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JUDICIAL CENTRE	CALGARY
PLAINTIFF	**GMT CAPITAL CORP.**
DEFENDANTS	**STRATEGIC OIL AND GAS LTD. and STRATEGIC TRANSMISSION LTD.**
DOCUMENT	**BENCH BRIEF**

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July 19, 2021

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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BENCH BRIEF OF THE APPLICANT IN SUPPORT OF APPLICATION TO APPROVE SALES PROCESS AND TO APPROVE SALES ADVISOR

TABLE OF CONTENTS

I. INTRODUCTION

1. This brief is submitted on behalf of Alvarez & Marsal Canada Inc, in its capacity as the Court-appointed receiver and manager (the "**NWT Receiver**") of those properties, assets and undertakings of Strategic Oil and Gas Ltd. and Strategic Transmission Ltd. (together "**Strategic**") situated in the Northwest Territories (the "**NWT Property**") in support of its application to, among other things, seek the Court's approval to:

   (a) engage Sayer Energy Advisors (the "**Sales Advisor**") to act as an advisor to, and assist with, the NWT Receiver's proposed Sales Solicitation Process regarding the NWT Property (the "**SSP**");

   (b) conduct the NWT Receiver's proposed SSP of the NWT Property; and

   (c) seal on the Court record the First Confidential Supplement to the Receiver's Second Report dated July 12, 2021 (the "**First Confidential Supplement**").

2. The NWT Receiver has analyzed and evaluated Strategic's NWT Property and determined that conducting the proposed SSP in respect of same, with the assistance of the experience and expertise of the Sales Advisor, is the most commercially reasonable manner by which to maximize value for Strategic's stakeholders and, where possible, transfer as many of the oil and gas properties to responsible third parties.

3. Further, the First Confidential Supplement contains commercially sensitive information which, if disseminated, could adversely affect the proposed SSP as well as the commercial interests of third parties, namely the Sales Advisor and the other two parties who submitted proposals to act as sales advisor to the NWT Receiver. The sealing order is necessary to prevent the First Confidential Supplement from being disclosed. The sealing order sought is the least restrictive means possible to prevent dissemination of the First Confidential Supplement.

4. The NWT Receiver therefore submits that the approval of: i) the Engagement Letter between the NWT Receiver and the Sales Advisor, ii) the proposed SSP, and iii) sealing order, are just, convenient, commercially reasonable, and appropriate in the circumstances.

II. STATEMENT OF FACTS

5. For brevity, the facts have not been repeated in this Bench Brief and are set out in the Second Report of the Receiver dated July 12, 2021 (the "**Second Report**"). All capitalized terms used but not otherwise defined herein have the meaning given to them in the Second Report.

III. ISSUES

6. This bench brief addresses the following three issues before this Honourable Court:

   (a) should Sayer Energy Advisors be approved as the Sales Advisor;

   (b) should the NWT Receiver's proposed SSP be approved; and

   (c) is it appropriate to grant the sealing order respecting the First Confidential Supplement?

IV. LAW AND ARGUMENT

7. In executing its duties, a receiver must act honestly, in good faith, and deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.[1] Generally speaking, a receiver's primary objective is the liquidation of an insolvent debtor's assets in order to maximize realizations for creditors.[2] The statutory authority for a receiver to conduct such sales is grounded in the very broad wording of section 243(1)(c) of the *BIA*, which provides the court with the ability to authorize a receiver to "take any other action that the court considers advisable".[3] As recently stated by the Alberta Court of Appeal, this "power would include the mandate to sell some of the assets of the insolvent corporation…"[4] This power of sale by virtue of section 243(1)(c) of the *BIA* has also been recognized by the Ontario Court of Appeal.[5]

8. Additionally, the NWT Receivership Order contemplates that the NWT Receiver may conduct a marketing process, and engage consultants to assist with such process, as

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 247 (the "*BIA*") **[TAB 1]**.
[2] *Third Eye Capital Corporation v Dianor Resources Inc.*, 2019 ONCA 508 at paras 71-76 [*Dianor*] [**TAB 2**].
[3] *BIA*, *supra* at para 243(1)(c) [**TAB 1**].
[4] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226 at paras 20 and 31 [**TAB 3**].
[5] *Dianor supra*, at para 76 [**TAB 2**].

necessary. Specifically, the NWT Receivership Order provides that the NWT Receiver is expressly empowered and authorized to:

(a) take possession of and exercise control over the NWT Property;

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

(c) sell, convey, transfer, lease or assign the NWT Property or any part or parts thereof, out of the ordinary course of business, subject to the approval of this Honourable Court for any transactions exceeding $200,000, or the aggregate of multiple transactions exceeding $500,000; and

(d) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, to assist with the exercise of the NWT Receiver's powers and duties. [6]

A. The Engagement of the Sales Advisor Should be Approved

9. While there are no specific statutory provisions respecting a receiver's engagement of a consultant or an advisory party such as a sales advisor, the NWT Receiver submits that this Court may draw upon the factors which a court would typically consider when determining whether to approve a financial advisor's charge in restructuring proceedings. Those factors are:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

[6] The January 28, 2020 Receivership Order of Madam Justice Horner, subparagraphs 5(a), (d), (k), and (l) [NWT Receivership Order] [**TAB 4]**

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[7]

10. Additional factors courts have considered in determining whether to approve agreements with financial advisors in the restructuring context are:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.[8]

11. The NWT Receiver requires advisory services to run a robust sales process in order to maximize value to Strategic's creditors and stakeholders. Further, given the nature of the NWT Property, the NWT Receiver requires the assistance of a party, such as the Sales Advisor, who has experience providing advisory services on divestitures specific to the oil and gas industry. The Sales Advisor also has familiarity with the geographic region where the NWT Property is situated, which will be an asset in the proposed SSP.[9]

12. The NWT Receiver solicited informal requests for proposals ("**RFPs**") from four reputable firms with experience in Canadian oil and gas merger and acquisition activities. Of the four firms solicited, three responded to the NWT Receiver's RFPs. Having received three competitive proposals, the NWT Receiver provided each potential sales advisor with a further opportunity to clarify certain terms of their proposals and adjust their fee structure.[10]

13. After carefully considering the responses to the RFPs received, and following consultation with the GNWT, the NWT Receiver entered into the Engagement Letter with the Sales Advisor. The NWT Receiver considered that the Sales Advisor:

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[7] *Re Canwest Publishing Inc.*, 2010 ONSC 222 at para 54 [**TAB 5**].
[8] *Re Danier Leather Inc*, 2016 ONSC 1044 at para 47 [**TAB 6**].
[9] Second Report of the Receiver dated July 12, 2021, at paras. 40, 44 [**Second Report**]; First Confidential Supplement to the Receiver's Second Report dated July 12, 2021, at Appendix "C" [**Confidential Report**].
[10] Second Report, at para. 45; Confidential Report at paras. 7-13.

(a) is well known in the local industry and specializes in coordinating disposition programs in the oil and gas industry;

(b) has previously acted as a sales advisor of distressed assets, including in the insolvency context; and

(c) was reasonably priced in comparison to the other proposals received, especially in considering the additional experience possessed by the Sales Advisor. The NWT Receiver submits that the quantum of the fees payable under the Engagement Letter reflect an appropriate incentive to secure the highest and best bid for the NWT Property.[11]

14. The NWT Receiver is of the view that the fee arrangement is fair, reasonable and consistent with fee arrangements in other engagements of similar size, scope and complexity in its experience.[12]

15. Further, the NWT Receiver's engagement of the Sales Advisor is supported by the Government of the Northwest Territories ("**GNWT**"), who is the party funding the within Receivership Proceedings.[13]

16. As noted above, this Court has the jurisdiction to approve the NWT Receiver's engagement of the Sales Advisor pursuant to section 243(1)(c) of the *BIA*, and in fact, such engagement is expressly contemplated by the NWT Receivership Order.[14] For all of the foregoing reasons, the NWT Receiver submits that it is appropriate for this Court to exercise that jurisdiction and approve the Engagement Letter and the fees payable thereunder.

B. The Proposed SSP is Fair, Transparent and Commercially Reasonable in the Circumstances and Should Therefore be Approved

17. While courts have drawn a distinction between the approval of a sales process and the approval of an actual sale itself, the factors which a court is to consider on such motions are

[11] Second Report *supra*, at paras. 47; Confidential Report, *supra* at paras. 15.
[12] Second Report *supra*, at para. 48.
[13] Second Report *supra*, at para. 47.
[14] NWT Receivership Order *supra*, at subparagraphs 5(a), (d), (k), and (l) [**TAB 4**].

intertwined and drawn from the oft-cited *Soundair* principles.[15] When reviewing a sales and marketing process proposed by a receiver a court should assess:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[16]

18. Lastly, a court should give weight to the recommendations of its receiver, a court-appointed officer with significant expertise in the insolvency area.[17] The proposed sales process need not be perfect, only reasonable.[18]

19. The NWT Receiver, in consultation with the Sales Advisor, has prepared the proposed SSP, attached as Appendix "B" to the Second Report. The NWT Receiver submits that the form of SSP proposed is fair, reasonable and appropriate in the circumstances. Among other things, the NWT Receiver notes that:

(a) the sale of the NWT Property is on an 'as is where is basis' and subject to Court approval;

(b) the SSP will require that any Successful Bidder (as defined in the SSP) be compliant with the regulatory requirements of the applicable energy regulator; and

(c) the process itself is contemplated to run for a period of five (5) weeks, and is sufficiently robust to provide the market with sufficient exposure to maximize value for stakeholders. [19]

20. The NWT Receiver submits that its proposed SSP is fair and transparent, providing any interested party that executes a non-disclosure agreement an opportunity to participate in the process. Further, any "Successful Bid" under the proposed SSP will ultimately require

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[15] *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6 [*blutip*] [**TAB 7**].
[16] *blutip supra*, at para 6 [**TAB 7**].
[17] *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at paras 10, 15, 19 [**TAB 8**]
[18] *Re Sanjel Corporation*, 2016 ABQB 257 at para 80 [**TAB 9**].
[19] Second Report *supra*, at para. 58.

this Court's approval, adding another layer of fairness, transparency and integrity to the proposed sales process.[20]

21. Secondly, the NWT Receiver considers that the proposed SSP, and more specifically the timelines contemplated thereunder, are commercially reasonable in the circumstances.[21] In consultation with the Sales Advisor and the GNWT, the NWT Receiver has determined that the most optimal start date for the proposed SSP is in the weeks leading up to the Labour Day long weekend, when more potential purchasers are expected to be interested in acquisition opportunities. Further, the proposed SSP contemplates a broad canvassing of the market through multiple channels, including through targeted email communications and strategically placed advertisements through oil and gas industry specific news outlets.[22]

22. Third, the NWT Receiver submits that the broad marketing contemplated under the proposed SSP, in combination with the experience and expertise of the Sales Advisor, will optimize the chances of securing the best possible price for the NWT Property.

23. Lastly, the NWT Receiver submits that the proposed SSP is in the best interests of all of Strategic's stakeholders. In addition to marketing for sale the NWT Property, the proposed SSP will also include a marketing for sale of Strategic's Interprovincial Pipeline, despite the fact that the NWT Receiver is not presently in care and custody of said pipeline.[23] This approach is similar to the approach taken in the *Lexin* receivership proceedings, wherein the court appointed receiver in that instance was never in physical possession of oil and gas assets regulated by the Alberta Energy Regulator; however, *Lexin's* receiver did have the power to market and sell Lexin's oil and gas properties.[24]

24. The NWT Receiver's proposed SSP is supported by the GNWT, as well as the Canada Energy Regulator, being the regulator over the Interprovincial Pipeline.

25. As with the engagement of the Sales Advisor, this Court has the jurisdiction to approve the proposed SSP pursuant to section 243(1)(c) of the *BIA*, and the SSP is expressly

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[20] *blutip supra*, at para. 6 [**TAB 7**].
[21] *Ibid* [**TAB 7**].
[22] Second Report *supra*, at paras. 54-59.
[23] Second Report *supra*, at paras. 32-35.
[24] Lexin Resources Ltd. Receivership Order, granted March 20, 2017 in Court of Queen's Bench Action No. 1701-03460 [**TAB 10**].

contemplated by the NWT Receivership Order.[25] The NWT Receiver submits that for all of the foregoing reasons it is commercially reasonable and appropriate to approve the SSP.

C. Sealing of the First Confidential Supplement is Appropriate

26. The principles as to when public access to a court file may be restricted are set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v Canada (Minister of Finance)*, which provides that:

    (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 rights 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.[26]

27. The First Confidential Supplement contains confidential information regarding the Sales Advisor's fee structure, as well as the proposed fee structure and commercial terms made to the NWT Receiver by the other third parties who also delivered proposals to act as the NWT Receiver's sales advisor on this mandate. Such proposals also provide commentary on the NWT Receiver's anticipated sales process. If such information were disclosed it could adversely affect not only the proposed SSP, but also the commercial interests of these third parties in future mandates. The NWT Receiver has however included a redacted copy of the Engagement Letter with the Sales Advisor in its Second Report.

28. Therefore, the NWT Receiver submits that the sealing order sought is the least restrictive means to maintain the confidentiality of such information. The NWT Receiver submits that the salutary effects of the sealing order outweigh the deleterious effects of restricting access to the First Confidential Supplement, and that the sealing order is therefore appropriate in the circumstances.

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[25] NWT Receivership Order *supra*, at subparagraphs 5(a), (d), (k), and (l) [**TAB 4**].
[26] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522 at para 53 [**TAB 11**].

V. RELIEF REQUESTED

29. For all of the foregoing reasons, the NWT Receiver submits that the approval of: i) the Engagement Letter between the NWT Receiver and the Sales Advisor, and ii) proposed SSP, are just, convenient, commercially reasonable, and appropriate in the circumstances, and further, that the granting of the requested sealing order is the less restrictive means to prevent the dissemination of commercially sensitive information.

30. Consequently, the NWT Receiver respectfully requests that this Honourable Court grant the Order requested by it, which, amongst other things: i) approves the Engagement Letter between the NWT Receiver and the Sales Advisor, ii) approves the NWT Receiver's proposed SSP, and iii) seals the First Confidential Supplement on the Court record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July, 2021.

BORDEN LADNER GERVAIS LLP

Per: *J. Cameron*

Jessica L. Cameron

Counsel for the NWT Receiver, Alvarez & Marsal Canada Inc.

TABLE OF AUTHORITITES

TAB	**AUTHORITY**
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Third Eye Capital Corporation v Dianor Resources Inc.*, 2019 ONCA 508
3.	*DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226
4.	*The January 28, 2020 Receivership Order of Madam Justice Horner*
5.	*Re Canwest Publishing Inc.*, 2010 ONSC 222
6.	*Re Danier Leather Inc*, 2016 ONSC 1044
7.	*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750
8.	*Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375
9.	*Re Sanjel Corporation*, 2016 ABQB 257
10.	Lexin Resources Ltd. Receivership Order, granted March 20, 2017 in Court of Queen's Bench Action No. 1701-03460
11.	*Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522

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 June 16, 2021

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Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

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.

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

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 :

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).

TAB 2

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

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Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable

of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence

is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions

TAB 3

2021 ABCA 226
Alberta Court of Appeal

DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation

2021 CarswellAlta 1442, 2021 ABCA 226

DGDP-BC Holdings Ltd. (Appellant) and Third Eye Capital Corporation (Respondent) and PricewaterhouseCoopers Inc. (Respondent)

DGDP-BC Holdings Ltd. (Appellant) and Third Eye Capital Corporation (Respondent) and Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondents) and PricewaterhouseCoopers Inc. in its capacity as the court-appointed receiver of Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondent)

Jack Watson J.A., Frans Slatter J.A., and Ritu Khullar J.A.

Heard: June 7, 2021
Judgment: June 17, 2021
Docket: Calgary Appeal 2001-0241-AC, 2001-0125-AC

Counsel: T.L. Czechowskyj, Q.C., I. Aversa, S. Babe, for Appellant
C.D. Simard, K.R. Cameron, for Respondent, Third Eye Capital Corporation
R. Gurofsky, J.L. Cameron, for Respondent, PricewaterhouseCoopers Inc.
No one, for Respondents, Accel Canada Holdings Limited and Accel Energy Canada Limited

Subject: Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Marshalling of secured claims

Court approved interim financing loan secured by Interim Lenders' Charge with appellant D Ltd. and respondent T Corporation as interim lenders, and granted debtor-in-possession ("DIP") loans priority — DIP Financing Term Sheet provided that both A Limited entities were joint and several borrowers and that Interim Lenders' Charge attached to assets of both entities — Monitor negotiated sale of A Limited's assets to T Corporation, and T Corporation applied for appointment of receiver as part of sale process — Supervising judge appointed P Inc. as receiver and issued receivership order which granted Receivers' Borrowings Charge priority over Interim Lenders' Charge — D Ltd. appealed — Appeal dismissed — Consent requirement under s. 11.2 of Companies' Creditors Arrangement Act did not extend to charges created through other sources of jurisdiction like Bankruptcy and Insolvency Act — Section 243 of Bankruptcy and Insolvency Act gave supervising judges broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that arose — Supervising judge had discretion and jurisdiction to establish priority of Receivers' Borrowings Charge .

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

Court approved interim financing loan secured by Interim Lenders' Charge with appellant D Ltd. and respondent T Corporation as interim lenders, and granted debtor-in-possession ("DIP") loans priority — DIP Financing Term Sheet provided that both A Limited entities were joint and several borrowers and that Interim Lenders' Charge attached to assets of both entities — Monitor negotiated sale of A Limited's assets to T Corporation following approval by supervising judge, and T Corporation applied for appointment of receiver as part of sale process — Debt secured by Interim Lenders' Charge was allocated to both A Limited entities, with portion allocated to one entity used to pay off part of that entity's transaction and portion allocated to other entity being deferred — Sale of non-deferred entity closed with D Ltd. being paid sums owing to it under Interim Lenders' Charge that were allocated to non-deferred entity — D Ltd. appealed approval of sale — Appeal dismissed — Section 243 of Bankruptcy and Insolvency Act included mandate to sell some assets of insolvent corporation while only paying out portion of DIP financing — DIP Term Financing Sheet always recognized that A Limited was made up of two separate entities — Reality was that there were two separate corporations and that bifurcated treatment of Interim Lenders' Charge might have been

> Charge had been created under s. 11.2(1), those charges could not have been given priority without the consent of the appellant.

16 The respondents argue, however, that the Receiver's Borrowings Charge was not a charge granted under the *CCAA* and therefore does not fit within the provisions of s. 11.2(3). That section, they argue, only applies when two or more interim financing charges are made under the *CCAA*. Since the Receiver's Borrowings Charge was made under the *BIA*, it is not subject to the requirement for consent, and the wide jurisdiction given to supervising judges under the *BIA* allowed this supervising judge to set priorities.

17 The respondents rely on s. 243(1)(c) of the BIA, which authorizes the supervising judge to "take any other action that the court considers advisable". There is a similar wide-ranging discretion under s. 13(2) of the Judicature Act, but it does not enhance the analysis here. These provisions create a plenary and open-ended jurisdiction in the court. Technically they are not a part of the "inherent" jurisdiction of the court; they are a residual statutory jurisdiction, not part of the "inherent jurisdiction of superior courts of record": Century Services Inc v Canada (Attorney General), 2010 SCC 60 at para. 64, [2010] 3 SCR 379. However, the appellant is correct that in either case, the residual or inherent discretion would yield to any specific statutory provision that expressly or impliedly narrowed it.

18 How these various sections interact is a pure question of statutory interpretation. The provisions of the *CCAA* and *BIA* should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament. Since the two statutes deal with the same topic, they should be interpreted and applied in a complementary way, with due regard to their different focuses: *Century Services* at paras. 24, 76, 78; *Reference re Broadcasting Regulatory Policy CRTC 2010-168*, 2012 SCC 68.

19 The proper interpretation of s. 11.2(3) of the CCAA is clear. The reference to "the security or charge" in that subsection can only be a reference to a security or charge under subsection 11.2(1). While the priority of a section 11.2 charge cannot be subordinated to another charge under that section without the consent of a prior holder of such a charge, that requirement of consent does not extend to charges created through other sources of jurisdiction, such as the *BIA*. The appellant did not enjoy a veto over the priority of the Receiver's Borrowings Charge as it argues.

20 The other side of the equation is that the supervising judge clearly has authority to authorize a receiver to borrow and to grant the receiver security. The very wide wording of s. 243(1)(c) of the BIA ("take any other action that the court considers advisable") has been interpreted to give supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise: Third Eye Capital Corporation v Dianor Resources Inc., 2019 ONCA 508 at paras. 57–58, 435 DLR (4th) 416. Further, s. 31(1) of the BIA provides:

> 31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.
>
> This provision clearly authorizes the order that was made. While the phrase "in priority to the creditors' claims" applies most directly to the pre-insolvency creditors of the insolvent corporation, there is no reason to limit the supervising judge's mandate to order the priority of borrowings made to facilitate the insolvency proceedings themselves. In addition, s. 243(1)(c) is wide enough to allow a supervising judge to set the order of priority.

21 In summary, the answer to the question on which leave to appeal was granted is that the supervising judge did have the jurisdiction or discretion to make the order granting priority to the Receiver's Borrowings Charge.

22 The parties did not contest whether leave to appeal was granted on the consequential issue, namely whether the supervising judge exercised her discretion to reorder the priorities between the Interim Lenders' Charge and the Receiver's Borrowings Charge in a reasonable way. As noted, a supervising judge's discretion is very wide, and it follows that the exercise of that

29 The appellant argues that the supervising judge had no discretion to bifurcate the Interim Lenders' Charge in this way, and even if there was such a discretion, it was not reasonably exercised.

30 A number of aspects of sales transactions under receiverships are well established:

> (a) The assets of the insolvent corporation can be sold free and clear of encumbrances, even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors: *Dianor Resources*.
>
> (b) If the insolvent corporation has more than one asset, individual assets can be sold free and clear of all encumbrances, again even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors. Any unpaid debts remain in place, and can be satisfied by subsequent sales of other assets.
>
> (c) When assets are sold free and clear of all encumbrances, that could include encumbrances related to debtor-in-possession financing, even if the sale does not generate sufficient funds to pay out those encumbrances. Security and priority given to debtor-in-possession lenders provide no assurance that the loans will actually be repaid.

It is against this background that the appellant argues that there was no jurisdiction or discretion to vest the assets of Accel Energy in the purchaser free and clear of the Interim Lenders' Charge unless that charge was paid off in full. There is, however, no reason in principle to carve that exception out of the general propositions just stated.

31 As previously discussed, the power given to supervising judges in s. 243(1)(c) of the BIA to "take any other action that the court considers advisable" has been read very widely. That power would include the mandate to sell some of the assets of the insolvent corporation, while only paying out a portion of the debtor-in-possession financing.

32 Alternatively, the appellant argues that the discretion should not have been exercised in this case. The original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers and that the Interim Lenders' Charge would attach to the assets of both Accel Entities. The appellant argues that it was unfair to allocate the interim Lenders' charge between the two entities, and then allow the sale to proceed without paying off the charge in full. However, as previously noted, the debtor-in-possession lender is never assured that its loans will be paid back at all or in full. There is always a prospect that the insolvency will evolve unfavourably, meaning that there are insufficient funds to meet all legitimate claims. When exercising her discretion the supervising judge must weigh the legitimate expectations of all stakeholders against the changed circumstances.

33 The unique position of Third Eye Capital as a major secured creditor, as a DIP lender, as the agent of the DIP lenders, and as a supporter of the successful bidder for the assets was not lost on the supervising judge. Third Eye Capital might have been operating with an eye to its own best interests, but that is not necessarily and automatically an indicator that the order granted by the supervising judge was unreasonable. As Slatter JA observed in Wilks Brothers LLC v 12178711 Canada Inc, 2020 ABCA 430 at para. 72, 85 CBR (6th) 9:

> During the approval process, all stakeholders are allowed to identify their own best interests, and pursue those best interests. Acting in one's own best interests is not bad faith: *Bhasin v Hrynew*, 2014 SCC 71 at para. 70, [2014] 3 SCR 494.
>
> The DIP Financing Term Sheet certainly created legitimate expectations, but as noted there was never an assurance that the DIP funding would be repaid. There is no indication on this record that Third Eye Capital did anything that specifically breached a contract or was tortious or otherwise offended against a law. Third Eye Capital was merely able to persuade the supervising judge that the sale and vesting order it proposed represented the proper balancing of the interests of all of the stakeholders. The appellant's disappointment at the outcome is not a basis for upsetting the decision of the supervising judge.

34 Notwithstanding that the original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers, it was always recognized that they were separate corporations, with separate primary secured creditors, and separate stakeholders. The Monitor from the beginning allocated the borrowings under the Interim Lenders'

TAB 4

COURT FILE NUMBER	2001 - 01210
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	GMT CAPITAL CORP.
DEFENDANTS	STRATEGIC OIL AND GAS LTD. and STRATEGIC TRANSMISSION LTD.
DOCUMENT	**RECEIVERSHIP ORDER -** **NORTHWEST TERRITORIES ASSETS**

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
JAN 2 8 2020
CLERK OF THE COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
Suite 3810, Bankers Hall West
888 3rd Street SW
Calgary, Alberta, T2P 5C5

Telephone 403-351-2921
Facsimile 403-648-1151

Attention: Jeffrey Oliver/Mary I.A. Buttery, Q.C.

I hereby certify this to be a true copy of the original ORDER
Dated this 28 day of Jan 2020
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED:	January 28, 2020
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Madam Justice Horner
LOCATION OF HEARING:	Calgary, Alberta

UPON THE APPLICATION of GMT Capital Corp. ("**GMT**"); **AND UPON** reading the Application, the Affidavit of Pauline Bertha de Jong, the Affidavit of **[Affiant]** and the pleadings and proceedings filed in this Action; **AND UPON** noting the consent of Alvarez & Marsal Canada Inc ("**A&M**") to act as Receiver and Manager of those properties, assets and undertakings of Strategic Oil and Gas Ltd. and Strategic Transmission Ltd. ("**Strategic**") situate in the Northwest Territories; AND UPON hearing counsel for GMT, Strategic, the Government of the Northwest Territories, the Alberta Energy Regulator, KPMG Inc., in its capacity as Monitor of Strategic, and any other interested parties that may be present;

NWT RECEIVER'S POWERS

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

(a) to take possession and control of the NWT Property and any and all proceeds, receipts and disbursements arising out of or from the NWT Property

(b) to receive, preserve, protect and maintain control of the NWT Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of NWT Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on business in respect of the NWT Property, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts as they pertain to the NWT Property only, and after consultation with the Alberta Receiver;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties as conferred by this Order, and in respect of the NWT Property only, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to preserve and protect the NWT Property or any part or parts thereof;

(f) to collect any monies or accounts now owed or may be owed in respect of the NWT Property;

(g) to settle, extend or compromise any indebtedness owing in respect of the NWT Property, in consultation with the Alberta Receiver;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the NWT Property in the NWT Receiver's name, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the NWT Property and operations of Strategic in relation to the NWT Property;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the NWT Property or the NWT Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the NWT Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

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

(l) to sell, convey, transfer, lease or assign the NWT Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $200,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 59(10) of the *Personal Property Security Act,* SNWT 1994, c 8 or any similar legislation in any other province or territory shall not be required.

(m) to apply for any vesting order or other orders (including without limitation, confidentiality or sealing orders) necessary to convey the NWT Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such NWT Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the NWT Receiver deems appropriate all matters relating to the NWT Property and the receivership, and to share information, subject to such terms as to confidentiality as the NWT Receiver deems advisable;

(o) to register a copy of this Order and any other orders in respect of the NWT Property against title to any of the NWT Property, and when submitted by the NWT Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of the Northwest Territories, or any other similar government authority, notwithstanding section 177 of the *Land Titles Act*, RSNWT 1988, c. 8, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the NWT Receiver in its capacity as NWT Receiver of Strategic and not in its personal capacity;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the NWT Receiver, in the name of Strategic and solely with respect to the NWT Property; and

(q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the NWT Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including Strategic, and without interference from any other Person (as defined below).

TAB 5

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank

TAB 6

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Motion brought to, inter alia, approve stalking horse agreement and SISP — SISP approved — Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings — SISP was warranted at this time — SISP would result in most viable alternative for D Inc. — If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders — Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which

TAB 7

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous

Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.

MOTION by receiver for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in its First Report.

***D.M. Brown J.*:**

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. [1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, [2] *BIA* proposals, [3] and *CCAA* proceedings. [4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a

TAB 8

2021 ONCA 375
Ontario Court of Appeal

Marchant Realty Partners Inc. v. 2407553 Ontario Inc.

2021 CarswellOnt 7770, 2021 ONCA 375

Marchant Realty Partners Inc., as agent (Responding Party) and 2407553 Ontario Inc., 2384648 Ontario Inc., 2384646 Ontario Inc., 24000196 Ontario Inc. and 2396139 Ontario Inc. (Moving Parties)

Marchant Realty Partners Inc., as agent (Responding Party) and 4544 Zimmerman Avenue LP and 4544 Zimmerman Avenue GP Inc. (Moving Parties)

Marchant Realty Partners Inc., as agent (Responding Party) and 4267 River Road LP and 4267 River Road GP Inc. (Moving Parties)

M. Jamal J.A.

Heard: May 20, 2021
Judgment: May 31, 2021
Docket: CA M52417, M52418, M52419

Counsel: Steven L. Graff, Miranda Spence, Stephen Nadler, for Moving Parties
Sara-Ann Wilson, Kenneth Kraft, for Responding Party, Zeifman Partners Inc.

Subject: Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency
Debtors and creditors

***M. Jamal J.A.*:**

1 The moving parties are debtors ("Debtors") over whose assets, undertakings, and real property the responding party Zeifman Partners Inc., ("Receiver") is the court-appointed receiver and manager. The Debtors seek leave to appeal to this court under s. 193(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B–3 ("BIA"), from orders of Cavanagh J. ("motion judge") of the Superior Court of Justice (Commercial List) dated March 25, 2021, approving the Receiver's proposed sale process and list prices for five commercial properties in downtown Niagara Falls, Ontario ("Properties").

2 For the reasons that follow, the motions for leave to appeal are dismissed.

Background

3 Marchant Realty Partners Inc. ("Agent"), as agent for a group of lenders ("Lenders"), commenced three related receivership proceedings before the Commercial List concerning loans the Lenders made to the Debtors. The loans matured over three years ago, some loans more than four years ago. As of October 2020, the Debtors owed more than $16 million under the loans.

4 The three receivership applications were originally scheduled for September 2018 but were adjourned five times to give the Debtors more time to refinance the Properties. The refinancing never happened.

5 With no refinancing or repayment plan on the horizon, the Agent moved forward with the receivership applications. In August 2020, Gilmore J. of the Commercial List appointed the Receiver as receiver and manager over the Debtors' Properties,

although the appointment was stayed for just over two months to give the Debtors one last chance to repay the loans. They could not do so, and the Receiver's appointment became effective in mid-October 2020.

6 The Properties are about 4 km from the tourist area of Niagara Falls. The Properties are mixed-use commercial properties (most needing repairs), a seasonal operating motel (closed because of the pandemic), and vacant land.

7 The Receiver is authorized to market the Properties, including advertising them for sale, soliciting offers to buy them, and negotiating such terms as the Receiver deems appropriate.

The Motion Judge's Decision

8 The Receiver recommended list prices for the sale of Properties based on: (1) independent appraisals from two local appraisers, Humphrey Appraisal Services Inc. and Jacob Ellens & Associates Inc.; (2) recommended list prices for the Properties from three real estate brokerages; and (3) discussions with Jones Lang LaSalle Real Estate Services, the proposed listing brokerage, which has expertise selling properties around Niagara Falls. Even with these list prices, the Lenders will lose money on their loans to the Debtors.

9 The Debtors opposed the proposed list prices and relied on competing appraisals of Colliers, a commercial real estate firm. Colliers' appraisals — which focussed on the development potential of the Properties — were almost 300% higher than the Receiver's list prices. The Debtors asked the motion judge to direct the Receiver to list the Properties at Colliers' proposed prices for 60 days to see what the market will bear.

10 By order dated March 25, 2021, the motion judge approved the Receiver's proposed sale process and list prices for the Properties. The motion judge found:

> The Receiver is an officer of the court with duties to all stakeholders. In my view, the Receiver has shown that it is acting in good faith and diligently to discharge its duties to deal with the [Properties] in a commercially reasonable manner. The Receiver has reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the [Properties]. The Receiver has explained why it does not agree with the Colliers appraisals, and why it has recommended that the sale process be approved. I have considered the process which the Receiver has followed and the information upon which it relies to support its recommendations. The [Debtors] have not shown that the Receiver followed a flawed procedure. I am not satisfied that this is an exceptional case where it is proper for me to reject the business judgment made by the Receiver.

The Test for Leave to Appeal Under s. 193(e) of the BIA

11 The moving parties seek leave to appeal from the motion judge's orders under s. 193(e) of the BIA. This provision provides that, unless an appeal lies as of right or as otherwise expressly provided, an appeal lies to the Court of Appeal "from any order or decision of a judge of the court . . . by leave of a judge of the Court of Appeal".

12 In deciding whether to grant leave under s. 193(e) of the BIA, this court considers the following principles:

- Granting leave is "discretionary and must be exercised in a flexible and contextual way": Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

- In exercising its discretion, the court should examine whether the proposed appeal: (1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*, at para. 29; McEwen (Re), 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

Should this Court Grant Leave to Appeal?

(1) Does the proposed appeal raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice?

13 The Debtors assert that the proposed appeal raises an issue of general important to bankruptcy/insolvency practice. They frame the issue on the proposed appeal as "the extent of the deference that the Court owes to a receiver's business judgment when approving a sale process." They claim the appeal "will provide guidance to receivers as they consider the level of scrutiny they may expect from the Court, and to other stakeholders as they consider whether to challenge the actions taken by any given receiver."

14 The Receiver frames the issue on appeal much more narrowly. It claims the appeal "is highly fact-specific and concerns, in essence, the appropriate list prices" of the Properties. It says no legal principles are in dispute and the appeal will have "no bearing or importance for the practice of insolvency and the administration of receivership proceedings."

15 I agree with the Receiver. Although on any appeal the court would consider and apply the principles of deference applicable to a receiver's business judgment, those principles are not in dispute. They were correctly stated by the motion judge, who cited this court's decision in Regal Constellation Hotel Ltd. (Re)(2004), 71 O.R. (3d) 355 (C.A.), at para. 23:

> Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

16 On the Debtors' argument, the appeal would involve the application of these settled principles. However, applying settled principles of deference to the Receiver's business decisions here would not raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice.

17 The Debtors also say the motion judge failed to apply the correct legal test for evaluating whether a receiver has acted properly in selling a property, as stated in Royal Bank of Canada v. Soundair Corp.(1991), 4 O.R. (3d) 1 (C.A.). This issue relates to the deference issue because the Debtors claim the motion judge failed to cite or apply the *Soundair* test and instead was unduly deferential to the Receiver. I will consider this argument below in evaluating whether the proposed appeal is *prima facie* meritorious.

(2) Is the proposed appeal prima facie meritorious?

18 In evaluating whether the proposed appeal has *prima facie* merit, I begin by noting that this court gives substantial deference to the discretion of commercial court judges supervising insolvency and restructuring proceedings and does not intervene absent demonstrable error: Ravelston Corp. Ltd. (Re), 2007 ONCA 135, 85 O.R. (3d) 175, at para. 3.

19 As already noted, commercial court judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will not intervene: *Ravelston*, at para. 3; *Regal Constellation Hotel*, at para. 23. A court "will assume that the receiver is acting properly unless the contrary is clearly shown": *Regal Constellation Hotel*, at para. 23.

20 The Debtors assert, however, that this court would overcome the deference shielding the receiver's business judgments and the motion judge's review of those judgments because the motion judge made an extricable error of law. The Debtors say the motion judge erred in law by failing to state or apply the *Soundair* test for evaluating whether a receiver has acted properly in recommending list prices for the Properties.

TAB 9

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

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

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

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Sale of assets — Debtor companies were severely impacted by economic downturn, and breached covenants under credit agreement with secured creditors — Debtors agreed with secured creditors to implement Sales and Investment Solicitation Process (SISP), which resulted in proposed asset sales that would provide no recovery for unsecured creditors — Debtors were granted Initial Order under Companies' Creditors Arrangement Act — Debtors brought application for order approving sales transactions generated through SISP — Trustee of bonds brought application for order dismissing debtors' application, and allowing bondholders to propose plan of arrangement, among other relief — Debtors' application granted; trustee's application dismissed — As result of enactment of s. 36 of Act, there was no jurisdictional impediment to sale of assets where such sales met requisite tests, even in absence of plan of arrangement — Fact that SISP occurred before seeking protection under Act did not amount to abuse of Act — Despite speed and economic environment, SISP was reasonable, competitive and robust, and generated range of bids significantly above liquidation value — Allegations of bad faith were not supported by evidence — Bondholders were aware of SISP and intention to obtain protection under Act, and were not improperly denied access to information — Factors in s. 36(3) of Act favoured approval of proposed sales — Further allegations raised after hearing were duly investigated by monitor and shown to be groundless Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36.

APPLICATION by debtor companies for orders approving sales of assets generated through Sales and Investment Solicitation Process; APPLICATION by trustee of the bonds for order dismissing debtors' application, allowing bondholders to propose plan of arrangement, and other relief.

***B.E. Romaine J.*:**

I. Introduction

of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

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

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

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

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

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

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

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

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

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

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

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc

TAB 10

I hereby certify this to be a true copy of the original Order
Dated this 22 day of March
for Clerk of the Court

Clerk's stamp:

FIAT: Let the within Order be filed ~~notwithstanding~~ that the counsel approvals are by electronic signature and in counterpart, this 21st day of March, 2017.

not necessary
2012 ABCA 150 ¶7
J.C.Q.B.A

COURT FILE NO.	1701-03460
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ALBERTA ENERGY REGULATOR
RESPONDENT	LEXIN RESOURCES LTD.
DOCUMENT	**RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson Phone: 403 571 1053 Fax: 403 571 1528 Email: nicholsonc@jssbarristers.ca File: 13817.001

JUDICIAL CENTRE OF CALGARY
FILED
MAR 22 2017
CLERK OF THE COURT

DATE ON WHICH ORDER WAS PRONOUNCED: March 20, 2017

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary Courts Centre

NAME OF THE JUDGE WHO MADE THIS ORDER: The Honourable Justice P.R. Jeffrey

UPON the application of Alberta Energy Regulator ("**AER**") in respect of Lexin Resources Ltd. ("**Lexin**" or the "**Debtor**"); **AND UPON** having read the Application of the AER; the Affidavit of Laura Chant, sworn on March 11, 2017 including the reference therein to the "Equipment Order" granted March 3, 2017 in Court of Queen's Bench Action No. 1701 02272; the Affidavit of Service of Helen Bowker, sworn and filed March 14, 2017; and the Affidavit of Charles Selby, sworn and filed March 17, 2017; **AND UPON** reading the consent of Grant Thornton Limited to act as receiver ("**Receiver**") of the Debtor; **AND UPON** hearing counsel for AER and other interested parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of this Application is hereby abridged and service thereof is deemed good and sufficient.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("**BIA**") and/or section 13(2) of the *Judicature Act,* R.S.A. 2000, Grant Thornton Limited is hereby appointed Receiver, without security, of all of Lexin's current and future assets, undertakings and properties of every nature and kind whatsoever, including all proceeds thereof, provided that the appointment of the Receiver shall not include any oil or gas wells, pipelines or facilities located outside the Province of Alberta or regulated by an entity other than the AER (the "**Property**").

RECEIVER'S POWERS

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

   (a) to take possession of and exercise control over the Property, with the exception of taking possession of or exercising physical control over any Lexin oil or gas wells, pipelines, facilities or sites regulated by the AER (the "**Sites and Abandoned Sites**"), and any and all proceeds, receipts and disbursements arising out of or from the Property, and for greater clarity, while the Receiver shall have limited powers with respect to the Property as it relates to the Sites and Abandoned Sites as more particularly set out herein, the Receiver shall not have the power to take possession of and exercise physical control over the Sites and the Abandoned Sites;

(b) to exercise any powers it has under section 14.06 of the BIA;

(c) to receive, preserve and protect the books and records of the Debtor or any part or parts thereof, including, but not limited to, relocating of the books and records to safeguard them as may be necessary or desirable;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(f) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(g) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(h) to initiate, prosecute and continue the prosecution of any and all proceedings (with the exception of the hearing scheduled for March 22 and 23, 2017 of Lexin's application filed in Court of Queen's Bench Action Number 1701-02272 and in its Originating Application filed in Court of Queen's Bench Action Number 1701-03310 (the "**Applications**"), on the issue before the Court to be argued at that time, namely, the Court's jurisdiction to hear the foregoing Applications (the "**Jurisdiction Question**"), which Jurisdiction Question may continue to be advanced by Lexin as opposed to the Receiver), and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceedings, and

provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

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

(j) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $50,000, provided that the aggregate consideration for all such transactions does not exceed $150,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

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

(k) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(l) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(m) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(n) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(q) to, with leave of the Court, assign the Debtor into bankruptcy, to become the trustee in bankruptcy of the Debtor and to take all steps reasonably required to carry out its role as trustee in bankruptcy of the Debtor should the Receiver deem it appropriate in the circumstances to do so; and

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. Notwithstanding any other provision of this Order, nothing herein shall empower, authorize or require the Receiver: (i) to take possession of or exercise physical control over the Sites and the Abandoned Sites; or (ii) to manage, operate or carry on the business of the Debtor; and the Receiver shall not be deemed to have taken any of the actions or steps referred to in this paragraph 4 solely as a consequence of having taken some of the steps authorized pursuant to paragraph 3.

5. Upon the AER receiving from any person a request for approval to remove equipment from any of the Sites pursuant to the Equipment Order (the "**Request**"), the AER shall forthwith bring that communication to the attention of the Receiver, and the Receiver

shall cooperate with the AER with respect to any proposed removal of equipment from any Sites and Abandoned Sites, and will thereafter either:

(a) approve the removal of the equipment on such terms as are appropriate, having regard to the entitlements of all persons; or

(b) advise the person who made the Request that the equipment may not be removed without Court Order, made on application brought in these proceedings (Action No. 1701-03460) with 7 days' prior notice to the Receiver and AER.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

6. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependant on maintaining possession) to the Receiver upon the Receiver's request.

7. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 7 or in

paragraph 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

8. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

10. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court,

provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 10; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

11. All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

12. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

13. All Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking

services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

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

EMPLOYEES

15. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations

under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, SC 2005, c 47 ("**WEPPA**").

16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

    (i) before the Receiver's appointment; or

    (ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring

the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

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

RECEIVER'S ACCOUNTS

19. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) of the BIA.

20. The Receiver and its legal counsel shall pass their accounts from time to time.

21. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

22. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such

rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

23. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "**A**" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

25. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

ALLOCATION

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

GENERAL

27. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

29. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. The Applicant shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

34. The Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/creditorupdates and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

_____
J.C.Q.B.A.

APPROVED as the Order granted:

GROIA AND COMPANY PROFESSIONAL CORPORATION

Per: _____
Joseph Groia
Counsel for Lexin Resources Ltd.

BORDEN LADNER GERVAIS LLP

Per: _____
Robyn Gurofsky
Counsel for Grant Thornton Limited

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____
Christa Nicholson
Counsel for the Alberta Energy Regulator

FILING

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(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

J.C.Q.B.A.

APPROVED as the Order granted:

GROIA AND COMPANY PROFESSIONAL CORPORATION

Per: _____
Joseph Groia
Counsel for Lexin Resources Ltd.

BORDEN LADNER GERVAIS LLP

Per: _____
Robyn Gurofsky
Counsel for Grant Thornton Limited

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____
Christa Nicholson
Counsel for the Alberta Energy Regulator

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that GRANT THORNTON LIMITED, the receiver (the "**Receiver**") of all of the assets, undertakings and properties of LEXIN RESOURCES LTD. appointed by Order of the Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (the "**Court**") dated the ___ day of _____, ____ (the "**Order**") made in action number _____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [**daily**] [monthly **not** in advance on the ___ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Alberta Treasury Branches from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at _____.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ___ day of _____, 20__.

GRANT THORNTON LIMITED, solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____
Name:
Title:

TAB 11

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

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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

> *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

TABLE OF CONTENTS

I. INTRODUCTION

1. This brief is submitted on behalf of Alvarez & Marsal Canada Inc, in its capacity as the Court-appointed receiver and manager (the "**NWT Receiver**") of those properties, assets and undertakings of Strategic Oil and Gas Ltd. and Strategic Transmission Ltd. (together "**Strategic**") situated in the Northwest Territories (the "**NWT Property**") in support of its application to, among other things, seek the Court's approval to:

   (a) engage Sayer Energy Advisors (the "**Sales Advisor**") to act as an advisor to, and assist with, the NWT Receiver's proposed Sales Solicitation Process regarding the NWT Property (the "**SSP**");

   (b) conduct the NWT Receiver's proposed SSP of the NWT Property; and

   (c) seal on the Court record the First Confidential Supplement to the Receiver's Second Report dated July 12, 2021 (the "**First Confidential Supplement**").

2. The NWT Receiver has analyzed and evaluated Strategic's NWT Property and determined that conducting the proposed SSP in respect of same, with the assistance of the experience and expertise of the Sales Advisor, is the most commercially reasonable manner by which to maximize value for Strategic's stakeholders and, where possible, transfer as many of the oil and gas properties to responsible third parties.

3. Further, the First Confidential Supplement contains commercially sensitive information which, if disseminated, could adversely affect the proposed SSP as well as the commercial interests of third parties, namely the Sales Advisor and the other two parties who submitted proposals to act as sales advisor to the NWT Receiver. The sealing order is necessary to prevent the First Confidential Supplement from being disclosed. The sealing order sought is the least restrictive means possible to prevent dissemination of the First Confidential Supplement.

4. The NWT Receiver therefore submits that the approval of: i) the Engagement Letter between the NWT Receiver and the Sales Advisor, ii) the proposed SSP, and iii) sealing order, are just, convenient, commercially reasonable, and appropriate in the circumstances.

II. STATEMENT OF FACTS

5. For brevity, the facts have not been repeated in this Bench Brief and are set out in the Second Report of the Receiver dated July 12, 2021 (the "**Second Report**"). All capitalized terms used but not otherwise defined herein have the meaning given to them in the Second Report.

III. ISSUES

6. This bench brief addresses the following three issues before this Honourable Court:

   (a) should Sayer Energy Advisors be approved as the Sales Advisor;

   (b) should the NWT Receiver's proposed SSP be approved; and

   (c) is it appropriate to grant the sealing order respecting the First Confidential Supplement?

IV. LAW AND ARGUMENT

7. In executing its duties, a receiver must act honestly, in good faith, and deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.[1] Generally speaking, a receiver's primary objective is the liquidation of an insolvent debtor's assets in order to maximize realizations for creditors.[2] The statutory authority for a receiver to conduct such sales is grounded in the very broad wording of section 243(1)(c) of the *BIA*, which provides the court with the ability to authorize a receiver to "take any other action that the court considers advisable".[3] As recently stated by the Alberta Court of Appeal, this "power would include the mandate to sell some of the assets of the insolvent corporation…"[4] This power of sale by virtue of section 243(1)(c) of the *BIA* has also been recognized by the Ontario Court of Appeal.[5]

8. Additionally, the NWT Receivership Order contemplates that the NWT Receiver may conduct a marketing process, and engage consultants to assist with such process, as

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 247 (the "*BIA*") **[TAB 1]**.
[2] *Third Eye Capital Corporation v Dianor Resources Inc.*, 2019 ONCA 508 at paras 71-76 [*Dianor*] [**TAB 2**].
[3] *BIA*, *supra* at para 243(1)(c) [**TAB 1**].
[4] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226 at paras 20 and 31 [**TAB 3**].
[5] *Dianor supra*, at para 76 [**TAB 2**].

necessary. Specifically, the NWT Receivership Order provides that the NWT Receiver is expressly empowered and authorized to:

(a) take possession of and exercise control over the NWT Property;

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

(c) sell, convey, transfer, lease or assign the NWT Property or any part or parts thereof, out of the ordinary course of business, subject to the approval of this Honourable Court for any transactions exceeding $200,000, or the aggregate of multiple transactions exceeding $500,000; and

(d) engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, to assist with the exercise of the NWT Receiver's powers and duties. [6]

A. The Engagement of the Sales Advisor Should be Approved

9. While there are no specific statutory provisions respecting a receiver's engagement of a consultant or an advisory party such as a sales advisor, the NWT Receiver submits that this Court may draw upon the factors which a court would typically consider when determining whether to approve a financial advisor's charge in restructuring proceedings. Those factors are:

(a) the size and complexity of the business being restructured;

(b) the proposed role of the beneficiaries of the charge;

(c) whether there is an unwarranted duplication of roles;

(d) whether the quantum of the proposed charge appears to be fair and reasonable;

[6] The January 28, 2020 Receivership Order of Madam Justice Horner, subparagraphs 5(a), (d), (k), and (l) [NWT Receivership Order] [**TAB 4]**

(e) the position of the secured creditors likely to be affected by the charge; and

(f) the position of the Monitor.[7]

10. Additional factors courts have considered in determining whether to approve agreements with financial advisors in the restructuring context are:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.[8]

11. The NWT Receiver requires advisory services to run a robust sales process in order to maximize value to Strategic's creditors and stakeholders. Further, given the nature of the NWT Property, the NWT Receiver requires the assistance of a party, such as the Sales Advisor, who has experience providing advisory services on divestitures specific to the oil and gas industry. The Sales Advisor also has familiarity with the geographic region where the NWT Property is situated, which will be an asset in the proposed SSP.[9]

12. The NWT Receiver solicited informal requests for proposals ("**RFPs**") from four reputable firms with experience in Canadian oil and gas merger and acquisition activities. Of the four firms solicited, three responded to the NWT Receiver's RFPs. Having received three competitive proposals, the NWT Receiver provided each potential sales advisor with a further opportunity to clarify certain terms of their proposals and adjust their fee structure.[10]

13. After carefully considering the responses to the RFPs received, and following consultation with the GNWT, the NWT Receiver entered into the Engagement Letter with the Sales Advisor. The NWT Receiver considered that the Sales Advisor:

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[7] *Re Canwest Publishing Inc.*, 2010 ONSC 222 at para 54 [**TAB 5**].
[8] *Re Danier Leather Inc*, 2016 ONSC 1044 at para 47 [**TAB 6**].
[9] Second Report of the Receiver dated July 12, 2021, at paras. 40, 44 [**Second Report**]; First Confidential Supplement to the Receiver's Second Report dated July 12, 2021, at Appendix "C" [**Confidential Report**].
[10] Second Report, at para. 45; Confidential Report at paras. 7-13.

(a) is well known in the local industry and specializes in coordinating disposition programs in the oil and gas industry;

(b) has previously acted as a sales advisor of distressed assets, including in the insolvency context; and

(c) was reasonably priced in comparison to the other proposals received, especially in considering the additional experience possessed by the Sales Advisor. The NWT Receiver submits that the quantum of the fees payable under the Engagement Letter reflect an appropriate incentive to secure the highest and best bid for the NWT Property.[11]

14. The NWT Receiver is of the view that the fee arrangement is fair, reasonable and consistent with fee arrangements in other engagements of similar size, scope and complexity in its experience.[12]

15. Further, the NWT Receiver's engagement of the Sales Advisor is supported by the Government of the Northwest Territories ("**GNWT**"), who is the party funding the within Receivership Proceedings.[13]

16. As noted above, this Court has the jurisdiction to approve the NWT Receiver's engagement of the Sales Advisor pursuant to section 243(1)(c) of the *BIA*, and in fact, such engagement is expressly contemplated by the NWT Receivership Order.[14] For all of the foregoing reasons, the NWT Receiver submits that it is appropriate for this Court to exercise that jurisdiction and approve the Engagement Letter and the fees payable thereunder.

B. The Proposed SSP is Fair, Transparent and Commercially Reasonable in the Circumstances and Should Therefore be Approved

17. While courts have drawn a distinction between the approval of a sales process and the approval of an actual sale itself, the factors which a court is to consider on such motions are

[11] Second Report *supra*, at paras. 47; Confidential Report, *supra* at paras. 15.
[12] Second Report *supra*, at para. 48.
[13] Second Report *supra*, at para. 47.
[14] NWT Receivership Order *supra*, at subparagraphs 5(a), (d), (k), and (l) [**TAB 4**].

intertwined and drawn from the oft-cited *Soundair* principles.[15] When reviewing a sales and marketing process proposed by a receiver a court should assess:

(a) the fairness, transparency and integrity of the proposed process;

(b) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and

(c) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.[16]

18. Lastly, a court should give weight to the recommendations of its receiver, a court-appointed officer with significant expertise in the insolvency area.[17] The proposed sales process need not be perfect, only reasonable.[18]

19. The NWT Receiver, in consultation with the Sales Advisor, has prepared the proposed SSP, attached as Appendix "B" to the Second Report. The NWT Receiver submits that the form of SSP proposed is fair, reasonable and appropriate in the circumstances. Among other things, the NWT Receiver notes that:

(a) the sale of the NWT Property is on an 'as is where is basis' and subject to Court approval;

(b) the SSP will require that any Successful Bidder (as defined in the SSP) be compliant with the regulatory requirements of the applicable energy regulator; and

(c) the process itself is contemplated to run for a period of five (5) weeks, and is sufficiently robust to provide the market with sufficient exposure to maximize value for stakeholders. [19]

20. The NWT Receiver submits that its proposed SSP is fair and transparent, providing any interested party that executes a non-disclosure agreement an opportunity to participate in the process. Further, any "Successful Bid" under the proposed SSP will ultimately require

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[15] *CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750 at para 6 [*blutip*] [**TAB 7**].
[16] *blutip supra*, at para 6 [**TAB 7**].
[17] *Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375 at paras 10, 15, 19 [**TAB 8**]
[18] *Re Sanjel Corporation*, 2016 ABQB 257 at para 80 [**TAB 9**].
[19] Second Report *supra*, at para. 58.

this Court's approval, adding another layer of fairness, transparency and integrity to the proposed sales process.[20]

21. Secondly, the NWT Receiver considers that the proposed SSP, and more specifically the timelines contemplated thereunder, are commercially reasonable in the circumstances.[21] In consultation with the Sales Advisor and the GNWT, the NWT Receiver has determined that the most optimal start date for the proposed SSP is in the weeks leading up to the Labour Day long weekend, when more potential purchasers are expected to be interested in acquisition opportunities. Further, the proposed SSP contemplates a broad canvassing of the market through multiple channels, including through targeted email communications and strategically placed advertisements through oil and gas industry specific news outlets.[22]

22. Third, the NWT Receiver submits that the broad marketing contemplated under the proposed SSP, in combination with the experience and expertise of the Sales Advisor, will optimize the chances of securing the best possible price for the NWT Property.

23. Lastly, the NWT Receiver submits that the proposed SSP is in the best interests of all of Strategic's stakeholders. In addition to marketing for sale the NWT Property, the proposed SSP will also include a marketing for sale of Strategic's Interprovincial Pipeline, despite the fact that the NWT Receiver is not presently in care and custody of said pipeline.[23] This approach is similar to the approach taken in the *Lexin* receivership proceedings, wherein the court appointed receiver in that instance was never in physical possession of oil and gas assets regulated by the Alberta Energy Regulator; however, *Lexin's* receiver did have the power to market and sell Lexin's oil and gas properties.[24]

24. The NWT Receiver's proposed SSP is supported by the GNWT, as well as the Canada Energy Regulator, being the regulator over the Interprovincial Pipeline.

25. As with the engagement of the Sales Advisor, this Court has the jurisdiction to approve the proposed SSP pursuant to section 243(1)(c) of the *BIA*, and the SSP is expressly

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[20] *blutip supra*, at para. 6 [**TAB 7**].
[21] *Ibid* [**TAB 7**].
[22] Second Report *supra*, at paras. 54-59.
[23] Second Report *supra*, at paras. 32-35.
[24] Lexin Resources Ltd. Receivership Order, granted March 20, 2017 in Court of Queen's Bench Action No. 1701-03460 [**TAB 10**].

contemplated by the NWT Receivership Order.[25] The NWT Receiver submits that for all of the foregoing reasons it is commercially reasonable and appropriate to approve the SSP.

C. Sealing of the First Confidential Supplement is Appropriate

26. The principles as to when public access to a court file may be restricted are set out in the Supreme Court of Canada's decision in *Sierra Club of Canada v Canada (Minister of Finance)*, which provides that:

    (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 rights 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.[26]

27. The First Confidential Supplement contains confidential information regarding the Sales Advisor's fee structure, as well as the proposed fee structure and commercial terms made to the NWT Receiver by the other third parties who also delivered proposals to act as the NWT Receiver's sales advisor on this mandate. Such proposals also provide commentary on the NWT Receiver's anticipated sales process. If such information were disclosed it could adversely affect not only the proposed SSP, but also the commercial interests of these third parties in future mandates. The NWT Receiver has however included a redacted copy of the Engagement Letter with the Sales Advisor in its Second Report.

28. Therefore, the NWT Receiver submits that the sealing order sought is the least restrictive means to maintain the confidentiality of such information. The NWT Receiver submits that the salutary effects of the sealing order outweigh the deleterious effects of restricting access to the First Confidential Supplement, and that the sealing order is therefore appropriate in the circumstances.

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[25] NWT Receivership Order *supra*, at subparagraphs 5(a), (d), (k), and (l) [**TAB 4**].
[26] *Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522 at para 53 [**TAB 11**].

V. RELIEF REQUESTED

29. For all of the foregoing reasons, the NWT Receiver submits that the approval of: i) the Engagement Letter between the NWT Receiver and the Sales Advisor, and ii) proposed SSP, are just, convenient, commercially reasonable, and appropriate in the circumstances, and further, that the granting of the requested sealing order is the less restrictive means to prevent the dissemination of commercially sensitive information.

30. Consequently, the NWT Receiver respectfully requests that this Honourable Court grant the Order requested by it, which, amongst other things: i) approves the Engagement Letter between the NWT Receiver and the Sales Advisor, ii) approves the NWT Receiver's proposed SSP, and iii) seals the First Confidential Supplement on the Court record.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of July, 2021.

BORDEN LADNER GERVAIS LLP

Per: *J. Cameron*

Jessica L. Cameron

Counsel for the NWT Receiver, Alvarez & Marsal Canada Inc.

TABLE OF AUTHORITITES

TAB	**AUTHORITY**
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Third Eye Capital Corporation v Dianor Resources Inc.*, 2019 ONCA 508
3.	*DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226
4.	*The January 28, 2020 Receivership Order of Madam Justice Horner*
5.	*Re Canwest Publishing Inc.*, 2010 ONSC 222
6.	*Re Danier Leather Inc*, 2016 ONSC 1044
7.	*CCM Master Qualified Fund v blutip Power Technologies*, 2012 ONSC 1750
8.	*Marchant Realty Partners Inc. v. 2407553 Ontario Inc.*, 2021 ONCA 375
9.	*Re Sanjel Corporation*, 2016 ABQB 257
10.	Lexin Resources Ltd. Receivership Order, granted March 20, 2017 in Court of Queen's Bench Action No. 1701-03460
11.	*Sierra Club of Canada v Canada (Minister of Finance)*, [2002] 2 SCR 522

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 June 16, 2021

Last amended on November 1, 2019

À jour au 16 juin 2021

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Audit of proceedings

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

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

Application of this Part

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

Automatic application

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

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

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.

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

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 :

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).

TAB 2

2019 ONCA 508
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, 11 P.P.S.A.C. (4th) 11, 306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

Third Eye Capital Corporation (Applicant / Respondent) and Ressources Dianor Inc. /Dianor Resources Inc. (Respondent / Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018
Judgment: June 19, 2019
Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.
Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation
Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.
Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.
Steven J. Weisz, for Intervener, Insolvency Institute of Canada

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Estates and Trusts; Insolvency; Natural Resources; Property

Headnote

Natural resources --- Mines and minerals — Remedies — Vesting orders

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title; however, it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable

of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — TE was successful — Motion judge approved sale to TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 was unsuccessful in its cross-motion claiming payment for debt owing under Repair and Storage Liens Act — 235 appealed — In holding that royalty rights created no interest in law, vesting order was granted whereby receiver sold mining rights to third-party purchaser, free and clear of royalty rights — Vesting order was not stayed pending appeal and was executed — Appeal dismissed — Third party interest in land in nature of GORs can be extinguished by vesting order granted in receivership proceeding; however, motion judge erred in concluding that it was appropriate to extinguish them from title given nature of GORs — It was held that GOR was interest in gross product extracted from land, not fixed monetary sum — While GOR, like fee simple interest, may be capable of being valued at point in time, this does not transform substance of interest into one that is concerned with fixed monetary sum rather than element of property itself — Interest represented by GOR was ownership in product of mining claim, either payable by share of physical product or share of revenues — Given nature of 235's interest and absence of any agreement that allowed for any competing priority, there was no need to resort to any further considerations — Motion judge erred in granting order extinguishing 235's GORs, although he had jurisdiction to do so.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal

At request of insolvent company's lender, TE, court appointed receiver over assets, undertaking and property, including mining claims — Certain claims were subject to Gross Overriding Royalty (GOR) in favour of company from which appellant 235 had acquired royalty rights — Notices of agreements granting GORs were registered on title to surface and mining rights — Order approving bid process for sale of insolvent's mining claims generated two bids, both with condition that GORs be terminated or reduced — Motion judge approved sale to successful bidder TE and granted vesting order purporting to extinguish GORs — Motion judge rejected 235's argument that claims would continue to be subject to GORs after their transfer to TE holding that GORs did not run with land or grant holder of GORs interest in lands over which insolvent held mineral rights — Motion judge also held that ss. 11(2), 100, and 101 of the Courts of Justice Act gave him "the jurisdiction to grant a vesting order of the assets to be sold to [TE] on such terms as are just", including authority to dispense with royalty rights — Expert's valuation of royalty rights was found to be fair and receiver paid this amount to 235, which was held in trust — 235 appealed and TE moved for order quashing 235's appeal as moot since 235 did not seek stay of vesting order which operated to extinguish GORs when it was registered on title, but it was premature to quash appeal — 235 served and filed notice of appeal of sale approval 29 days after motion judge's decision and 8 days after order was signed, issued and entered — Appeal dismissed — Appeal period in Bankruptcy and Insolvency General Rules (BIGR) governed appeal — Under R. 31 of BIGR, notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates" — 235 had known for considerable time there could be no sale to TE in absence of extinguishment of GORs and royalty rights; this was condition of sale that was approved by motion judge — 235 was stated to be unopposed to sale but opposed sale condition requiring extinguishment — Jurisdiction to grant approval of sale emanated from BIA and so did vesting component — It would have made little sense to split two elements of order in circumstances — Essence of order was anchored in BIGR — Accordingly, appeal period was 10 days as prescribed by R. 31 of BIGR and ran from date of motion judge's decision, and 235's appeal was out of time.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence

is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions

TAB 3

2021 ABCA 226
Alberta Court of Appeal

DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation

2021 CarswellAlta 1442, 2021 ABCA 226

DGDP-BC Holdings Ltd. (Appellant) and Third Eye Capital Corporation (Respondent) and PricewaterhouseCoopers Inc. (Respondent)

DGDP-BC Holdings Ltd. (Appellant) and Third Eye Capital Corporation (Respondent) and Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondents) and PricewaterhouseCoopers Inc. in its capacity as the court-appointed receiver of Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondent)

Jack Watson J.A., Frans Slatter J.A., and Ritu Khullar J.A.

Heard: June 7, 2021
Judgment: June 17, 2021
Docket: Calgary Appeal 2001-0241-AC, 2001-0125-AC

Counsel: T.L. Czechowskyj, Q.C., I. Aversa, S. Babe, for Appellant
C.D. Simard, K.R. Cameron, for Respondent, Third Eye Capital Corporation
R. Gurofsky, J.L. Cameron, for Respondent, PricewaterhouseCoopers Inc.
No one, for Respondents, Accel Canada Holdings Limited and Accel Energy Canada Limited

Subject: Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Marshalling of secured claims

Court approved interim financing loan secured by Interim Lenders' Charge with appellant D Ltd. and respondent T Corporation as interim lenders, and granted debtor-in-possession ("DIP") loans priority — DIP Financing Term Sheet provided that both A Limited entities were joint and several borrowers and that Interim Lenders' Charge attached to assets of both entities — Monitor negotiated sale of A Limited's assets to T Corporation, and T Corporation applied for appointment of receiver as part of sale process — Supervising judge appointed P Inc. as receiver and issued receivership order which granted Receivers' Borrowings Charge priority over Interim Lenders' Charge — D Ltd. appealed — Appeal dismissed — Consent requirement under s. 11.2 of Companies' Creditors Arrangement Act did not extend to charges created through other sources of jurisdiction like Bankruptcy and Insolvency Act — Section 243 of Bankruptcy and Insolvency Act gave supervising judges broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that arose — Supervising judge had discretion and jurisdiction to establish priority of Receivers' Borrowings Charge .

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

Court approved interim financing loan secured by Interim Lenders' Charge with appellant D Ltd. and respondent T Corporation as interim lenders, and granted debtor-in-possession ("DIP") loans priority — DIP Financing Term Sheet provided that both A Limited entities were joint and several borrowers and that Interim Lenders' Charge attached to assets of both entities — Monitor negotiated sale of A Limited's assets to T Corporation following approval by supervising judge, and T Corporation applied for appointment of receiver as part of sale process — Debt secured by Interim Lenders' Charge was allocated to both A Limited entities, with portion allocated to one entity used to pay off part of that entity's transaction and portion allocated to other entity being deferred — Sale of non-deferred entity closed with D Ltd. being paid sums owing to it under Interim Lenders' Charge that were allocated to non-deferred entity — D Ltd. appealed approval of sale — Appeal dismissed — Section 243 of Bankruptcy and Insolvency Act included mandate to sell some assets of insolvent corporation while only paying out portion of DIP financing — DIP Term Financing Sheet always recognized that A Limited was made up of two separate entities — Reality was that there were two separate corporations and that bifurcated treatment of Interim Lenders' Charge might have been

> Charge had been created under s. 11.2(1), those charges could not have been given priority without the consent of the appellant.

16 The respondents argue, however, that the Receiver's Borrowings Charge was not a charge granted under the *CCAA* and therefore does not fit within the provisions of s. 11.2(3). That section, they argue, only applies when two or more interim financing charges are made under the *CCAA*. Since the Receiver's Borrowings Charge was made under the *BIA*, it is not subject to the requirement for consent, and the wide jurisdiction given to supervising judges under the *BIA* allowed this supervising judge to set priorities.

17 The respondents rely on s. 243(1)(c) of the BIA, which authorizes the supervising judge to "take any other action that the court considers advisable". There is a similar wide-ranging discretion under s. 13(2) of the Judicature Act, but it does not enhance the analysis here. These provisions create a plenary and open-ended jurisdiction in the court. Technically they are not a part of the "inherent" jurisdiction of the court; they are a residual statutory jurisdiction, not part of the "inherent jurisdiction of superior courts of record": Century Services Inc v Canada (Attorney General), 2010 SCC 60 at para. 64, [2010] 3 SCR 379. However, the appellant is correct that in either case, the residual or inherent discretion would yield to any specific statutory provision that expressly or impliedly narrowed it.

18 How these various sections interact is a pure question of statutory interpretation. The provisions of the *CCAA* and *BIA* should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament. Since the two statutes deal with the same topic, they should be interpreted and applied in a complementary way, with due regard to their different focuses: *Century Services* at paras. 24, 76, 78; *Reference re Broadcasting Regulatory Policy CRTC 2010-168*, 2012 SCC 68.

19 The proper interpretation of s. 11.2(3) of the CCAA is clear. The reference to "the security or charge" in that subsection can only be a reference to a security or charge under subsection 11.2(1). While the priority of a section 11.2 charge cannot be subordinated to another charge under that section without the consent of a prior holder of such a charge, that requirement of consent does not extend to charges created through other sources of jurisdiction, such as the *BIA*. The appellant did not enjoy a veto over the priority of the Receiver's Borrowings Charge as it argues.

20 The other side of the equation is that the supervising judge clearly has authority to authorize a receiver to borrow and to grant the receiver security. The very wide wording of s. 243(1)(c) of the BIA ("take any other action that the court considers advisable") has been interpreted to give supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise: Third Eye Capital Corporation v Dianor Resources Inc., 2019 ONCA 508 at paras. 57–58, 435 DLR (4th) 416. Further, s. 31(1) of the BIA provides:

> 31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor's property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor's property in priority to the creditors' claims.
>
> This provision clearly authorizes the order that was made. While the phrase "in priority to the creditors' claims" applies most directly to the pre-insolvency creditors of the insolvent corporation, there is no reason to limit the supervising judge's mandate to order the priority of borrowings made to facilitate the insolvency proceedings themselves. In addition, s. 243(1)(c) is wide enough to allow a supervising judge to set the order of priority.

21 In summary, the answer to the question on which leave to appeal was granted is that the supervising judge did have the jurisdiction or discretion to make the order granting priority to the Receiver's Borrowings Charge.

22 The parties did not contest whether leave to appeal was granted on the consequential issue, namely whether the supervising judge exercised her discretion to reorder the priorities between the Interim Lenders' Charge and the Receiver's Borrowings Charge in a reasonable way. As noted, a supervising judge's discretion is very wide, and it follows that the exercise of that

29 The appellant argues that the supervising judge had no discretion to bifurcate the Interim Lenders' Charge in this way, and even if there was such a discretion, it was not reasonably exercised.

30 A number of aspects of sales transactions under receiverships are well established:

> (a) The assets of the insolvent corporation can be sold free and clear of encumbrances, even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors: *Dianor Resources*.
>
> (b) If the insolvent corporation has more than one asset, individual assets can be sold free and clear of all encumbrances, again even if the sale does not generate sufficient funds to pay out all creditors, or any class of creditors. Any unpaid debts remain in place, and can be satisfied by subsequent sales of other assets.
>
> (c) When assets are sold free and clear of all encumbrances, that could include encumbrances related to debtor-in-possession financing, even if the sale does not generate sufficient funds to pay out those encumbrances. Security and priority given to debtor-in-possession lenders provide no assurance that the loans will actually be repaid.

It is against this background that the appellant argues that there was no jurisdiction or discretion to vest the assets of Accel Energy in the purchaser free and clear of the Interim Lenders' Charge unless that charge was paid off in full. There is, however, no reason in principle to carve that exception out of the general propositions just stated.

31 As previously discussed, the power given to supervising judges in s. 243(1)(c) of the BIA to "take any other action that the court considers advisable" has been read very widely. That power would include the mandate to sell some of the assets of the insolvent corporation, while only paying out a portion of the debtor-in-possession financing.

32 Alternatively, the appellant argues that the discretion should not have been exercised in this case. The original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers and that the Interim Lenders' Charge would attach to the assets of both Accel Entities. The appellant argues that it was unfair to allocate the interim Lenders' charge between the two entities, and then allow the sale to proceed without paying off the charge in full. However, as previously noted, the debtor-in-possession lender is never assured that its loans will be paid back at all or in full. There is always a prospect that the insolvency will evolve unfavourably, meaning that there are insufficient funds to meet all legitimate claims. When exercising her discretion the supervising judge must weigh the legitimate expectations of all stakeholders against the changed circumstances.

33 The unique position of Third Eye Capital as a major secured creditor, as a DIP lender, as the agent of the DIP lenders, and as a supporter of the successful bidder for the assets was not lost on the supervising judge. Third Eye Capital might have been operating with an eye to its own best interests, but that is not necessarily and automatically an indicator that the order granted by the supervising judge was unreasonable. As Slatter JA observed in Wilks Brothers LLC v 12178711 Canada Inc, 2020 ABCA 430 at para. 72, 85 CBR (6th) 9:

> During the approval process, all stakeholders are allowed to identify their own best interests, and pursue those best interests. Acting in one's own best interests is not bad faith: *Bhasin v Hrynew*, 2014 SCC 71 at para. 70, [2014] 3 SCR 494.
>
> The DIP Financing Term Sheet certainly created legitimate expectations, but as noted there was never an assurance that the DIP funding would be repaid. There is no indication on this record that Third Eye Capital did anything that specifically breached a contract or was tortious or otherwise offended against a law. Third Eye Capital was merely able to persuade the supervising judge that the sale and vesting order it proposed represented the proper balancing of the interests of all of the stakeholders. The appellant's disappointment at the outcome is not a basis for upsetting the decision of the supervising judge.

34 Notwithstanding that the original DIP Financing Term Sheet had provided that Accel Holdings and Accel Energy would be joint and several borrowers, it was always recognized that they were separate corporations, with separate primary secured creditors, and separate stakeholders. The Monitor from the beginning allocated the borrowings under the Interim Lenders'

TAB 4

COURT FILE NUMBER	2001 - 01210
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	GMT CAPITAL CORP.
DEFENDANTS	STRATEGIC OIL AND GAS LTD. and STRATEGIC TRANSMISSION LTD.
DOCUMENT	**RECEIVERSHIP ORDER -** **NORTHWEST TERRITORIES ASSETS**

Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
FILED
JAN 2 8 2020
CLERK OF THE COURT

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Cassels Brock & Blackwell LLP
Suite 3810, Bankers Hall West
888 3rd Street SW
Calgary, Alberta, T2P 5C5

Telephone 403-351-2921
Facsimile 403-648-1151

Attention: Jeffrey Oliver/Mary I.A. Buttery, Q.C.

I hereby certify this to be a true copy of the original ORDER
Dated this 28 day of Jan 2020
for Clerk of the Court

DATE ON WHICH ORDER WAS PRONOUNCED:	January 28, 2020
NAME OF JUDGE WHO MADE THIS ORDER:	The Honourable Madam Justice Horner
LOCATION OF HEARING:	Calgary, Alberta

UPON THE APPLICATION of GMT Capital Corp. ("**GMT**"); **AND UPON** reading the Application, the Affidavit of Pauline Bertha de Jong, the Affidavit of **[Affiant]** and the pleadings and proceedings filed in this Action; **AND UPON** noting the consent of Alvarez & Marsal Canada Inc ("**A&M**") to act as Receiver and Manager of those properties, assets and undertakings of Strategic Oil and Gas Ltd. and Strategic Transmission Ltd. ("**Strategic**") situate in the Northwest Territories; AND UPON hearing counsel for GMT, Strategic, the Government of the Northwest Territories, the Alberta Energy Regulator, KPMG Inc., in its capacity as Monitor of Strategic, and any other interested parties that may be present;

NWT RECEIVER'S POWERS

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

(a) to take possession and control of the NWT Property and any and all proceeds, receipts and disbursements arising out of or from the NWT Property

(b) to receive, preserve, protect and maintain control of the NWT Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of NWT Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate and carry on business in respect of the NWT Property, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part other business, or cease to perform any contracts as they pertain to the NWT Property only, and after consultation with the Alberta Receiver;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the powers and duties as conferred by this Order, and in respect of the NWT Property only, including without limitation those conferred by this Order;

(e) to purchase or lease machinery, equipment, inventories, supplies, premises or other assets to preserve and protect the NWT Property or any part or parts thereof;

(f) to collect any monies or accounts now owed or may be owed in respect of the NWT Property;

(g) to settle, extend or compromise any indebtedness owing in respect of the NWT Property, in consultation with the Alberta Receiver;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the NWT Property in the NWT Receiver's name, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the NWT Property and operations of Strategic in relation to the NWT Property;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the NWT Property or the NWT Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding, and provided further that nothing in this Order shall authorize the NWT Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

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

(l) to sell, convey, transfer, lease or assign the NWT Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $200,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

and in each such case notice under subsection 59(10) of the *Personal Property Security Act,* SNWT 1994, c 8 or any similar legislation in any other province or territory shall not be required.

(m) to apply for any vesting order or other orders (including without limitation, confidentiality or sealing orders) necessary to convey the NWT Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such NWT Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the NWT Receiver deems appropriate all matters relating to the NWT Property and the receivership, and to share information, subject to such terms as to confidentiality as the NWT Receiver deems advisable;

(o) to register a copy of this Order and any other orders in respect of the NWT Property against title to any of the NWT Property, and when submitted by the NWT Receiver for registration this Order shall be immediately registered by the Registrar of Land Titles of the Northwest Territories, or any other similar government authority, notwithstanding section 177 of the *Land Titles Act*, RSNWT 1988, c. 8, or the provisions of any other similar legislation in any other province or territory, and notwithstanding that the appeal period in respect of this Order has not elapsed and the Registrar of Land Titles shall accept all Affidavits of Corporate Signing Authority submitted by the NWT Receiver in its capacity as NWT Receiver of Strategic and not in its personal capacity;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the NWT Receiver, in the name of Strategic and solely with respect to the NWT Property; and

(q) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the NWT Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons, including Strategic, and without interference from any other Person (as defined below).

TAB 5

2010 ONSC 222
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010
Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Subject: Insolvency; Corporate and Commercial

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately $1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

APPLICATION by entity of company already protected under Companies' Creditors Arrangement Act for similar protection.

***Pepall J.*:**

Reasons for Decision

services to the LP Entities and is essential to the solicitation process. This charge would rank in third place, subsequent to the administration charge and the DIP charge.

53 In the past, an administration charge was granted pursuant to the inherent jurisdiction of the court. Section 11.52 of the amended CCAA now provides statutory jurisdiction to grant an administration charge. Section 11.52 states:

> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

54 I am satisfied that the issue of notice has been appropriately addressed by the LP Entities. As to whether the amounts are appropriate and whether the charges should extend to the proposed beneficiaries, the section does not contain any specific criteria for a court to consider in its assessment. It seems to me that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

This is not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence.

55 There is no question that the restructuring of the LP Entities is large and highly complex and it is reasonable to expect extensive involvement by professional advisors. Each of the professionals whose fees are to be secured has played a critical role in the LP Entities restructuring activities to date and each will continue to be integral to the solicitation and restructuring process. Furthermore, there is no unwarranted duplication of roles. As to quantum of both proposed charges, I accept the Applicants' submissions that the business of the LP Entities and the tasks associated with their restructuring are of a magnitude and complexity that justify the amounts. I also take some comfort from the fact that the administrative agent for the LP Secured Lenders has agreed to them. In addition, the Monitor supports the charges requested. The quantum of the administration charge appears to be fair and reasonable. As to the quantum of the charge in favour of the Financial Advisor, it is more unusual as it involves an incentive payment but I note that the Monitor conducted its own due diligence and, as mentioned, is supportive of the request. The quantum reflects an appropriate incentive to secure a desirable alternative offer. Based on all of these factors, I concluded that the two charges should be approved.

(g) Directors and Officers

56 The Applicants also seek a directors and officers charge ("D & O charge") in the amount of $35 million as security for their indemnification obligations for liabilities imposed upon the Applicants' directors and officers. The D & O charge will rank

TAB 6

2016 ONSC 1044
Ontario Superior Court of Justice

Danier Leather Inc., Re

2016 CarswellOnt 2414, 2016 ONSC 1044, 262 A.C.W.S. (3d) 573, 33 C.B.R. (6th) 221

In the Matter of Intention to Make a Proposal of Danier Leather Inc.

Penny J.

Heard: February 8, 2016
Judgment: February 10, 2016
Docket: 31-CL-2084381

Counsel: Jay Swartz, Natalie Renner, for Danier
Sean Zweig, for Proposal Trustee
Harvey Chaiton, for Directors and Officers
Jeffrey Levine, for GA Retail Canada
David Bish, for Cadillac Fairview
Linda Galessiere, for Morguard Investment, 20 ULC Management, SmartReit and Ivanhoe Cambridge
Clifton Prophet, for CIBC

Subject: Civil Practice and Procedure; Estates and Trusts; Insolvency

Headnote

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

D Inc. filed notice of intention to make proposal under Bankruptcy and Insolvency Act — Motion brought to, inter alia, approve stalking horse agreement and SISP — SISP approved — Certain other relief granted, including that key employee retention plan and charge were approved, and that material about key employee retention plan and stalking horse offer summary would not form part of public record pending completion of proposal proceedings — SISP was warranted at this time — SISP would result in most viable alternative for D Inc. — If SISP was not implemented in immediate future, D Inc.'s revenues would continue to decline, it would incur significant costs and value of business would erode, decreasing recoveries for D Inc.'s stakeholders — Market for D Inc.'s assets as going concern would be significantly reduced if SISP was not implemented at this time because business was seasonal in nature — D Inc. and proposal trustee concurred that SISP and stalking horse agreement would benefit whole of economic community — There had been no expressed creditor concerns with SISP as such — Given indications of value obtained through solicitation process, stalking horse agreement represented highest and best value to be obtained for D Inc.'s assets at this time, subject to higher offer being identified through SISP — SISP would result in transaction that was at least capable of satisfying s. 65.13 of Act criteria.

MOTION to, inter alia, approve stalking horse agreement and SISP.

***Penny J.*:**

The Motion

1 On February 8, 2016 I granted an order approving a SISP in respect of Danier Leather Inc., with reasons to follow. These are those reasons.

2 Danier filed a Notice of Intention to make a proposal under the BIA on February 4, 2016. This is a motion to:

(a) approve a stalking horse agreement and SISP;

44 In the exercise of its business judgment, the Board unanimously approved the break fee, the expense reimbursement and the signage costs obligations. The Proposal Trustee and the financial advisor have both reviewed the break fee, the expense reimbursement and the signage costs obligations and concluded that each is appropriate and reasonable in the circumstances. In reaching this conclusion, the Proposal Trustee noted, among other things, that:

(i) the maximum amount of the break fee, expense reimbursement and signage costs obligations represent, in the aggregate 2.5% of the imputed value of the consideration under the stalking horse agreement, which is within the normal range for transactions of this nature;

(ii) each stalking horse bidder required a break fee and expense reimbursement as part of their proposal in the stalking horse process;

(iii) without these protections, a party would have little incentive to act as the stalking horse bidder; and

(iv) the quantum of the break fee, expense reimbursement and signage costs obligations are unlikely to discourage a third party from submitting an offer in the SISP.

45 I find the break fee to be reasonable and appropriate in the circumstances.

Financial Advisor Success Fee and Charge

46 Danier is seeking a charge in the amount of US$500,000 to cover its principal financial advisor's (Concensus) maximum success fees payable under its engagement letter. The Consensus Charge would rank behind the existing security, *pari passu* with the Administration Charge and ahead of the D&O Charge and KERP Charge.

47 Orders approving agreements with financial advisors have frequently been made in insolvency proceedings, including CCAA proceedings and proposal proceedings under the BIA. In determining whether to approve such agreements and the fees payable thereunder, courts have considered the following factors, among others:

(a) whether the debtor and the court officer overseeing the proceedings believe that the quantum and nature of the remuneration are fair and reasonable;

(b) whether the financial advisor has industry experience and/or familiarity with the business of the debtor; and

(c) whether the success fee is necessary to incentivize the financial advisor.

Sino-Forest Corp., Re, 2012 ONSC 2063 (Ont. S.C.J. [Commercial List]) at paras. 46-47; *Colossus Minerals Inc., Re*, *supra*.

48 The SISP contemplates that the financial advisor will continue to be intimately involved in administering the SISP.

49 The financial advisor has considerable experience working with distressed companies in the retail sector that are in the process of restructuring, including seeking strategic partners and/or selling their assets. In the present case, the financial advisor has assisted Danier in its restructuring efforts to date and has gained a thorough and intimate understanding of the business. The continued involvement of the financial advisor is essential to the completion of a successful transaction under the SISP and to ensuring a wide-ranging canvass of prospective bidders and investors.

50 In light of the foregoing, Danier and the Proposal Trustee are in support of incentivizing the financial advisor to carry out the SISP and are of the view that the quantum and nature of the remuneration provided for in the financial advisor's engagement letter are reasonable in the circumstances and will incentivize the Financial advisor.

51 Danier has also engaged OCI to help implement the SISP in certain international markets in the belief that OCI has expertise that warrants this engagement. OCI may be able to identify a purchaser or strategic investor in overseas markets which

TAB 7

2012 ONSC 1750
Ontario Superior Court of Justice [Commercial List]

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.

2012 CarswellOnt 3158, 2012 ONSC 1750, 213 A.C.W.S. (3d) 12, 90 C.B.R. (5th) 74

CCM Master Qualified Fund, Ltd. (Applicant) and blutip Power Technologies Ltd. (Respondent)

D.M. Brown J.

Heard: March 15, 2012
Judgment: March 15, 2012
Docket: CV-12-9622-00CL

Counsel: L. Rogers, C. Burr for Receiver, Duff & Phelps Canada Restructuring Inc.
A. Cobb, A. Lockhart for Applicant

Subject: Insolvency; Civil Practice and Procedure

Headnote

Bankruptcy and insolvency --- Receivers — Miscellaneous

Receiver was appointed over debtor company — Debtor was in development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate — Receiver brought motion for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in Receiver's First Report — Motion granted — Receiver lacked access to sufficient funding to support debtor's operations during lengthy sales process — Quick sales process was required — Marketing, bid solicitation and bidding procedures proposed by Receiver would result in fair, transparent and commercially efficacious process, and were approved — Stalking horse agreement was approved for purposes requested by Receiver — Receiver was granted priority over existing perfected security interests and statutory encumbrances — Debtor did not maintain any pension plans — Activities in Receiver's First Report were approved.

MOTION by receiver for orders approving sales process and bidding procedures, including use of stalking horse credit bid; priority of Receiver's Charge and Receiver's Borrowings Charge; and activities reported in its First Report.

***D.M. Brown J.*:**

I. Receiver's motion for directions: sales/auction process & priority of receiver's charges

1 By Appointment Order made February 28, 2012, Duff & Phelps Canada Restructuring Inc. ("D&P") was appointed receiver of blutip Power Technologies Ltd. ("Blutip"), a publicly listed technology company based in Mississauga which engages in the research, development and sale of hydrogen generating systems and combustion controls. Blutip employs 10 people and, as the Receiver stressed several times in its materials, the company does not maintain any pension plans.

2 D&P moves for orders approving (i) a sales process and bidding procedures, including the use of a stalking horse credit bid, (ii) the priority of a Receiver's Charge and Receiver's Borrowings Charge, and (iii) the activities reported in its First Report. Notice of this motion was given to affected persons. No one appeared to oppose the order sought. At the hearing today I granted the requested Bidding Procedures Order; these are my Reasons for so doing.

II. Background to this motion

3 The Applicant, CCM Master Qualified Fund, Ltd. ("CCM"), is the senior secured lender to Blutip. At present Blutip owes CCM approximately $3.7 million consisting of (i) two convertible senior secured promissory notes (October 21, 2011: $2.6 million and December 29, 2011: $800,000), (ii) $65,000 advanced last month pursuant to a Receiver's Certificate, and (iii) $47,500 on account of costs of appointing the Receiver (as per para. 30 of the Appointment Order). Receiver's counsel has opined that the security granted by Blutip in favour of CCM creates a valid and perfected security interest in the company's business and assets.

4 At the time of the appointment of the Receiver Blutip was in a development phase with no significant sources of revenue and was dependant on external sources of equity and debt funding to operate. As noted by Morawetz J. in his February 28, 2012 endorsement:

> In making this determination [to appoint a receiver] I have taken into account that there is no liquidity in the debtor and that it is unable to make payroll and it currently has no board. Stability in the circumstances is required and this can be accomplished by the appointment of a receiver.

5 As the Receiver reported, it does not have access to sufficient funding to support the company's operations during a lengthy sales process.

III. Sales process/bidding procedures

A. General principles

6 Although the decision to approve a particular form of sales process is distinct from the approval of a proposed sale, the reasonableness and adequacy of any sales process proposed by a court-appointed receiver must be assessed in light of the factors which a court will take into account when considering the approval of a proposed sale. Those factors were identified by the Court of Appeal in its decision in *Royal Bank v. Soundair Corp.*: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the efficacy and integrity of the process by which offers are obtained; (iii) whether there has been unfairness in the working out of the process; and, (iv) the interests of all parties. [1] Accordingly, when reviewing a sales and marketing process proposed by a receiver a court should assess:

> (i) the fairness, transparency and integrity of the proposed process;
>
> (ii) the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and,
>
> (iii) whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale.

7 The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. Stalking horse bids have been approved for use in other receivership proceedings, [2] *BIA* proposals, [3] and *CCAA* proceedings. [4]

8 Perhaps the most well-known recent example of the use of a stalking horse credit bid was that employed in the Canwest Publishing Corp. *CCAA* proceedings where, as part of a sale and investor solicitation process, Canwest's senior lenders put forward a stalking horse credit bid. Ultimately a superior offer was approved by the court. I accept, as an apt description of the considerations which a court should take into account when deciding whether to approve the use of a stalking horse credit bid, the following observations made by one set of commentators on the Canwest *CCAA* process:

> To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a

TAB 8

2021 ONCA 375
Ontario Court of Appeal

Marchant Realty Partners Inc. v. 2407553 Ontario Inc.

2021 CarswellOnt 7770, 2021 ONCA 375

Marchant Realty Partners Inc., as agent (Responding Party) and 2407553 Ontario Inc., 2384648 Ontario Inc., 2384646 Ontario Inc., 24000196 Ontario Inc. and 2396139 Ontario Inc. (Moving Parties)

Marchant Realty Partners Inc., as agent (Responding Party) and 4544 Zimmerman Avenue LP and 4544 Zimmerman Avenue GP Inc. (Moving Parties)

Marchant Realty Partners Inc., as agent (Responding Party) and 4267 River Road LP and 4267 River Road GP Inc. (Moving Parties)

M. Jamal J.A.

Heard: May 20, 2021
Judgment: May 31, 2021
Docket: CA M52417, M52418, M52419

Counsel: Steven L. Graff, Miranda Spence, Stephen Nadler, for Moving Parties
Sara-Ann Wilson, Kenneth Kraft, for Responding Party, Zeifman Partners Inc.

Subject: Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency
Debtors and creditors

***M. Jamal J.A.*:**

1 The moving parties are debtors ("Debtors") over whose assets, undertakings, and real property the responding party Zeifman Partners Inc., ("Receiver") is the court-appointed receiver and manager. The Debtors seek leave to appeal to this court under s. 193(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B–3 ("BIA"), from orders of Cavanagh J. ("motion judge") of the Superior Court of Justice (Commercial List) dated March 25, 2021, approving the Receiver's proposed sale process and list prices for five commercial properties in downtown Niagara Falls, Ontario ("Properties").

2 For the reasons that follow, the motions for leave to appeal are dismissed.

Background

3 Marchant Realty Partners Inc. ("Agent"), as agent for a group of lenders ("Lenders"), commenced three related receivership proceedings before the Commercial List concerning loans the Lenders made to the Debtors. The loans matured over three years ago, some loans more than four years ago. As of October 2020, the Debtors owed more than $16 million under the loans.

4 The three receivership applications were originally scheduled for September 2018 but were adjourned five times to give the Debtors more time to refinance the Properties. The refinancing never happened.

5 With no refinancing or repayment plan on the horizon, the Agent moved forward with the receivership applications. In August 2020, Gilmore J. of the Commercial List appointed the Receiver as receiver and manager over the Debtors' Properties,

although the appointment was stayed for just over two months to give the Debtors one last chance to repay the loans. They could not do so, and the Receiver's appointment became effective in mid-October 2020.

6 The Properties are about 4 km from the tourist area of Niagara Falls. The Properties are mixed-use commercial properties (most needing repairs), a seasonal operating motel (closed because of the pandemic), and vacant land.

7 The Receiver is authorized to market the Properties, including advertising them for sale, soliciting offers to buy them, and negotiating such terms as the Receiver deems appropriate.

The Motion Judge's Decision

8 The Receiver recommended list prices for the sale of Properties based on: (1) independent appraisals from two local appraisers, Humphrey Appraisal Services Inc. and Jacob Ellens & Associates Inc.; (2) recommended list prices for the Properties from three real estate brokerages; and (3) discussions with Jones Lang LaSalle Real Estate Services, the proposed listing brokerage, which has expertise selling properties around Niagara Falls. Even with these list prices, the Lenders will lose money on their loans to the Debtors.

9 The Debtors opposed the proposed list prices and relied on competing appraisals of Colliers, a commercial real estate firm. Colliers' appraisals — which focussed on the development potential of the Properties — were almost 300% higher than the Receiver's list prices. The Debtors asked the motion judge to direct the Receiver to list the Properties at Colliers' proposed prices for 60 days to see what the market will bear.

10 By order dated March 25, 2021, the motion judge approved the Receiver's proposed sale process and list prices for the Properties. The motion judge found:

> The Receiver is an officer of the court with duties to all stakeholders. In my view, the Receiver has shown that it is acting in good faith and diligently to discharge its duties to deal with the [Properties] in a commercially reasonable manner. The Receiver has reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the [Properties]. The Receiver has explained why it does not agree with the Colliers appraisals, and why it has recommended that the sale process be approved. I have considered the process which the Receiver has followed and the information upon which it relies to support its recommendations. The [Debtors] have not shown that the Receiver followed a flawed procedure. I am not satisfied that this is an exceptional case where it is proper for me to reject the business judgment made by the Receiver.

The Test for Leave to Appeal Under s. 193(e) of the BIA

11 The moving parties seek leave to appeal from the motion judge's orders under s. 193(e) of the BIA. This provision provides that, unless an appeal lies as of right or as otherwise expressly provided, an appeal lies to the Court of Appeal "from any order or decision of a judge of the court . . . by leave of a judge of the Court of Appeal".

12 In deciding whether to grant leave under s. 193(e) of the BIA, this court considers the following principles:

- Granting leave is "discretionary and must be exercised in a flexible and contextual way": Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

- In exercising its discretion, the court should examine whether the proposed appeal: (1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*, at para. 29; McEwen (Re), 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

Should this Court Grant Leave to Appeal?

(1) Does the proposed appeal raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice?

13 The Debtors assert that the proposed appeal raises an issue of general important to bankruptcy/insolvency practice. They frame the issue on the proposed appeal as "the extent of the deference that the Court owes to a receiver's business judgment when approving a sale process." They claim the appeal "will provide guidance to receivers as they consider the level of scrutiny they may expect from the Court, and to other stakeholders as they consider whether to challenge the actions taken by any given receiver."

14 The Receiver frames the issue on appeal much more narrowly. It claims the appeal "is highly fact-specific and concerns, in essence, the appropriate list prices" of the Properties. It says no legal principles are in dispute and the appeal will have "no bearing or importance for the practice of insolvency and the administration of receivership proceedings."

15 I agree with the Receiver. Although on any appeal the court would consider and apply the principles of deference applicable to a receiver's business judgment, those principles are not in dispute. They were correctly stated by the motion judge, who cited this court's decision in Regal Constellation Hotel Ltd. (Re)(2004), 71 O.R. (3d) 355 (C.A.), at para. 23:

> Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

16 On the Debtors' argument, the appeal would involve the application of these settled principles. However, applying settled principles of deference to the Receiver's business decisions here would not raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice.

17 The Debtors also say the motion judge failed to apply the correct legal test for evaluating whether a receiver has acted properly in selling a property, as stated in Royal Bank of Canada v. Soundair Corp.(1991), 4 O.R. (3d) 1 (C.A.). This issue relates to the deference issue because the Debtors claim the motion judge failed to cite or apply the *Soundair* test and instead was unduly deferential to the Receiver. I will consider this argument below in evaluating whether the proposed appeal is *prima facie* meritorious.

(2) Is the proposed appeal prima facie meritorious?

18 In evaluating whether the proposed appeal has *prima facie* merit, I begin by noting that this court gives substantial deference to the discretion of commercial court judges supervising insolvency and restructuring proceedings and does not intervene absent demonstrable error: Ravelston Corp. Ltd. (Re), 2007 ONCA 135, 85 O.R. (3d) 175, at para. 3.

19 As already noted, commercial court judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will not intervene: *Ravelston*, at para. 3; *Regal Constellation Hotel*, at para. 23. A court "will assume that the receiver is acting properly unless the contrary is clearly shown": *Regal Constellation Hotel*, at para. 23.

20 The Debtors assert, however, that this court would overcome the deference shielding the receiver's business judgments and the motion judge's review of those judgments because the motion judge made an extricable error of law. The Debtors say the motion judge erred in law by failing to state or apply the *Soundair* test for evaluating whether a receiver has acted properly in recommending list prices for the Properties.

TAB 9

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

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

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

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Sale of assets — Debtor companies were severely impacted by economic downturn, and breached covenants under credit agreement with secured creditors — Debtors agreed with secured creditors to implement Sales and Investment Solicitation Process (SISP), which resulted in proposed asset sales that would provide no recovery for unsecured creditors — Debtors were granted Initial Order under Companies' Creditors Arrangement Act — Debtors brought application for order approving sales transactions generated through SISP — Trustee of bonds brought application for order dismissing debtors' application, and allowing bondholders to propose plan of arrangement, among other relief — Debtors' application granted; trustee's application dismissed — As result of enactment of s. 36 of Act, there was no jurisdictional impediment to sale of assets where such sales met requisite tests, even in absence of plan of arrangement — Fact that SISP occurred before seeking protection under Act did not amount to abuse of Act — Despite speed and economic environment, SISP was reasonable, competitive and robust, and generated range of bids significantly above liquidation value — Allegations of bad faith were not supported by evidence — Bondholders were aware of SISP and intention to obtain protection under Act, and were not improperly denied access to information — Factors in s. 36(3) of Act favoured approval of proposed sales — Further allegations raised after hearing were duly investigated by monitor and shown to be groundless Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36.

APPLICATION by debtor companies for orders approving sales of assets generated through Sales and Investment Solicitation Process; APPLICATION by trustee of the bonds for order dismissing debtors' application, allowing bondholders to propose plan of arrangement, and other relief.

***B.E. Romaine J.*:**

I. Introduction

of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

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

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

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

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

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

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

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

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

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

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

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc

TAB 10

I hereby certify this to be a true copy of the original Order
Dated this 22 day of March
for Clerk of the Court

Clerk's stamp:

FIAT: Let the within Order be filed ~~notwithstanding~~ that the counsel approvals are by electronic signature and in counterpart, this 21st day of March, 2017.

not necessary
2012 ABCA 150 ¶7
J.C.Q.B.A

COURT FILE NO.	1701-03460
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	ALBERTA ENERGY REGULATOR
RESPONDENT	LEXIN RESOURCES LTD.
DOCUMENT	**RECEIVERSHIP ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**JENSEN SHAWA SOLOMON DUGUID HAWKES LLP** Barristers 800, 304 - 8 Avenue SW Calgary, Alberta T2P 1C2 Christa Nicholson Phone: 403 571 1053 Fax: 403 571 1528 Email: nicholsonc@jssbarristers.ca File: 13817.001

JUDICIAL CENTRE OF CALGARY
FILED
MAR 22 2017
CLERK OF THE COURT

DATE ON WHICH ORDER WAS PRONOUNCED: March 20, 2017

LOCATION WHERE ORDER WAS PRONOUNCED: Calgary Courts Centre

NAME OF THE JUDGE WHO MADE THIS ORDER: The Honourable Justice P.R. Jeffrey

UPON the application of Alberta Energy Regulator ("**AER**") in respect of Lexin Resources Ltd. ("**Lexin**" or the "**Debtor**"); **AND UPON** having read the Application of the AER; the Affidavit of Laura Chant, sworn on March 11, 2017 including the reference therein to the "Equipment Order" granted March 3, 2017 in Court of Queen's Bench Action No. 1701 02272; the Affidavit of Service of Helen Bowker, sworn and filed March 14, 2017; and the Affidavit of Charles Selby, sworn and filed March 17, 2017; **AND UPON** reading the consent of Grant Thornton Limited to act as receiver ("**Receiver**") of the Debtor; **AND UPON** hearing counsel for AER and other interested parties;

IT IS HEREBY ORDERED AND DECLARED THAT:

SERVICE

1. The time for service of the notice of this Application is hereby abridged and service thereof is deemed good and sufficient.

APPOINTMENT

2. Pursuant to section 243(1) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("**BIA**") and/or section 13(2) of the *Judicature Act,* R.S.A. 2000, Grant Thornton Limited is hereby appointed Receiver, without security, of all of Lexin's current and future assets, undertakings and properties of every nature and kind whatsoever, including all proceeds thereof, provided that the appointment of the Receiver shall not include any oil or gas wells, pipelines or facilities located outside the Province of Alberta or regulated by an entity other than the AER (the "**Property**").

RECEIVER'S POWERS

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

   (a) to take possession of and exercise control over the Property, with the exception of taking possession of or exercising physical control over any Lexin oil or gas wells, pipelines, facilities or sites regulated by the AER (the "**Sites and Abandoned Sites**"), and any and all proceeds, receipts and disbursements arising out of or from the Property, and for greater clarity, while the Receiver shall have limited powers with respect to the Property as it relates to the Sites and Abandoned Sites as more particularly set out herein, the Receiver shall not have the power to take possession of and exercise physical control over the Sites and the Abandoned Sites;

(b) to exercise any powers it has under section 14.06 of the BIA;

(c) to receive, preserve and protect the books and records of the Debtor or any part or parts thereof, including, but not limited to, relocating of the books and records to safeguard them as may be necessary or desirable;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to receive and collect all monies and accounts now owed or hereafter owing to the Debtor and to exercise all remedies of the Debtor in collecting such monies, including, without limitation, to enforce any security held by the Debtor;

(f) to settle, extend or compromise any indebtedness owing to or by the Debtor;

(g) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order;

(h) to initiate, prosecute and continue the prosecution of any and all proceedings (with the exception of the hearing scheduled for March 22 and 23, 2017 of Lexin's application filed in Court of Queen's Bench Action Number 1701-02272 and in its Originating Application filed in Court of Queen's Bench Action Number 1701-03310 (the "**Applications**"), on the issue before the Court to be argued at that time, namely, the Court's jurisdiction to hear the foregoing Applications (the "**Jurisdiction Question**"), which Jurisdiction Question may continue to be advanced by Lexin as opposed to the Receiver), and to defend all proceedings now pending or hereafter instituted with respect to the Debtor, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceedings, and

provided further that nothing in this Order shall authorize the Receiver to defend or settle the action in which this Order is made unless otherwise directed by this Court;

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

(j) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $50,000, provided that the aggregate consideration for all such transactions does not exceed $150,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause,

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

(k) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(l) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(m) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(n) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtor;

(o) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtor, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtor;

(p) to exercise any shareholder, partnership, joint venture or other rights which the Debtor may have;

(q) to, with leave of the Court, assign the Debtor into bankruptcy, to become the trustee in bankruptcy of the Debtor and to take all steps reasonably required to carry out its role as trustee in bankruptcy of the Debtor should the Receiver deem it appropriate in the circumstances to do so; and

(r) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations;

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtor, and without interference from any other Person.

4. Notwithstanding any other provision of this Order, nothing herein shall empower, authorize or require the Receiver: (i) to take possession of or exercise physical control over the Sites and the Abandoned Sites; or (ii) to manage, operate or carry on the business of the Debtor; and the Receiver shall not be deemed to have taken any of the actions or steps referred to in this paragraph 4 solely as a consequence of having taken some of the steps authorized pursuant to paragraph 3.

5. Upon the AER receiving from any person a request for approval to remove equipment from any of the Sites pursuant to the Equipment Order (the "**Request**"), the AER shall forthwith bring that communication to the attention of the Receiver, and the Receiver

shall cooperate with the AER with respect to any proposed removal of equipment from any Sites and Abandoned Sites, and will thereafter either:

(a) approve the removal of the equipment on such terms as are appropriate, having regard to the entitlements of all persons; or

(b) advise the person who made the Request that the equipment may not be removed without Court Order, made on application brought in these proceedings (Action No. 1701-03460) with 7 days' prior notice to the Receiver and AER.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

6. (i) The Debtor, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property (excluding Property subject to liens the validity of which is dependant on maintaining possession) to the Receiver upon the Receiver's request.

7. All Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtor, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 7 or in

paragraph 8 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or documents prepared in contemplation of litigation or due to statutory provisions prohibiting such disclosure.

8. If any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

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

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

10. No Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court,

provided, however, that nothing in this Order shall: (i) prevent any Person from commencing a proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such proceeding is not commenced before the expiration of the stay provided by this paragraph 10; and (ii) affect a Regulatory Body's investigation in respect of the debtor or an action, suit or proceeding that is taken in respect of the debtor by or before the Regulatory Body, other than the enforcement of a payment order by the Regulatory Body or the Court. "**Regulatory Body**" means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province.

NO EXERCISE OF RIGHTS OF REMEDIES

11. All rights and remedies (including, without limitation, set-off rights) against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

12. No Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtor, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

13. All Persons having oral or written agreements with the Debtor or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking

services, payroll services, insurance, transportation services, utility or other services to the Debtor are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and this Court directs that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtor or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

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

EMPLOYEES

15. Subject to employees' rights to terminate their employment, all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations

under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*, SC 2005, c 47 ("**WEPPA**").

16. Pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtor, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

17. (a) Notwithstanding anything in any federal or provincial law, the Receiver is not personally liable in that position for any environmental condition that arose or environmental damage that occurred:

    (i) before the Receiver's appointment; or

    (ii) after the Receiver's appointment unless it is established that the condition arose or the damage occurred as a result of the Receiver's gross negligence or wilful misconduct.

(b) Nothing in sub-paragraph (a) exempts a Receiver from any duty to report or make disclosure imposed by a law referred to in that sub-paragraph.

(c) Notwithstanding anything in any federal or provincial law, but subject to sub-paragraph (a) hereof, where an order is made which has the effect of requiring

the Receiver to remedy any environmental condition or environmental damage affecting the Property, the Receiver is not personally liable for failure to comply with the order, and is not personally liable for any costs that are or would be incurred by any person in carrying out the terms of the order,

(i) if, within such time as is specified in the order, within 10 days after the order is made if no time is so specified, within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, or during the period of the stay referred to in clause (ii) below, the Receiver:

A. complies with the order, or

B. on notice to the person who issued the order, abandons, disposes of or otherwise releases any interest in any real property affected by the condition or damage;

(ii) during the period of a stay of the order granted, on application made within the time specified in the order referred to in clause (i) above, within 10 days after the order is made or within 10 days after the appointment of the Receiver, if the order is in effect when the Receiver is appointed, by,

A. the court or body having jurisdiction under the law pursuant to which the order was made to enable the Receiver to contest the order; or

B. the court having jurisdiction in bankruptcy for the purposes of assessing the economic viability of complying with the order; or

(iii) if the Receiver had, before the order was made, abandoned or renounced or been divested of any interest in any real property affected by the condition or damage.

LIMITATION ON THE RECEIVER'S LIABILITY

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

RECEIVER'S ACCOUNTS

19. The Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case, incurred at their standard rates and charges. The Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, incurred both before and after the making of this Order in respect of these proceedings, and the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person but subject to section 14.06(7), 81.4(4) and 81.6(2) of the BIA.

20. The Receiver and its legal counsel shall pass their accounts from time to time.

21. Prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including the legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

22. The Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $200,000 (or such greater amount as this Court may by further Order authorize) at any time, at such

rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges set out in sections 14.06(7), 81.4(4) and 81.6(2) and 88 of the BIA.

23. Neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

24. The Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "**A**" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

25. The monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

ALLOCATION

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

GENERAL

27. The Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Receiver will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

29. Nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtor.

30. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. The Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. The Applicant shall have its costs of this motion, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtor's estate with such priority and at such time as this Court may determine.

33. Any interested party may apply to this Court to vary or amend this Order on not less than 7 days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

FILING

34. The Receiver shall establish and maintain a website in respect of these proceedings at www.grantthornton.ca/creditorupdates and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

_____
J.C.Q.B.A.

APPROVED as the Order granted:

GROIA AND COMPANY PROFESSIONAL CORPORATION

Per: _____
Joseph Groia
Counsel for Lexin Resources Ltd.

BORDEN LADNER GERVAIS LLP

Per: _____
Robyn Gurofsky
Counsel for Grant Thornton Limited

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____
Christa Nicholson
Counsel for the Alberta Energy Regulator

FILING

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(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders and other materials filed in these proceedings by or on behalf of the Receiver, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

J.C.Q.B.A.

APPROVED as the Order granted:

GROIA AND COMPANY PROFESSIONAL CORPORATION

Per: _____
Joseph Groia
Counsel for Lexin Resources Ltd.

BORDEN LADNER GERVAIS LLP

Per: _____
Robyn Gurofsky
Counsel for Grant Thornton Limited

JENSEN SHAWA SOLOMON DUGUID HAWKES LLP

Per: _____
Christa Nicholson
Counsel for the Alberta Energy Regulator

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that GRANT THORNTON LIMITED, the receiver (the "**Receiver**") of all of the assets, undertakings and properties of LEXIN RESOURCES LTD. appointed by Order of the Court of Queen's Bench of Alberta in Bankruptcy and Insolvency (the "**Court**") dated the ___ day of _____, ____ (the "**Order**") made in action number _____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [**daily**] [monthly **not** in advance on the ___ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Alberta Treasury Branches from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at _____.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property) as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ___ day of _____, 20__.

GRANT THORNTON LIMITED, solely in its capacity as Receiver of the Property (as defined in the Order), and not in its personal capacity

Per: _____
Name:
Title:

TAB 11

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of

expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables 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

> *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

