**"

(collectively, the "**Investments Lands**").[3]

16. Kalco Farms is the registered owner of one parcel of land, detailed as follows:

MERIDIAN 4 RANGE 22 TOWNSHIP 56
SECTION 20
THE EAST HALF OF THE SOUTH WEST QUARTER
CONTAINING 32.4 HECTARES (80 ACRES) MORE OR LESS
EXCEPTING THEREOUT ALL MINES AND MINERALS

-and-

MERIDIAN 4 RANGE 22 TOWNSHIP 56
SECTION 20
QUARTER SOUTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:

		HECTARES	(ACRES) MORE OR LESS
A). PLAN 0524670	ROAD	0.403	1.00

EXCEPTING THEREOUT ALL MINES AND MINERALS
"**Lot 1**"

(the "**Farms Lands**").[4]

17. The Individuals are the registered owners of three parcels of land, detailed as follows:

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[3] First Report at para 7.

[4] First Report at para 8.

(a) PLAN 8022100
LOT 1
EXCEPTING THEREOUT ALL MINES AND MINERALS
AREA: 32.7 HECTARES (80.8 ACRES) MORE OR LESS
"**Lot 7**"

(b) MERIDIAN 4 RANGE 22 TOWNSHIP 56
SECTION 20
QUARTER NW
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:

LESS		HECTARES	(ACRES) MORE OR LESS
A). PLAN 9020606	DESCRIPTIVE	1.42	3.51
B). PLAN 0524865	SUBDIVISION	1.00	2.47

EXCEPTING THEREOUT ALL MINES AND MINERALS
"**Lot 3**"

(c) MEDIAN 4 RANGE 22 TOWNSHIP 56
SECTION 8
QUARTER NORTH EAST
CONTAINING 64.7 HECTARES (160 ACRES) MORE OR LESS
EXCEPTING THEREOUT:

		HECTARES	(ACRES) MORE OR LESS	
A). ALL THAT PORTION DESCRIBED AS FOLLOWS; COMMENCING AT THE NORTH EAST CORNER OF THE SAID QUARTER SECTION THENCE WESTERLY ALONG THE NORTH BOUNDARY THEREOF ELEVEN HUNDRED AND FOURTY FOUR (1144) FEET, THENCE SOUTHERLY PARALLEL TO THE EAST BOUNDARY OF SAID QUARTER SECTION SEVEN HUNDRED AND FIFTY (750) FEET, THENCE EASTERLY PARALLEL TO THE SAID NORTH BOUNDARY TO THE SAID EAST BOUNDARY, THENCE NORTHERLY ALONG THE SAID EAST BOUNDARY TO THE POINT OF COMMENCEMENT CONTAINING.....		7.97	19.67	
B). PLAN 5354NY	ROAD	0.458	1.13	
C). PLAN 7920291	RIGHT OF WAY	0.364	0.90	VALVE SITE
D). PLAN 8120387	RIGHT OF WAY	0.191	0.47	
E). PLAN 8422370	ROAD		0.427	1.06
F). PLAN 0426682	ROAD		0.020	0.05

EXCEPTING THEREOUT ALL MINES AND MINERALS

"**Lot 2**"

(collectively, the "**Personal Lands**").[5]

[5] First Report at para 9.

18. The Kalco Lands are located rurally in Sturgeon County, north of the City of Edmonton and in the vicinity of the Town of Gibbons. There are nine agricultural properties and two acreage properties.[6]

19. Each parcel of the Kalco Lands is generally open arable land. The Kalco Lands consists of approximately 1200 acres of land, primarily used for farming the Crops.[7]

20. Lots 1, 7 and 9 of the Kalco Lands have been improved with residential dwellings with Lot 1 further improved with an extensive grain handling system and large shop.[8]

ii. Other Assets of the Debtors

21. The Companies' assets also consist of inventory, equipment and machinery (collectively, the "**Kalco Equipment**").[9]

22. The Companies' also have a receivable related to crop insurance from Agriculture Financial Services Corporation ("**AFSC**").[10] AFSC advised the Receiver that Kalco Farms is entitled to the amount of approximately $1.55 million by way of a claim it made pursuant to a Contract of Insurance for Annual Crops (the "**Insurance Proceeds**").[11]

23. This amount has been reduced by $152,838.53 for the annual crop insurance premiums owing to AFSC (the "**Premiums**"). Kalco Farms further assigned $250,000 to one of its creditors, Providence Grain Group Inc. ("**Providence**"). Providence and the Receiver agreed to permit AFSC to hold back $250,000 from the Insurance Proceeds until Providence and the Receiver either agree to its distribution, or Court order.[12]

24. AFSC paid to the Receiver the Insurance Proceeds, minus the Premiums and the $250,000 holdback, on April 1, 2021.[13]

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[6] First Report, Confidential Appendix 1.

[7] Ibid.

[8] Ibid.

[9] First Report at para 11.

[10] Ibid.

[11] First Report at para 95.

[12] First Report at paras 96-97.

[13] First Report at para 98.

C. Marketing and Sales Process for the Kalco Lands

i. Acceptance of the Colliers / GD Proposal

25. Given the seasonal nature of farming, it was important for the Receiver to market the Kalco Lands expeditiously to enable such lands to have sufficient exposure to the market and to be sold in time for potential purchasers to farm the lands in 2021 farming season. If the Kalco Lands were not sold in advance of the 2021 farming season, the Receiver would have had to takes steps to ensure the Kalco Lands were properly seeded to prevent them from turning fallow and lose value, which would have increased the administration costs of the estate.

26. The Receiver was advised by realtors, Harrison Bowker, and other professionals, that farming season in Alberta typically commences at the end of April and culminates by the end of May.[14]

27. The Confidential Appendix includes the appraisal of the Kalco Lands and the marketing proposals submitted to the Receiver to market and sell the Kalco Lands. In particular, the Receiver requested and received proposals from three commercial real estate firms, namely:

    (a) A combined listing proposal submitted by Colliers Macaulay Nicolls Inc. and GD (collectively, "**Colliers / GD**"). Key attributes of the Colliers / GD proposal include:

        (i) An online timed auction wherein bidders could submit bids on individual parcels at any time prior to the auction closing dates;

        (ii) A proposed timeline with the auction launching on February 19, 2021 and closing on March 19, 2021;

        (iii) Allowing for en bloc offers to be submitted prior to the auction closing; and

        (iv) A detailed and extensive marketing approach which included a dedicated webpage, marketing on the Colliers and GD websites and high visibility signage.

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[14] First Report at para 39.

(b) A proposal submitted by Jones Lange LaSalle Inc. ("**JLL**") who partnered with the brokerage, Hansen Land Brokers. Key attributes of JLL's proposal include:

(i) A traditional, individually priced listing strategy for the sale of the Kalco Lands where, if by the end of April 2021 the lands have not be sold, the remaining properties be offered for sale by way of auction or by leasing the Kalco Lands for the 2021 farming season; and

(ii) A marketing approach which included showcasing the lands in a catalogue format, using high visibility signage, a dedicated branded website and hard copy mail outs to local areas.

(c) A proposal submitted by Kelley Urban Land ("**Kelley**"), a team associated with Remax Real Estate and who specializes in the sale of land in and around the City of Edmonton. Key attributes of Kelly's proposal included:

(i) A two-phased listing approach with the first phase as being unlisted and the second phase as including listed prices for any remaining lands, to be sold by March 31, 2021; and

(ii) A marketing approach which included using signs with flags and directional signs, aerial and ground photography and website exposure.[15]

28. The Receiver reviewed each of the proposals submitted by Colliers / GD, JLL and Kelley and upon consideration of the appraisals and marketing proposals, the Receiver selected Colliers / GD to market and list the Kalco Lands. The Receiver came to this decision due to the following reasons:

(a) Colliers' has expertise in receiverships and with complex real estate listings and, in combination with GD's agricultural auction experience, the Receiver believed this would likely result in the highest possible value for the sale of the Kalco Lands;

(b) A timed online auction would allow the Receiver to close the sales for all parcels prior to May 2021, for the start of the seeding season, while still ensuring the properties would be adequately exposed to the market;

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[15] First Report at paras 46-49 and Confidential Appendix 4.

(c) JLL's proposal would potentially result in an overall longer process with the likelihood of no significant increase in proceeds; and

(d) Colliers / GD's proposal contained the necessary detail and strategy which the Receiver required to ensure that the Kalco Lands would be sold for the highest price in an expeditious manner.

29. Further, BMO supported Colliers / GD as the listing agent for the Kalco Lands.[16]

30. Once retained, various efforts were undertaken by Colliers / GD to market the Kalco Lands to prospective purchasers, which were approved by the Receiver. These marketing efforts are set out in detail in the First Report and include the following:

(a) Preparing various forms of advertisements; installing physical signage on the properties themselves; sending out email campaigns; conducting in-person tours; and establishing a data room to provide interested parties with due diligence documents;

(b) Preparing marketing brochures (the "**Marketing Brochures**") for each of the Kalco Lands, which included information such as the descriptions of the various site improvements, farmland assessments, and pictures, and that were sent to 1,982 prospective purchasers and agents; and

(c) Maintaining a webpage for the auction of the Kalco Lands which attracted 19,854 views and to which the Marketing Brochures were posted which were themselves viewed 1,177 times and obtained 262 downloads;

(collectively, the "**Kalco Land Marketing Efforts**")[17]

ii. Results of the Colliers / GD Marketing and Sale Process

31. Colliers / GD hosted an online unreserved timed auction ("**Kalco Auction**") for each Lot.[18] The Kalco Auction commenced on February 19, 2021 and began closing on March

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[16] First Report at para 49.

[17] First Report at paras 52-56.

[18] First Report at para 50.

22, 2021 at 10:00 a.m. MST and continued with staggered closing for each Lot occurring every 30 minutes thereafter.[19]

32. 105 bidders registered with the Kalco Auction, 55 of whom paid $25,000 participation deposits.[20] These substantial participation deposits were required to ensure that auction participants were serious about purchasing the Kalco Lands.

33. The Colliers / GD sales process also allowed for prospective purchasers to submit sealed en bloc offers. The en bloc offers had to be submitted to the Receiver by March 19, 2021 at 3:00 p.m. MST to ensure that any potential purchaser submitting an en bloc offer was not influenced by the bids in the Kalco Auction. Further, to ensure the fairness and impartiality of the sale process, the Receiver did not open the sealed bids until after bidding had ceased on all Lots in the Kalco Auction. [21]

34. The Receiver received one sealed en bloc offer to purchase the Kalco Lands. The offer was submitted by Nilsson Bros Inc. for the purchase of all the Kalco Lands, which is attached to the First Report as Confidential Appendix 6 (the "**Nilsson Offer**").[22]

35. The aggregate amount of the highest bids submitted in the Kalco Auction totalled $8,092,500 (the "**High Bids**"), as further summarized in the First Report and Confidential Appendix 6.[23]

36. Based on the Receiver's review of both the Nilsson Offer and the High Bids, the Receiver believes the High Bids are cumulatively the highest and best offer for the Kalco Lands, and will provide the greatest recovery to the Companies' creditors and stakeholders.[24] BMO also supports the acceptance of the High Bids. [25]

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[19] First Report at para 59.

[20] First Report at para 58.

[21] First Report at paras 60-61.

[22] First Report at para 63.

[23] First Report at paras 64-65.

[24] First Report at para 66.

[25] First Report at para 67.

37. The Receiver submits that the sales process generated the highest possible price for the Kalco Lands within the short marketing season for farmlands, while still ensuring the Kalco Lands were sufficiently exposed to the market to attract the best price.

38. As a result, the Receiver has negotiated and executed ten (10) Land APAs relating to each of the Kalco Lands with each of the highest bidders, which are collectively attached to the Confidential Appendix at Appendix 8, and has collected from each purchaser a deposit in the amount of 25% of the purchase price for each of the Kalco Lands.[26]

39. The Land APAs are conditional only upon the approval of this Honourable Court.

D. Marketing and Sales Process for the Kalco Equipment

40. The Receiver engaged GD, an auction, liquidation and appraisal company with extensive agricultural experience and knowledge, to prepare an appraisal for the Kalco Equipment.[27]

41. The Receiver prepared and distributed a Request for Offers to Purchase the Kalco Equipment by way of a parallel sales process to that of the Kalco Lands.

42. The Receiver undertook various efforts to market the Kalco Equipment. These efforts include:

    (a) marketing the Kalco Equipment for a period of four weeks;

    (b) preparing and distributing a Request for Offers to Purchase the Kalco Equipment ("**ROP**") to 107 prospective purchasers, notifying prospective purchasers of:

        (i) the nature of the Companies' business and assets;

        (ii) Kalco Equipment available for sale; and

        (iii) the form of offer, and terms and conditions for the Kalco Equipment proposed by the Receiver;

    (c) marketing the ROP on the Receiver's dedicated website, Insolvency Insider, and the Alberta Auctioneer Associations website;

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[26] First Report at para 68 and Confidential Appendix 8.

[27] First Report at para 22 and Confidential Appendix 2.

(d) conducting 29 tours with prospective purchasers to view and inspect the Kalco Equipment; and

(e) holding discussions with various prospective purchasers regarding the sale of the Kalco Equipment.[28]

43. The Receiver conducted a tender bid sales process for the Kalco Equipment with a deadline of 4:00 pm MST on Friday, March 19, 2021 (the "**Equipment Bid Deadline**"), and a requirement that the Kalco Equipment be removed from the Kalco Lands by no later than Friday, April 23, 2021.[29]

44. As of the Equipment Bid Deadline, the Receiver received 21 offers for the purchase of the Kalco Equipment consisting of eight en bloc offers and 13 piecemeal offers for select assets only, summaries of which are included in Confidential Appendix 9.[30]

45. Based on a review of the appraisals for the Kalco Equipment and an analysis of the offers received, the Receiver is of the opinion that the en bloc offer received from Ritchie Bros. (the "**Ritchie Bros. Offer**") places the highest value on the Kalco Equipment, a copy of which is included in at Confidential Appendix 10.[31]

46. In addition, the Receiver's is of the view that the Ritchie Bros. Offer is superior for the following reasons:

(a) it is a cash offer;

(b) Ritchie Bros. has agreed to remove the equipment from the property by April 23, 2021; and

(c) BMO is in support of the acceptance of this offer.[32]

47. The Receiver has executed the Equipment APA with Ritchie Bros., subject to this Honourable Court's approval.[33]

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[28] First Report at paras 70-77.

[29] First Report at para 72.

[30] First Report at paras 78-79 and Confidential Appendix 9.

[31] First Report at para 80 and Confidential Appendix 10.

[32] First Report at paras 81 & 83.

E. Vacancy of the Kalco Lands

48. There are personal residences located on three of the Kalco Lands. At the date of the Receivership Order, these residences were occupied by various parties (the "**Occupants**"). The Receiver permitted the occupants to continue to reside on the lands without paying for rent or utilities.[34]

49. The Occupants include:

(a) Jansen and her children, who were occupying a home on Lot 7;

(b) The parents of Kalisvaart, namely, Jack Kalisvaart ("**Jack**") and Theresa Kalisvaart ("**Theresa**"), who are occupying a home on Lot 1; and

(c) An employee of Kalco Farms, Mike Visser ("**Visser**"), who is occupying a home on Lot 9.[35]

i. Occupancy of Karen Jansen

50. The Receiver advised counsel for Jansen that the Receiver was attempting to sell the Kalco Lands, and that it hoped to give possession of Lot 7 to a purchaser on or before April 15, 2021.

51. Jansen and her children vacated the premises on or around March 7, 2021.[36]

ii. Occupancy of Jack and Theresa Kalisvaart

52. The Receiver is unaware of the existence of any agreement entered into by Jack and Theresa with respect to them residing in the home on Lot 1.[37] Therefore, it is not clear if Jack and Theresa are tenants and thus governed by the terms of the *Residential*

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[33] First Report at para 82 and Confidential Appendix 11.

[34] First Report at para 100.

[35] First Report at para 99.

[36] First Report at para 101.

[37] First Report at para 100.

Tenancies Act, SA 2004, c R-17.1 (the "***RTA***") or whether they have a personal license to occupy the home.[38]

53. In anticipation of the sale of the Kalco Lands, on March 1, 2021, the Receiver hand-delivered letters to Jack and Theresa, notifying them of the Receivership and of the Receiver's intention to sell the Kalco Lands.[39] Jack and Theresa were advised that the Receiver anticipated that a potential purchaser would likely require possession of the land by April 15, 2021 in order to plant and maintain crops, and that the sale of Lot 1 would likely impact their ability to continue residing on the premises. Jack and Theresa were also invited to participate in the Kalco Auction.[40]

54. Counsel for the Receiver has had discussions with counsel for Jack and Theresa who advised that Jack and Theresa have a home in Fort Saskatchewan and that they plan to vacate Lot 1 by May 1, 2021.[41]

iii. Occupancy of Mike Visser

55. Visser's employment with Kalco Farms commenced on January 10, 2016 and was thereafter terminated on January 14, 2021. Mike Visser's employment agreement with Kalco Farms (the "**Employment Agreement**") does not contain a contractual term with respect to the notice period for termination. As there is no term respecting the notice period in the Employment Agreement nor the existence of any written tenancy agreement, the Receiver determined that Visser is entitled to four weeks' notice in accordance with the terms of the *RTA* and the *Employment Standards Code*, RSA 2000, c E-9 (the "***ESC***").[42]

56. On March 1, 2021, the Receiver hand-delivered a notice to Mike Visser, providing him with more than six weeks' notice of the termination of his tenancy by asking him to vacate the premises by April 15, 2021.[43]

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[38] First Report at para 105.

[39] First Report at para 105-106 and Appendix I.

[40] First Report at para 105.

[41] First Report at para 107.

[42] First Report at para 102.

[43] First Report at para 103 and Appendix I.

57. In an email sent to the Receiver on March 16, 2021, it was confirmed that Visser would vacate the premises on or before April 15, 2021.[44]

F. The Harvesting of Kalco's 2020 Crop

58. On or about May 11, 2020, Kalco Farms entered into certain grain delivery contracts with Providence whereby Kalco Farms agreed to deliver to Providence certain quantities of peas and canola.[45]

59. On or about May 25, 2020, Providence registered a security interest against all present and future crop inputs, crops and proceeds of such crop of the Companies at the PPR (the "**Providence Security**").[46] The Receiver is currently obtaining a legal opinion regarding the validity and enforceability of the Providence Security.[47]

60. The Receiver has had discussions with and sought further information from Providence regarding the delivery contracts and the actual amounts of the 2020 crops delivered to Providence. It has also requested from Providence a reconciliation of the amount of crops delivered compared to the amount of crops that ought to have been delivered pursuant to the delivery contracts and the amount of indebtedness owed to Providence.[48]

61. Despite representations made by the Companies' management, the Receiver understands that only a portion of Kalco's harvested 2020 crop was delivered to Providence. Accordingly, the Receiver is currently investigating the whereabouts of the remaining crops, or its proceeds.[49]

62. When the Receiver took possession of the books and records of the Companies, the Companies' computers disclosed very little information and the Companies' accounting software had not been updated. Therefore, the Receiver has not been able to identify and locate the majority of the 2020 crops, though based on the Companies' financial

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[44] First Report at para 104.

[45] First Report at para 90.

[46] First Report at para 91.

[47] First Report at para 90.

[48] First Report at para 92.

[49] First Report at para 93.

statements for the year ending 2019, Kalco farmed 15,874 acres of land and reported $5,485,519 in total revenue. As noted earlier, the Receiver estimates that Kalco farmed approximately 11,236 acres of land in 2020 and the Receiver projects that revenues would approximate $3.2 million-$4.5 million.[50]

63. As a result the Receiver will likely require examining relevant parties under oath to assist with determining the quantity and location of the 2020 crops or their proceeds.

III. ISSUES

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

(a) approve the Land APAs and the Equipment APA entered into by the Receiver for the sale of the Kalco Lands and the Kalco Equipment and approve the vesting of the purchased assets in the names of the purchasers?

(b) if this Honourable Court approves the sale of the Kalco Lands, when should vacant possession of the three Lots containing personal residences be given to the applicable purchasers?

(c) grant a Sealing Order, sealing from the Court record the Confidential Appendix until such time that the Kalco Lands and Kalco Equipment are sold?

(d) authorize the Receiver to assign the Companies into bankruptcy?

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[50] First Report at paras 94-95.

IV. ARGUMENT

A. The Sale of the Kalco Lands and Kalco Equipment is Commercially Reasonable

65. The *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 permits the Court to authorize and empower 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.[51]

66. 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.[52]

67. The criteria to be applied when considering whether to approve a sale or sales process administered by a receiver were established by the Ontario Court of Appeal in the seminal case, *Royal Bank v Soundair Corp.*[53] The "*Soundair* Principles" that ought to be considered by the Court are:

(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.[54]

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

[52] *BIA*, s. 247 [**TAB 1**].

[53] *Royal Bank v Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 CBR (3d) 1, 83 DLR (4th) 76 (ONCA) ("***Soundair***") [**TAB 2**].

[54] *Soundair* at para 16 [**TAB 2**].

68. The Alberta Court of Appeal in *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd* recently held that the *Soundair* Principles must be considered by the Court when requested to approve a receiver's sales process.[55]

69. The Court also provides a court-appointed receiver with deference, assuming that the receiver's course of action and recommendation is appropriate unless the contrary is clearly shown.[56]

i. The Sale of the Kalco Assets Satisfies the Soundair Principles

70. It is respectfully submitted that the sale of the Kalco Lands and the Kalco Equipment (collectively the "**Kalco Assets**") pursuant to the Land APAs and the Equipment APA (collectively the "**APAs**") satisfies the *Soundair* Principles.

71. The Kalco Lands consist of nearly 1,200 acres of primarily farming lands and the Kalco Equipment is primarily used for farming operations. As the 2021 farming season is rapidly approaching, the best time to liquidate farming assets is immediately prior to the commencement of the farming season so that purchasers are able to farm the lands, which the Receiver understands to be late April and early May, weather depending.[57]

72. If the Receiver does not liquidate the Kalco Assets in advance of the 2021 farming season, the Receiver will have to make arrangements to seed the Kalco Lands to preserve their value and prevent them from turning fallow.

73. This would invariably increase the administration costs of this estate and could risk the Receiver ultimately obtaining less value for the Kalco Assets as they may be sold in the off season. As such, the Receiver concluded that time was of the essence in developing a sales process and selling the Kalco Assets.

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[55] *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433 at para 10 [**TAB 3**].

[56] *Soundair* at para 14 [**TAB 2**].

[57] First Report at paras 6 and 39.

Sufficient Efforts have been Undertaken to Market and Sell the Kalco Assets

74. The Receiver respectfully submits that the Kalco Assets were exposed to the market for a sufficient period of time and during the prime marketing season for farming assets to be able to obtain the best prices for the Kalco Assets.

(a) The Kalco Lands

75. The Receiver obtained and reviewed proposals from three commercial real estate firms and concluded that the best proposal for the marketing and sale of the Kalco Lands was submitted by Colliers / GD.

76. The Kalco Lands were marketed for sale in the Kalco Auction, which was an online timed auction and allowed for bidders to bid on each parcel of the Kalco Lands separately.[58] In addition, the Receiver also solicited sealed en bloc offers in the event one purchaser wanted to purchase all of the Kalco Lands.

77. The marketing efforts undertaken by Colliers / GD were extensive, particularly when consideration is given to the short period of time available to do so. The Marketing Brochure was sent to 1,982 prospective purchasers and the Marketing Brochure available on the webpage of Colliers / GD was viewed 1,177 times.[59]

78. These marketing efforts resulted in 105 registered bidders, of which 55 bidders submitted $25,000 participation deposits.[60] Significant participation deposits were required to ensure that participants in the Kalco Auction were serious purchasers.

79. One en bloc offer was received.[61]

80. Taking into consideration the analysis of the bids received in the Kalco Auction as well as the Nilsson Offer, the Receiver accepts the opinion of Colliers / GD that the Kalco Lands were exposed to the market to sufficiently generate the highest and best offer,

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[58] First Report, para 50.

[59] First Report, para 56.

[60] First Report, para 58.

[61] First Report, para 63.

namely, the High Bids.[62] The Debtors' largest creditor, BMO, also supports the acceptance of the High Bids.[63]

81. The Receiver is of the opinion that there are no alternative options for realization that are likely to have resulted in a better price for the Kalco Lands and, as a result, the Receiver submits that its efforts were sufficient to garner the best price for the lands.

(b) The Kalco Equipment

82. The Receiver submits that the marketing efforts undertaken were sufficient in the circumstances. The Kalco Equipment was marketed by the Receiver for a period of four weeks and the ROP was sent to 107 prospective purchasers advising them of the sale of the Kalco Equipment. The Receiver also conducted 29 tours with prospective purchasers to view and inspect the Kalco Equipment and engaged in discussions with various prospective purchasers regarding the sale of the Kalco Equipment.[64]

83. 21 offers were received for the purchase of the Kalco Equipment.

84. Ritchie Bros. submitted an en bloc offer for the purchase of the entirety of the Kalco Equipment (the "**Ritchie Offer**"). This is a cash offer that places the highest value on the Kalco Equipment and, further, Ritchie Bros. has agreed to remove the Kalco Equipment by April 23, 2021 such that the vacant possession of the Kalco Lands can be given to a purchaser in time for farming season.[65]

85. BMO also supports the acceptance of the Ritchie Offer for the sale of the Kalco Equipment.

86. It is respectfully submitted that the above marketing efforts and sales process was "sufficient" and satisfies the first *Soundair* Principle.

<u>Interest of All Parties Have Been Considered</u>

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[62] First Report, paras 64-66.

[63] First Report, para 67.

[64] First Report, paras 74-76.

[65] First Report, paras 80-81.

87. A receiver's primary concern should be to protect the interest of the debtor's creditors.[66]

88. In considering the "interest 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, the receiver must consider the interest of all creditors and then act for the benefit of the general body.[67]

89. BMO, the major secured creditor of the Debtors, supports the sale of the Kalco Assets by way of the APAs with the High Bidders and Ritchie Bros.

90. The High Bids and the Ritchie Offer both provide for the highest estimated net realization for the assets and the highest potential recovery for the creditors of the Debtors.

91. The acceptance of the High Bids and the Ritchie Offer is a cost effective means for realizing on the Kalco Lands and Kalco Equipment, during the prime marketing season for farming assets, in an expeditious manner.

92. Further, the Receiver has also considered the interests of the Occupants and the Individuals throughout the entirety of the sale process.

93. As discussed herein, all Occupants were either provided with ample notice to vacate the premises or with notice that the sale of the Kalco Lands could impact their ability to continue residing on the property, thus allowing them a reasonable amount of time to make arrangements to find alternate living accommodations.

94. The Individuals and the Occupants were also provided with an opportunity to participate in the Kalco Auction.

95. As will be discussed, the Occupants (as hereinafter defined) have either already vacated the Kalco Lands, or indicated an intention to vacate the Kalco Lands so that a purchaser may obtain vacant possession of the Kalco Lands in time to farm them.

96. Finally, the Receiver ensured that the sales process was fair to all participants in the Kalco Auction, en bloc bidders and bidders who submitted sealed bids in the ROP. For example:

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[66] See *Cobrico Developments Inc. v Tucker Industries Inc.*, 2000 ABQB 766 [**TAB 4**]

[67] *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 ("***Elaborate Homes***") at para 61 [**TAB 5**] citing *Scanwood Canada Ltd., Re,* 2011 NSSC 189, 305 NSR (2d) 34.

(a) significant participation deposits were required from auction participants, and bids were non-revocable to ensure that auction participants' bids were made in good faith;

(b) en bloc offers for the purchase of the Kalco Lands were required to be sealed and submitted in advance of the Kalco Auction (which was public) to ensure that the purchase price was not impacted by the auction results and no potential purchaser had an unfair advantage;

(c) the Receiver did not review the en bloc offers until after the Kalco Auction closed to ensure that the process was fair to all participants; and

(d) bidders in the ROP process were required to submit offers in a sealed bid to ensure that no purchaser had an unfair advantage.

97. In these circumstances, the Receiver respectfully submits that it is commercially reasonable and in the best interest of the Debtor's stakeholders that the APAs receive the approval of this Honourable Court.

The Efficacy and Integrity of the Process

98. The Receiver submits that there is nothing improper about obtaining GD / Colliers to market and sell the Kalco Lands and the ROP. Further, there is nothing improper about the Receiver's acceptance of the APAs for the sale of the Kalco Lands with the Highest Bidders and the Kalco Equipment with Ritchie Bros.

99. The Receiver has conducted itself with integrity and in good faith in considering the proposals presented to it by the various companies and offerors, as well as during its ongoing communications with the Occupants.

100. The Receiver obtained proposals from three separate commercial real estate firms and thoroughly examined and considered each proposal from an impartial perspective with the sole objective of ensuring the Kalco Lands were adequately marketed and sold for the highest possible amount prior to the start of the 2021 farming season.

101. The Receiver further engaged GD to appraise the Kalco Equipment as GD has extensive experience with agricultural property.

102. The sales processes selected by the Receiver exposed the Kalco Assets to a broad range of potential purchasers during what is considered to be the prime marketing season for agricultural assets in Alberta, and for a sufficient period of time to obtain the best price.

There is No Unfairness in the Process

103. There is no suggestion that the Receiver has failed to act reasonably, prudently and fairly in carrying out its duties and in entering into the APAs for the sale of the Kalco Assets.

104. In particular, no party will be materially prejudiced or disadvantaged by the Receiver entering into the APAs for the sale of the Kalco Assets.

105. The sale of the Kalco Assets by way of the APAs allows for the best purchase price and thus will be advantageous to the Debtors' creditors. If the sale process for the Kalco Lands was extended any further, there would be a risk that they would not sell in time for a purchaser to plant crops, which would require the Receiver to take steps to ensure crops were planted, or risk the Kalco Lands losing value.

106. Further, as the sale of the Kalco Lands was required to be done expeditiously, this also meant that the Kalco Equipment had to be sold within a shortened time frame. The Kalco Equipment takes up a large amount of space on the Kalco Lands and the Receiver would have to find a location to store the Kalco Equipment, and incur storage costs if it sold the Kalco Lands without selling the Kalco Equipment. Moreover, as noted above, the Kalco Equipment is also farming related and therefore the best time to liquidate such equipment is now.

107. The Receiver also submits that the Occupants have each been provided with reasonable notice of the need to either vacate the premises or of the likelihood that they would need to vacate the premises once the Kalco Lands were sold.

108. Based on the forgoing, it is respectfully submitted that the *Soundair* Principles have been satisfied and that the Receiver has acted in a commercially reasonable manner in entering into the APAs for the sale of the Kalco Lands and Kalco Equipment.

ii. Vesting of the Purchased Assets

109. A vesting order is necessary in these circumstances as it will allow the for purchasers to obtain a free and clear title to the purchased assets, which is a condition of the APAs.

B. Vacant Possession of the Kalco Lands Can Ought to Be Given By May 1, 2021

110. As mentioned above, three of the Lots have personal residences and either are or were occupied by the Occupants. The Receiver respectfully submits that it is reasonable and appropriate in the circumstances to grant vacant possession of the Kalco Lands on or before May 1, 2021.

i. Jack and Theresa Kalisvaart Have Agreed to Vacate the Premises

111. Jack and Theresa reside in a home on Lot 1 and the Receiver is unaware of any agreement entered into by Jack and Theresa with respect to residing in the premises.

112. As there is no written agreement with Jack and Theresa regarding the terms or rights available to them as occupants of the premises, it cannot be definitively said whether Jack and Theresa have a personal license to occupy the home or, alternatively whether they are "tenants" under the *RTA*.

113. Regardless, given the urgency that exists to sell the Kalco Lands in advance of farming season, and Jack and Theresa's indication that they have alternative living accommodations and can vacate by May 1, 2021, it is respectfully submitted that vacant possession of Lot 1 ought to be granted to the purchaser of Lot 1 by May 1, 2021.

Consideration of Tenancy Pursuant to the RTA

114. The *RTA* defines a "tenant", in relevant part, as "*a person who is permitted by the landlord to occupy residential premises under a residential tenancy agreement.*"[68] The *RTA* further defines a "residential tenancy agreement" as a written, oral or implied agreement to rent residential premises.[69]

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[68] *Residential Tenancies Act,* SA 2004, c R-17.1, s 1(1)(t) ("***RTA***") [**TAB 6**]

[69] *RTA*, s. 1(1)(m) [**TAB 6**].

115. While there is no written agreement that the Receiver is aware of, there may still be an oral or implied residential tenancy agreement for Jack and Theresa to reside in the premises as tenants.

116. If there is an oral or implied agreement, it is clear that the agreement cannot be for a term of more than one year. The Alberta Court of Queen's Bench recently held that an oral lease for a term of more than one year is rendered unenforceable by the *Statute of Frauds* and therefore the Court cannot enforce an oral lease that was intended to be for more than one year.[70]

117. The Receiver has not been provided with evidence that Jack and Theresa have an oral lease agreement permitting them to reside on Lot 1 for a fixed term, and thus, it is unlikely that Jack and Theresa will be considered fixed term tenants under the *RTA*.

118. If there is evidence of an oral residential tenancy agreement, then pursuant to the terms of the *RTA*, the tenancy can be terminated at any time by either party unless there is an agreement to the contrary.[71] The Receiver is unaware of an oral agreement with such a term. In any event, Alberta Courts have held that the commencement and duration of fixed tenancies must be ascertainable with certainty, and thus, it is unlikely there can be an enforceable fixed term tenancy without a written agreement.[72]

119. As such, if Jack and Theresa are considered to be tenants under the *RTA*, it is most likely a periodic tenancy.

120. The *RTA* provides that a periodic tenancy that is for a period of more than one week but less than one year is deemed to be a monthly tenancy.[73] Moreover, even if the occupants previously had a fixed term agreement which expired and they now continue to reside on the premises, the *RTA* implies the continued tenancy as being a monthly tenancy, if the prior tenancy was for a fixed term of one month or more, or a weekly tenancy, if the prior tenancy was for a fixed term of less than one month.[74]

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[70] *Fluid Pro Oilfield Services Ltd v Diamond Cut Industrial Park Ltd*, 2017 ABQB 630 at para 13 [**TAB 7**].

[71] *RTA*, s 15 [**TAB 6**].

[72] Anger & Honesberger, *Law of Real Property*, 3rd ed at 7:30.30 [**TAB 8**].

[73] *RTA*, s 5(4) [**TAB 6**].

[74] *RTA*, s 13 [**TAB 6**].

121. If there is a periodic monthly tenancy in place for Jack and Theresa, they are likely entitled to three months notice[75] , unless the Receiver and Jack and Theresa otherwise agree. [76]

122. In this case, Jack and Theresa have agreed to vacate the premises, by May 1, 2021. Therefore, even if they are found to have a periodic tenancy, vacant possession can be granted by May 1, 2021.

Consideration of Personal License to Occupy the Premises

123. There is also a possibility that Jack and Theresa are not considered to be tenants pursuant to the *RTA* and have merely been provided with a personal license to occupy the premises.

124. Factors that the Court considers when determining whether there is a license to occupy premises includes consideration of the following, among other factors:

(a) a licence normally involves granting the right to use the property without obtaining exclusive possession, however, exclusive possession does not preclude the possibility that a licence has been created;

(b) in deciding whether a licence has been created, the decisive factor is the parties' intention; and

(c) the question of whether the parties intended to create a licence is a question of fact. Where there is no formal document to evidence this intention, the precise circumstances and conduct of the parties must be examined to decide whether a licence was intended.[77]

125. Alberta Courts have further stated that:

> Typical examples of a personal license to occupy or consent are a verbal agreement or permission, family arrangements, acts of friendship, generosity or charity, caretaker arrangements, or occupation by servants or employees.[78]

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[75] *RTA*, s 8 [**TAB 6**].

[76] *RTA*, s 20(1) [**TAB 6**].

[77] *Moore v McIndoe*, 2018 ABQB 235 at para 122 ("***Moore***") [**TAB 9**].

[78] *Moore* at para 124 [**TAB 9**].

126. Generally, a license agreement is found where there is no indication that the occupant has the rights generally afforded to a lessor. For instance, Courts have held that if it is unlikely that the occupant is able to sub-lease the premises, this weighs in favor of finding there is a personal license to occupy as opposed to a tenancy.[79]

127. With respect to the period of notice required for the termination of a licensing agreement, Alberta Courts have held:

> A licensing agreement may provide for termination on notice without grounds or otherwise. If so, it must be sufficient notice to allow the licensee to remove himself from the premises. If the contract of license does not specify the length of notice, then it will, in most circumstances, be presumed by the Court to be reasonable notice.[80]

128. In this case, the Receiver submits it is more likely that Jack and Theresa have a personal license to occupy the premises located on Lot 1 given their familial relationship with the Individuals, and thus that the license can be terminated on reasonable notice.

129. Given the circumstances at issue, the Kalco Lands must be sold and Jack and Theresa have been provided with notice that their ability to continue residing in the property would be impacted by such sale. Further, since Jack and Theresa have alternate living accommodations available to them, the Receiver submits it is reasonable in the circumstances that they vacate the premises by May 1, 2021.

ii. Mike Visser Has Agreed to Vacate the Premises

130. Visser currently resides on Lot 9.

131. Visser is considered to be a tenant pursuant to the *RTA* by virtue of the Employment Agreement with Kalco Farms as his tenancy was entered into by reason of his employment.

132. Section 11 of the *RTA* states the following with respect to terminating the tenancy of an employee:

> 11 If a periodic tenancy of residential premises has been entered into by reason of the tenant's employment by the landlord and that employment

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[79] *Law v Lau*, 2015 ABQB 423 at para 71 [**TAB 10**] citing *Robertson v King (Estate)*, 1999 ABQB 167 aff'd 1999 ABCA 314.

[80] *Singh v RJB Developments Inc.*, 2016 ABPC 305 at para 80 [**TAB 11**].

> is terminated, either the landlord or the tenant may terminate the tenancy by serving notice on the other party in sufficient time to provide a period of notice of termination of the tenancy that is
>
> (a) a period equal to
>
> (i) the period of notice of termination of employment required under any law in force in Alberta that is applicable to the tenant's employment,
>
> (ii) the period of notice of termination of employment agreed on by the landlord and the tenant, or
>
> (iii) one week,
>
> whichever is longest, or
>
> (b) a period prescribed in or determined in accordance with the regulations.[81]

133. As mentioned herein, the Employment Agreement does not contain a term with respect to the notice period Visser is entitled to upon termination. Further, there is no written agreement in place respecting Visser's tenancy. Lastly, there is no prescribed period in the *RTA Regulations* specifying the notice that ought to be given to Visser.

134. Due to the foregoing, Visser is to be provided with a period of notice equal to that specified in the *ESC*. Notwithstanding that the *ESC* does not apply to certain employees of farming operations by way of section 2.1, this does not apply to Visser's employment as he not a shareholder of Kalco Farms nor a family member of the Individuals.[82]

135. As such, since Visser's employment with Kalco Farms was for a period of more than four years but less than six years, section 56(c) of the *ESC* provides that Visser is entitled to four weeks' notice.[83]

136. The Receiver submits it adequately complied with the requirements for the form of notice as set out in section 10 of the *RTA* when providing notice to terminate a tenancy of an employee.[84] On March 1, 2021, the Receiver hand-delivered the written notice to Visser, which was signed by the Receiver, and which advised him to vacate the premises on or before April 15, 2021.

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[81] *RTA*, s 11 [**TAB 6**].

[82] *Employment Standards Code,* RSA 2000, c E-9 ("***ESC***"), s 2.1 [**TAB 12**].

[83] *ESC*, s 56(c) [**TAB 12**].

[84] *RTA*, s 10 [**TAB 6**].

137. Visser has further indicated he will be vacating the premises by this date.

iii. Karen Jansen Has Vacated the Premises

138. No notice was required to be given to Jansen for her to vacate the premises, as she is the registered owner of Lot 7, where she and her children resided.

139. In any event, Jansen, as a Debtor, was aware of the Receivership Order and was thereafter advised of the Receiver's intention to sell the Kalco Lands.

140. Jansen and her children vacated the premises on March 7, 2021 and the property is currently vacant.

C. A Restricted Court Access Order Respecting the Confidential Appendix is Necessary

141. The Receiver seeks a Restricted Court Access Order, sealing the Confidential Appendix.

142. The Court's authority to grant Restricted Court Access Orders is contemplated under *Rule* 6.28 and Division 4 of Part 6 of the *Alberta Rules of Court*.[85]

143. 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.[86]

144. 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

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[85] *Alberta Rules of Court,* AR 124/2010, Division 4 of Part 6 including Rule 6.28 [**TAB 13**].

[86] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [**TAB 14**].

valuations, in case a further bidding process is required should the transaction being approved fall through.[87]

145. 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.[88]

146. In *Alberta Treasury Branches v Elaborate Homes Ltd.*, Justice K.G. Nielsen 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.[89]

147. The Receiver submits that in these circumstances it is necessary to seal the Confidential Appendix to prevent a real and substantial risk of harm to a commercial interest. The Confidential Appendix contains appraisals with respect to the Kalco Assets, as well as the proposals and offers submitted to the Receiver. If such information was to be made public before the final completion of the transactions contemplated in the APAs, it could detrimentally impact the Debtors and the Debtors' creditors as it could result in the sale of the Kalco Lands or the Kalco Equipment at a lower price.

148. Release of the information prior to the completion of the sale of the Kalco Assets may cause irreparable harm to the fairness of the sale process. This would negatively impact the stakeholders of the Debtor, who have an interest in ensuring the highest value possible is received for the assets.

149. The Receiver further submits that the salutary effects of sealing of the Confidential Appendix outweigh any deleterious effects that may be caused by the sealing.

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[87] *Look Communications Inc v Look Mobile Corp*, 2009 CarswellOnt 7952 (Ont SCJ [Commercial List] at para 17 [**TAB 15**].

[88] *887574 Ontario Inc v Pizza Pizza Ltd*, 1994 CarswellOnt 1214, [1994] OJ No 3112 [**TAB 16**] at para 6.

[89] *Elaborate Homes supra.* at para 54 [**TAB 5**].

150. The sealing of the Confidential Appendix is also essential for satisfying the *Soundair* principles as required by this Court, and therefore it is both reasonable and appropriate for the Court to seal the Confidential Exhibit on the Court Record.

D. Permission to Assign Kalco into Bankruptcy

i. The Court Has the Authority to Authorize Receivers to Assign Debtors Into Bankruptcy

151. As a receiver is not a creditor and is not owed money by a debtor, it is not able to bring a bankruptcy application pursuant to Section 43 of the *BIA*.[90]

152. However, "an insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors".[91]

153. The Receiver has been given the express power to assign Kalco into bankruptcy by way of the Receivership Order, subject to the approval of the Court. Specifically, paragraph 3(s) of the Receivership Order states:

> **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:
>
> ...
>
> (s) with prior Court approval, to assign Kalco Investments Ltd. and Kalco Farms Ltd. into bankruptcy... [emphasis added].[92]

154. While the standard Template Receivership Order in Alberta does not provide a receiver with the authority to assign a debtor that is subject to the Receivership Order into bankruptcy, the explanatory notes to the Alberta Template Order expressly state that there is case law authorizing receivers to assign debtors over which they are appointed

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[90] *BIA* s. 42 [**TAB 1**].

[91] *BIA* s. 48 [**TAB 1**].

[92] First Report, Appendix B.

in bankruptcy, however, that Receivers generally seek the approval of the Court prior to doing so.[93]

155. Justice Graesser of the Alberta Court of Queen's Bench in *Bank of Montreal v Ladacor AMS Ltd,* 2019 ABQB 985, recently approved an application of the Receiver requesting permission to assign the debtor corporation into bankruptcy.[94] This relief was opposed by one debtor who argued that assigning any of the debtors into bankruptcy should only be done after the Receiver completed a proper investigation and analysis of the assets and debts of the debtor corporations, and should only occur when it is commercially reasonable to do so.[95]

156. The Court found that one of the debtor companies, Ladacor, was insolvent under any interpretation of insolvency and that it had no remaining assets, all physical assets had been disposed of and its receivables had been collected.[96]

157. The Court found that what was left of the three debtor corporations was "a paucity of assets and a mountain of claims against them."[97] He further stated that, <u>while there are possible ways of dealing with the claims in a receivership, the only effective way of dealing with the numerous claims is through a statutory process such as bankruptcy</u>.[98]

158. While in this case the driving factor behind the Receiver's request to assign Kalco into bankruptcy at this time is to take advantage of the investigatory powers in the *BIA*, there are numerous unsecured creditors of Kalco that may benefit from the claims process prescribed in the *BIA*.

159. The Ontario Superior Court in *RBC v Gustin*, 2019 ONSC 5370 also recently affirmed that a Receiver has the authority to assign a debtor company into bankruptcy.[99] In *Gustin*, Justice Rady determined that a Receiver has the authority to assign a debtor into bankruptcy and stated:

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[93] Alberta Template Receivership Order Explanatory Notes, page 4 [**TAB 17**].

[94] *Bank of Montreal v Ladacor AMS Ltd,* 2019 ABQB 985 ("***Ladacor***") [**TAB 18**].

[95] *Ladacor* at para 92 [**TAB 18**].

[96] *Ladacor* at para 56 [**TAB 18**].

[97] *Ladacor* at para 143 [**TAB 18**].

[98] *Ladacor* at paras 144-145 [**TAB 18**].

[99] *RBC v Gustin*, 2019 ONSC 5370 ("***Gustin***") [**TAB 19**].

> ...The Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions.[100]

ii. It is Reasonable in the Circumstances for the Court to Permit the Receiver to Apply to Assign Kalco into Bankruptcy

160. The Receiver submits that, in order to adequately exercise its duties under the Receivership Order, it is necessary in the circumstances for the Receiver to assign Kalco into bankruptcy.

161. There are certain powers contained in the *BIA* that are not available in a receivership. For example, s. 163 of the *BIA* permits a trustee in bankruptcy to examine any person reasonably thought to have knowledge of the affairs of a bankrupt, or any officer or director of a bankrupt respecting the bankrupt or the bankrupt's dealings with its property.[101]

162. In this case, the whereabouts of a substantial portion of Kalco's Crops that were harvested in 2020 is unknown. The Receiver has made inquiries of Michael Kalisvaart and Providence as to the quantity and whereabouts of the Crops, however to date the Receiver has only been able to account for a portion of the estimated 2020 Crops. As such, the ability for the Receiver to determine to quantity and location of the 2020 crops or their proceeds is limited.

163. The Receivership Order does not give the Receiver the power to examine such persons under oath. The Receiver submits that the investigatory powers in the *BIA* may assist it in locating the Crops, or their proceeds (which value is of some significance), and distributing the same to the Debtors' creditors.

164. Similar to the reasoning in *Ladacor*, while there might be possible ways of dealing with the missing Crops by way of the receivership process, the only effective way to do so is by assigning Kalco into bankruptcy since the Receiver has thus far been unable to locate or quantify he Crops.

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[100] *Gustin* at para 15 [**TAB 19**].

[101] *BIA*, s 163 [**TAB 1**].

165. Given the substantial value of the estimated 2020 Crops, it is in the interests of all stakeholders for the Receiver to be afforded access to the investigatory powers of the *BIA*.

166. The Receiver respectfully submits that it would be in the best interests of the creditors of the Debtor for this Honourable Court to exercise its authority and authorize the Receiver to assign the Companies into bankruptcy.

V. RELIEF CLAIMED

167. Based upon the materials filed and the foregoing submissions, the Receiver respectfully requests:

(a) An Order approving the sale of the Kalco Lands by way of Land APAs to purchasers with the Highest Bids and the sale of the Kalco Equipment by way of the Equipment APA to Ritchie Bros, and granting the Vesting Order;

(b) An Order directing that vacant possession of the Kalco Lands be granted to the purchasers with the highest bids on or before May 1, 2021;

(c) A Restricted Court Access Order, sealing the Confidential Appendix of the First Report on the Court record until the earlier of the Receiver writing the Clerk of the Court that the transactions contemplated in the First Report and Confidential Appendix have closed, or September 30, 2021;

(d) An Order permitting the Receiver to assign the Debtor, Kalco, into bankruptcy; and

(e) Such further or other relief as may be requested of the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6th DAY OF APRIL, 2021

MILLER THOMSON LLP

Per: 

Susy Trace
Counsel for the Applicant, The Bowra Group Inc. in its capacity as Receiver of the Debtor

TABLE OF AUTHORITIES

TAB

TAB 1

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 15, 2021

Last amended on November 1, 2019

À jour au 15 février 2021

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any inquiry or investigation that may be deemed necessary in respect of the conduct of the bankrupt, the causes of his bankruptcy and the disposition of his property, and the official receiver shall report the findings on any such inquiry or investigation to the Superintendent, the trustee and the court.

(2) [Repealed, 2005, c. 47, s. 98]

Application of section 164

(3) Section 164 applies in respect of an inquiry or investigation under subsection (1).

R.S., 1985, c. B-3, s. 162; 2004, c. 25, s. 76(F); 2005, c. 47, s. 98.

Examination of bankrupt and others by trustee

163 (1) The trustee, on ordinary resolution passed by the creditors or on the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent or a mandatary, or a clerk, a servant, an officer, a director or an employee of the bankrupt, respecting the bankrupt or the bankrupt's dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in that person's possession or power relating in all or in part to the bankrupt or the bankrupt's dealings or property.

Examination of bankrupt, trustee and others by a creditor

(2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

Examination to be filed

(3) The evidence of any person examined under this section shall, if transcribed, be filed in the court and may be read in any proceedings before the court under this Act to which the person examined is a party.

R.S., 1985, c. B-3, s. 163; 1997, c. 12, s. 96; 2004, c. 25, s. 77(E).

enquête ou investigation qui peut être estimée nécessaire au sujet de la conduite du failli, des causes de sa faillite et de la disposition de ses biens, et le séquestre officiel fait rapport des conclusions de toute enquête ou investigation de ce genre au surintendant, au syndic et au tribunal.

(2) [Abrogé, 2005, ch. 47, art. 98]

Application de l'art. 164

(3) L'article 164 s'applique relativement à une enquête ou à une investigation prévue par le paragraphe (1).

L.R. (1985), ch. B-3, art. 162; 2004, ch. 25, art. 76(F); 2005, ch. 47, art. 98.

Interrogatoire du failli et d'autres par le syndic

163 (1) Le syndic, sur une résolution ordinaire adoptée par les créanciers, ou sur la demande écrite ou résolution de la majorité des inspecteurs, peut, sans ordonnance, examiner sous serment, devant le registraire du tribunal ou une autre personne autorisée, le failli, toute personne réputée connaître les affaires du failli ou toute personne qui est ou a été mandataire, commis, préposé, dirigeant, administrateur ou employé du failli, au sujet de ce dernier, de ses opérations ou de ses biens, et il peut ordonner à toute personne susceptible d'être ainsi interrogée de produire les livres, documents, correspondance ou papiers en sa possession ou pouvoir qui se rapportent en totalité ou en partie au failli, à ses opérations ou à ses biens.

Examen par le créancier

(2) Sur demande faite au tribunal par un créancier, le surintendant ou une autre personne intéressée et sur preuve d'une raison suffisante, une ordonnance peut être rendue pour interroger sous serment, devant le registraire ou une autre personne autorisée, le syndic, le failli ou tout inspecteur ou créancier ou toute autre personne nommée dans l'ordonnance, afin d'effectuer une investigation sur l'administration de l'actif d'un failli; le tribunal peut en outre ordonner la production par la personne visée des livres, documents, correspondance ou papiers en sa possession ou son pouvoir qui se rapportent en totalité ou en partie au failli, au syndic ou à tout créancier, les frais de cet interrogatoire et de cette investigation étant laissés à la discrétion du tribunal.

L'interrogatoire doit être produit

(3) Le témoignage de toute personne interrogée sous l'autorité du présent article doit, s'il a été transcrit, être produit au tribunal et peut être lu lors de toute procédure prise devant le tribunal aux termes de la présente loi et à laquelle est partie la personne interrogée.

L.R. (1985), ch. B-3, art. 163; 1997, ch. 12, art. 96; 2004, ch. 25, art. 77(A).

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.

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.

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.

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.

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).

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 ».

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).

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).

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.

Lieu du dépôt

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

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

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

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,

or both.

Idem

(2) On the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt) or a creditor, made within six months after the statement of accounts was provided to the Superintendent pursuant to subsection 246(3), the court may order the receiver to submit the statement of accounts to the court for review, and the court may adjust, in such manner and to such extent as it considers proper, the fees and charges of the receiver as set out in the statement of accounts.

1992, c. 27, s. 89.

Receiver may apply to court for directions

249 A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

1992, c. 27, s. 89.

Right to apply to court

250 (1) An application may be made under section 248 or 249 notwithstanding any order of a court as defined in subsection 243(1).

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.

Idem

(2) Sur demande du surintendant, de la personne insolvable, du syndic — en cas de faillite — ou d'un créancier, présentée au plus tard six mois après la transmission au surintendant de l'état de comptes visé au paragraphe 246(3), le tribunal peut ordonner au séquestre de lui soumettre cet état de comptes pour examen; le tribunal peut, de la manière et dans la mesure qu'il estime indiquées, ajuster les honoraires et dépenses du séquestre qui y sont consignés.

1992, ch. 27, art. 89.

Instructions du tribunal

249 Le tribunal donne au séquestre qui lui en fait la demande les instructions écrites qu'il estime indiquées sur toute disposition de la présente partie.

1992, ch. 27, art. 89.

Ordonnance d'un autre tribunal

250 (1) Une demande peut être présentée aux termes des articles 248 ou 249 indépendamment de toute ordonnance qu'aurait pu rendre un tribunal au sens du paragraphe 243(1).

(f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

(h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(i) if he defaults in any proposal made under this Act; and

(j) if he ceases to meet his liabilities generally as they become due.

f) si, à une assemblée de ses créanciers, il produit un bilan démontrant qu'il est insolvable, ou présente ou fait présenter à cette assemblée un aveu par écrit de son incapacité de payer ses dettes;

g) s'il cède, enlève ou cache, ou essaie ou est sur le point de céder, d'enlever ou de cacher une partie de ses biens, ou en dispose ou essaie ou est sur le point d'en disposer, avec l'intention de frauder, frustrer ou retarder ses créanciers ou l'un d'entre eux;

h) s'il donne avis à l'un de ses créanciers qu'il a suspendu ou qu'il est sur le point de suspendre le paiement de ses dettes;

i) s'il fait défaut à toute proposition concordataire faite sous le régime de la présente loi;

j) s'il cesse de faire honneur à ses obligations en général au fur et à mesure qu'elles sont échues.

Unauthorized assignments are void or null

(2) Every assignment of an insolvent debtor's property other than an assignment authorized by this Act, made by an insolvent debtor for the general benefit of their creditors, is void or, in the Province of Quebec, null.

R.S., 1985, c. B-3, s. 42; 1997, c. 12, s. 26; 2004, c. 25, s. 27.

Les cessions non autorisées sont nulles

(2) Toute cession de ses biens, autre qu'une cession consentie conformément à la présente loi, faite par un débiteur insolvable au profit de ses créanciers en général, est nulle.

L.R. (1985), ch. B-3, art. 42; 1997, ch. 12, art. 26; 2004, ch. 25, art. 27.

Application for Bankruptcy Order

Requête en faillite

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

Requête en faillite

43 (1) Sous réserve des autres dispositions du présent article, un ou plusieurs créanciers peuvent déposer au tribunal une requête en faillite contre un débiteur :

a) d'une part, si la ou les dettes envers le ou les créanciers requérants s'élèvent à mille dollars et si la requête en fait mention;

b) d'autre part, si le débiteur a commis un acte de faillite dans les six mois qui précèdent le dépôt de la requête et si celle-ci en fait mention.

If applicant creditor is a secured creditor

(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

Cas où le créancier requérant est un créancier garanti

(2) Lorsque le créancier requérant est un créancier garanti, il doit, dans sa requête, ou déclarer qu'il consent à abandonner sa garantie au profit des créanciers dans le cas où une ordonnance de faillite est rendue contre le débiteur, ou fournir une estimation de la valeur de sa garantie; dans ce dernier cas, il peut être admis à titre de créancier requérant jusqu'à concurrence du solde de sa créance, déduction faite de la valeur ainsi estimée, comme s'il était un créancier non garanti.

Affidavit

(3) The application shall be verified by affidavit of the applicant or by someone duly authorized on their behalf having personal knowledge of the facts alleged in the application.

Consolidation of applications

(4) If two or more applications are filed against the same debtor or against joint debtors, the court may consolidate the proceedings or any of them on any terms that the court thinks fit.

Place of filing

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

Proof of facts, etc.

(6) At the hearing of the application, the court shall require proof of the facts alleged in the application and of the service of the application, and, if satisfied with the proof, may make a bankruptcy order.

Dismissal of application

(7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for other sufficient cause no order ought to be made, it shall dismiss the application.

Dismissal with respect to some respondents only

(8) If there are more respondents than one to an application, the court may dismiss the application with respect to one or more of them, without prejudice to the effect of the application as against the other or others of them.

Appointment of trustee

(9) On a bankruptcy order being made, the court shall appoint a licensed trustee as trustee of the property of the bankrupt, having regard, as far as the court considers just, to the wishes of the creditors.

Stay of proceedings if facts denied

(10) If the debtor appears at the hearing of the application and denies the truth of the facts alleged in the application, the court may, instead of dismissing the application, stay all proceedings on the application on any terms that it may see fit to impose on the applicant as to costs or on the debtor to prevent alienation of the debtor's

Affidavit

(3) La requête doit être attestée par un affidavit du requérant, ou d'une personne dûment autorisée en son nom, qui a une connaissance personnelle des faits qui y sont allégués.

Jonction des requêtes

(4) Lorsque plusieurs requêtes sont déposées contre le même débiteur ou contre des codébiteurs, le tribunal peut joindre les procédures, ou quelques-unes d'entre elles, aux conditions qu'il juge convenables.

Lieu du dépôt

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

Preuve des faits et de la signification

(6) À l'audition, le tribunal exige la preuve des faits allégués dans la requête et de la signification de celle-ci; il peut, s'il juge la preuve satisfaisante, rendre une ordonnance de faillite.

Rejet de la requête

(7) Lorsque le tribunal n'estime pas satisfaisante la preuve des faits allégués dans la requête, ou de la signification de celle-ci, ou si le débiteur lui a démontré à sa satisfaction qu'il est en état de payer ses dettes, ou si le tribunal juge que, pour toute autre cause suffisante, aucune ordonnance ne devrait être rendue, il doit rejeter la requête.

Rejet de la requête à l'égard de certains défendeurs seulement

(8) Lorsqu'il y a plus d'un défendeur dans une requête, le tribunal peut rejeter la requête relativement à l'un ou à plusieurs d'entre eux, sans préjudice de l'effet de la requête à l'encontre de l'autre ou des autres défendeurs.

Nomination de syndics

(9) Lorsqu'une ordonnance de faillite est rendue, le tribunal nomme un syndic autorisé à titre de syndic des biens du failli en tenant compte, dans la mesure où le tribunal le juge équitable, de la volonté des créanciers.

Sursis des procédures

(10) Lorsque le débiteur comparaît relativement à la requête et nie la véracité des faits qui y sont allégués, le tribunal peut, au lieu de rejeter la requête, surseoir aux procédures relatives à la requête aux conditions qu'il juge convenable d'imposer au requérant quant aux frais ou au

property and for any period of time that may be required for trial of the issue relating to the disputed facts.

Stay of proceedings for other reasons

(11) The court may for other sufficient reason make an order staying the proceedings under an application, either altogether or for a limited time, on any terms and subject to any conditions that the court may think just.

Security for costs

(12) Applicants who are resident out of Canada may be ordered to give security for costs to the debtor, and proceedings under the application may be stayed until the security is furnished.

Bankruptcy order on another application

(13) If proceedings on an application have been stayed or have not been prosecuted with due diligence and effect, the court may, if by reason of the delay or for any other cause it is considered just, substitute or add as applicant any other creditor to whom the debtor may be indebted in the amount required by this Act and make a bankruptcy order on the application of the other creditor, and shall, immediately after making the order, dismiss on any terms that it may consider just the application in the stayed or non-prosecuted proceedings.

Withdrawing application

(14) An application shall not be withdrawn without the leave of the court.

Application against one partner

(15) Any creditor whose claim against a partnership is sufficient to entitle the creditor to present a bankruptcy application may present an application against any one or more partners of the firm without including the others.

Court may consolidate proceedings

(16) If a bankruptcy order has been made against one member of a partnership, any other application against a member of the same partnership shall be filed in or transferred to the same court, and the court may give any directions for consolidating the proceedings under the applications that it thinks just.

débiteur afin d'empêcher l'aliénation de ses biens, et pendant le temps nécessaire à l'instruction de la contestation.

Suspension des procédures pour autres raisons

(11) Le tribunal peut, pour d'autres raisons suffisantes, rendre une ordonnance suspendant les procédures intentées dans le cadre d'une requête, soit absolument, soit pour un temps limité, aux conditions qu'il juge équitables.

Cautionnement pour frais

(12) Le requérant qui réside à l'étranger peut être contraint de fournir au débiteur un cautionnement pour les frais, et les procédures découlant de la requête peuvent être suspendues jusqu'à ce que le cautionnement soit fourni.

Ordonnance de faillite sur autre requête

(13) Lorsque des procédures relatives à une requête ont été suspendues ou n'ont pas été poursuivies avec la diligence et l'effet voulus, le tribunal peut, s'il croit juste de le faire en raison du retard ou pour toute autre cause, substituer au requérant ou lui adjoindre tout autre créancier envers qui le débiteur peut être endetté de la somme prévue par la présente loi; il peut rendre une ordonnance de faillite sur la requête d'un tel autre créancier, et doit dès lors rejeter, aux conditions qu'il croit justes, la requête dont les procédures ont été suspendues ou n'ont pas été poursuivies.

Retrait d'une requête

(14) Une requête ne peut être retirée sans l'autorisation du tribunal.

Requête contre un associé

(15) Tout créancier dont la réclamation contre une société de personnes est suffisante pour l'autoriser à présenter une requête en faillite peut présenter une requête contre un ou plusieurs membres de cette société, sans y inclure les autres.

Jonction des procédures par le tribunal

(16) Lorsqu'une ordonnance de faillite a été rendue contre un membre d'une société de personnes, toute autre requête contre un membre de la même société est déposée ou renvoyée au même tribunal, et ce dernier peut donner les instructions qui lui semblent justes pour joindre les procédures intentées dans le cadre des requêtes.

Meaning of disbursements

(2) In subsection (1), "disbursements" do not include payments made in operating a business of the debtor.

Accounts, discharge of interim receivers

(3) With respect to interim receivers appointed under section 46, 47 or 47.1,

(a) the form and content of their accounts, including their final statement of receipts and disbursements,

(b) the procedure for the preparation and taxation of those accounts, and

(c) the procedure for the discharge of the interim receiver

shall be as prescribed.

1992, c. 27, s. 16; 2004, c. 25, s. 30; 2005, c. 47, s. 32; 2015, c. 3, s. 7(F).

Application of sections 43 to 46

48 Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

R.S., 1985, c. B-3, s. 48; 1997, c. 12, s. 28.

Assignments

Assignment for general benefit of creditors

49 (1) An insolvent person or, if deceased, the executor or administrator of their estate or the liquidator of the succession, with the leave of the court, may make an assignment of all the insolvent person's property for the general benefit of the insolvent person's creditors.

Sworn statement

(2) The assignment must be accompanied by a sworn statement in the prescribed form showing the debtor's property that is divisible among his or her creditors, the names and addresses of all his or her creditors and the amounts of their respective claims.

Filing of assignment

(3) The assignment made under subsection (1) shall be offered to the official receiver in the locality of the debtor, and it is inoperative until filed with that official receiver, who shall refuse to file the assignment unless it is in the prescribed form or to the like effect and accompanied by the sworn statement required by subsection (2).

Sens de débours

(2) Pour l'application du paragraphe (1), ne sont pas compris parmi les débours les paiements effectués dans le cadre des opérations propres aux affaires du débiteur.

Comptes et libération du séquestre intérimaire

(3) La forme et le contenu des comptes — y compris l'état définitif des recettes et des débours — du séquestre intérimaire nommé aux termes des articles 46, 47 ou 47.1 et la procédure à suivre pour leur préparation et leur taxation, ainsi que pour la libération du séquestre intérimaire sont déterminés par les Règles générales.

1992, ch. 27, art. 16; 2004, ch. 25, art. 30; 2005, ch. 47, art. 32; 2015, ch. 3, art. 7(F).

Application des art. 43 à 46

48 Les articles 43 à 46 ne s'appliquent pas au particulier dont la principale activité — et la principale source de revenu — est la pêche, l'agriculture ou la culture du sol, ni au particulier qui travaille pour un salaire, un traitement, une commission ou des gages ne dépassant pas deux mille cinq cents dollars par année et qui n'exerce pas un commerce pour son propre compte.

L.R. (1985), ch. B-3, art. 48; 1997, ch. 12, art. 28.

Cessions

Cession au profit des créanciers en général

49 (1) Une personne insolvable ou, si elle est décédée, l'exécuteur testamentaire, le liquidateur de la succession ou l'administrateur à la succession, avec la permission du tribunal, peut faire une cession de tous ses biens au profit de ses créanciers en général.

Déclaration sous serment

(2) La cession est accompagnée d'une déclaration sous serment dans la forme prescrite, indiquant les biens du débiteur susceptibles d'être partagés entre ses créanciers, les noms et adresses de tous ses créanciers et les montants de leurs réclamations respectives.

Production de la cession

(3) La cession est présentée au séquestre officiel dans la localité du débiteur, et elle est inopérante tant qu'elle n'a pas été déposée auprès de ce séquestre officiel qui en refuse la production, à moins qu'elle ne soit en la forme

prescrite ou en des termes ayant le même effet, et accompagnée de la déclaration sous serment requise au paragraphe (2).

Appointment of trustee

(4) Where the official receiver files the assignment made under subsection (1), he shall appoint as trustee a licensed trustee whom he shall, as far as possible, select by reference to the wishes of the most interested creditors if ascertainable at the time, and the official receiver shall complete the assignment by inserting therein as grantee the name of the trustee.

Nomination de syndic

(4) Lorsque le séquestre officiel accepte la production de la cession, il nomme comme syndic un syndic autorisé qu'il choisira, autant que faire se peut, en tenant compte des désirs des créanciers les plus intéressés, s'il est possible de s'en rendre compte à ce moment. Le séquestre officiel complète la cession en y insérant comme cessionnaire le nom du syndic.

Cancellation of assignment

(5) Where the official receiver is unable to find a licensed trustee who is willing to act, the official receiver shall, after giving the bankrupt five days notice, cancel the assignment.

Annulation de cession

(5) Le séquestre officiel annule la cession, sur préavis de cinq jours au failli, lorsqu'il ne peut trouver un syndic autorisé qui consente à agir.

Procedure in small estates

(6) Where the bankrupt is not a corporation and in the opinion of the official receiver the realizable assets of the bankrupt, after the claims of secured creditors are deducted, will not exceed five thousand dollars or such other amount as is prescribed, the provisions of this Act relating to the summary administration of estates shall apply.

Procédures à l'égard d'actifs peu considérables

(6) Lorsque le failli n'est pas une personne morale et que, de l'avis du séquestre officiel, ses avoirs réalisables, déduction faite des réclamations des créanciers garantis, ne dépassent pas cinq mille dollars ou tout autre montant prescrit, les dispositions de la présente loi concernant l'administration sommaire des actifs s'appliquent.

Future property not to be considered

(7) In the determination of the realizable assets of a bankrupt for the purposes of subsection (6), no regard shall be had to any property that may be acquired by the bankrupt or devolve on the bankrupt before the bankrupt's discharge.

Exclusion des biens futurs

(7) Il n'est pas tenu compte pour la détermination des avoirs réalisables du failli des biens que celui-ci peut acquérir ou qui peuvent lui être dévolus avant sa libération.

Where subsection (6) ceases to apply

(8) The official receiver may direct that subsection (6) shall cease to apply in respect of the bankrupt where the official receiver determines that

(a) the realizable assets of the bankrupt, after the claims of secured creditors are deducted, exceed five thousand dollars or the amount prescribed, as the case may be, or

(b) the costs of realization of the assets of the bankrupt are a significant proportion of the realizable value of the assets,

and the official receiver considers that such a direction is appropriate.

R.S., 1985, c. B-3, s. 49; 1992, c. 1, s. 15, c. 27, s. 17; 1997, c. 12, s. 29; 2004, c. 25, s. 31(E); 2005, c. 47, s. 33.

Cessation d'effet du paragraphe (6)

(8) Le séquestre officiel peut ordonner que le paragraphe (6) cesse de s'appliquer au failli s'il détermine que les avoirs réalisables de celui-ci, déduction faite des réclamations des créanciers garantis, dépassent cinq mille dollars ou le montant prescrit, ou que les coûts de réalisation de ces avoirs représentent une partie importante de leur valeur réalisable, et s'il estime pareille mesure indiquée.

L.R. (1985), ch. B-3, art. 49; 1992, ch. 1, art. 15, ch. 27, art. 17; 1997, ch. 12, art. 29; 2004, ch. 25, art. 31(A); 2005, ch. 47, art. 33.

TAB 2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

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.

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*

British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*

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.) — *referred to*

Crown Trust Co. v. Rosenburg (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.) — *applied*

Salima 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) (C.A.) — *referred to*

Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

Employment Standards Act, R.S.O. 1980, c. 137.

Environmental Protection Act, R.S.O. 1980, c. 141.

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 do ing 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.

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 considera tion 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 *Salima 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 or der to make a serious bid.

51 The offering memorandum had not been completed by February11, 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 JJ.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. 11-12 [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 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 negligence 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 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 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 con stitutes proximately 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 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.

TAB 3

2019 ABCA 433
Alberta Court of Appeal

Pricewaterhousecoopers Inc v. 1905393 Alberta Ltd

2019 CarswellAlta 2418, 2019 ABCA 433, [2019] A.W.L.D. 4519,
312 A.C.W.S. (3d) 237, 74 C.B.R. (6th) 14, 98 Alta. L.R. (6th) 1

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd. (Respondent / Cross-Appellants / Applicant) and 1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd. (Appellants / Cross-Respondents / Respondents) and Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd. (Respondents / Interested Parties)

Thomas W. Wakeling, Dawn Pentelechuk, Jolaine Antonio JJ.A.

Heard: September 3, 2019
Judgment: November 14, 2019
Docket: Edmonton Appeal 1903-0134-AC

Counsel: D.M. Nowak, J.M. Lee, Q.C., for Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393 Alberta Ltd.
D.R. Peskett, C.M. Young, for Appellants
C.P. Russell, Q.C., R.T. Trainer, for Respondent, Servus Credit Union Ltd.
S.A. Wanke, for Respondent, Ducor Properties Ltd.
S.T. Fitzgerald, for Respondent, Northern Electric Ltd.
H.S. Kandola, for Respondent, Fancy Doors & Mouldings Ltd.

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous

Appellants appeal Approval and Vesting Order which approved sale proposed in Asset Purchase Agreement between Receiver, PWC, and respondent, D Ltd. — Appeal dismissed — Chambers judge was keenly alive to abbreviated marketing period and appraised values of hotels — Nevertheless, having regard to unique nature of property, incomplete construction of development hotel, difficulties with prospective purchasers in branding hotels in area outside of major centre and area which was in midst of economic downturn, she concluded that receiver acted in commercially reasonable manner and obtained best price possible in circumstances — Even with abbreviated period for submission of offers, chambers judge reasonably concluded that receiver undertook extensive marketing campaign, engaged commercial realtor and construction consultant, and consulted and dialogued with owner throughout process, which process appellants took no issue with, until offers were received.

Table of Authorities

Cases considered:

Bank of Montreal v. River Rentals Group Ltd. (2010), 2010 ABCA 16, 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 470 W.A.C. 333, 469 A.R. 333, 63 C.B.R. (5th) 26 (Alta. C.A.) — considered

Northstone Power Corp. v. R.J.K. Power Systems Ltd. (2002), 2002 ABCA 201, 2002 CarswellAlta 1111, 36 C.B.R. (4th) 272, 317 A.R. 192, 284 W.A.C. 192 (Alta. C.A.) — referred to

Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc. (2013), 2013 BCSC 2222, 2013 CarswellBC 3640, 12 C.B.R. (6th) 282 (B.C. S.C.) — referred to

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

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 1985 CarswellAlta 332 (Alta. C.A.) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

1905393 Alberta Ltd v. Servus Credit Union Ltd (2019), 2019 ABCA 269, 2019 CarswellAlta 1342, 72 C.B.R. (6th) 20 (Alta. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(c) — considered

s. 193(e) — considered

***Per curiam*:**

1 The appellants appeal an Approval and Vesting Order granted on May 21, 2019 which approved a sale proposed in the May 3, 2019 Asset Purchase Agreement between the Receiver, PriceWaterhouseCoopers, and the respondent, Ducor Properties Ltd ("Ducor"). The assets consist primarily of lands and buildings in Grande Prairie, Alberta described as a partially constructed 169 room full service hotel not currently open for business (the "Development Hotel") and a 63 room extended stay hotel ("Extended Stay Hotel") currently operating on the same parcel of land (collectively the "Hotels"). The Hotels are owned by the appellant, 1905393 Alberta Ltd. ("190") whose shareholder is the appellant, Stellar One Holdings Ltd, and whose president and sole director is the appellant, David Podollan.

2 The respondent, Servus Credit Union Ltd ("Servus"), is 190's largest secured creditor. Servus provided financing to 190 for construction of the Hotels. On May 16, 2018, Servus issued a demand for payment of its outstanding debt. As of June 29, 2018, 190 owed Servus approximately $23.9 million. That debt remains outstanding and, in fact, continues to increase because of interest, property taxes and ongoing carrying costs for the Hotels incurred by the Receiver.

3 On July 20, 2018, the Receiver was appointed over all of 190's current and future assets, undertakings and properties. The appellants opposed the Receiver's appointment primarily on the basis that 190 was seeking to re-finance the Hotels. That re-financing has never materialized.

4 As a result, the Receiver sought in October 2018 to liquidate the Hotels. In typical fashion, the Receiver obtained an appraisal of the Hotels, as did the respondents. After consulting with three national real estate brokers, the Receiver engaged the services of Colliers International ("Colliers"), which recommended a structured sales process with no listing price and a fixed bid submission date. While the sales process contemplated an exposure period of approximately six weeks between market launch and offer submission deadline, Colliers had contacted over 1,290 prospective purchasers and agents using a variety of mediums in the months prior to market launch, exposing the Hotels to national hotel groups and individuals in the industry, and conducted site visits and answered inquiries posed by prospective buyers. Prospective purchasers provided feedback to Colliers but that included concerns about the quality of construction on the Development Hotel.

5 The Receiver also engaged the services of an independent construction consultant, Entuitive Corporation, to provide an estimate of the cost to complete construction on the Development Hotel and to assist in decision-making on whether to complete the Development Hotel. In addition, the Receiver contacted a major international hotel franchise brand to obtain input on prospective franchisees' views of the design and fixturing of the Development Hotel. The ability to brand the Hotels

is a significant factor affecting their marketability. Moreover, some of the feedback confirmed that energy exploration and development in Grande Prairie is down, resulting in downward pressure on hotel-room demand.

6 Parties that requested further information in response to the listing were asked to execute a confidentiality agreement whereupon they were granted access to a "data-room" containing information on the Hotels and offering related documents and photos. Colliers provided confidential information regarding 190's assets to 27 interested parties.

7 The deadline for offer submission yielded only four offers, each of which was far below the appraised valued of the Hotels. Three of the four offers were extremely close in respect of their stated price; the fourth offer was significantly lower than the others. As a result, the Receiver went back to the three prospective purchasers that had similar offers and asked them to re-submit better offers. None, however, varied their respective purchase prices in a meaningful manner when invited to do so. The Receiver ultimately accepted and obtained approval for Ducor's offer to purchase which, as the appellants correctly point out, is substantially less than the appraised value of the Hotels.

8 The primary thrust of the appellants' argument is that an abbreviated sale process resulted in an offer which is unreasonably low having regard to the appraisals. They argue that the Receiver was improvident in accepting such an offer and the chambers judge erred by approving it. Approving the sale, they argue, would eliminate the substantial equity in the property evidenced by the appraised value and that the "massive prejudice" caused to them as a result materially outweighs any further time and cost associated with requiring the Receiver to re-market the Hotels with a longer exposure time. Mr. Podollan joins in this argument as he is potentially liable for any shortfall under personal guarantees to Servus for all amounts owed to Servus by 190. The other respondents, Fancy Doors & Mouldings Ltd and Northern Electric Ltd, similarly echo the appellants' arguments as the shortfall may deprive them both from collecting on their builders' liens which, collectively, total approximately $340,000.

9 The appellants obtained both a stay of the Approval and Vesting Order and leave to appeal pursuant to s 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: *1905393 Alberta Ltd v. Servus Credit Union Ltd*, [2019] A.J. No. 895, 2019 ABCA 269 (Alta. C.A.). The issues around which leave was granted generally coalesce around two questions. First, whether the chambers judge applied the correct test in deciding whether to approve of the Receiver recommended sale; and second, whether the chambers judge erred in her application of the legal test to the facts in deciding whether to approve the sale and, in particular, erred in her exercise of discretion by failing to consider or provide sufficient weight to a relevant factor. The standard of review is correctness on the first question and palpable and overriding error on the second: *Northstone Power Corp. v. R.J.K. Power Systems Ltd.*, 2002 ABCA 201 (Alta. C.A.) at para 4, (2002), 317 A.R. 192 (Alta. C.A.).

10 As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.) at para 16, (1991), 46 O.A.C. 321 (Ont. C.A.) ("*Soundair*"). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

11 The appellants suggest that *Soundair* has been modified by our Court in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 13, (2010), 469 A.R. 333 (Alta. C.A.), to require an additional four factors in assessing whether a receiver has complied with its duties: (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic; (b) whether the circumstances indicate that insufficient time was allowed for the making of bids; (c) whether inadequate notice of sale by bid was given; and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner. The appellants argue that, although the chambers judge considered the *Soundair* factors, she erred by failing to consider the additional *River Rentals* factors and, in so doing, in effect applied the "wrong law".

12 We disagree. The chambers judge expressly referred to the *River Rentals* case. *River Rentals*, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the *Soundair* test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: *Salima*

Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (Alta. C.A.) at paras 12-13. At its core, *River Rentals* highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the *Soundair* test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

13 At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) at para 4, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]), aff'd on appeal (2000), 15 C.B.R. (4th) 298 (Ont. C.A.).

14 Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: *Soundair* at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": *Soundair* at para 22.

15 The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers — of which there is absolutely none — the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 (Alta. C.A.) at para 13.

16 Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": *Romspen Mortgage Corp. v. Lantzville Foothills Estates Inc.*, 2013 BCSC 2222 (B.C. S.C.) at para 20.

17 The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.

18 We see no reviewable error. This ground of appeal is also dismissed.

19 Finally, leave to appeal was also granted on whether s 193 of the *Bankruptcy and Insolvency Act*, and specifically s 193(a) or (c) of the Act, creates a leave to appeal as of right in these circumstances or whether leave to appeal is required pursuant to s 193(e). As the appeal was also authorized under s 193(e), we find it unnecessary to address whether this case meets the criteria for leave as of right in s 193(a)-(d) of the Act.

Appeal dismissed.

TAB 4

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.

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.

Table of Authorities

Cases considered by *Lee J.*:

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 (N.S. C.A.) — distinguished

Royal Bank v. Fracmaster Ltd. (1999), 245 A.R. 138, 11 C.B.R. (4th) 217 (Alta. Q.B.) — referred to

Royal Bank v. Fracmaster Ltd. (1999), *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 244 A.R. 93, *(*sub nom. *UTI Energy Corp. v. Fracmaster Ltd.)* 209 W.A.C. 93, 11 C.B.R. (4th) 230 (Alta. C.A.) — applied

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

Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473, 65 A.R. 372, 59 C.B.R. (N.S.) 242 (Alta. C.A.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) — applied

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — considered

Statutes considered:

Personal Property Security Act, S.A. 1988, c. P-4.05

Generally — referred to

s. 60 — pursuant to

s. 60(15) — pursuant to

s. 66(1) — considered

***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 Montreal* (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 mad 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.

17 The Receiver/Manager rely on the case of *Skyepharma 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 *Skyepharma*, 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 *Skyepharma*, 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 *Skyepharma* 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:

> 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 Plimsoll 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 affect 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 *Skyepharma* 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

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 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 5

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.

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.

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 *Skyepharma 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.

TAB 6

Province of Alberta

RESIDENTIAL TENANCIES ACT

Statutes of Alberta, 2004
Chapter R-17.1

Current as of July 23, 2020

Office Consolidation

Alberta Queen's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952
Fax: 780-452-0668

E-mail: qp@gov.ab.ca
Shop on-line at www.qp.alberta.ca

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of Alberta, enacts as follows:

Interpretation

1(1) In this Act,

(a) "child" means a person under 18 years of age;

(a.1) "common areas" means areas controlled by a landlord and used for access to residential premises or for the service or enjoyment of tenants;

(b) "council" means

(i) the council of a city, town, village, municipal district or Metis settlement,

(ii) in the case of an improvement district, the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for the *Municipal Government Act*, or

(iii) in the case of a special area, the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for the *Special Areas Act*;

(c) "court" means

(i) the Provincial Court, or

(ii) the Court of Queen's Bench;

(d) "Director" means the Director of Residential Tenancies appointed under section 55;

(e) "fixed term tenancy" means a tenancy under a residential tenancy agreement for a term that ends on a day specified in the agreement;

(f) "landlord" means

(i) the owner of the residential premises,

(ii) a property manager who acts as agent for the owner of the residential premises and any other person who, as agent for the owner, permits the occupation of the residential premises under a residential tenancy agreement,

(iii) the heirs, assigns, personal representatives and successors in title of the owner of the residential premises, and

(iv) a person who is entitled to possession of the residential premises, other than a tenant, and who attempts to enforce any of the rights of a landlord under a residential tenancy agreement or this Act;

(g) "Minister" means the Minister determined under section 16 of the *Government Organization Act* as the Minister responsible for this Act;

(h) "overholding tenant" means a person who was a tenant of premises and who does not vacate the premises after the tenancy has expired or been terminated;

(i) "periodic tenancy" means

(i) a tenancy under a residential tenancy agreement that is renewed or continued without notice,

(ii) with respect to a fixed term tenancy that contains a provision allowing for renewal or continuation of the tenancy without notice, that part of the tenancy that arises after the end of the fixed term tenancy, and

(iii) with respect to a fixed term tenancy that does not contain a provision referred to in subclause (ii), the part of the tenancy that arises after the end of the fixed term tenancy, where the landlord and tenant by their conduct expressly or impliedly indicate that they intend that the tenancy be renewed or continued after the end of the fixed term tenancy;

(j) "prescribed" means prescribed by regulation;

(j.1) "protected adult" means an assisted adult, represented adult or supported adult as defined in the *Adult Guardianship and Trusteeship Act*;

(k) "rent" means the consideration to be paid by a tenant to a landlord under a residential tenancy agreement, but does not include a security deposit;

(l) "residential premises" means any place occupied by an individual as a residence;

(m) "residential tenancy agreement" means a written, oral or implied agreement to rent residential premises;

(n) "security deposit" means any money, property or right paid or given by a tenant of residential premises to a landlord

(i) to be held by or for the landlord as security for the performance of an obligation or the payment of a liability by the tenant, or

(ii) to be returned to the tenant on the happening of a condition;

(n.1) "stalking" means repeated conduct by a person, without lawful excuse or authority, that the person knows or reasonably ought to know constitutes harassment of another person and causes that other person to fear for his or her personal safety;

(o) "subsidized public housing" means residential premises rented to a tenant of low income who pays rent that is

(i) reduced by reason of public funding provided by the government of Canada or Alberta or a municipality, or by their agents, under the *National Housing Act* (Canada) or the *Alberta Housing Act* or its predecessor, and

(ii) determined by the tenant's income;

(p) "substantial breach" means

(i) on the part of a tenant, a breach of a covenant specified in section 21 or a series of breaches of a residential tenancy agreement, the cumulative effect of which is substantial, and

(ii) on the part of a landlord, a breach of a covenant specified in section 16(c);

(q) "tenancy month" means the period on which a monthly periodic tenancy is based whether or not it is a calendar month, and the month begins on the day rent is payable unless another date is specified in the residential tenancy agreement;

(r) "tenancy week" means the period on which a weekly periodic tenancy is based whether or not it is a calendar week, and the week begins on the day rent is payable unless another date is specified in the residential tenancy agreement;

(s) "tenancy year" means the period on which a yearly periodic tenancy is based whether or not it is a calendar year, and the year begins on the day, or the anniversary of the day, on which the tenant first becomes entitled to possession unless another day is specified in the residential tenancy agreement;

(t) "tenant" means

(i) a person who is permitted by the landlord to occupy residential premises under a residential tenancy agreement,

(ii) a person who is permitted to occupy residential premises under an assignment or sublease of a residential tenancy agreement to which the landlord has consented under section 22, and

(iii) an heir, assign or personal representative of a person referred to in subclause (i) or (ii).

(2) A reference to "tenant" in the following provisions includes a person who was a tenant of premises whose tenancy has expired or been terminated and who has vacated the premises:

section 1(1)(n);
section 19(2), (3);
section 25(b);
section 31;
section 37;
section 41;
section 44(5)(a);
section 46;
section 60(3), (5);
section 70(1)(h).

Part 1
Periodic Tenancies

Notice of termination of periodic tenancy

5(1) A weekly, monthly or yearly tenancy may be terminated by either the landlord or the tenant on notice to the other.

(2) The notice

(a) must be served in sufficient time to give the period of notice required by section 7, 8, 9, 11 or 12, as the case may be, and

(b) must meet the requirements of section 10.

(3) A tenancy not referred to in subsection (1) that is terminable on notice must, unless otherwise agreed, be terminated as provided by section 10 and the notice must be served on the landlord or tenant, as the case may be.

(4) If a periodic tenancy of residential premises is for a period of more than one week but less than one year, that tenancy is, for the purposes of terminating the tenancy, deemed to be a monthly tenancy.

(5) A period of notice required by section 7, 8, 9, 11 or 12 may be modified by a regulation made under section 70(1)(c.1).

2004 cR-17.1 s5;2007 c11 s1

Termination by landlord

6(1) A notice under this Part from a landlord to a tenant to terminate a periodic tenancy is of no effect unless the termination is for one or more of the prescribed reasons or for the reasons set out in section 11 or 12.

(2) A landlord who gives a notice under this Part to a tenant to terminate a periodic tenancy for one or more of the prescribed reasons or for the reasons set out in section 12 contravenes this Act if the tenant vacates the premises and the landlord does not use the premises for the reasons set out in the notice within a reasonable time after the termination date set out in the notice.

Notice to terminate weekly tenancy

7 A notice to terminate a weekly tenancy given by a landlord or tenant must be served on the other party on or before the first day of the tenancy week to be effective on the last day of that tenancy week.

Notice to terminate monthly tenancy

8(1) A notice to terminate a monthly tenancy must be served

(a) by a tenant on the tenant's landlord, on or before the first day of a tenancy month to be effective on the last day of that tenancy month, or

(b) by a landlord on the landlord's tenant, on or before the first day of a notice period to be effective on the last day of the notice period.

(2) In this section and section 10(2)(b), "notice period" means a period of 3 consecutive tenancy months.

Notice to terminate yearly tenancy

9 A notice to terminate a yearly tenancy must be served

(a) by a tenant on the tenant's landlord, on or before the 60th day before the last day of a tenancy year, or

(b) by a landlord on the landlord's tenant, on or before the 90th day before the last day of a tenancy year,

to be effective on the last day of the tenancy year.

Form of notice

10(1) A notice to terminate a tenancy must

(a) be in writing,

(b) be signed by the person giving the notice or the person's agent,

(c) in the case of a landlord terminating the tenancy, set out the reasons for which the tenancy is being terminated,

(d) identify the premises in respect of which the notice is served, and

(e) state the date on which the tenancy is to terminate.

(2) If a notice to terminate a weekly, monthly or yearly tenancy is not served in sufficient time to give the period of notice required by section 7, 8 or 9, as the case may be, the notice is still effective to terminate

(a) the weekly tenancy on the last day of the first complete tenancy week following the date on which the notice is served,

(b) the monthly tenancy

(i) if the notice is served by a tenant on the tenant's landlord, on the last day of the first complete tenancy month following the date on which the notice is served, or

(ii) if the notice is served by a landlord on the landlord's tenant, on the last day of the first complete notice period following the date on which the notice is served,

or

(c) the yearly tenancy

(i) if the notice is served before the end of the tenancy year by a tenant on the tenant's landlord, 60 days from the date on which the notice is served, or

(ii) if the notice is served before the end of the tenancy year by a landlord on the landlord's tenant, 90 days from the date on which the notice is served.

(3) Subsection (2) does not apply to a notice to terminate under section 11 or 12.

Notice to terminate tenancy of employee

11 If a periodic tenancy of residential premises has been entered into by reason of the tenant's employment by the landlord and that employment is terminated, either the landlord or the tenant may terminate the tenancy by serving notice on the other party in sufficient time to provide a period of notice of termination of the tenancy that is

(a) a period equal to

(i) the period of notice of termination of employment required under any law in force in Alberta that is applicable to the tenant's employment,

(ii) the period of notice of termination of employment agreed on by the landlord and the tenant, or

(iii) one week,

whichever is longest, or

(b) a period prescribed in or determined in accordance with the regulations.

Notice to terminate for condominium conversion

12(1) In this section,

(a) "condominium plan" means a condominium plan as defined in the *Condominium Property Act*;

(b) "condominium unit" means a unit as defined in the *Condominium Property Act*.

(2) If after the commencement of a periodic tenancy of residential premises

(a) a condominium plan that includes or is proposed to include those residential premises is registered or is proposed to be registered in the land titles office, and

(b) termination of that tenancy is sought for the purpose of obtaining vacant possession of the residential premises in order that the residential premises or any part of them may be sold as a condominium unit or as part of a condominium unit,

the landlord may terminate that tenancy by serving a notice of termination on the tenant at least 180 days before the day named in the notice for the termination of the residential tenancy agreement.

(3) Notwithstanding subsection (2), if the residential tenancy agreement is terminated by the tenant before the day specified in the notice, the landlord may rent the premises to another tenant for the period remaining until the day specified in the notice, if the landlord gives that tenant notice of the termination date before entering into the residential tenancy agreement.

Implied periodic tenancy

13 When a periodic tenancy is implied by operation of law after the expiration or termination of a prior fixed term tenancy, the implied tenancy, in the absence of facts showing a contrary intention, is

(a) if the prior tenancy was for a fixed term of one month or more, a monthly tenancy, or

(b) if the prior tenancy was for a fixed term of less than one month, a weekly tenancy.

Notice of increase in rent

14(1) A landlord shall not increase the rent payable under a residential tenancy agreement or recover any additional rent resulting from an increase unless the landlord serves on the tenant a written notice of the increase in rent

(a) in respect of a weekly tenancy, at least 12 tenancy weeks,

(b) in respect of a monthly tenancy, at least 3 tenancy months, and

(c) in respect of any other periodic tenancy, at least 90 days,

before the date on which the increase is to be effective.

(2) A notice under this section must indicate the date on which the increase is to be effective and must be dated and signed by the landlord.

(3) If the residential tenancy agreement provides for a period of notice longer than the period specified in subsection (1), the landlord must give at least that longer period of notice before increasing the rent payable or recovering any additional rent resulting from the increase.

(4) A landlord shall not increase the rent payable under a residential tenancy agreement or recover any additional rent resulting from an increase unless the prescribed amount of time has passed, which shall not be less than 1 year.

(5) A tenant under a periodic tenancy who receives a notice under this section and who fails to give to the landlord notice of termination effective on or before the date the rent increase is to be effective is deemed to have agreed to the increase in rent.

(6) A notice of increase in rent that does not comply with or is not given in accordance with this section is void.

(7) A tenant who pays increased rent pursuant to a notice of increase in rent that does not comply with or is not given in accordance with this section may recover the amount by which the rent was increased in an action in debt.

(8) A period of notice required by this section may be modified by a regulation made under section 70(1)(c.1).

2004 cR-17.1 s14;2007 c11 s1

Prohibition on rent increases in emergency

14.1(1) In this section, "emergency end date" means the date of the lapse or termination of the state of public health emergency declared under Order in Council 80/2020 or such alternative date as may be prescribed.

(2) If a tenancy expires or is terminated on or after March 27, 2020, and the landlord and tenant enter into a new residential tenancy agreement in respect of the same residential premises that was the subject of the expired or terminated residential tenancy agreement during the period beginning on March 27, 2020 and ending on the emergency end date, the rent payable under the new residential tenancy agreement from the date the agreement was entered into until the emergency end date is deemed to be the amount of rent payable under the residential tenancy agreement that was in force immediately prior to the date on which the landlord and tenant entered into the new residential tenancy agreement.

(3) Despite section 14, a landlord shall not increase the rent payable under an existing residential tenancy agreement until after the emergency end date where

(a) a landlord has given a tenant a written notice of an increase in the rent in accordance with section 14, and

(b) the notice period required under section 14(1) is to elapse during the period beginning on March 27, 2020 and ending on the emergency end date.

2020 c6 s3;2020 cC-19.5 s12

Part 2
Obligations of Landlords and Tenants

Notice to terminate not required

15 Notwithstanding any agreement to the contrary, notice to terminate is not required in order to terminate a fixed term tenancy.

Landlord's covenants

16 The following covenants of the landlord form part of every residential tenancy agreement:

(a) that the premises will be available for occupation by the tenant at the beginning of the tenancy;

(b) that, subject to section 23, neither the landlord nor a person having a claim to the premises under the landlord will in any

significant manner disturb the tenant's possession or peaceful enjoyment of the premises;

(c) that the premises will meet at least the minimum standards prescribed for housing premises under the *Public Health Act* and regulations.

Copy of agreement for tenant

17(1) If a residential tenancy agreement is in writing and the tenant has signed and returned the written residential tenancy agreement to the landlord, the landlord shall, within 21 days after the written residential tenancy agreement is returned to the landlord, serve on the tenant a copy of the written residential tenancy agreement signed by the landlord.

(2) A tenant may withhold payment of rent until the tenant is served with a copy of the residential tenancy agreement under subsection (1).

Notice of landlord

18(1) In this section, "notice of landlord" means a written notice that is dated and signed by the landlord and sets out the name of one of the persons who falls within the definition of landlord and a postal address and physical location in Canada for that person.

(2) When a tenant enters into a residential tenancy agreement with a landlord, the landlord shall serve the tenant with a notice of landlord within 7 days after the day on which the tenant takes possession of the residential premises.

(3) A landlord of residential premises that are contained in a building or complex with common areas may, instead of complying with subsection (2), post the notice of landlord in a conspicuous place in a common area.

(4) If the information in the notice of landlord changes, the landlord shall forthwith serve the tenant with a new notice with the current information or, if the landlord has posted the notice under subsection (3), forthwith post a new notice with the current information.

(5) The landlord who posts a notice of landlord under this section shall take all reasonable steps to ensure that it remains posted.

2004 cR-17.1 s18;2009 c7 s11

Inspection report

19(1) A landlord and tenant shall inspect the residential premises within one week before or after a tenant takes possession of the residential premises, and the landlord shall, forthwith on completion of the inspection, provide the tenant with a report of the inspection that describes the condition of the premises.

(2) A landlord and tenant shall inspect the residential premises within one week before or after the tenant gives up possession of the residential premises and the landlord shall, forthwith on completion of the inspection, provide the tenant with a report of the inspection that describes the condition of the premises.

(3) A landlord may complete the inspection without the tenant if the landlord proposes 2 inspections to take place

(a) on different days,

(b) on days that are not holidays, and

(c) between 8 a.m. and 8 p.m.,

and no adult person who falls within the definition of tenant agrees to take part.

(4) For the purposes of subsection (3) the landlord may propose alternative inspection times, with the inspection to take place on the 2nd date and time if it does not proceed on the first date and time.

(5) A report must contain the prescribed statements and be signed in accordance with the regulations.

(6) A landlord shall

(a) keep a copy of an inspection report prepared under this section for at least 3 years after the termination of the tenancy, and

(b) make the inspection report available for inspection by the Director or an authorized person for the purposes of an inspection or investigation under Part 6.

Time of expiration or termination

20(1) Unless the landlord and tenant agree on a different time, a tenancy that expires or is terminated ends at 12 noon on the last day of the tenancy.

(2) This section does not apply to a tenancy terminated by notice under section 30.

TAB 7

Court of Queen's Bench of Alberta

Citation: Fluid Pro Oilfield Services Ltd v Diamond Cut Industrial Park Ltd, 2017 ABQB 630

Date: 20171018
Docket: 1603 14314
Registry: Edmonton

Between:

Fluid Pro Oilfield Services Ltd

Plaintiff

- and -

Diamond Cut Industrial Park Ltd

Defendant/Plaintiff by Counterclaim

- and -

Fluid Pro Oilfield Services Ltd and Chad Brent McFarland

Defendants by Counterclaim

Corrected judgment: A corrigendum was issued on October 18, 2017; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Decision
of
W.S. Schlosser, Master, Court of Queen's Bench of Alberta

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[1] This is the Plaintiff's application for Summary Judgment on a contract, with a cross-application to amend the Defence and Counterclaim. The Plaintiff also seeks dismissal of the Counterclaim.

[2] The central issue for the cross-application is whether the questions about the admissibility of evidence render the proposed amendments hopeless.

amendments also raise express or implied amendment of the written agreement and breach of the duty of performance of a contract in good faith (the ***Bhasin*** duties).

[11] The eight pages of proposed amendments (much of it evidence) are a thesaurus of remedies all amounting to one thing: that the Knobloch's do not want to be bound by clause 1.1 of the contract and that Fluid Pro should be responsible for their loss – which is really the opposite of what the written agreement says. Angie and Joe describe clause 1.1 as a "false term" and that Chad and Fluid Pro are scoundrels; acting in bad faith by purporting to rely on clause 1.1 and terminating.

Analysis

[12] The test for amendment is well established:

> [13] ... Generally, any pleading may be amended, no matter how careless or late the party seeking the amendment, subject to four major exceptions, which are:
>
> (a) The amendment would cause serious prejudice to the opposing party, not compensable in costs;
>
> (b) The amendment requested is hopeless;
>
> (c) Unless permitted by statute, the amendment seeks to add a new party or new cause of action after the expiry of a limitation period; and
>
> (d) There is an element of bad faith associated with the failure to plead the amendment in the first instance.
>
> [14] The evidentiary threshold for allowing amendments to pleadings is generally low. Where the proposed amendment is purely ancillary, no evidence will be required. However, a proposed amendment that alleges new substantive facts must be supported by evidence. As Hughes J. concluded in *Canadian Natural Resources Ltd. v. Arcelormittal Tubular Products Roman S.A.*, 2012 ABQB 679 (Alta Q.B.), at para.53, "Although only modest evidence need be provided, it must have some foundation in fact."
>
> ***Attila Dogan,*** paras 13, 14 per Wittmann CJ., aff'd 2014 ABCA 74

1. The Statute of Frauds

[13] An oral lease for a term of more than a year is rendered unenforceable by s 4 of the *Statute of Frauds*, so the Court can't simply enforce a seven year oral lease. The writing would have to be rectified to match the agreement.

2. The Written Word

[14] Contracts are often said to be a 'meeting of the minds'. The gist of the Defendant's argument is that the writing does not reflect the true meeting of the minds because they had been *ad idem* on other terms.

[15] The difficulty is that unless equitable relief can be given, this hopeful position is not generally in line with contract law. To quote the great American jurist, Oliver Wendell Holmes:

TAB 8

§7:30.30 Tenancy for a Term Certain

A term certain or term of years refers to any lease that is made for a period that is certain in terms of time.[1] Such a tenancy must be created by express contract and its commencement and duration must be indicated with certainty, either originally or in such a way as to be ascertainable afterwards with certainty.[2] Thus, where a head tenant under a month-to-month tenancy agrees to allow a subtenant to remain in possession for the term of the head lease, there can be no term certain.[3] On the other hand, a lease for one year whereunder the landlord has the right to terminate the lease before the expiration of the term is not uncertain, nor is the right of premature termination repugnant.[4] The tenancy will commence on its stated commencement date[5] and will automatically come to an end at the end of the term.[6] In the absence of any stipulation to the contrary, it is not necessary to serve a demand for possession or notice to quit at the end of the term.[7] As in the case of a freehold, the leasehold may be subject to conditions providing the lessor with a right of re-entry or a right to determine the lease. Similarly, a lease may be dependent on the happening of a specified event and this does not affect the continuation of the lease.

There is no limit on the length of the term provided that it is not in perpetuity and that other statutory provisions such as the writing requirements of the *Statute of Frauds* and the relevant registration legislation are satisfied. A perpetual lease is invalid at common law and is treated as creating a periodic year-to-year tenancy or a freehold estate, but the Crown may have such power.[8] A lease may, however, contain a term providing for its perpetual renewal.[9] Thus, a lease for 21 years, renewable in perpetuity for further 21-year terms does not offend the rule against perpetuities and is not invalid as creating an uncertain term.[10] Nor is it important that rent for the renewal periods is to be fixed by arbitration.[11] Moreover, the right of renewal will be subject to other terms of the lease such as termination clauses.[12] In Ontario a tenant is not entitled to the benefits of s. 20 of the *Commercial Tenancies Act*[13] so as to obtain relief from the failure to properly give notice of renewal pursuant to the terms of the lease.[14] The term of years is assignable and, unlike the tenancy at will, it is not personal such that the death of the landlord or tenant leaves the estate unaffected.

FOOTNOTES

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[1] It would seem that a lease for a certain period of less than a year does not, strictly speaking, create a term of years: *Land Settlement Assn., Ltd. v. Carr*, [1944] 2 All E.R. 126 (C.A.). However, leases of less than one year are generally treated the same for most purposes.

TAB 9

Court of Queen's Bench of Alberta

Citation: Moore v McIndoe, 2018 ABQB 235

Date: 20180328
Docket: 1401 13256
Registry: Calgary

Between:

Victor Moore and Careen Moore

Applicants

- and -

James McIndoe and Laurel McIndoe

Respondents

Memorandum of Decision
of the
Honourable Mr. Justice J.T. Eamon

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then the time starts to run. In ***Lindsay***, the adverse possessor knew it did not have title to the lands and openly pursued a course of action calculated to be the least likely to alert the true owner to the fact of its possession. Waite J of this Court held it was entitled to pursue that course of action and refused to apply the fraud exception in the limitations legislation.

(c) License to occupy

[119] The required possession must be adverse in the sense that the occupation must be without consent of the owner. Consent precludes adverse possession (***Reeder*** at para 10; ***JA Pye (Oxford) Ltd v Graham***, [2003] 1 AC 419 (HL) at para 37).

[120] In Alberta, consent may arise from a personal license or a tenancy at will. Unlike some other jurisdictions, no legislated time limitation runs on a tenancy at will that could eventually convert permissible occupancy to adverse possession. There is no time limitation on the duration of a consent which can be asserted in defence to a claim of adverse possession in Alberta.

[121] In appropriate cases the court may infer consent from the parties' conduct, words and circumstances (***Robertson v King Estate***, 1999 ABQB 167 (CanLII), 243 AR 201, aff'd 1999 ABCA 314 (CanLII), 244 AR 379; ***Lehr v St Mary River Irrigation District***, [1993] AJ No 1411 (QB) at para 40).

[122] In ***Lehr***, at paras 54 - 62 (QL version), Mr Justice McBain of this Court set out the following principles with respect to licenses:

> From the foregoing authorities, the following principles with respect to licences are drawn:
>
> 1. A "licence," with respect to real property, is the authority to do an act with respect to the land which would otherwise constitute a trespass.
>
> 2. A licence does not pass an interest in the property. Rather it is only a personal privilege with respect to the land.
>
> 3. A licence normally involves granting the right to use the property without obtaining exclusive possession. However, exclusive possession does not preclude the possibility that a licence has been created.
>
> 4. In deciding whether a licence has been created, the decisive factor is the parties intention.
>
> 5. The question of whether the parties intended to create a licence is a question of fact. Where there is no formal document to evidence this intention, the precise circumstances and conduct of the parties must be examined to decide whether a licence was intended.
>
> 6. The essential element to be discovered from the circumstances and conduct of the parties is the permission or consent of the title holder.
>
> 7. A licence may be implied from the acquiescence of the true owner. However, this will require that the occupier knew who the true owner of the land was and that the owner knew that someone was in occupation of their property.
>
> 8. Finally, a licence will not be imputed from the circumstances and conduct of the parties if there is evidence which negatives such intention.

(Underlining added)

[123] ***Lehr*** is frequently cited for the general principle that consent may be inferred from the circumstances. I do not agree that the seventh proposition described by McBain J, if it suggests that mere acquiescence without more is sufficient ground to infer a license, accurately states the law of Alberta.

[124] Typical examples of a personal license to occupy or consent are a verbal agreement or permission, family arrangements, acts of friendship, generosity or charity, caretaker arrangements, or occupation by servants or employees (***Ryan v Ryan*** (1881), 5 SCR 387; ***Cobb and Another v. Lane***, [1952] 3 All ER 1199 (CA); ***Errington v Errington Woods***, [1952] 1 TLR 231 (CA); ***Robertson v King (Estate)***; ***Pollo v Taylor***, 2004 ABQB 173; ***MacKinnon v MacKinnon***, 2010 ONCA 170; ***Law v Lau***, 2015 ABQB 423). In ***Lehr***, the local irrigation board gave verbal permission to an adjacent landowner to farm on the board's lands associated with an irrigation reservoir. That arrangement continued with the claimants, who had purchased lands belonging to that prior owner and knew about the arrangement, as evidenced by the conduct of the claimants and the board (***Lehr***, at paras 11-13, 23, 25, 71). These cases are highly fact specific and include factual elements beyond mere acquiescence between strangers.

[125] The notion that a license can be inferred from mere acquiescence derives from the reasons of Lord Denning MR in ***Wallis's Cayton Bay Holiday Came Ltd v. Shell-Mex and BP Ltd***, [1974] 3 All ER 575, [1975] QB 94 (CA), which was heavily relied on in ***Lehr***.

[126] ***Wallis's*** was a case of so-called inconsistent use. The claimant, who farmed lands and operated a holiday caravan camp, owned lands adjacent to the disputed lands and near to a proposed roadway to be built by the county council. The true owners were two commercial corporations. They had no relationship with the claimants. The true owners held the lands for future development (a garage or filling station) once the roadway was built. All of the lands were originally farm land. They were not separated by fencing. Seeing there were no fences, the claimant cut the grass and allowed their cattle to go onto the disputed lands. One year, the claimant ploughed and cropped the lands. Eventually, the claimant occupied the lands as a playground for their holiday camp.

[127] The majority of the Court held that the true owner had not been adversely possessed because the claimant's occupation was not inconsistent with the intentions of the true owner for the land. The basis for that was the so-called inconsistent use doctrine. It was described by the dissenting judge, Stamp LJ, in ***Wallis's*** as follows:

> There are passages in the judgments in *Leigh v. Jack*, 5 Ex.D. 264, and cases which followed it which, taken out of their context, might lead to the conclusion that where an owner of land has acquired it for a particular purpose and does not immediately require it for that purpose, he is not, so long as that intention remains in existence and cannot be carried into effect, to be taken, as against a squatter, to be out of possession of the land for the purposes of the statute.
>
> ([1974] 3 All ER at p 583)

[128] Stamp LJ would have held for the claimants, no matter how reprehensible their conduct in knowingly occupying the lands as squatters and avoiding the true owner's inquiries of them until the limitation period had run, because they were in actual, notorious and exclusive

possession of the lands. He refused to accept that previous authority established "so long as the true owner cannot use his land for the purpose for which he acquired it the acts done by the squatter do not amount to possession of the land". Rather, one must "look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession".

[129] The other members of the Court held for the true owner. Lord Denning found an implied license for the following reasons:

> Where the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for it, and so leaves it unoccupied, he does not lose his title to it simply because some other person enters on it and uses it for some temporary purpose, like stacking materials; or for some seasonal purpose, like growing vegetables. Not even if this temporary or seasonal purpose continues year after year for 12 years, or more: see *Leigh v. Jack* (1879) 5 Ex.D. 264; *Williams Brothers Direct Supply Ltd. v. Raftery* [1958] 1 Q.B. 159; and *Tecbild Ltd. v. Chamberlain* (1969) 20 P. & C.R. 633. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decisions is because it does not lie in that other person's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be ascribed to the licence or permission of the true owner. By using the land, knowing that it does not belong to him, he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission. And it has been held many times in this court that acts done under a licence or permitted by the owner do not give a licensee a title under the Limitation Act 1939. They do not amount to adverse possession: see *Cobb v. Lane* [1952] 1 T.L.R. 1037; *British Railways Board v. G. J. Holdings Ltd*., March 25, 1974; Bar Library Transcript No. 81 of 1974 in this court.
>
> ([1974] 3 All ER at p 580. Underlining added)

[130] The third member of the panel, Ormrod LJ, applied the inconsistent use doctrine. He held that in order to constitute adverse possession, the claimant's possession must be inconsistent with the true owner's present or future intentions for the land. In ***Wallis's***, that possession was not inconsistent.

[131] The inconsistent use doctrine was firmly rejected in England by the House of Lords in ***Pye***. It held that the doctrine was heretical and wrong because exclusive possession depends on the intention of the squatter, not of the true owner (***Pye*** at para 45).

[132] Lord Denning's implied license theory was reversed by statute in England. It was branded an "original heresy" by the English Court of Appeal in ***Buckinghamshire CC v Moran***, [1990] 1 Ch 623 (CA), at p 646 per Nourse LJ, Butler-Sloss LJ concurring. It was described as "contrary to principle" by Neuberger J in ***JA Pye (Oxford) Ltd v Graham***, [2000] Ch 676 at pp 690-691. It was rejected by the House of Lords in ***Pye***, at paras 32 and 45 of [2003] 1 AC 419, where the implied license theory and the inconsistent use doctrine were described as "difficult to follow", wrong, and, again, heresy.

TAB 10

Court of Queen's Bench of Alberta

Citation: Law v Lau, 2015 ABQB 423

Date: 20150630
Docket: 1201 12200
Registry: Calgary

Between:

Choon Hoe Law

Plaintiff

- and -

Choon Liong Lau

Defendant

Reasons for Judgment
of the
Honourable Madam Justice G.A. Campbell

Introduction

[1] This proceeding commenced in August 2012, when Choon Liong Lau (the "**Defendant**"), by Originating Application, sought to terminate his brother Choon Hoe Law's (the "**Plaintiff**") occupancy and deliver up possession of a residence located municipally at 231 Erin Mount Place SE, in Calgary, Alberta (the "**Property**").

[2] The Plaintiff in a Statement of Claim filed on September 26, 2012, alleged that the Defendant held the Property in trust for him and sought a declaration that the Plaintiff is the equitable owner of the Property. An Amended Statement of Claim filed on April 12, 2013 further

to remove the plaintiff from the land because he had cut down timber. The plaintiff undertook to cut no more timber, to pay the taxes and to give up possession when required to do so by the father. The plaintiff commenced action against his brother who had entered the land and cut down some of the timber for his own use.

[66] The trial judge found in favour of the defendant and accepted the verbal evidence that the plaintiff's alleged possession was not adverse, but merely that of caretaker and agent for his father and therefore the plaintiff could not set up the *Statute of Limitations* as against his brother defendant.

[67] Ritchie CJ, speaking for the majority of the Supreme Court in finding that plaintiff was on the land as a mere caretaker for his father or at the very least as a tenant at will repeated the remarks of Chief Justice Wilson (at para 19):

> I am quite sensible the plaintiff's claim is a most unrighteous one. He is setting it up against his father, who has all along dealt kindly by him, and who has left him a portion of land by his will ....

[68] Justice Gwynne, while concurring with the majority decision delivered by Ritchie CJ, focused on possession as agent or caretaker and commented as follows (at para 35):

> ... it would certainly tend to render the title to land very insecure if it should be competent for a person who obtains the possession of land in the character of servant, agent or caretaker for another, at his own sole pleasure, without the knowledge and consent of the other, to convert that relationship into one of tenancy at will so as to enable the agent, who is confided in as such by his principal, to dispossess his principal, and in the process of time to extinguish his title.

[69] In a more recent Alberta decision, ***Robertson v King (Estate),*** 1999 ABQB 167; aff'd, 244 AR 379 [*Robertson*], the plaintiff brought an action for possession of land against the executor for the King Estate. Mr. King was a rancher, who had ranched a very large ranch with his brother. His brother predeceased him. The plaintiff resided in a cabin on the ranch and claimed to have resided there since June 1986. The plaintiff, who had never paid rent, claimed that she was entitled to the exclusive use of the lands, which she believed from conversations she had with Mr. King was to be her permanent home.

[70] The trial judge in *Robertson*, reviewed the law on adverse possession in Alberta. In addition to the statutory provisions, Justice McBain noted that the law of adverse possession relies on common law requirements, including the requirement that the possession must be exclusive (at para 30). He also distinguished the *Lutz* decision noting that dissenting Appellant Justice Laycraft would not have found adverse possession had a license been established on the facts.

[71] The trial judge then considered whether the Plaintiff could assert a claim with respect to the cabin only. He found that her claim against the cabin also failed and stated at para 36:

> I find on the facts that the Plaintiff's occupation of the cabin was also pursuant to a personal licence of occupation. A review of the law of adverse possession in both Alberta and England indicates that even an implied licence to occupy land will defeat a claim for adverse possession by eliminating the necessary quality of possession. In *Lehr v. Board of Directors of the St. Mary River Irrigation District*

(unreported, September 1, 1993 Alta.Q.B.) I had occasion to consider this very issue. After reviewing the case law I decided that the Plaintiffs' claim for adverse possession in that case must fail because they had occupied the land pursuant to an implied licence. In that case I referred to a decision of Lord Denning called *Cobb and Another v. Lane* [1952] 3 All ER 1199 in which an owner of property had allowed her brother to live on it for thirteen years. Upon her death and her bequeathing the property to other people he claimed adverse possession. Lord Denning said at page 1202:

> The question in all these cases is one of intention: Did the circumstances and the conduct of the parties show that all was intended was that the occupier should have a personal privilege with no interest in the land? It seems to me that the judge so found. The defendant had only a personal privilege with no interest in the land, which he could assign or sub-let, and he could not part with possession to another. He was only a licensee, and he cannot pray in aid the provisions of the *Limitation Act*, 1939.

[72] The trial judge concluded that the plaintiff had occupied the cabin as a result of the kindness and generosity of Mr. King and as such her occupancy was pursuant to a licence of occupation granted by Mr. King, which defeated her claim to the property on the basis of adverse possession. In so finding, the trial judge commented (at paragraph 41):

> It is appropriate to borrow the words of Lord Greene in Booker v. Palmer [1942] 2 All E.R. 675 at 676 where he said in referring to an owner of a cottage who had allowed someone who had lost their house to live in it:
>
> > . . . His sole motive was to act as a good and charitable citizen towards people in distress. In my opinion, the result is that the only permissible inference is that the appellant was intended to be there as a licensee.

[73] The trial judge also noted that the question of whether a licence is created relies heavily on the intention of the parties at the time. The trial judge then pointed out that in the absence of some written documentation, oral transfers of real property are unenforceable. The plaintiff's claim to a life interest in the property failed as it was contrary to the *Statute of Frauds*.

[74] The Alberta Court of Appeal upheld the trial judge's decision. Justice Costigan, in delivering the court's reasons for dismissal of the appeal, confirmed that the plaintiff had been permitted to occupy the disputed land out of generosity and kindness as a licensee only and that there was never any intention that she would acquire any interest in the disputed lands.

[75] In a more recent Alberta decision, ***Pollo v Taylor,*** 2004 ABQB 173 [*Pollo*], Justice Moore noted that in ***Lehr v. St. Mary River Irrigation District***, [1993] AJ No 1411 [*Lehr*], the trial judge was required to characterize the relationship between the plaintiff and the defendant. In *Pollo* (at para 46), Justice Moore stated:

> The trial judge distilled some principles with respect to licences, and I have compressed the trial judge's paragraphs 55, 56, 58 and 59:
>
> > A "licence," with respect to real property, is the authority to do an act with respect to the land which would otherwise constitute a

> trespass. A licence does not pass as an interest in the property. Rather it is only a personal privilege with respect to the land. In deciding whether a licence has been created, the decisive factor is the parties' intention. The question of whether the parties intended to create a licence is a question of fact. Where there is no formal document to evidence this intention, the precise circumstances and conduct of the parties must be examined to decide whether a licence was intended.

[76] In *Lehr*, Justice McBain reviewed the authorities and laid out the principles necessary to establish a licence (at paras 55- 61):

> From the foregoing authorities, the following principles with respect to licences are drawn:
>
> > A "licence," with respect to real property, is the authority to do an act with respect to the land which would otherwise constitute a trespass.
> >
> > A licence does not pass an interest in the property. Rather it is only a personal privilege with respect to the land.
> >
> > A licence normally involves granting the right to use the property without obtaining exclusive possession. However, exclusive possession does not preclude the possibility that a license has been created.
> >
> > In deciding whether a licence has been created, the decisive factor is the parties' intention.
> >
> > The question of whether the parties intended to create a licence is a question of fact. Where there is no formal document to evidence this intention, the precise circumstances and conduct of the parties must be examined to decide whether a licence was intended.
> >
> > The essential element to be discovered from the circumstances and conduct of the parties is the permission or consent of the title holder.
> >
> > A licence may be implied from the acquiescence of the true owner. However, this will require that the occupier knew who the true owner of the land was and that the owner knew that someone was in occupation of their property.
> >
> > Finally, a licence will not be imputed from the circumstances and conduct of the parties if there is evidence which negatives such intention.

[77] The Defendant also submits that there was an agency agreement between him and the Plaintiff. The Defendant submits that the process of renting the Property on behalf of the Defendant, including acts such as executing leases, arranging occupation by the tenants, accepting rental payments, maintaining the Property in a state of good repair, terminating leases,

paying the Property's expenses, was an agency arrangement and this arrangement continued throughout until it was terminated by him in August 2012.

[78] The Defendant cites from *Bowstead & Reynolds on Agency*, Peter Watts and FMB Reynolds, Sweet & Maxwell-Thomson Reuter 201 London, England at 39:

> The relationship of principal and agent may be constituted -
>
> (a) by the conferring of authority by the principal on the agent, which may be express, or implied from the conduct or situation of the parties.

3. Application of the Law to the Facts

[79] For the purposes of this trial, I find as fact the following:

1 The Plaintiff has lived in the Property since 1995.

2. The Defendant has not re-entered the Property or sought possession of the Property until 2012.

3. Improvements and maintenance of the Property have been made by the Plaintiff since 1995.

4. The Plaintiff has made the insurance, utilities and property tax payments since 1995.

5.. The Plaintiff has never paid rent for the Property, nor was any rent asked of him.

6. The Defendant was aware that the Plaintiff had been living in the Property since 1995.

7. Title to the Property has been registered in the name of the Defendant continuously since he purchased the Property in 1982.

[80] The Plaintiff argues that he has met the burden of the test in *Wellhead* in order to successfully establish a claim of adverse possession or dispossession. The Plaintiff agrees that up until 1993 the property was owned by the Defendant. However, after that date because the Property was allegedly transferred to him, the Plaintiff then understood that the Property was owned or belonged to him. According to the Plaintiff, the Defendant knew about his possession of the Property but was indifferent as he neither consented nor objected to his occupation of the Property. The Defendant made no attempt to retake possession and at all times the Plaintiff has possessed the property exclusively, continuously, openly and notoriously.

[81] The Plaintiff asserts that the Defendant had transferred the Property to him so questions of agency or license are irrelevant because the Plaintiff was, as of November 1993, the beneficial and true owner of the Property.

[82] The Defendant submits that there is no evidence to prove that the Property was transferred to the Plaintiff either impliedly or expressly. The Plaintiff could only take and continue occupancy of the Property with the consent of its owner, the Defendant. And the Defendant provided his consent, actual or implied, to the Plaintiff taking occupation of the Property. Because the Plaintiff's possession of the property was by virtue of consent, licence or

TAB 11

In the Provincial Court of Alberta

Citation: Singh v RJB Developments Inc., 2016 ABPC 305

Date: 20161222
Docket: P1602600557
Registry: Lethbridge

Between:

Jaspreet Singh

Tenant
Applicant

- and -

RJB Developments Inc. and Lisa Visser

Landlord
Respondent

Judgment of the Honourable
J.N. LeGrandeur
Assistant Chief Judge

Nature of the Proceedings

[1] In this matter the Tenant (hereinafter referred to as the Applicant) brings an application pursuant to the provisions of the *Residential Tenancies Act*, SA 2004, cR-17.1 seeking damages for the allegedly wrongful termination of the Residential Tenancy Agreement between the Applicant and the Landlord, RJB Developments Inc. (hereinafter referred to as the Respondent) dated September 9th, 2015 which provided for a term between September 1, 2015 and April 28, 2016. The Applicant seeks return of prepaid rent for the period January 18, 2016 through April 28, 2016, punitive or exemplary damages and return of $26.25 inclusive of GST being the portion of the security deposit allegedly wrongfully withheld. The Applicant also seeks interest on any judgment granted and costs against the Respondents, RJB Developments Inc. and/or Lisa Visser.

[2] The Respondents seek dismissal of the Applicant's claims on the basis that the contract between the Respondent company and Tenant was terminated by the Respondent company for valid cause, that is, breach by the Applicant of the Residential Tenancy Agreement (Exhibit #3). The Respondent reserved the right to claim damages for such repudiation by the alleged wrongful acts of the Applicant. The Respondent asserts that retention of the prepaid rent under the agreement of September 9th, 2015 represents the loss sustained by the Respondent

Respondent, Lisa Visser

[77] The claim against the Respondent, Lisa Visser is dismissed without costs. It was not improper to name her, given that she would appear to fit the definition of Landlord in the *Residential Tenancies Act*. It is clear that she was only an agent signatory and that at all times the Landlord was known to the Respondent and continues to be the owner and operator of the subject premises. Judgment would only be given against an agent if the actual owner of the premises was unknown or no longer an operating entity in which case the agent would be the principle operating party and therefore liable.

License

[78] Although given my judgment aforesaid, it is not necessary for me to discuss the respective ramifications for the parties had I concluded that the Applicant was occupying the subject premises based upon a license as opposed to a residential tenancy; it is likely beneficial for the parties' understanding for me to make some comments in that regard.

[79] Had I concluded the relationship to be one of licensor and licensee, it goes without saying that the license in this case is contractual in nature. Accordingly, issues such as interpretation, consideration, termination, breach, and damages calculated are to be considered in accordance with the principles of the law of contract.

[80] A licensing agreement may provide for termination on notice without grounds or otherwise. If so, it must be sufficient notice to allow the licensee to remove himself from the premises. If the contract of license does not specify the length of notice, then it will, in most circumstances, be presumed by the Court to be reasonable notice.

[81] In the case at hand, the contract, if only a license, provides for termination on 24 hours' notice only as a consequence of a breach of the agreement by the licensee as described in paragraph 14(a) and (b) and paragraph 50.

[82] Accordingly, the subject contract may not be terminated without cause. In this case, as I have found already, there was no cause proven as is contemplated by the *Residential Tenancies Act* and I conclude no cause proven if we are dealing with a the licensing agreement. Accordingly the Respondent wrongfully removed the licensee from occupation in breach of the licensing contract. The remedies available to the licensee for breach of licensing contract are essentially the same as the remedies available for a tenant under the *Residential Tenancies Act* for breach by a landlord of a residential tenancy agreement. In this instance the Applicant would have been entitled to the same damages as were assessed for the breach of the residential tenancy agreement as discussed aforesaid, and accordingly the consequences for the licensor would have been the same.

Heard on the 3rd day of October, 2016.
Dated at the City of Lethbridge, Alberta this 22nd day of December, 2016.

J.N. LeGrandeur
A Judge of the Provincial Court of Alberta

Appearances:

Andrew Robb
for the Applicant

Self-Represented
for the Respondent

TAB 12

Province of Alberta

EMPLOYMENT STANDARDS CODE

Revised Statutes of Alberta 2000
Chapter E-9

Current as of November 1, 2020

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(ee) "year of employment" means a period of 12 consecutive months.

(2) A reference to "this Act" includes a regulation made under this Act.

RSA 2000 cE-9 s1;2001 c6 s6;2009 c4 s2;2013 c6 s2;
2017 c9 s2;2019 c18 s6;2020 c28 s1(2)

Part 1
Application and Operation of this Act

Application of this Act

2(1) This Act applies to all employers and employees, including the Crown in right of Alberta and its employees, except as otherwise provided in this Part.

(2) Except for provisions relating to leaves under Divisions 7 to 7.6 and other provisions of this Act necessary to give effect to those provisions, this Act does not apply to

(a) employees who are members of a municipal police service appointed pursuant to the *Police Act* and their employers with respect to the employment of those employees, or

(b) employees and employers to the extent that another Act states that this Act or a provision of it does not apply to them.

(3), (4) Repealed 2017 c9 s3.

RSA 2000 cE-9 s2;2001 c6 s6;2003 c26 s19;
2009 c4 s3;2013 c6 s3;2011 c12 s33;2017 c9 s3

Farm and ranch exemptions

2.1(1) The following do not apply to employees who are employed in a farming or ranching operation referred to in subsection (4) or to their employer while acting in the capacity of employer of those employees:

(a) sections 16 and 18 of Part 2, Division 3, Hours of Work;

(b) Part 2, Division 4, Overtime and Overtime Pay.

(2) Despite subsection (1), this Act does not apply to

(a) employees described in subsection (3) who are employed in a farming or ranching operation referred to in subsection (4), or to their employer while acting in the capacity of employer of those employees, and

(b) employees who are employed in a farming or ranching operation referred to in subsection (4), or to their employer while acting in the capacity of employer of those employees, if the operation employs 5 or fewer employees, not including

(i) employees described in subsection (3), and

(ii) employees who are employed by the employer for fewer than 6 consecutive months.

(3) The following are employees that are described for the purpose of subsection (2):

(a) an employee who is a shareholder of a corporation engaged in a farming or ranching operation of which all shareholders are family members of the same family;

(b) an employee who is a family member of a shareholder of a corporation engaged in a farming or ranching operation of which all shareholders are family members of the same family;

(c) an employee who is a family member of a sole proprietor engaged in a farming or ranching operation;

(d) an employee who is a family member of a partner in a partnership engaged in a farming or ranching operation where all partners are family members of the same family.

(4) For the purposes of subsections (1) and (2) an employee is employed in a farming or ranching operation if the employee's employment is directly related to

(a) the primary production of eggs, milk, grain, seeds, fruit, vegetables, mushrooms, sod, trees, shrubs, plants, honey, livestock, diversified livestock animals within the meaning of the *Livestock Industry Diversification Act*, poultry or bees,

(b) the primary production of a product referred to in clause (a) in a greenhouse or nursery, or

(c) any other primary agricultural operation specified in the regulations.

(5) In this section, "family member", in relation to a shareholder, sole proprietor or partner, means

(a) the spouse or adult interdependent partner of the shareholder, sole proprietor or partner, or

(b) whether by blood, marriage or adoption or by virtue of an adult interdependent relationship, a child, parent, grandparent, sibling, aunt, uncle, niece, nephew or first cousin of the shareholder, sole proprietor or partner or of the shareholder's, sole proprietor's or partner's spouse or adult interdependent partner,

and includes any other person who is a member of a class of persons designated in the regulations under the *Employment Standards Code*.

2017 c9 s4;2019 c19 s2

Exemptions, modifications and substitutions

2.2 Despite anything in this Act, regulations under section 138 may

(a) exempt an employment, employer or employee from Part 2 or any provision of it, and

(b) vary or substitute any provision of Part 2 in respect of an employment, employer or employee.

2017 c9 s4

Civil remedies and greater benefits

3(1) Nothing in this Act affects

(a) any civil remedy of an employee or an employer;

(b) an agreement, a right at common law or a custom that

(i) provides to an employee earnings, leaves of the types described in Divisions 7 to 7.6 or other benefits that are at least equal to those under this Act, or

(ii) imposes on an employer an obligation or duty greater than that under this Act.

(2) If under an agreement an employee is to receive greater earnings or leaves of the types described in Divisions 7 to 7.6 than those for which this Act provides, the employer must give those greater benefits.

RSA 2000 cE-9 s3;2001 c6 s6;2009 c4 s4;2013 c6 s4;2017 c9 s5

(b) when an employee has been employed by the employer for 90 days or less,

(c) when the employee is employed for a definite term or task for a period not exceeding 12 months on completion of which the employment terminates,

(d) when the employee is laid off after refusing an offer by the employer of reasonable alternative work,

(e) if the employee refuses work made available through a seniority system,

(f) if the employee is not provided with work by the employer by reason of a strike or lockout occurring at the employee's place of employment,

(g) when the employee is employed under an agreement by which the employee may elect either to work or not to work for a temporary period when requested to work by the employer,

(h) if the contract of employment is or has become impossible for the employer to perform by reason of unforeseeable or unpreventable causes beyond the control of the employer,

(i) if the employee is employed on a seasonal basis and on the completion of the season the employee's employment is terminated, or

(j) when employment ends in the circumstances described in sections 62 to 64.

RSA 2000 cE-9 s55;2017 c9 s37;2020 c28 s1(14)

Employer's termination notice

56 To terminate employment an employer must give an employee written termination notice of at least

(a) one week, if the employee has been employed by the employer for more than 90 days but less than 2 years,

(b) 2 weeks, if the employee has been employed by the employer for 2 years or more but less than 4 years,

(c) 4 weeks, if the employee has been employed by the employer for 4 years or more but less than 6 years,

(d) 5 weeks, if the employee has been employed by the employer for 6 years or more but less than 8 years,

(e) 6 weeks, if the employee has been employed by the employer for 8 years or more but less than 10 years, or

(f) 8 weeks, if the employee has been employed by the employer for 10 years or more.

RSA 2000 cE-9 s56;2017 c9 s38

Termination pay

57(1) Instead of giving a termination notice, an employer may pay an employee termination pay of an amount at least equal to the wages the employee would have earned if the employee had worked the regular hours of work for the applicable termination notice period.

(2) An employer may give an employee a combination of termination pay and termination notice, in which case the termination pay must be at least equal to the wages the employee would have earned for the applicable termination notice period that is not covered by the notice.

(3) If the wages of an employee vary from one pay period to another, the employee's termination pay must be determined by calculating the average of the employee's wages during the previous 13 weeks in which the employee worked preceding the date of termination of employment.

RSA 2000 cE-9 s57;2017 c9 s39

Termination of employment by an employee

58(1) Except as otherwise provided in subsection (2), to terminate employment an employee must give the employer a written termination notice of at least

(a) one week, if the employee has been employed by the employer for more than 90 days but less than 2 years, or

(b) 2 weeks, if the employee has been employed by the employer for 2 years or more.

(2) Subsection (1) does not apply when

(a) there is an established custom or practice in any industry respecting the termination of employment that is contrary in whole or in part to subsection (1),

(b) an employee terminates employment because the employee's personal health or safety would be in danger if the employee continued to be employed by the employer,

TAB 13

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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 the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

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

(a) file the application in Form 32, and

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

Notice to media

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

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

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or master assigned to application

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

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

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

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

AR 124/2010 s6.33;194/2020

Application to seal or unseal court files

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

(2) The application must be made to

(a) the Chief Justice, or

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

(3) The Court may direct

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

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

(c) any other matter that the circumstances require.

Persons having standing at application

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

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

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

No publication pending application

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

AR 124/2010 s6.36;143/2011

TAB 14

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

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
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Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
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— 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 minimes 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 minimes 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

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 minimes 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.

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.
L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation

de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a $1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

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 CEAA 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 CEAA 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 15

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

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.

Table of Authorities

Cases considered by *Newbould J.*:

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982 CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, *(*sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, *(*sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

887574 Ontario Inc. v. Pizza Pizza Ltd. (1994), 35 C.P.C. (3d) 323, 23 B.L.R. (2d) 239, 1994 CarswellOnt 1214 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

s. 192 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

s. 2(b) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 137 — considered

***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 it 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 (AttorneyGeneral)*, [1989] 1 S.C.R. 927, [page551] 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 16

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.

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.

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.

Curtailment of 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.

Table of Authorities

Cases considered:

A. (J.) v. Canada Life Assurance Co. (1989), 35 C.P.C. (2d) 6, 70 O.R. (2d) 27 (H.C.) — *considered*

Hassnah Insurance Co. of Israel v. Mew, [1993] 2 Lloyd's Rep. 243, (Q.B.D. [Com. Ct.]) — *considered*

London & Leeds Estates Ltd. v. Paribas Ltd. (July 28, 1994), Mance J. (Eng. Q.B.) [unreported] — *considered*

MacIntyre v. Nova Scotia (Attorney General), [1982] 1 S.C.R. 175, 26 C.R. (3d) 193, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129 — *followed*

MDS Health Group Ltd. v. Canada (Attorney General) (1993), 20 C.P.C. (3d) 137, 15 O.R. (3d) 630 (Gen. Div.)*applied*

S. (P.) v. C. (D.) (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) — *applied*

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17.

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Courts of Justice Act, R.S.O. 1990, c. C.43 —

s. 137(2)

Sale of Goods Act, R.S.O. 1990, c. S.1.

Words and phrases considered:

ALTERNATIVE DISPUTE RESOLUTION

This [non-binding arbitration] differs from other forms of [Alternative Dispute Resolution ("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, nonbinding opinion, nonbinding arbitration. Of course, the simplest method — often overlooked — is that of noninvolvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately, more to the point . . . 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 concessions 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 . . . public policy supports the nontrial resolution of disputes.

. . . . .

. . . 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 if 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 . . . In other instances public exposure may induce a very negative reaction . . .

BINDING ARBITRATION

. . . a binding arbitration is a noncourt 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.

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 ("P^2") 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.

P^2 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 P[2] 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 it 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 P^2 as moving party to demonstrate sound reason for departing from the openness rule: See *MDS*, supra, at p. 633. As the factum of P^2 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 P^2 case) the court proceedings are merely the continuation of the fight between P^2 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 P^2 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 P^2 is dismissed. P^2 is to pay $1,000 in costs forthwith to the plaintiffs represented by Ms. Spies and Mr. Mitchell; no other costs awarded.

Motion dismissed.

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 JJ.A. (Ont. C.A.).

TAB 17

ALBERTA TEMPLATE RECEIVERSHIP ORDER
EXPLANATORY NOTES

Alberta Template Order Committee,
Calgary/Edmonton, Alberta

INTRODUCTION

In February of 2006, the Alberta Template Orders Committee (the "**Alberta Committee**") finalized a template receivership order for Alberta and explanatory notes to be read in conjunction therewith.

The Alberta Template Receivership Order used the model receivership order (the "**Ontario Order**") and explanatory notes (the "**Ontario Explanatory Notes**") developed by the Commercial List Users' Committee of the Ontario Superior Court of Justice (the "**Ontario Committee**") as a starting point for developing the Alberta Template Receivership Order (the "**Receivership Order**"), focusing on those areas where the Alberta practice or legislation diverged from that in Ontario. In this fashion, the Alberta Committee hoped that the form of template Order would be as similar as practicable to the Ontario Order, while appropriately addressing Alberta-specific concerns. The Alberta Committee recognizes that updates to the Receivership Order and these Explanatory Notes are appropriate and necessary to keep current with changes in law and practice.

The Receivership Order presented by the Alberta Committee is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, the Receivership Order is meant to serve as a starting point from which any additions, amendments or deletions can be highlighted and brought to the attention of the Justice from whom the Order is sought. The Court is not bound by the Receivership Order but must craft an order that meets the particular circumstances of the receivership (*RBC v Reid-Built Homes,* 2018 ABQB 124, at para 57).

The assistance of members of the judiciary to the Alberta Committee, notably the Honourable Justices K. M. Horner, K.M. Eidsvik, and K.G. Nielsen, does not mean that there is any "arrangement" with the Court that a Receivership Order will be granted in all instances where the proposed Order approximates the Receivership Order, or at all. The input of the judiciary is appreciated, but in each application the discretion of the presiding Justice will be completely unfettered by the use or non use of the Receivership Order.

RECEIVER

The Receivership Order appoints the court officer as a Receiver under s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**") and as Receiver and Manager pursuant to s. 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2 (the "**JA**") and s. 99(a) of the *Business Corporations Act*, R.S.A. 2000, c. B-9 (the "**ABCA**"). In those cases, where the applying creditor holds a security agreement charging the debtor company's personal property, the Order could also reference an appointment under s. 65(7) of the *Personal Property Security Act*, R.S.A. 2000, c. P-7 (the "**PPSA**").

The Receivership Order assumes the applying creditor maintains security over all of the debtor company's property, business and undertaking, and it is not the recommended form to be used in land foreclosure actions, where appointments are made pursuant to s. 49 of the *Law of Property Act*, R.S.A. 2000, c. L-7.

The dual appointment of a Receiver pursuant to s. 243(1) of the BIA and a Receiver and Manager pursuant to one or more of s. 13(2) of the JA and s. 99(a) of the ABCA has both benefits and burdens that the applying party should consider in determining what to include and what, if anything, to exclude. **In this regard, it should be noted that dual appointments raise distinct procedural and other issues with varying consequences which counsel must be cognizant of, including, for example, differing appeal periods between Queen's Bench civil and bankruptcy actions.**

In those cases where there are facts in dispute between the appointing creditor and the debtor company, but the Court finds it just and convenient to appoint a Receiver to preserve and maintain the status quo while outstanding issues are determined, a number of the powers and authorities of the Receiver granted under the Receivership Order may not be appropriate and may have to be modified, depending upon the applicable facts and the interests of the parties and other affected creditors.

It is more likely that the debtor company or other interested persons would have greater success in a future application to vary or amend the Receivership Order under the "comeback" clause in paragraph 33, if the debtor company or any such interested person was not served with notice of the application to obtain the Order. The debtor company and other potentially affected persons should therefore be served with notice of the application where circumstances permit. Further, the preamble should identify all of those served, and note the appearance or non-appearance of the parties and persons served.

As stated in the Ontario Explanatory Notes:

> Many rights are affected by service and appearance at a motion. Appeal rights, effective vesting and even the effectiveness of the receivership order itself may depend upon proof of service and appearance. Recitation of these jurisdictional facts in the order itself should not be ignored.

Unless the Order is being consented to by the debtor company, it is recommended that the application be made before a Justice in Chambers, rather than before a Master in Chambers. It is unlikely, unless the Order is consented to by the debtor company, that a Master has the jurisdiction to grant the injunctive relief contained within the Receivership Order.

PARAGRAPH 3—THE RECEIVER'S POWERS

The Alberta Committee considers the recitation of powers to be given to a Receiver in the Ontario Order to be appropriate for the Receivership Order, and adopts the Ontario Committee's rationale expressed in the Ontario Explanatory Notes:

1. While it is tempting to give the Receiver a broadly worded simple power to take all reasonable steps to conduct the Receivership, it is very helpful and often essential for the Receiver to be able to point to a specifically enumerated power in the Order to enforce compliance or support the Receiver's entitlement to act. Therefore, the most essential and least controversial powers regarding presentation and realization have been identified and included. It is open to counsel to seek to reduce or enlarge upon the listed powers by highlighting the change and bringing it to the Court's attention;

2. Among the powers specifically enumerated are the standard powers to take possession of and protect and preserve the debtor's property, particularly liquid assets. Included in paragraph 3(a) is the Receiver's ability to abandon, dispose of, or otherwise release any interest in the Debtor's real property and oil and gas assets without incurring liability, which reflects the decision in *Orphan Well Association v Grant Thornton Limited,* 2017 ABCA 124 ("*Redwater*"). It is noted that an appeal in *Redwater* was heard by the Supreme Court of Canada on February 15, 2018 and the Supreme Court reserved its decision;

3. It is assumed the Receiver will manage the business, hire consultants as required, enter into transactions and compromise claims owing to the debtor;

4. Normal powers to litigate are included;

5. It is assumed the Receiver will market and sell assets with no specific approval of the marketing process required. However, a Receiver is well advised in a significant case to seek prior approval to avoid subsequent questioning of the efficacy of the process

itself. There is a materiality level established for assets sold beyond which prior approval of the Court should be sought;

6. Paragraph 3(n) empowers the Receiver to report to, meet and discuss with affected persons. It is expected that as an officer of the Court, the Receiver will engage in meaningful communications with stakeholders. This process can cause extra costs and therefore requires the Receiver to exercise reasonable discretion. The case law is clear that use of the Court-appointed Receiver is not the private preserve of the senior creditors and must have some degree of transparency and accountability to stakeholders. Expensive appearances and last minute challenges may be avoided by timely communications among the appropriate parties;

7. The concluding words of paragraph 3 are designed to clarify that the Receiver is exclusively in control of the debtor's activities. Absent specific authority, the debtor's board of directors may not engage in litigation or take any other steps on behalf of the debtor following the Receiver's appointment; and

8. There is no specific provision allowing the Receiver to make an assignment in bankruptcy or to consent to the making of a Bankruptcy Order under the BIA. While some case law permits Receivers to take such steps, typically Receivers seek prior Court approval even where the specific power to do so is included in the Order. Bankrupting the debtor may reverse priorities and prejudice or favour certain creditors over others. Bankruptcy is a sufficiently material, substantive and final act that, if a Receiver is empowered to bankrupt the debtor, it should be expressly brought to the Court's attention.

The Alberta Committee has added a phrase to paragraph 3(j) of the Receivership Order that makes it clear that, despite the Receiver being empowered to defend all actions involving the debtor, the Receiver does not have that authority with respect to the very action in which the Receiver is appointed. This follows *Toronto-Dominion Bank v. Fortin et al* (1978), 26 C.B.R. (N.S.) 168 (B.C.S.C.).

PARAGRAPHS 4 TO 6 – INJUNCTIONS, POSSESSION AND ACCESS TO PROPERTY

Paragraph 4 of the Receivership Order requires the debtor (including the debtor's management, advisors, and shareholders), those affiliated with the debtor and everyone with notice of the Order, to advise the Receiver of the existence of any of the debtor's property in their possession or control and to deliver to the Receiver such of the debtor's property as the Receiver requires.

The limitation of delivery of property to that which the Receiver requires is designed to save costs for third parties and protect the estate from being forced to incur costs to move or store property that might be more efficiently left in the possession of third parties temporarily or permanently.

Paragraph 4 also qualifies the obligation to protect the interests of third parties who may require continuing possession of the debtor's property in order to maintain certain lien rights.

Paragraph 5 mandates the Receiver's entitlement to records in the possession or control of any person that relate to the business or affairs of the debtor. The Receiver's entitlement to review such records is subject to exceptions for statutory provisions prohibiting such disclosure or privilege attaching to records which are the subject of a solicitor and client communication or are prepared in contemplation of litigation.

PARAGRAPHS 7 TO 11 – THE STAY

TAB 18

2019 ABQB 985
Alberta Court of Queen's Bench

Bank of Montreal v. Ladacor AMS Ltd

2019 CarswellAlta 2801, 2019 ABQB 985, [2020] A.W.L.D. 274, 313 A.C.W.S. (3d) 556

Bank of Montreal (Plaintiff) and Ladacor AMS Ltd, Nomads Pipeline Consulting Ltd, 2367147 Ontario Inc, and Donald Klisowsky (Defendants)

Robert A. Graesser J.

Heard: November 26, 2019
Judgment: December 19, 2019
Docket: Edmonton 1803-09581

Counsel: Andrew Wilkinson for Liberty Mutual Insurance Company
James Reid, Keith D. Marlowe for Receiver
Shaun D. Wetmore for Steenhof Entities
Norman D. Anderson for Donald Klisowsky

Headnote

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

Debtors were three related companies, two of which were involved in production of modular structures while third operated hotel — Debtors were placed into receivership, with receiver being appointed by court as receiver/manager — Significant debts were paid off, and receiver proposed that debtors be placed into bankruptcy — Debtors' principal believed one debtor was still solvent — Receiver brought application for order essentially approving receiver's conduct and accounts and proposed assignment of debtors into bankruptcy, and discharging and releasing receiver from any further obligations and any liability — Application granted in part — Anticipated accounts, fees, and disbursements in connection with completion of receivership proceedings were not to be approved until incurred, and discharging and releasing receiver was not appropriate until its work was actually completed, but requested relief was otherwise granted — Since two debtors had paid off secured debts of other debtor as guarantors, they essentially stood in shoes of secured creditor by way of subrogation — Net result was that remaining assets of debtors were to be transferred to one debtor who paid off most debt, to be followed by assignments into bankruptcy — It was unlikely that debtor with remaining assets would have enough to satisfy unsecured claims, and suggestion that other debtor was solvent was fanciful — Principal's criticisms of receiver's conduct were rejected — Sole effective way of dealing with numerous claims was through statutory process such as bankruptcy.

Table of Authorities

Cases considered by *Robert A. Graesser J.*:

Abakhan v. Halpen (2006), 2006 BCSC 1979, 2006 CarswellBC 3323, 29 C.B.R. (5th) 50, 26 B.L.R. (4th) 1 (B.C. S.C.) — referred to

Abakhan v. Halpen (2008), 2008 BCCA 29, 2008 CarswellBC 110, 39 B.L.R. (4th) 1, 76 B.C.L.R. (4th) 267, 40 C.B.R. (5th) 159, 250 B.C.A.C. 277, 416 W.A.C. 277, [2008] 7 W.W.R. 510 (B.C. C.A.) — referred to

Bank of Montreal v. Tolo-Pacific Consolidated Industries Corp. (2012), 2012 BCSC 1785, 2012 CarswellBC 3719, 97 C.B.R. (5th) 56 (B.C. S.C.) — referred to

EC & M Electric Ltd. v. Medicine Hat General & Auxiliary Hospital & Nursing Home (District No. 69) (1987), 50 Alta. L.R. (2d) 48, *(*sub nom. *E C & M Electric Ltd. v. Medicine Hat General & Auxiliary Hospital & Nursing Home, District No. 69)* 35 D.L.R. (4th) 80, 76 A.R. 281, 25 C.L.R. 110, 1987 CarswellAlta 25 (Alta. Q.B.) — referred to

Gerrow v. Dorais (2010), 2010 ABQB 560, 2010 CarswellAlta 1752, 324 D.L.R. (4th) 332, 34 Alta. L.R. (5th) 112, [2011] 3 W.W.R. 320, 96 C.L.R. (3d) 215, 503 A.R. 65 (Alta. Q.B.) — referred to

Jaycap Financial Ltd v. Snowdon Block Inc (2019), 2019 ABCA 47, 2019 CarswellAlta 160, 68 C.B.R. (6th) 7 (Alta. C.A.) — considered

Matticks v. B. & M Construction Inc. (Trustee of) (1992), 15 C.B.R. (3d) 224, *(*sub nom. *B & M Construction Inc., Re)* 11 O.R. (3d) 156, 1992 CarswellOnt 193 (Ont. Bktcy.) — referred to

Royal Bank v. Melvax Properties Inc. (2011), 2011 ABQB 167, 2011 CarswellAlta 401, 75 C.B.R. (5th) 294 (Alta. Q.B.) — considered

Western Union Petro International Co Ltd v. Anterra Energy Inc (2019), 2019 ABQB 165, 2019 CarswellAlta 418 (Alta. Q.B.) — considered

Windham Sales Ltd., Re (1979), 26 O.R. (2d) 246, 31 C.B.R. (N.S.) 130, 1 P.P.S.A.C. 73, 8 B.L.R. 317, 102 D.L.R. (3d) 459, 1979 CarswellOnt 227 (Ont. S.C.) — referred to

Wong v. Field (2012), 2012 BCSC 1141, 2012 CarswellBC 2720 (B.C. S.C. [In Chambers]) — referred to

Statutes considered:

Business Corporations Act, S.B.C. 2002, c. 57

Generally — referred to

Guarantees Acknowledgment Act, R.S.A. 2000, c. G-11

Generally — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7

s. 66(1) — referred to

***Robert A. Graesser J.*:**

Introduction

1 Alvarez & Marsal Canada Inc. LIT (the "Receiver") is the Receiver and Manager of Ladacor AMS Ltd. ("Ladacor"), Nomads Pipeline Consulting Ltd. ("Nomads") and 2367147 Ontario Inc. ("236"). It was appointed receiver and manager of these entities by Court order dated May 18, 2018 (the "Receivership Order"). It now applies for a number of orders:

1. Approving the actions, conduct and activities of the Receiver and its legal counsel outlined in the Receiver's Fourth Report to the Court dated September 3, 2019 and all other reports filed by the Receiver in these receivership proceedings;

2. Approving the Receiver's final statement of receipts and disbursements for the period for May 18, 2018 to August 31, 2019 as set out in the Fourth Report;

3. Approving the accounts, fees and disbursements of the Receiver and its independent legal counsel in connection with the completion of these receivership proceedings, including the costs of this application;

4. Approving the proposed allocation of cash held by the Receiver for Ladacor and Nomads to 236, as set out in the Fourth Report;

5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order;

6. Approving the transfer of all funds and property held by or collected by the Receiver, net of costs required to complete the administration of these receivership proceedings, into the bankrupt estates of the Debtors;

7. Declaring that the Receiver has duly and properly discharged its duties, responsibilities and obligations as Receiver;

8. Discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of any act done by the Receiver in these receivership proceedings, and its conduct as Receiver pursuant to its appointment in accordance with the Receivership Order, or otherwise; and

9. Authorizing the Receiver to transfer the books and records of the Debtors to the bankruptcy trustee, subject to preserving such records as required by statute.

2 The application was initially heard by Topolniski J on September 13. She approved the Receiver's accounts as set out in the Fourth Report and the Affidavit of Fees, a well as the accounts of the Receiver's counsel, Blake, Cassels & Graydon LLP.

3 Mr. Klisowsky was directed to provide the Receiver's counsel with a list of issues or questions pertaining to the Receiver's findings as reported in the Fourth Report and the Supplemental Report dated September 12, 2019.

4 An application by Hythe & District Pioneer Homes (Advisory Committee) ("Hythe") seeking to lift the stay of proceedings against Ladacor was adjourned to a later date. Hythe was attempting to file an amended statement of defence and counterclaim. It alleges that the work by Nomads was so deficient and defective that the entire project has to be demolished and Hythe will have to start again with a new contractor.

5 Mr. Klisowsky's application in relation to Nomad's potential liability on performance bonds with Liberty Mutual Insurance Company, and Mr. Klisowsky's concerns about Nomad's potential liability to the Government of Canada under the Employment and Social Development Canada Wage Earner Protection Program ("WEPP"), were also adjourned to a later date. The Receiver's discharge application was adjourned as well.

6 The adjourned applications were set down before me on November 27. The Hythe matter had been resolved directly between its counsel and counsel for the Receiver. That still left a number of issues that required resolution. Following submissions and argument, I reserved on all of the issues left to me to decide.

7 I received written submissions from counsel for the Receiver (3 in total), from counsel for Mr. Klisowsky, and from counsel for J. Steenhof & Associates Ltd and 1459428 Ontario Inc. I heard submissions from those counsel as well as from counsel for Liberty Mutual Insurance Company ("Liberty Mutual").

8 There was a significant volume of material put before me. The Receiver had prepared four reports over the course of the receivership, and added a supplement to the Fourth Report and provided a Fifth Report filed October 25, 2019 for the purposes of this application. The Supplement and Fifth Report mainly responded to the issues raised by Mr. Klisowsky.

9 There was an affidavit of fees from Orest Konowalchuk, a senior vice president of the Receiver. There were also were affidavits from John Hermann, from the Bank of Montreal ("BMO"), sworn May 18, 2018, from Mr. Klisowsky sworn September 7, 2019, September 11, 2019, and October 5, 2019, from Larry Slywka, a former employee of Ladacor, sworn October 13, 2019, from Bonnie Erin Richard, another former employee of Ladacor, filed October 25, 2019, and a "secretarial affidavit" from Lindsay Farr, sworn November 20, 2019. There was also an affidavit from Jacob Steenhof, from J. Steenhof & Associates Ltd ("J. Steenhof") and 1459428 Ontario Inc ("145"), sworn October 25, 2019.

10 Each of Mr. Klisowsky, Mr. Slywka, Ms. Richard and Mr. Steenhof were cross-examined on their affidavits and I have the transcripts from their cross-examinations.

Background

11 Most of the background facts are not in dispute. Mr. Klisowsky is the majority shareholder in Nomads (97.28%). His son owns the remaining 2.72% of the shares. Nomads was a Calgary based company whose principal business was the manufacture and production of advanced modular buildings and structures. These structures were generally constructed of sea cans. Part of Nomads' business was investing in other assets. One of those investments is its 90% interest in 236. 236 is an Ontario corporation whose business was the ownership and operation of a Days Inn hotel in Sioux Lookout, Ontario. The remaining 10% of the shares in 236 are owned by J. Steenhof, an Ontario corporation.

12 Ladacor is a wholly owned subsidiary of Nomads. Ladacor came into existence in 2017 and carried on the same advanced modular home business as did Nomads. It appears that the incorporation of Ladacor coincided with a banking change by Nomads.

13 In the latter part of 2017, Nomads began a banking relationship with BMO. Mr. Klisowsky injected some $4,000,000 of capital into Nomads/Ladacor. BMO loaned approximately $4,000,000 to Nomads/Ladacor. Ladacor was the principal debtor.

BMO took typical security from Ladacor. Guarantees of the Ladacor debt to BMO were provided by Nomads, 236 and Mr. Klisowsky.

14 After Ladacor was incorporated, all new work was directed to it, while Nomads completed the work it already had under contract. The work contracted by Nomads was, however, performed for it by Ladacor. Payments, whether from Nomads customers or Ladacor customers, were deposited into Ladacor's bank account with BMO

15 The accounting records and the evidence of Mr. Klisowsky, Mr. Slywka and Ms. Richard show that Nomads and Ladacor essentially operated as one entity. All bills were paid from the Ladacor bank account with BMO, and all of the enterprise employees (but for Mr. Klisowsky, his wife, and his son, were paid by Ladacor.

16 Ladacor entered into a bonding relationship with Liberty Mutual. Ladacor's indemnification obligations to Liberty Mutual were guaranteed by Nomads, 236, and by Mr. Klisowsky.

17 The months following the incorporation of Ladacor were not financially successful. Nomads had a major contract with Hythe that was ongoing and far from completion. Nomads had a large receivable ($2,700,000) owed to it by 1507811 Alberta Ltd on a project in Edmonton known as "Westgate". That project had been completed, but there were ongoing discussions about the outstanding payment.

18 Ladacor was performing the work on ongoing projects that were in various stages of completion, including a project in Banff. The Receiver completed these obligations over the course of the receivership.

19 In May 2018, shortly before the Receivership Order, Ladacor was awarded a sub-contract for work on the new court house in Chateh, Alberta. From the information before me, it is likely that Liberty Mutual had previously provided a bid bond, and subsequently provided a surety bond in favour of the general contractor, Kor Alta Construction Ltd ("Kor Alta"). Physical work on the project had not begun at the time of the Receivership Order, and the Receiver disclaimed the contract. That led to a bond claim by Kor Alta against Liberty Mutual. The claim in favour of Kor Alta is tentatively valued at over $1,000,000. Liberty Mutual seeks indemnification for that amount from each of Ladacor, Nomads, 236, and Mr. Klisowsky.

20 Following the Receivership Order, Hawke Electric, a subcontractor to Nomads, made a bond claim on a labour and material payment bond on the Westgate project against Liberty Mutual. Kor-Alta, the general contractor on the Chateh courthouse project, claimed in excess of $1,000,000 as a result of the termination of the subcontract by the Receiver. Liberty Mutual seeks indemnification for those amounts from each of Ladacor, Nomads, 236 and Mr. Klisowsky.

21 Liberty Mutual values these claims at a total of approximately $1,100,000.

22 The Receiver has reported throughout the receivership on its activities and realizations. A sale of the physical assets of Nomads and Ladacor was conducted in the late fall of 2018. The auction sale netted $606,000. Further physical assets (miscellaneous inventory) netted a further $76,000.

23 The Receiver was successful in collecting most if not all of the $2,700,000 receivable owed to Nomads on the Westgate project. The Receiver collected $1,568,609 owed to Ladacor on the Banff project.

24 Since 236 was also put into receivership, the Receiver took steps to sell 236's main asset, the Days Inn Hotel in Sioux Lookout. Of the roughly $5,000,000 sale proceeds, $4,000,000 were paid by the Receiver to BMO.

25 Ultimately, the time of the Fourth Report, the Receiver had paid off the secured debt to BMO, the Receiver's borrowings from BMO to enable it to carry on the Receivership, the WEPP claims, CRA and Service Canada trust/priority claims, along with its and its lawyer's fees and disbursements.

26 The supplemental report and Fifth Report update the figures. As at the time of that report, October 25, the Receiver was holding $10,398 for Nomads, $722,661 for Ladacor, and $637,241 for 236. The Receiver proposes to allocate all of the available proceeds currently in Ladacor's and Nomads' accounts to 236.

27 All three corporations would then be placed in bankruptcy.

28 Because Nomads and Ladacor had intermingled their physical assets, it was not possible for the Receiver to determine with any degree of certainty what assets belonged to Nomads and what assets belonged to Ladacor. For BMO, the secured creditor, it did not matter. It had reportedly good security against all of the assets regardless of which corporation owned them. For the purposes of the Fourth Report, which was from the date of the Receivership Order to August 31, 2019, the Receiver apportioned the auction proceeds $451,450 to Nomads and $154,407 to Ladacor. Ongoing expenses were apportioned between the two corporations based on the contracting party for the contract being worked on. Employee withholding claims by CRA and WEPP claims were broken down between the two corporations as well.

29 Following receipt of Mr. Klisowsky's cross application and the concerns he expressed over the apportionments in the Fourth Report, the Receiver retained Erin Richard to explain the financial situation and accounting of Nomads and Ladacor while she was comptroller for the final year of their operations. She had worked with the Receiver during the course of the receivership. Ms. Richard outlined in her affidavit how employees and assets had been apportioned between the two entities. She attempted to determine from the available records what assets had been owned before Ladacor was incorporated. Those would have been Nomads. Because Ladacor had become the main operating entity after the fall of 2017, anything acquired since then was attributed to Ladacor.

30 The same analysis was performed with respect to employees. For the purposes of payroll, withholdings and other employment related issues, the Receiver treated employees who had been employed with Nomads and who stayed on after Ladacor began operating as Nomads employees. Employees hired after Ladacor began operating were treated as Ladacor employees, even though they may have been working on Nomads projects.

31 For accounts payable and monies owed to trade creditors, the Receiver looked at which entity an invoice was addressed to, or which project it related to. If it was addressed to Nomads, or was in relation to a Nomads project, it was attributed to Nomads. And vice versa for Ladacor.

32 There does not appear to be any dispute that the Nomads/Ladacor records did not provide the Receiver with much guidance. There was no written agreement between Nomads and Ladacor when Ladacor assumed all of the operations of the two corporations. There was no asset transfer agreement. There was no agreement transferring Nomads' rights under any of its ongoing contracts to Ladacor. There was no agreement relating to employees.

33 According to Mr. Slywka, when Ladacor assumed the operations, employees at the time were simply told they were now working for Ladacor. It is unclear whether any of the parties Nomads had contracted with were ever told that Ladacor had taken over Nomads' operations, or that Nomads had assigned any rights to Ladacor.

34 Mr. Klisowsky takes issue with the amount of the asset sale proceeds attributed to Ladacor versus Nomads. He challenges Ms. Richard's assessment, noting that she was a relatively new employee at Ladacor. He also takes issue with the allocation of employees between the companies, and says that only his wife and son were Nomads employees, as all other workers worked for Ladacor. That impacts wages paid to the employees (their WEPP claims) as well as claims by the government for employee deductions and other trust claims made by the Government of Canada.

35 Mr. Klisowsky's view is that as at the beginning of 2018, Nomads was essentially a holding company. All of its projects, employees and assets had been transferred to Ladacor. Ladacor performed all of the work on all of the projects contracted to either Nomads or Ladacor. Ladacor paid all of the employee wages, regardless of what project they were working on. Ladacor paid all of the bills whether they were invoiced to Ladacor or to Nomads, as Ladacor had taken over all of the work on all of the ongoing projects.

36 Whatever the arrangement between Nomads and Ladacor was, it was not reduced to writing. There is some suggestion that the merging of operations and the creation of Ladacor was linked to collection activities undertaken against Nomads by Alberta Treasury Board and Finance in relation to a reassessment of tax credits Nomads had been given under a government

tax incentive program. A review by the Tax and Revenue Administration revisited the credits given to Nomads for 2012, 2013 and 2014 and assessed Nomads some $769,000. The Provincial government had apparently garnisheed Nomads' former bank, leading to Nomads setting up a new banking relationship with BMO.

37 The best that can be said of the operations of Nomads and Ladacor once Ladacor came into existence is that they operated under Mr. Klisowsky's control as "owner" of both entities. Daryl Nimchuk was the chief operating officer for some time. Ms. Richard was comptroller, and Larry Slywka was Ladacor's production manager. The operations of both Nomads and Ladacor were merged so that all receipts went into the Ladacor bank account and all bills were paid out of that account. There was no internal attempt to separate assets, projects, employee functions, bills or receivables. The reporting to BMO and any financial statements produced were "consolidated", although the two corporations were never consolidated under the *Business Corporations Act*. The joint operation is frequently described internally and on contracts as "Nomads Pipelines Consulting Ltd o/a Ladacor". The internal treatment of the two entities' operations does not reflect either entity's legal rights or obligations.

38 According to the brief filed on behalf of Mr. Klisowsky, and his affidavit evidence, he believes that despite all of the various claims being advanced against it, Nomads remains a solvent entity and that Nomads should not be put into bankruptcy. He points to the large receivable of $2,800,000 secured by a builder's lien against the Hythe project. He claims that there is a good defence to Liberty Mutual's claim against Nomads on the indemnity and guarantee agreement on the bond issued in favour of Kor Alta.

39 Mr. Klisowsky points to the wording of the indemnity agreement and argues that the agreement gave Nomads (or the Receiver when it took over control of Nomads following the Receivership Order) their right to cancel the bond in favour of Kor Alta. The Receiver failed to do so. The Receiver's failure should not be visited on Nomads, such that Nomads should not ultimately have to pay anything to the bonding company.

40 He refers to paragraph 45 of the Indemnity agreement that provides:

> 45. *Termination of the present agreement and its effect upon outstanding Bonds* — The present agreement shall only be terminated by any Indemnitor, upon prior written notice to the Surety by registered mail and at its head office, at least thirty days prior to its effective date; however, the said prior notice of termination will not modify, nor exclude, nor discharge the Indemnitors' obligations relating to Bonds issued prior to the effective date of termination or Bonds issued after the effective date of termination by reason of undertakings by the Surety prior to such date, the present agreement will remain in full force and effect as regards the other Indemnitors without any obligation on the part of the Surety to advise such other Indemnitors of such termination.

41 This argument affects Ladacor as well, as it is the primary obligee on the bond and it is required to indemnify Liberty Mutual. The Indemnity Agreement in favour of Liberty Mutual executed by Ladacor, Nomads and 236 by Mr. Klisowsky signing the same. Mr. Klisowsky signed a personal indemnification in favour of Liberty Mutual and there is a *Guarantees Acknowledgement Act* certificate dated January 4, 2018.

Issues

42 The Receiver raises a number of issues and seeks the Court's direction on the following:

> 1. Should the Receiver's apportionment of funds be approved, including its treatment of the contribution and subrogation obligations and rights of the guarantors?
>
> 2. Is there a valid defence on Liberty Mutual's indemnification claims on the bond claims against it?
>
> 3. Has the Receiver erred in apportioning employees, assets and debts?
>
> 4. Should all or any of the entities be put into bankruptcy? and
>
> 5. Should the Receiver's actions be approved?

43 Mr. Klisowky's application challenges a number of the Receiver's recommendations and conclusions and raises a number of issues:

1. The validity of the Liberty Mutual claims under the Indemnity Agreement;

2. The identification and allocation of unsecured debt as between Ladacor and Nomads;

3. The identification and allocation of the auction proceeds between Ladacor and Nomads;

4. The identification of employees of Nomads and any claims (CRA and WEPP);

5. The validity of the Alberta Treasury Board and Finance claim against Nomads;

6. The proposed subrogation from Nomads and Ladacor to 236;

7. The claim of J. Steenhof against 236; and

8. The conduct of the Receiver.

44 I will deal with subrogation first as my decision on it will impact a number of the other issues. I will then deal with Mr. Klisowsky's concerns and claims, before dealing with the relief sought by the Receiver.

Subrogation

45 BMO has been paid in full. It received $5,834,882. That included repayment of amounts loaned by BMO to fund the receivership. Most if not all of the funds that were paid to BMO resulted from the sale of 236's hotel in Sioux Lookout and the collection of the $2,600,000 receivable on the Westgate contract owed to Nomads. The principal debtor to BMO was Ladacor. It was the entity that borrowed and received the funds from BMO. The funds that resulted from collections on other Nomads and Ladacor projects and the sale of Nomads' and Ladacor's physical assets were mainly used to pay the ongoing costs of the receivership, including completion of some of the project work, and the Receiver's fees and disbursements.

46 BMO was a secured creditor, subject only to the superior WEPP claims and CRA source deduction claims, and the costs of the receivership. The Receiver argues on this application that guarantors (such as Nomads and 236) are entitled to be subrogated to the claims they have paid out on behalf of the principal debtor, Ladacor.

47 In this case, Nomads and 236 have paid off BMO's claims against Ladacor. Nomads and 236 are entitled to be subrogated to BMO's claim, and to stand in BMO's shoes with respect to any security BMO held against Ladacor. That means, according to the Receiver, that Nomads and 236 are now the primary secured creditors on any of Ladacor's remaining assets.

48 Additionally, as between guarantors who have paid out on their guarantees, Nomads and 236 are entitled to be treated proportionately, so the debt paid off should be apportioned between them. Where guarantors are equally liable to the obligee, the guarantors are considered to be responsible for equal shares of the debt.

49 Here, that would mean that each of Nomads and 236 should have paid off half of the debt owed to BMO. Since 236 paid more than half of the BMO debt, there should be an adjustment as between Nomads and 236, in 236's favor.

50 The way the Receiver has accounted for this is that the excess of collections over required payments has left a surplus, some of which now stands to the credit of Ladacor. Because 236 paid more than its half of the obligation, 236 is entitled to recover that excess from Ladacor.

51 Of the $5,834,882 paid to satisfy BMO's claims, $4,000,000 came from 236. The remainder came from Nomads. Because of contribution principles between guarantors, each of the guarantors should have paid $2,917,441. 266 overcontributed by $1,082,559. That amount is owed to it by Nomads.

52 The Receiver proposes to pay the funds remaining in the Nomads account and the Ladacor account (after holdbacks for further administration costs) in the approximate amount of $465,000 (Receiver's Fifth Report). 236 is expected to have approximately $517,000 in its account, so it will recover $982,001. It will be short by approximately $100,559. Because of it standing into BMO's security, it will be Nomads' only secured creditor to that extent.

53 This analysis and position is well supported by the Receiver's first brief for this application. The Receiver cites:

Gerrow v. Dorais, 2010 ABQB 560 (Alta. Q.B.);

Mercantile Law Amendment Act 1856, 19 & 20 Vict, c 97;

Matticks v. B. & M Construction Inc. (Trustee of), 1992 CarswellOnt 193 (Ont. Bktcy.);

Andrews & Millett, *Law of Guarantees*, 7th Ed (London: Sweet & Maxwell, 2015) at para 11-017;

Windham Sales Ltd., Re, 1979 CarswellOnt 227 (Ont. S.C.);

Wong v. Field, 2012 BCSC 1141 (B.C. S.C. [In Chambers]);

EC & M Electric Ltd. v. Medicine Hat General & Auxiliary Hospital & Nursing Home (District No. 69), 1987 CarswellAlta 25 (Alta. Q.B.); and

Abakhan v. Halpen, 2006 BCSC 1979 (B.C. S.C.) aff'd 2008 BCCA 29 (B.C. C.A.).

54 J. Steenhof, as an unsecured creditor of 236, and 145 as an unsecured creditor of Nomads on the Hythe project, agree with this analysis, as does Liberty Mutual. Mr. Klisowsky raises no specific objection to this proposal on the part of the Receiver, but suggests that it is premature. He says that the proper contribution between Nomads and 236 can only be calculated once the assets and liabilities of Nomads and Ladacor (as between those entities) have been properly allocated.

55 I am satisfied that for the purposes of finalizing the Receivership accounts, the monies the Receiver holds to the account of Ladacor and Nomads should be transferred to 236's account as a function of a guarantor's right to subrogation and to contribution rights and obligations as between co-guarantors.

Assets and Liabilities of the Debtors

Ladacor

56 There is no doubt that Ladacor is insolvent under any interpretation of "insolvency". It has no remaining assets, other than a contingent interest in the funds proposed to be held back by the Receiver to deal with CRA's post-receivership withholdings claims (discussed below), and a $57,000 GST refund apparently owed to it by CRA. All physical assets have been disposed of. All of Ladacor's projects have been abandoned, completed or wound down. Its receivables have been collected. There are still claims by CRA relating to pre-receivership GST. These claims total $33,446. While these claims presently enjoy priority status, they will drop down to unsecured status in the event of Ladacor's bankruptcy.

57 There is a post-receivership claim relating to source deductions assessed against the Receiver's independent contractors used to complete project work and for other receivership purposes. CRA's position is that these contractors should be treated as employees subject to employment insurance and Canada Pension Plan deductions. While the presently-advanced claim is approximately $10,000, the Receiver anticipates that there are a number of other claims that CRA will advance, depending on its success on the claims already made. The Receiver proposes to withhold $125,000 as a contingency to deal with those funds. It is possible that not all of those funds will be required, and some might ultimately be released back to Ladacor. Conversely, it is possible that the claims and costs of defending Ladacor against them will use up most or all of the contingency amount.

58 The Receiver's records list Ladacor's unsecured creditors. The present list totals approximately $3,500,000 in unsecured claims. That does not include over $1,100,000 from Liberty Mutual under the Indemnity Agreement in favour of Liberty Mutual.

59 The priority claims of CRA have been accounted for in the holdback of $125,000 discussed above. Ladacor's only remaining secured creditors are 236 and Nomads, because they are able to step into BMO's secured position because of their subrogation rights. Since 236's and Nomads' assets were used to pay off BMO, 236 and Nomads have a secured claim against Ladacor for up to $5,834,882, less the approximately $465,000 that will be paid to 236 as a result of this application.

60 It appears from this analysis that Ladacor's unsecured creditors are unlikely to make any recovery at all, as any remaining funds will go to or be attributed to 236 and Nomads, with 236 being able to recover all of any anticipated or hoped-for funds because of its contribution rights against Nomads.

61 It is obvious that Ladacor should be placed into bankruptcy, although it is difficult to see any advantage to that for Ladacor's unsecured creditors. The bankruptcy would appear to benefit only the creditors of 236, as discussed below.

62 In any event, there needs to be an orderly resolution to the massive amount of unsecured debt owed to Ladacor's creditors and the only way of achieving that is through bankruptcy

236

63 236 has no remaining assets, other than its subrogated claim against Ladacor and its claim against Nomads for contribution so that its and Nomads' contributions to BMO will be equalized. 236's creditors are all unsecured. The major claims are Liberty Mutual's claim for indemnity for bond claims against Ladacor ($1,100,000) and a claim from J. Steenhof for approximately $444,000. It too has a GST claim by CRA ($33,000), which is presently a priority claim but which will become unsecured on bankruptcy. There are only a few other unsecured claims totaling about $40,000.

64 Through its subrogation rights and contribution rights arising out of 236's payments to BMO, 236 will receive all of the remaining cash in the three debtor accounts. There is the possibility that some further funds might come to 236 from Ladacor (any surplus from the CRA holdback discussed above and the GST refund). Any such funds may be available for 236's creditors.

65 It is unlikely that 236 will receive any more than the amount presently suggested by the Receiver. That will not satisfy Liberty Mutual's claim, if the claim is valid and anywhere close to the current amount claimed. If J. Steenhof's claim has any validity, it and Liberty Mutual will recover only a fraction of their claims.

Nomads

66 In his submissions, Mr. Klisowsky emphasizes the $2,800,000 receivable and builder's lien claim Nomads has against Hythe. As discussed below, that claim is hotly disputed by Hythe. Hythe is attempting to amend its statement of defence and counterclaim to advance a claim against Nomads for damages significantly higher than the Nomads claim against Hythe.

67 There are two investments owned by Nomads. The first is 27.5% of the common shares in a private corporation, Testalta Corporation Ltd. Nomads is also owed a shareholder's loan of $220,500. The Receiver has no information on the value of this investment. It says that Mr. Klisowsky has not provided any relevant information that would assist it in valuing this asset. As a result, the Receiver places no value on Nomads' investment in Testalta and the Receiver has no information as to whether the shareholders' loan is recoverable.

68 The second of these investments is a 50% interest in 1878826 Alberta Ltd. This private corporation owns a Studio 6 Hotel in Bruderheim, Alberta. The Receiver's information is that the hotel is presently producing "minimal positive cash flow" and is subject to a mortgage of approximately $3,000,000. Because of the lack of information, the Receiver is unable to place any value on this investment.

69 Nomads has a contingent claim to the $54,236 the Receiver paid into Court to discharge a builder's lien in favour of Hawk Electric, filed against the Westgate project. Those funds are in Court as security for the lien and will remain there until further Court order. It is possible that some of those funds might come back to Nomads.

70 Nomads owns 23 modular storage units which were earmarked for the Hythe project. They remain in storage. Unless the Hythe project can use them, they have little residual value. No information was put before me as to the potential value of these storage units. The main value appears to be the ability to use them for completion of the Hythe project. It seems highly unlikely Nomads or the Receiver will have any further involvement with Hythe, other than in the litigation that has ensued.

71 Nomads is entitled to be indemnified for its payments to BMO by Ladacor and in that regard is a secured creditor, being entitled to step into BMO's security position. There is a possibility that Ladacor may not need all of the CRA contingency it has set up, and that it might recover a pre-receivership GST refund. However, since 236 is entitled to contribution from Nomads to equalize their payments to BMO to pay off Ladacor's debts to BMO, 236 will be entitled to recover any of the required contribution from Nomads as a secured creditor.

72 Having regard to the roughly $100,000 contribution owed to 236 and 236's security position, it appears highly unlikely that any funds will remain for the benefit of any of Nomads' unsecured creditors.

73 By way of liabilities, CRA is a priority creditor in the amount of $152,742 in pre-receivership GST. As with Ladacor, this claim will drop down to unsecured status in the event of Nomads' bankruptcy.

74 Nomads is liable to indemnify Liberty Mutual for both of the bond claims Liberty Mutual is liable for. Those claims total approximately $1,100,000.

75 Alberta Treasury Board and Finance Tax and Revenue Administration has a claim (presumably unsecured) against Nomads following a reassessment of tax credits for 2012, 2013 and 2014 totaling $769,245.68. This claim has been outstanding since some time in 2017. Mr. Klisowsky professes to know nothing about this claim.

76 236 has a claim against Nomads to equalize what the two entities paid out to satisfy Ladacor's debts to BMO in the approximate amount of $100,000, assuming all available funds from Ladacor and Nomads are paid over to 236 as a result of this application.

77 Hythe has recently provided information to the Receiver that the work done by Nomads should be demolished because of defects and mold infestation. The expert report provided states that the cost of repairing the existing work and completing it is likely to be significantly more expensive than demolishing the existing work and starting over again. The intended counterclaim will greatly exceed the amount of Nomads' builder's lien and claim for the value of work it claims to have done. While the relative merits of the positions of Nomads and Hythe are unknown, it seems clear that it will be a long and difficult fight for Nomads to collect anything from Hythe. It is not known what was agreed between the Receiver and Hythe with respect to this application such that Hythe's application to lift the stay of proceedings to allow it to file an amended statement of defence and counterclaim. However, the information presented by the Receiver casts doubt on the recoverability of the claimed receivable.

78 Nomads also has approximately $1,900,000 in debts to creditors, after deducting the Liberty Mutual and Alberta Treasury Board claims. One of the J. Steenhof companies, 145, has a claim against Nomads for work done on the Hythe project, but its hopes of collection are likely tied to its builder's lien.

79 It appears, following this analysis, that anything that Nomads may be able to recover from its few debtors will ultimately go to 236 until its and 236's payments to BMO have been equalized. The absence of information as to the potential value of Nomads' investments in Testalta and 1878826 Alberta Ltd makes it impossible to determine if there is any chance of recovery on either of those investments, or in what amount. The first $100,000 is likely to go to 236 and there are $4,700,000 in other creditors, so even if Nomads' present claim against Hythe were given full value (ignoring Hythe's counterclaim), Nomads would

be unable to pay off its unsecured creditors. In my view, the suggestion that Nomads is solvent and should be able to resolve outstanding issues with its creditors is fanciful.

80 Any remaining assets of Ladacor and Nomads will likely end up with 236 and be distributed to its creditors and not to any other creditors of Nomads or Ladacor. The resulting beneficiaries of that scenario are Liberty Mutual and J. Steenhof.

81 236 has no remaining assets other than its subrogated claim against Ladacor and the contribution claim against Nomads. The Receiver proposes to pay Ladacor's remaining funds in the amount of $799,000 less holdbacks and estimated administration costs to 236. Its claim against Ladacor is secured because of its rights to subrogation. However, claims will not satisfy the $4,000,000 236 paid to BMO.

Positions of Liberty Mutual, J. Steenhof and 145

82 Both Liberty Mutual and the Steenhof parties support the Receiver's application. They support the proposal to put all three of the debtor corporations into bankruptcy. They do not oppose any of the other relief sought by the Receiver.

Position of Mr. Klisowsky

83 The foundation of Mr. Klisowsky's disputes with the Receiver's reports and recommendations is that Mr. Klisowsky believes that Nomads remains solvent. Because of its assets, and in particular the Hythe receivable and builder's lien claim, the mis-allocation of debt between Nomads and Ladacor, the invalidity of the Alberta Treasury Board claim and the invalidity of the Liberty Mutual indemnification claims, there is no need to put Nomads into bankruptcy. He argues that Nomads essentially shut down and transferred all of its business to Ladacor. After late 2017, when the transfer took place, all rights and all obligations under existing contracts were assumed by Ladacor. As a result, almost all of the claims against Nomads and Ladacor should be Ladacor's responsibility. Mr. Klisowsky challenges the commercial reasonableness of the Receiver's decision to attribute a significant portion of the creditors to Nomads.

84 Mr. Klisowsky makes the same argument with respect to the physical assets of the enterprise. Effective late 2017, the assets that were eventually auctioned off by the Receiver were mainly assets of Ladacor and not Nomads. Mr. Klisowsky claims that the Receiver did not accurately identify equipment owned by Nomads such that it should be given credit for more of the proceeds of the physical asset sale than it was. The total proceeds of sale were $605,858, of which $451,450 was allocated to Nomads and $154,407 was allocated to Ladacor. Mr. Klisowsky says that most of this should have been allocated to Ladacor.

85 The same holds true for employee claims and the Receiver's treatment of WEPP claims and CRA withholding claims. After the assignment of the business to Ladacor, all employees (but for Mr. Klisowsky's wife and son) became Ladacor employees. Thus none, or almost none, of Nomads' real assets should have been used to pay off the BMO claims. Any remaining claims should be to Ladacor's account. and all the allocation of debt as between Nomads and Ladacor should be attributed to Ladacor.

86 According to Mr. Klisowsky, the Receiver overpaid the WEPP claims and CRA preferred/secured claims because of failing to properly identify what employees worked for Nomads and for Ladacor. From the Receiver's accounting, CRA source deductions for Nomads and Ladacor totaled $322,652. These do not appear to have been broken down between Nomads and Ladacor by the Receiver. The WEPP claims totaled $25,005 (attributed $18,056 to Nomads and $8949 to Ladacor.

87 Mr. Klisowsky says the manner of apportionment of employees was not commercially reasonable.

88 Ultimately, Mr. Klisowsky says that more work needs to be done by the Receiver to properly analyzed and the results amended.

89 Mr. Klisowsky's position with respect to the Liberty Mutual indemnification claims is that if Ladacor had any outstanding bonds, and if there are any valid bond claims, the indemnity agreement should have been terminated by the Receiver immediately on their appointment thus avoiding liability on the bonds. Mr. Klisowsky also takes the position that the Receiver should not have terminated the subcontract with Kor-Alta because that triggered the performance bond claims. Mr. Klisowsky challenges the commercial reasonableness of the Receiver's decision to cancel the contract.

90 Mr. Klisowsky argues that the work done by the Receiver to analyze and quantify the Alberta Finance claim relating to the reversed tax credits is deficient and needs further investigation as to whether the amount claimed is legitimate, whether it can be negotiated, and whether there is a process to appeal the reassessment. Mr. Klisowsky notes that the Alberta Finance claim is the most significant claim against Nomads other than the Liberty Mutual claim and suggests that the Receiver has not yet reached the point of commercial reasonableness in its work on this claim.

91 Mr. Klisowsky also argues that the 145 claim against Nomads on the Hythe project is not valid. It is a claim for $603,000. Additionally, he disputes J. Steenhof's claim for $444,000 against 236. He says there is an issue for trial regarding that claim, as he says that amount represents part of J. Steenhof's investment in 236 and not a debt owed by 236 to J. Steenhof.

92 Mr. Klisowsky argues that assigning any of the debtors into bankruptcy should only be done after the Receiver has completed a proper investigation and analysis of the assets and debts of the debtor corporations. Such a step should only occur when it is commercially reasonable to do so and that point has not been reached.

93 Other issues raised include the reasonableness of the Receiver's actions when heavy rains damaged the roof and other parts of the under-construction Hythe project and its response to the theft of some property from that site.

94 Mr. Klisowsky cites *Royal Bank v. Melvax Properties Inc.*, 2011 ABQB 167 (Alta. Q.B.) in support of his submissions. At the hearing, his counsel also referred to section 66(1) of the *Personal Property Security Act*, RSA 2000 c P-7, and *Bank of Montreal v. Tolo-Pacific Consolidated Industries Corp.*, 2012 BCSC 1785 (B.C. S.C.).

Analysis

1. The validity of the Liberty Mutual claims under the Indemnity Agreement

95 I cannot make any determination as to the validity of the Liberty Mutual claims as I have no documentation supporting the claims against the various bonds. In particular, none of the underlying contracts or subcontracts by Ladacor are in evidence. Mr. Klisowsky suggests that there was no signed contract between Ladacor and Kor-Alta. That may be so. However, that does not answer the matter, as there may well have been a bid bond issued in favour of Kor-Alta during the tendering process. A bid bond secures the successful tenderer's obligation to enter into a contract to perform the work and to provide a performance bond.

96 Mr. Klisowsky's brief seems to suggest that a performance bond and labour and material payment bond were issued, which suggest that there were underlying contracts in existence. But it is premature to try to assess these issues. Liberty Mutual has indemnification agreements from each of Ladacor, Nomads, 236 and Mr. Klisowsky. It does not appear that any of the bond claims have been finalized.

97 Liberty Mutual claims that it is or will be owed approximately $1,100,000 on account of the labour and material payment bond claim by Hawke Electric and the performance bond claim by Kor-Alta. Those claims may be valid and if they are valid, the indemnification agreements appear valid on their face.

98 The defence raised by Mr. Klisowsky: that the Receiver should have terminated the indemnity agreements thereby avoiding liability for the indemnitors, is entirely without merit. His reference to paragraph 45 of the Indemnity Agreement might provide an argument in his favour, it the paragraph ended after the first part of the first sentence. The sentence continues:

> . . . however, the said prior notice of termination will not modify, nor exclude, nor discharge the Indemnitors' obligations relating to Bonds issued prior to the effective date of termination or Bonds issued after the effective date of termination by reason of undertakings by the Surety prior to such date . . .

99 It would make no sense at all for the indemnitors to be able to avoid their liability to indemnify the bonding company for bonds issued before the termination becomes effective. The essence of paragraph 45 is that the indemnitors can avoid liability for future bonds or bonding obligations by giving a 30-day notice. Existing arrangements are not affected.

100 Standard form performance bonds, labour and material payment bonds and bid bonds do not have unilateral termination provisions or cancellation provisions on the part of either party. Once the bonding company is on the hook for a bonded obligation, the indemnitors are likewise on the same risk.

101 This is so elementary in the bonding world that no authorities need be cited. Mr. Klisowsky's argument here is without merit. If Liberty Mutual is liable on any of the bonds it issued for Ladacor, the indemnitors are almost certainly liable to indemnify Liberty Mutual (subject to the usual types of defences available to guarantors.

102 There is no basis to reject the Liberty Mutual claims from consideration of the merits of putting the debtor corporations into bankruptcy. Undoubtedly there may be litigation as to whether Liberty Mutual has properly paid out any of the claims against it and whether they have acted reasonably. But someone will have to carefully monitor the claims and Liberty Mutual's responses, and in doing so will be a costly venture for whomever is tasked with that.

2. The identification and allocation of unsecured debt as between Ladacor and Nomads

103 This is another area where Mr. Klisowsky's arguments are without merit. A debtor cannot unilaterally pass its debts on to someone else and avoid further liability. Subject to the terms of the contract between the creditor and the debtor, a creditor can assign its rights (like its receivables or benefits accruing under a contract) to a third party. Sometimes that requires the consent or agreement of the debtor or other contracting party, and sometimes not. Nomads might have been able to assign its rights under the contract with Hythe and others to Ladacor, and it might not have been.

104 While Nomads could by contract require another party to satisfy its obligations (such as Ladacor) that is not binding on the creditor. Someone cannot simply go to a creditor and say "I don't owe that to you any more, I assigned my obligations to someone else". If that were possible, every debtor would rush to assign its obligations to a shell company or insolvent entity. Creditors are entitled to look to their debtor for payment or performance and they do not have to try to collect from someone else, unless they have specifically agreed to do that through some valid contractual mechanism.

105 There is no evidence here that any of the Nomads creditors ever agreed to release Nomads and substitute Ladacor is its debtor. As a result, the method used by the Receiver with the assistance of Ms. Richard and others, was commercially reasonable. There were no written agreements between Nomads and Ladacor. Claims on contracts Nomads entered into are likely still Nomads' responsibility. Suppliers who supplied things on Nomads projects are likely still Nomads' creditors.

106 I see no error in principle as to how the Receiver characterized the creditors. The Receiver has made no binding determinations; that would result from a claims process in the receivership, or the normal claims processes in bankruptcy. No one has suggested that it would be more efficient or effective to have a claims process within the existing Receivership.

107 I do not see that the Receiver's actions in this area have been unreasonable in any way. It was faced with an undocumented mess and the Receiver has done its best to make sense of the disorganization created by the do-it-yourself creation of Ladacor by Mr. Klisowsky.

3. The identification and allocation of the auction proceeds between Ladacor and Nomads

108 There were no transfer documents in evidence as to any transfers of assets between Nomads and Ladacor. No purchase documents were in evidence showing which entity actually purchased an asset in the first place. In the absence of documentation, the approach taken by the Receiver appears to be reasonable. Where an asset appears to have been in Nomads' possession at the time Ladacor came into existence, it remained Nomads'. Anything acquired after Ladacor began operations was attributed to Ladacor.

109 I see nothing in this approach that is unreasonable. Again, any potential errors on the part of the Receiver were caused by the absence of appropriate documentation at the commencement of the receivership.

110 In any event, arguments of this nature do not get Nomads anywhere. The fewer assets Nomads had, the less it contributed to paying off the BMO debt, and the more it would owe to 236's contribution claim.

4. The identification of employees of Nomads and any claims (CRA and WEPP)

111 It does not appear that existing Nomads employees were properly transferred over to Ladacor's employment. Ladacor may well have been making all of the payroll payments once it took over as the operating company. For employment insurance, Canada Pension purposes, and employment standards purposes, the existing employees should have been terminated from Nomads and hired by Ladacor. Records of Employment should have been prepared and filed; accrued vacation pay should have been paid out.

112 The failure to take those steps, however, does not invalidate a successor employer's employment or liability to the workers it has taken on. It creates liabilities for the former employer (in this case Nomads).

113 This is one area where the Receiver may have been incorrect in its treatment of employees and liability for wages and withholdings. I only say "may", as in the circumstances the Receiver faced, it is possible that any unpaid employee (and CRA) could have chosen which entity to pursue. It would have been possible for Ladacor employees to work on Nomads projects. Nomads could have subcontracted its obligations to Ladacor such that as between Nomads and Ladacor, Ladacor would have all future responsibilities.

114 The absence of any agreement between Nomads and Ladacor makes it virtually impossible to determine what enforceable arrangements between Nomads and Ladacor were made. Consolidated financial statements were prepared. There is no evidence that Nomads and Ladacor had their own financial statements or books once Ladacor came into the picture.

115 There is no evidence that Nomads was ever paid anything by Ladacor for Nomads assets or its ongoing contracts. There is no evidence that Ladacor ever indemnified Nomads against claims from any of Nomads' creditors or contracting parties. Nevertheless, it is possible that most of the employee claims were Ladacor obligations.

116 That being said, the amounts of the claims really makes this a *de minimus* area of concern. Mr. Klisowsky complains of $18,056 of WEPP claims already paid out by the Receiver from Nomads, and disputes the estimated $84,300 in unsecured WEPP claims remaining against Nomads. Charging $18,056 to Ladacor instead of Nomads changes nothing of significance with respect to the results of the receivership and indeed would increase the amount of contribution Nomads would owe to 236. The less attributed to Nomads means the more attributed to 236 such that 236 would itself be a larger creditor of Nomads. That takes on even more significance when 236's status as a secured creditor is factored in, along with the unlikelihood of recovery for any of Nomads' unsecured creditors.

117 While Mr. Klisowsky makes a valid theoretical point, there is no merit to it in substance, as the amounts are too small to make any difference in the overall results.

5. The validity of the Alberta Treasury Board and Finance claim against Nomads

118 The Alberta Finance claim will have to be dealt with whether in the receivership or in a bankruptcy. This is not a claim that was made after the receivership began; it was made against Nomads sometime in 2017. If an appeal period with respect to the reassessment of taxes was missed, it was likely missed long before the Receivership. The Receiver can hardly be faulted for not spending a lot of time investigating an unsecured claim that Nomads appeared to be ignoring and restructuring its affairs to avoid paying.

119 There is nothing unreasonable in the Receiver's approach to this claim. The Receiver did nothing with respect to investigating the validity of any of the unsecured claims, let alone trying to negotiate settlements on them. The main task of the Receiver was to identify secured and preferred claims, and pay out BMO, CRA, Service Canada, and WEPP, so that anything remaining could be properly divided amongst the unsecured creditors.

120 The latter process has yet to occur, and is one of the reasons bankruptcy is a necessary process.

121 I find no fault on the part of the Receiver in this area, and certainly no lack of commercial reasonableness.

6. The claim of J. Steenhof against 236

122 There is little information about the validity of J. Steenhof's claims against 236. Mr. Klisowsky acknowledges that there is a triable issue between 236 and J. Steenhof as to whether the claim is a debt owed to a shareholder or whether the claim relates to the shareholder's investment in the corporation for the purchase of its shares. That needs to be decided in some binding manner. Absent a claims process, the Receiver is not in a position to make any determination. At the end of the day, however, that is really a question for the unsecured creditors of 236. Mr. Klisowsky does not claim to be a creditor of 236, let alone a secured creditor. He claims to be a shareholder. The information suggests that the shareholders of 236 are likely to receive nothing for any shareholders' loans, let alone any equity they may have in that corporation.

123 It is certainly not an issue that can be decided summarily and will likely be a time consuming and expensive exercise.

124 The Receiver cannot be criticized for its approach to this claim and there is nothing commercially unreasonable about maintaining the J. Steenhof claims in the list of unsecured creditors.

Relief sought by Receiver

125 This takes us to the Receiver's requested relief, which I can now deal with having regard to the facts as I have found them.

1. Approving the actions, conduct and activities of the Receiver and its legal counsel outlined in the Receiver's Fourth Report to the Court dated September 3, 2019 and all other reports filed by the Receiver in these receivership proceedings

126 Whether the Receiver should have taken different action after the rain damage to the Hythe project, and whether the Receiver should have taken different action after thefts of equipment or tools from that project, are arguable issues.

127 However, Mr. Klisowsky has not raised any issues or arguments that require further evidence or a trial.

128 In response to Mr. Klisowsky's criticisms of the Receiver, counsel says that it is too late for Mr. Klisowsky to raise these arguments. The Receiver has been transparent throughout; Mr. Klisowsky has been represented throughout and has been present at most if not all of the court appearances. The allocations of assets and employees and payment of secured and preferred claims have been dealt with in the Receiver's various reports and on the court applications approving payments and transactions. Mr. Klisowsky has been silent throughout the proceedings and took no appeals from any of the orders made. Counsel argues that any suggestion that the Receiver has not acted in a commercially reasonable manner is without foundation.

129 Additionally, counsel for the Receiver points out that no expert evidence has been put forward as to what should have been done regarding any of these issues to achieve commercial reasonableness.

130 The Receiver cites *Jaycap Financial Ltd v. Snowdon Block Inc*, 2019 ABCA 47 (Alta. C.A.) on the subject of commercial reasonableness and a receiver's obligation to:

> . . . exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking (at paragraph 28).

131 The Receiver says that here, it satisfied those obligations and acted in a fully transparent manner having regard to its various reports and court applications.

132 The Receiver cites *Western Union Petro International Co Ltd v. Anterra Energy Inc*, 2019 ABQB 165 (Alta. Q.B.) and argues that the record before me is sufficient to enable me to make a fair and just determination of the issues without requiring more evidence, or a trial.

133 Counsel also refers to the decision in *Royal Bank v. Melvax Properties Inc.*, 2011 ABQB 167 (Alta. Q.B.) where Veit J referred to the weight to be given to the business judgments of others involved in the matter. Here, counsel points to the support the receiver has from Nomads', Ladacor's and 236's largest creditors, Liberty Mutual and the Steenhof parties. The other large creditor, Alberta Finance, has taken no position.

134 The value of the theft was not significant in the overall scheme of things, and the Receiver's actions following the rain damage were aimed towards having Hythe continue on with some aspects of the construction contract. The objective there was to recover the amounts owed to date, and be able to make valuable use of the containers that still remain in storage. While those efforts ultimately proved unsuccessful, and the benefit of hindsight gives rise to the efficacy of those actions, the Receiver's actions do not appear to be outside the scope of commercial reasonableness. Nor do they approach the gross negligence or willful misconduct level required to have the Receiver liable for any loss resulting from those actions.

135 To the extent that the Receiver's actions have not otherwise been approved in previous orders, I am satisfied that relief should be granted to the Receiver

2. Approving the Receiver's final statement of receipts and disbursements for the period for May 18, 2018 to August 31, 2019 as set out in the Fourth Report

136 With the exception of Mr. Klisowsky's concerns addressed above, no one challenged the appropriateness of the Receiver's final statement of receipts and disbursements for this period. Mr. Klisowsky took no objection to the time spent or the hourly rates, but objected to the completeness of the Receiver's work.

137 I am satisfied that it is appropriate to approve these accounts, and do so (to the extent not already covered by Topolniski J's Order of September 13).

3. Approving the accounts, fees and disbursements of the Receiver and its independent legal counsel in connection with the completion of these receivership proceedings, including the costs of this application

138 While I do not see any problem with the anticipated accounts, fees and disbursements in connection with the completion of the receivership proceedings, I think it is more appropriate to approve these accounts, fees and disbursements when they have been incurred. Hopefully they can be completed within the budgeted amounts.

4. Approving the proposed allocation of cash held by the Receiver for Ladacor and Nomads to 236, as set out in the Fourth Report

139 I acknowledge that the Receiver's work in allocating assets and employees between Ladacor and Nomads may not have resulted in a perfect allocation. That is not because the Receiver's work was deficient or flawed. Rather, it was because of the corporate mess that existed at the time of the Receivership Order. The Receiver had to try to make sense of an undocumented and ill-conceived "takeover" of Nomads by Ladacor. The proposed method of allocation by Mr. Klisowsky is unworkable, especially as it is founded on the incorrect assumption that Nomads could assign its obligations to Ladacor in a manner that would be binding on its creditors.

140 The reality is that any reallocation of assets would be moot. Putting more assets and liabilities into Ladacor would result in Nomads making a smaller contribution to paying off the BMO debt. That would simply increase the amount of 236's secured claim for contribution from Nomads. While it might leave fewer unsecured creditors for Nomads to have to deal with, the above analysis indicates that Nomads' unsecured creditors are unlikely to make any recovery at all.

141 As such, my conclusion is that no creditor is prejudiced by the allocations that were made by the Receiver between Nomads and Ladacor.

142 The Receiver has, in my view, correctly applied the applicable principles of subrogation and contribution, such that it is appropriate to allocate all of the remaining cash of Ladacor and Nomads to 236.

5. Approving the Receiver's proposal to assign the Debtors into bankruptcy in accordance with the Receivership Order

143 What is left with the three debtor corporations is a paucity of assets and a mountain of claims against them. Only the Liberty Mutual claim involves all three corporations. Total claims (counting Liberty Mutual only once) exceed $7,000,000. None of the claims have been proven. There may be defences to some or many of the claims, and some of the claims may be excessive in amount.

144 Getting to the bottom of all of this will be time consuming and very expensive. Litigation with Hythe has already commenced. Its result is uncertain. Success on that litigation would appear to be the only real chance of any collection for Nomads' unsecured creditors. The only effective way of dealing with the numerous claims is through a statutory process such as bankruptcy. While there are possible ways of dealing with claims in a receivership, no one other than Mr. Klisowsky is recommending that the receivership continue. The Receiver's recommendation is to use the bankruptcy process to deal with the few remaining assets and myriad of claims.

145 I agree with the Receiver's recommendation and accordingly approve its proposal to assign the three debtor corporations into bankruptcy.

6. Approving the transfer of all funds and property held by or collected by the Receiver, net of costs required to complete the administration of these receivership proceedings, into the bankrupt estates of the Debtors

146 Having approved the assignments into bankruptcy, it flows that any funds and property remaining after the administration of the receivership has been completed should be transferred into the respective bankruptcy proceedings.

7. Declaring that the Receiver has duly and properly discharged its duties, responsibilities and obligations as Receiver

147 There is no valid objection to this relief being granted, to the date of this decision and insofar is the Receiver carries out the orders herein.

8. Discharging and releasing the Receiver from any and all further obligations as Receiver and any and all liability in respect of any act done by the Receiver in these receivership proceedings, and its conduct as Receiver pursuant to its appointment in accordance with the Receivership Order, or otherwise

148 This order appears to be premature, as there is still work to be done to carry out the terms of this order. To date, this relief appears appropriate but this relief should be applied for after the Receiver has completed its work and not in advance.

9. Authorizing the Receiver to transfer the books and records of the Debtors to the bankruptcy trustee, subject to preserving such records as required by statute.

149 Having approved the assignments into bankruptcy, this relief flows from that order and is granted.

Application granted in part.

TAB 19

CITATION: RBC v. Gustin, 2019 ONSC 5370
COURT FILE NO.: 35-2225602T
DATE: 20190916

ONTARIO

SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

B E T W E E N:	)	
	)	
MNP Limited	)	
	)	J. Ross MacFarlane, for MNP Limited, the
	)	Receiver
Receiver	)	
	)	
Royal Bank of Canada	)	
	)	
	)	Timothy C. Hogan, for the applicant, Royal
	)	Bank of Canada
	)	
Applicant	)	
	)	
- and -	)	
	)	
	)	
Grant Gustin	)	Benjamin Blay, for the respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	**HEARD:** September 13, 2019

RADY J.

Introduction

[1] MNP, the Court appointed Receiver, seeks the Approval of its first report dated August 30, 2019 and various related relief. The only controversy is whether the Court can and should order the relief sought in para. 8 of the proposed draft order. It authorizes the Receiver to file an assignment in bankruptcy on behalf of the debtor. Royal Bank of Canada supports the relief and Mr. Gustin opposes.

[2] I pause here to note that the receiver was also seeking relief against 1886890 Ontario Limited and Frank Gustin, who is Grant Gustin's father. He and the numbered company filed a responding motion record opposing some of the relief the Receiver's being requested. I am advised that the Receiver and Mr. Gustin Sr. have reached an accommodation and as a result, he did not participate in the motion.

Facts

[3] Grant Gustin has been a farmer operating a hog and cash crop farm in Petrolia on land he owned at 4715 Lasalle Line and also rented elsewhere.

[4] Royal Bank of Canada holds a mortgage on the property and a first ranking general security agreement. Mr. Gustin is in default, which led to the appointment of the Receiver. Mr. Gustin has not been cooperative, and there is evidence in the record that he has withheld relevant information and has or has threatened to remove assets from the Receiver's reach.

[5] The Receiver and Royal Bank of Canada say that he misrepresented that he was the owner of 931 hogs. The hogs may be owned by J. A. Cryderman Farms Inc. They are being managed by Scott Leystra, a business associate of Mr. Gustin.

[6] Mr. Gustin also has made eight payments totaling $242,047 to Mr. Leystra between March and May 2019. There is also an issue respecting the ownership of certain equipment and stored grain (which was the subject of Mr. Gustin Senior's response to the motion). Mr. Gustin has said some of the equipment and crops are jointly owned with or owned outright by his father.

The Law

[7] As already noted, the Receiver seeks authority from the Court to make an assignment in bankruptcy of the debtor. Obviously, it is not a creditor.

[8] It wishes to avail itself of the enhanced powers available to a trustee in bankruptcy under ss. 158 and 161-167 of the *Bankruptcy & Insolvency Act*. This is necessary given Mr. Gustin's lack of cooperation and misrepresentations.

[9] In support of the relief sought, Royal Bank of Canada submits that Mr. Gustin has committed acts of bankruptcy as defined in s. 42(1) of the *BIA* and in particular subsections (f), (g), (h) and (j). He availed himself of the provisions of the *Farm Debt Mediation Act*, thereby acknowledging his insolvency.

[10] As a preliminary matter, ss. 43-48 of the *BIA* protects farmers from creditor applications for bankruptcy orders. Section 48 provides:

> Sections 43 to 46 do not apply to individuals whose principal occupation and means of livelihood is fishing, farming or the tillage of the soil or to any individual who works for wages, salary, commission or hire at a rate of compensation not exceeding twenty-five hundred dollars per year and does not on their own account carry on business.

[11] The Receiver and Royal Bank of Canada submit that Mr. Gustin is no longer entitled to the protection afforded by the *BIA* because he ceased being a farmer when the Receiver was appointed.

[12] There is authority supporting the Court's power to grant this form of relief in *Royal Bank of Canada v. Sun Squeeze Juices Inc.*, [1994] O.J. No. 567 (Gen. Div.) aff'd 1994 Carswell Ont. 310 (C.A.); and *Bank of Montreal Owen Sound Golf and Country Club Ltd.*, 2012 ONSC 557.

[13] On behalf of Mr. Gustin, Mr. Blay opposes the relief for the following reasons:

1) an assignment is premature because there is no evidence of what the creditor's position will be on liquidation;

2) Royal Bank of Canada is a single, secured creditor and as a result, must show special circumstances;

3) the cases relied upon both involved corporations rather than individuals; and

4) there are remedies available under provincial legislation for improper conveyances etc. and resort to the *BIA* is unnecessary.

Analysis

[14] I agree with the Receiver and Bank that Mr. Gustin ceased to fall within the ambit and protection of s. 48 of the *BIA* upon the appointment of the Receiver. His principal occupation and means of livelihood can no longer be said to be from active farming.

[15] Further, the Court is empowered to authorize the Receiver to file an assignment in bankruptcy. There is ample authority supporting that conclusion, including the decisions to which reference has been made, but also the cases cited in those decisions. There is no sound basis to distinguish the cases because the debtors were corporations. There is no legal distinction between a person and a corporation.

[16] Nor is Royal Bank of Canada a sole creditor. A list of Mr. Gustin's unsecure Creditors is found in the material filed.

[17] Finally, while there may well be remedies available under provincial statues, it is needlessly inefficient and expensive to be required to resort to them. And more importantly, it would serve to delay the orderly execution of the Receiver's undertaking.

[18] I am satisfied that the relief sought should be granted as requested and I have signed the order provided.

_____

Justice H. A. Rady

Released: September 16, 2019

CITATION: RBC v. Gustin, 2019 ONSC 5370
COURT FILE NO.: 35-2225602T
DATE: 20190916

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

MNP Limited

Receiver

Royal Bank of Canada

Applicant

- and -

Grant Gustin

Respondent

REASONS FOR JUDGMENT

J.

Released: September 16, 2019