COURT FILE NUMBER	**1903-12504**
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	MAYNBRIDGE CAPITAL INC.
DEFENDANTS	VOICE CONSTRUCTION OPCO ULC, VOICE MANAGEMENT LTD., VOICE CONSTRUCTION LTD., EARTH & ENERGY CONSTRUCTION LTD., VOICE HOLDINGS LTD., and 2012442 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF MAYNBRIDGE CAPITAL INC., RE: RECEIVER'S APPLICATION FOR APPROVAL OF SALE AND VESTING ORDER**

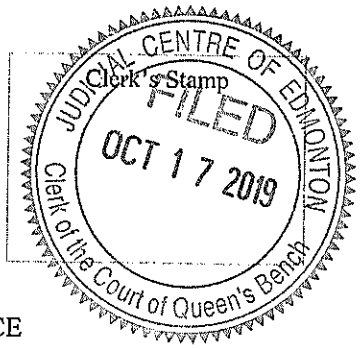

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TABLE OF CONTENTS

I. INTRODUCTION 1
II. ISSUE 1
III. LAW AND ANALYSIS 2
A. Court Approval of Receivership Sales 2
B. Credit Bid Sales 2
C. The Transaction Should Be Approved 3
D. Sealing Order for the Confidential Supplement 4
IV. RELIEF SOUGHT 5

I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Maynbridge Capital Inc. ("**Maynbridge**"), secured creditor of Voice Construction OPCO ULC, Voice Management Ltd., Voice Construction Ltd., Earth & Energy Construction Ltd., Voice Holdings Ltd. and 2012442 Alberta Ltd. (collectively, the "**Debtors**"), in support of the application of Alvarez & Marsal Canada Inc., in its capacity as the court-appointed receiver and receiver-manager (the "**Receiver**") of the Debtor,[1] for approval of the sale and vesting of the Credit Bid APA (the "**Transaction**") between Maynbridge and the Receiver (the "**Application**").[2]

2. The facts in support of the Receiver's Application are detailed in the Fourth Report of the Receiver filed on October 17, 2019 (the "**Fourth Report**"), which Maynbridge adopts as if reproduced herein.

3. Maynbridge submits that the Transaction is commercially reasonable and fair. As more fully set out in the Fourth Report, the Debtors were in the business of providing civil construction services, and own a large amount of construction equipment.[3] While the Receiver has not run a sale full process for the assets, it has been involved in extensive negotiations with Maynbridge, which is also the fulcrum secured creditor.[4] Maynbridge shares the Receiver's concern that a full sale process for the assets would lower the market price for same.[5] The Transaction is in the best interest of all stakeholders.

4. In its Application, the Receiver also seeks a sealing order in respect of Confidential Appendices 1, 2 and 3 (the "**Confidential Supplement**") to the Fourth Report, which contains, among other things, an unredacted copy of the Credit Bid APA and the Receiver's analysis thereof. Disclosure of this information, before the Transaction closes, could undermine any future sale process.

II. ISSUE

5. The issues in the within Application are as follows:

   (a) Should this Honourable Court approve the sale and vesting of the Transaction?

   (b) Should this Honourable Court grant the sealing order with respect to the Confidential Supplement?

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[1] *See*, Consent Receivership Order pronounced by the Honourable Associate Chief Justice K. G. Nielsen on June 25, 2019.
[2] Unless otherwise indicated, capitalised terms used herein shall have the meanings ascribed to them in the Fourth Report of the Receiver filed on October 17, 2019 [**Fourth Report**].
[3] Fourth Report at paras 9, 31.
[4] Fourth Report at para 4(c).
[5] Fourth Report at paras 28-29.

III. LAW AND ANALYSIS

A. Court Approval of Receivership Sales

6. A receiver is required to act honestly and in good faith, and to deal with the property of the insolvent person in a commercially reasonable manner.[6] Further, a receiver is "expected 'to realize on the debtor's assets and pay the security holders and the other creditors who are owed money'".[7]

7. In considering whether to approve a proposed sale of assets by a receiver, the courts have applied the following four factors, also known as the *Soundair* principles or factors:

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

   (b) the interests of all parties;

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

   (d) whether there has been unfairness in the working out of the process.[8]

8. Alberta courts have found that the *Soundair* principles do not require a formal court-supervised sale process in every case. Rather, the decision to approve a sale by the receiver is a "matter of discretion", dependent upon the relevant facts and circumstances in a particular case.[9]

9. Accordingly, this Honourable Court's decision with respect to the sale and vesting of the Transaction involves a discretionary exercise, having view to the circumstances of the receivership, including the receiver's conduct, the interest of all parties, and the integrity of the sales process.

B. Credit Bid Sales

10. Credit bids submitted by secured creditors are common in receivership proceedings. Indeed, the Ontario Superior Court of Justice has confirmed that "[i]t is well established in Canada insolvency law that a secured creditor is permitted to bid its debt in lieu of providing cash consideration."[10]

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[6] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, section 247 [**TAB 1**].

[7] *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 [**TAB 2**] at para 22, in which the Court of Appeal of Alberta refers to *Bennett on Receiverships*, 3rd ed (Toronto:Carswell, 2011) at 6.

[8] *Re Sydco Energy Inc*, 2018 ABQB 75 at para 50 [**TAB 3**], citing *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (ONCA) at para 16 [**TAB 4**].

[9] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 at para 20 [**TAB 5**].

[10] *8527504 Canada Inc v Liquibrands Inc*, 2015 ONSC 5912 [***Liquibrands***] [**TAB 6**] at para 20, citing *Elleway Acquisitions Ltd v 4358376 Canada Inc*, 2013 ONSC 7009 [***Elleway***] [**TAB 7**] at para 38.

11. In determining whether a credit bid should be approved, the courts have considered whether cash that would otherwise be paid in lieu of a credit bid would accrue to the benefit of the secured creditor (credit bidder)[11] and whether the credit bid had a chilling effect on potential bidders.[12]

C. The Transaction Should Be Approved

12. The Transaction is commercially reasonable and satisfy the *Soundair* principles in the unique circumstances of this receivership.

13. As set out in the Receiver's Fourth Report, although the Receiver did not undertake a formal marketing process, the Receiver reviewed the parties that expressed unsolicited interest in purchasing the Debtors' equipment and worked with those interested parties that were prepared to make offers that exceed the forced sale value of the assets.[13] While the Receiver was successful in selling some of the Debtors' assets, consisting generally of higher quality equipment, the Receiver continues to hold mid- to lower quality assets for which there is no interest from third parties.[14]

14. The Receiver has obtained an appraisal for the assets.[15] The Receiver has also participated in numerous phone calls, meetings, and other consultations with Maynbridge to discuss, among other things, the sale of the assets.[16] The Receiver and Maynbridge negotiated the terms of the Credit Bid APA in light of the foregoing circumstances. In doing so, the Receiver has undertaken significant effort to obtain the best possible price for the relevant construction assets.

15. Given that the Debtors' assets consist of a significant number of construction equipment located at multiple locations in the Provinces of Alberta and British Columbia,[17] all of which require substantial resources for storage and maintenance,[18] a formal marketing process would be complicated, time-consuming, and extremely costly to the estate. Further, there is significant concern that a wholesale auction would flood the market and reduce the market price for the Debtors' equipment.[19] The best method to maximize value is therefore a sale of the Debtors' remaining assets to the sole purchaser that is willing to offer a reasonable price in light of the appraised value, as contemplated in the Transaction.

16. In light of the Receiver's efforts with respect to the valuation of the assets and extensive discussions with interested parties, and given the nature of the Debtors' remaining assets and concerns relating

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[11] *Liquibrands* at para 21 **[TAB 6]**; *Elleway* at paras 40-41 **[TAB 7]**.
[12] *Liquibrands* at para 22 **[TAB 6]**
[13] Fourth Report at paras 26, 27, 30.
[14] Fourth Report at paras 32-34.
[15] Fourth Report at para 43(c).
[16] Fourth Report at para 12(o).
[17] Fourth Report at para 24(a).
[18] Fourth Report at para 43(b), 110.
[19] Fourth Report at para 28.

to a full sale process, the Receiver has acted providently in proposing to liquidate the assets through the Transaction and has made a sufficient effort to obtain the best price.

17. Further, the interest of all parties are served by the Transaction, and the process leading up to the execution of the Credit Bid APA has been fair. The Receiver has previously obtained an Order for the declaration of valid security interests in the Debtors' assets.[20] In turn, the Transaction contemplates payment to claimants having priority interests in the subject assets and provides a mechanism to ensure that these interests are satisfied and the priority claims fulfilled.[21] Maynbridge is unaware of any stakeholders who oppose the Transaction.

18. The fact that the Transaction involves a credit bid does not preclude this Honourable Court's approval of the requested sale and vesting order. The credit bid results in only a partial reduction of the indebtedness owed to Maynbridge. If cash was paid in lieu of the proposed credit bid, such cash would accrue to the benefit of Maynbridge. Further, the estate has sufficient cash flow from prior asset sales and does not require more cash.[22]

19. The Transaction cannot be said to have a chilling effect on other potential bidders. The Receiver has indicated that no third party has expressed an interest in purchasing the assets at an acceptable purchase price.[23] The Transaction is the most effective way to liquidate the Debtors' remaining assets.

20. In all the circumstances, Maynbridge respectfully requests that this Honourable Court exercise its discretion to approve the Transactions.

D. Sealing Order for the Confidential Supplement

21. The test for granting a sealing order was set out by Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*.[24] A sealing order should 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.[25]

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[20] *See*, the Order pronounced by the Honourable Justice J. S. Little on September 30, 2019.
[21] Fourth Report at para 42.
[22] Fourth Report at para 46.
[23] Fourth Report at para 37.
[24] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 [***Sierra Club***] [**TAB 8**].
[25] *Sierra Club* at para 53 [**TAB 8**].

22. The Confidential Supplement contains commercially sensitive information of Credit Bid APA, particularly, the purchase price. If this information is disseminated, and should the Transactions fail to close, the Receiver's ability to negotiate with future prospective buyers and maximize the value of the Debtor's assets would be placed at risk.[26] Further, Maynbridge intends to monetize the assets in the near future should the Transaction close,[27] and the purchase price therefore remains commercially sensitive for some time following closing.

23. The temporary sealing order sought for the Confidential Supplement is the least restrictive and prejudicial alternative to prevent dissemination of the Debtors' commercially sensitive information and it is fair and just in the circumstances to restrict public access to the Confidential Supplement.

IV. RELIEF SOUGHT

24. Maynbridge respectfully requests that the Honourable Court grant an order approving the Transaction and a sealing order for the Confidential Supplement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF OCTOBER 2019.

BORDEN LADNER GERVAIS LLP

for Per: Matti Lemmens
Solicitors for the Plaintiff, Maynbridge Capital Inc.

[26] Fourth Report at para 47.
[27] Fourth Report at para 47.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2.	*Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109
3.	*Re Sydco Energy Inc*, 2018 ABQB 75
4.	*Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (ONCA)
5.	*Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47
6.	*8527504 Canada Inc v Liquibrands Inc*, 2015 ONSC 5912
7.	*Elleway Acquisitions Ltd v 4358376 Canada Inc*, 2013 ONSC 7009
8.	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 247

s 247. Good faith, etc.

Currency

247. Good faith, etc.
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.

Amendment History
1992, c. 27, s. 89(1)

Currency
Federal English Statutes reflect amendments current to June 12, 2019
Federal English Regulations are current to Gazette Vol. 153:13 (June 26, 2019)

TAB 2

2019 ABCA 109
Alberta Court of Appeal

Edmonton (City) v. Alvarez & Marsal Canada Inc

2019 CarswellAlta 511, 2019 ABCA 109, [2019] 5 W.W.R. 38, [2019] A.W.L.D. 1566, [2019] A.W.L.D. 1570, [2019] A.W.L.D. 1624, 303 A.C.W.S. (3d) 478, 432 D.L.R. (4th) 724, 68 C.B.R. (6th) 165, 83 Alta. L.R. (6th) 34, 85 M.P.L.R. (5th) 1

City of Edmonton (Respondent / Applicant) and Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp. (Appellants / Defendants) and Royal Bank of Canada (Not a Party to the Appeal / Plaintiff) and Reid-Built Homes Ltd and Emilie Reid (Not Parties to the Appeal / Defendants)

Marina Paperny, Sheila Greckol, Ritu Khullar JJ.A.

Heard: February 7, 2019
Judgment: March 25, 2019
Docket: Edmonton Appeal 1803-0050-AC

Proceedings: reversing *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), [2018] 5 W.W.R. 565, 2018 CarswellAlta 305, 2018 ABQB 124, 57 C.B.R. (6th) 1, 65 Alta. L.R. (6th) 230, 72 M.P.L.R. (5th) 55, Robert A. Graesser J. (Alta. Q.B.)

Counsel: H.A. Gorman, Q.C., A.M. Badami, for Appellants
A. Turcza-Karhut, C.N. Androschuk, for Respondent

Subject: Insolvency; Property; Public; Tax — Miscellaneous; Municipal

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.2 Fees and expenses
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order
Municipal law
XXI Tax collection and enforcement
XXI.9 Practice and procedure
XXI.9.a Parties

Headnote

Bankruptcy and insolvency --- Receivers — Fees and expenses

Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's

charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Municipal law --- Tax collection and enforcement — Practice and procedure — Parties

Residential home builder was placed in receivership and court appointed receiver under Bankruptcy and Insolvency Act (Act) — Receivership order gave priority to receiver's charges over other claims — Receiver applied for order granting it authority to repair, maintain and complete builder's properties and for corresponding first priority charge against each specific property for any expenses incurred — Secured creditors and city disputed priority of receiver's charge — Chambers judge exercised discretion under Act in granting receiver's charge priority over claims of secured creditors, but refused to prioritize receiver's charge for fees and disbursements over city's claim for unpaid property taxes — Receiver appealed — Appeal allowed — Chambers judge reasonably applied relevant principles in declining to give priority to claims of secured creditors over receiver's charge — Chambers judge's observations and policy considerations applied equally to city's application, but chambers judge approached city's application differently — There was no principled reason for drawing distinction between city's position and that of secured creditors — Court had discretion under Act with respect to priority to be given to receiver's charges, but exercise of discretion must be on principled basis — Receiver had priority for its fees and disbursements in accordance with original receivership order.

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order

Table of Authorities

Cases considered:

CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd. (2012), 2012 ONSC 1750, 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]) — followed

Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp. (2013), 2013 ONSC 6809, 2013 CarswellOnt 15121 (Ont. S.C.J.) — considered

First Leaside Wealth Management Inc., Re (2012), 2012 ONSC 1299, 2012 CarswellOnt 2559 (Ont. S.C.J. [Commercial List]) — considered

JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp. (2006), 2006 CarswellOnt 4619, 25 C.B.R. (5th) 156 (Ont. S.C.J.) — followed

Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd. (1975), 9 O.R. (2d) 84, 21 C.B.R. (N.S.) 201, 59 D.L.R. (3d) 492, 1975 CarswellOnt 123 (Ont. C.A.) — followed

Royal Bank of Canada v. Delta Logistics Transportation Inc. (2017), 2017 ONSC 368, 2017 CarswellOnt 340, 44 C.B.R. (6th) 77, 7 P.P.S.A.C. (4th) 1 (Ont. S.C.J.) — considered

Royal Bank of Canada v. Reid-Built Homes Ltd (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.) — referred to

Royal Bank v. Vulcan Machinery & Equipment Ltd. (1992), 3 Alta. L.R. (3d) 358, 13 C.B.R. (3d) 69, [1992] 6 W.W.R. 307, 1992 CarswellAlta 287 (Alta. Q.B.) — considered

Secure 2013 Group Inc. v. Tiger Calcium Services Inc (2017), 2017 ABCA 316, 2017 CarswellAlta 1856, 58 Alta. L.R. (6th) 209, 417 D.L.R. (4th) 509, 13 C.P.C. (8th) 1 (Alta. C.A.) — referred to

Statutes considered:

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

s. 243 — considered

s. 243(6) — considered

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

Generally — referred to

Municipal Government Act, R.S.A. 2000, c. M-26

s. 348 — considered

s. 348(d)(i) — considered

APPEAL by receiver from judgment reported at *Royal Bank of Canada v. Reid-Built Homes Ltd* (2018), 2018 ABQB 124, 2018 CarswellAlta 305, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.), refusing to prioritize receiver's charge for fees and disbursements over municipality's claim for unpaid property taxes.

***Per curiam*:**

Introduction and Standard of Review

1 The issue on this appeal is whether the chambers judge properly exercised his discretion under s 243(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] when he refused to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Royal Bank of Canada v. Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta. Q.B.) [*Decision*].

2 The exercise of discretion is given deference on appeal unless the judge proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test: *Secure 2013 Group Inc. v. Tiger Calcium Services Inc*, 2017 ABCA 316 (Alta. C.A.) at para 34, (2017), 58 Alta. L.R. (6th) 209 (Alta. C.A.).

Background

3 The appellant, Alvarez & Marsal Canada Inc, was the court-appointed receiver (the Receiver) for seven companies, collectively referred to as Reid-Built, a residential home builder. Reid-Built was placed in receivership and the Receiver appointed under the *BIA* by court order on November 2, 2017. The receivership order gives priority to the Receiver's charges over other claims.

4 On November 24, 2017, the Receiver applied for an order granting it the authority to repair, maintain and complete Reid-Built's properties, and a corresponding first priority charge as against each specific property for any expenses incurred (Property Powers Order). Such expenses are included in the Receiver's claim for fees and disbursements (Receiver's Charge). The Receiver's application was heard on November 29, 2017. At the same time, the chambers judge heard applications filed by two secured creditors of Reid-Built, both of which disputed the priority for the Receiver's Charge. Before those applications were disposed of, the respondent Edmonton applied to modify the Property Powers Order, or alternatively for a declaration that its special lien for unpaid property taxes ranks ahead of the Receiver's Charge.

5 The chambers judge dismissed the applications of the secured creditors (that part of his order has not been appealed), but granted Edmonton's application. The Receiver appeals.

Issues on appeal

6 The issue on appeal is whether the chambers judge erred in principle in his approach to the applications before him. The Receiver submits that the chambers judge erred in the exercise of his discretion under s 243(6) by relying on considerations that were incorrect in fact or in law.

7 The Receiver also submits that the chambers judge failed to provide the parties with a proper opportunity to make submissions on the point, thereby breaching the duty of fairness.

8 For the reasons that follow, we have decided that the first ground of appeal must be allowed. The chambers judge improperly exercised his discretion in deciding that the Receiver's Charge ought not to rank ahead of Edmonton's property tax claim. Given our decision on the first issue, it is not necessary for us to consider the procedural fairness issue, and we have not done so.

Analysis

9 Section 243 of the *BIA* deals with the appointment of a receiver by the court on the application of a secured creditor. This appeal concerns the discretion granted the court by s 243(6), which governs the making of orders respecting the payment of

the receiver's fees and disbursements and, in particular, gives the court the discretion to grant a super priority to a receiver's claim for fees and disbursements. It provides:

> (6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

10 The standard receivership order template provides for such a priority. The intended purpose of the template, which was developed as a joint project of the insolvency bar and bench, is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. The receivership order issued in this matter included the following provision with respect to the Receiver's accounts:

> Any expenditure or liability which shall properly be made or incurred by the Receiver . . . shall be allowed to it in passing its accounts and 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 (the "Receiver's Charge")

11 Edmonton objected to the Receiver's Charge being granted priority over its claim to unpaid property taxes. It pointed out that s 348 of the *Municipal Government Act*, RSA 2000, c M-26 [*MGA*], grants to Edmonton a special lien over land and any improvements on it for property tax amounts owing. Section 348 provides:

> **Tax becomes debt to municipality**
>
> 348 Taxes due to a municipality
>
> (a) are an amount owing to the municipality,
>
> (b) are recoverable as a debt due to the municipality,
>
> (c) take priority over the claims of every person except the Crown, and
>
> (d) *are a special lien*
>
> (i) *on land and any improvements to the land, if the tax is a property tax*, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or
>
> (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community. [emphasis added]

12 Edmonton argued that its lien for unpaid property taxes should rank ahead of the Receiver's Charge, as Edmonton, whose claim is fully secured and in first position, will not gain any benefit from the receivership. In short, as Edmonton's claim will be paid out in full regardless of the receivership, it should not have to bear the cost of the receivership.

13 In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors — a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that, as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority

position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

14 The chambers judge exercised his discretion to grant the Receiver's Charge priority over the claims of both the mortgagee and builders' lien claimant. Relevant to his consideration was the decision in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84 (Ont. C.A.) [*Robert F. Kowal Investments Ltd.*], applied in *Royal Bank v. Vulcan Machinery & Equipment Ltd.*, [1992] 6 W.W.R. 307, 13 C.B.R. (3d) 69 (Alta. Q.B.). *Robert F. Kowal Investments Ltd.* refers to a general rule that secured creditors may not be subject to the charges and expenses of a receivership. This is so because, "the general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders": *Robert F. Kowal Investments Ltd.*, quoting Ralph Ewing Clark, *Clark On Receivers*, 3rd ed, vol 1, s 22, p 25. There are, however, exceptions to that general rule, three of which were enumerated in *Robert F. Kowal Investments Ltd.*:

> 1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;
>
> 2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or
>
> 3. if the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

15 These principles are well accepted and proper considerations for a court in exercising its discretion under s 243(6). The principles are also expressly incorporated in the explanatory notes to the template receivership order, which also states that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions apply.

16 In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (*Decision* at paras 136-137):

> [136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.
>
> [137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

17 In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), where it was noted that in *CCAA* proceedings, "professional services are provided . . . in reliance on super priorities contained in initial orders".[1] We agree with the observation of Brown J at para 22 that:

> . . . comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* . . .

18 The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in, *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.) at para 45 (and cited in, *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809 (Ont. S.C.J.) at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

19 Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

20 The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

21 There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

22 We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

23 The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in, *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) at para 26:

> The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

24 With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

25 This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process.

There is no evidence that the running of individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

26 Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

Appeal allowed.

Footnotes

1 *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para 51.

TAB 3

2018 ABQB 75
Alberta Court of Queen's Bench

Sydco Energy Inc (Re)

2018 CarswellAlta 157, 2018 ABQB 75, [2018] A.W.L.D. 1029,
289 A.C.W.S. (3d) 13, 57 C.B.R. (6th) 73, 64 Alta. L.R. (6th) 156

In the Matter of the Receivership of Sydco Energy Inc.

MNP Ltd, in its capacity as the Court-appointed Receiver and Manager of Sydco Energy Inc (Applicant)

B.E. Romaine J.

Judgment: January 31, 2018
Docket: Calgary 1701-02520

Counsel: Tom Cumming, Anthony Mersich, for Receiver MNP Ltd.
Patrick Fitzpatrick, for Rothwell Development Corporation
Jeffrey Oliver, for Wormwood Resources
Patricia M. Johnston, Q.C., Keely R. Cameron, for Alberta Energy Regulator
Ryan Algar, for Trican Partnership & Trican Well Service Ltd.
Gregory Plester, for Clear Hills County

Subject: Estates and Trusts; Insolvency; Natural Resources
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate
XIV.3 Trustee's possession of assets
XIV.3.d Miscellaneous
Headnote
Bankruptcy and insolvency --- Administration of estate — Trustee's possession of assets — Miscellaneous
Insolvent oil company (S) went into receivership in February 2017 and court approved sale process — S's major shareholder RD sent Alberta Energy Regulator (AER) proposed sales process order — AER added condition that successful bidder be at arm`s length to S to which RD opposed with concern it would improperly fetter receiver`s ability to conduct sales process in commercially reasonable manner for benefit of all creditors and stakeholders and also that "at arm's length" was vague term — AER refused to allow second company 203 with virtually same principals as S to transfer some of S's wells to itself and refused to allow third company WR to assume S`s well licences unless it could prove it was not related — Receiver applied for court order approving sale of assets and vesting order to WR and based on AER history, sought specifics from Redwater order to be incorporated respecting AER authority — Application granted — Portions of Redwater order incorporated into application properly interpreted, did not give AER authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in insolvency — While AER had discretion to review transfer applications, it must do so within provincial law in force — In deciding whether or not concerns expressed by third parties during 30-day review process warrant further delay in approval process, AER could not take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require hearing — AER failed to establish their concern that WR Ltd bid was example of unfairness of allowing insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid costs of public obligations — With respect to court's jurisdiction to restrain AER from exercising its discretion regarding licence transfer applications, Supreme Court in AbitibiBowater made it clear that, while regulatory body has discretion on how best to ensure that regulatory obligations were met, and court should

avoid interfering, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings" — In most recent amendments to insolvency legislation, decisions of AbitibiBowater and Redwater tried to delineate boundary between creditor and regulatory claims in environmental sphere, but difficult issues remain that must be determined.

Table of Authorities

Cases considered by *B.E. Romaine J.*:

AbitibiBowater Inc., Re (2012), 2012 SCC 67, 2012 CarswellQue 12490, 2012 CarswellQue 12491, 352 D.L.R. (4th) 399, 71 C.E.L.R. (3d) 1, 95 C.B.R. (5th) 200, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* 438 N.R. 134, (sub nom. *Newfoundland and Labrador v. AbitibiBowater Inc.)* [2012] 3 S.C.R. 443 (S.C.C.) — considered

Alberta (Attorney General) v. Moloney (2015), 2015 SCC 51, 2015 CSC 51, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 12 W.W.R. 1, 29 C.B.R. (6th) 173, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 476 N.R. 318, 85 M.V.R. (6th) 37, 22 Alta. L.R. (6th) 287, 391 D.L.R. (4th) 189, [2015] 3 S.C.R. 327, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 606 A.R. 123, (sub nom. *Moloney v. Administrator, Motor Vehicle Accident Claims Act (Alta.))* 652 W.A.C. 123 (S.C.C.) — considered

Alberta Energy Regulator v. Grant Thornton Limited (2017), 2017 ABCA 278, 2017 CarswellAlta 1568, 57 Alta. L.R. (6th) 37, 52 C.B.R. (6th) 1, 9 C.P.C. (8th) 238 (Alta. C.A.) — referred to

Alberta Treasury Branches v. COGI Limited Partnership (2016), 2016 ABQB 43, 2016 CarswellAlta 73, 33 C.B.R. (6th) 22 (Alta. Q.B.) — considered

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

Cansearch Resources Ltd v. Regent Resources Ltd (2017), 2017 ABQB 535, 2017 CarswellAlta 1601, 52 C.B.R. (6th) 114, 60 Alta. L.R. (6th) 373, 7 P.P.S.A.C. (4th) 278 (Alta. Q.B.) — considered

Grant Thornton Ltd. v. Alberta Energy Regulator (2016), 2016 ABQB 278, 2016 CarswellAlta 994, 37 C.B.R. (6th) 88, 33 Alta. L.R. (6th) 221, [2016] 11 W.W.R. 716 (Alta. Q.B.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 ABCA 124, 2017 CarswellAlta 695, 8 C.E.L.R. (4th) 1, [2017] 6 W.W.R. 301, 50 Alta. L.R. (6th) 1, 47 C.B.R. (6th) 171 (Alta. C.A.) — considered

Orphan Well Assn. v. Grant Thornton Ltd. (2017), 2017 CarswellAlta 2352, 2017 CarswellAlta 2353 (S.C.C.) — referred to

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

Statutes considered:

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

s. 14.06(4) [en. 1997, c. 12, s. 15] — considered

s. 14.06(4)(c) [en. 1997, c. 12, s. 15] — considered

Oil and Gas Conservation Act, R.S.A. 2000, c. O-6

Generally — referred to

s. 24(1) — referred to

s. 24(2) — referred to

s. 106(1) — considered

s. 106(3) — referred to

s. 108 — referred to

Pipeline Act, R.S.A. 2000, c. P-15

Generally — referred to

s. 18(1) — referred to

s. 18(3) — referred to

s. 51 — referred to

s. 52 — considered

Responsible Energy Development Act, S.A. 2012, c. R-17.3

Generally — referred to

Securities Act, R.S.A. 2000, c. S-4

s. 1(l) "control person" — referred to

Traffic Safety Act, R.S.A. 2000, c. T-6

Generally — referred to

Rules considered:

Alberta Energy Regulator Rules of Practice, Alta. Reg. 99/2013

Generally — referred to

APPLICATION by receiver of insolvent company for order approving sale of insolvent's assets.

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

I. Introduction

1 In this application, the Receiver of Sydco Energy Inc sought an order approving a sale of assets. The approval and vesting order proposed by the Receiver departed from the usual order of its kind by specifically including certain declarations relating to the Alberta Energy Regulator ("AER") arising from the decisions in *Re Redwater Energy Corporation* and the Receiver's experiences and communications with the AER leading up to the application. I approved the sale of assets, and allowed the order to include the specific provisions sought by the Receiver, given the conduct of the AER lending up to the sale application, the evidence of AER's intentions with respect to the sale and its view of the scope of its regulatory authority. These are my reasons.

II. Facts

2 The history of this receivership is relevant to the issues that were before me.

3 Rothwell Development Corporation is a major shareholder of Sydco Energy Inc, holding, in combination with the principals of Rothwell, about 65% of its shares. It is also Sydco's major secured creditor. As at February 10, 2017, Sydco owed Rothwell in excess of $15.9 million.

4 In 2016, it had been apparent for some time to Rothwell that Sydco was in financial difficulty. In October 2016, Rothwell engaged James Catherwood and Warren Coles to become employees of Sydco in order to perform an operational review and to determine whether Sydco could be continued as a long-term going concern business. Mr. Catherwood and Mr. Coles had not had any relationship with Sydco prior to this and were not shareholders of Sydco. They were retained because of their knowledge of and experience in the oil and gas industry. In early February 2017, Rothwell, in consultation with its legal and financial advisors, Mr. Catherwood and Mr. Coles, determined that Sydco was no longer viable as a going concern. Rothwell obtained an order putting Sydco into receivership on February 23, 2017. At the time, Sydco had 443 wells, 108 producing, 117 suspended, 143 abandoned, and the remaining shut-in or special status.

5 Mr. Catherwood and Mr. Coles were engaged by the Receiver to continue managing Sydco's business under the Receiver's direction, and to assist with the sale of Sydco's assets. The Court approved a sales process on February 23, 2017.

6 In advance of the receivership application, Rothwell's counsel communicated with Patricia Johnston Q.C., the Executive Vice President and General Counsel of the AER. He sent her a draft of the proposed sales process order, which included a provision permitting the submission of a credit bid. Ms. Johnston advised that she required a condition in the order that the successful bidder be at arm's length to Sydco. Rothwell's counsel did not agree to the proposed condition, indicating that the proposed Receiver was concerned that it would be "an improper fetter on the ability of the Receiver to conduct a sales process

in a commercially reasonable manner for the benefit of all creditors and stakeholders" and also that the term "arm's length" was vague. Ms. Johnston responded that:

> ... the AER will typically not approve the transfer of assets from a Licensee to a Purchaser that is non-arm's length in insolvency situations unless both parties have zero non-compliances.
>
> If this caveat is not included in the sales process ... prospective non-arm's length purchasers of Sydco AER licensed assets might be in store for an ugly surprise when they come to the AER for approval of related AER licenses if Sydco has any non-compliances.

7 Ms. Johnston followed this email with the advice that:

> ... if the seller (Sydco) has a liability management rating of less than 1.0 before or after the transaction, it is considered to be non-compliant with AER requirements. In that scenario, it is extremely unlikely the AER would permit a transfer of licenses to a non-arm's length transferee.

8 Five parties submitted bids in response to the sales process, which was thorough and conducted through an experienced sales agent. Unfortunately, none of the bids were for the purchase of all of the assets. The best bid by far was a credit bid submitted by Rothwell through 2032951 Alberta Ltd, a company incorporated for the purpose by Wayne Hekle, the President and one of the principals of Rothwell (the "203 bid").

9 The Receiver determined that the 203 bid provided the best possible recovery for the receivership estate of Sydco for, among others, the following reasons:

> a) the bid submitted by 203 included many more petroleum and natural gas assets of Sydco than any of the competing bids, with the result that:
>
> i. the impact on the Orphan Well Fund would be significantly less as a result of the proposed sale to 203; and
>
> ii. a larger portion of Sydco's arrears of pre-receivership municipal realty taxes would be assumed by 203 than by the competing bidders;
>
> b) the consideration offered by 203 exceeded that offered by any other bidder; and
>
> c) 203 represented that it would be able to obtain a BA Code, which is necessary for a corporation to hold AER issued licences to operate wells, facilities and pipelines, from the AER, and that, upon completion of the purchase and sale transaction, would have a liability management rating in excess of 2.0 as required by AER Bulletin Nos. 2016-16 and 2016-21. 203 had applied for a BA Code on April 13, 2017, before its bid was accepted by the Receiver.

10 After 203 was selected as the successful bidder, the Receiver renounced those Sydco assets for which no bids had been submitted, including over 300 non-producing wells. Based on the decisions in *Grant Thornton Ltd. v. Alberta Energy Regulator*, 2016 ABQB 278 (Alta. Q.B.) *("Redwater Trial Decision")* and *Orphan Well Assn. v. Grant Thornton Ltd.*, 2017 ABCA 124 (Alta. C.A.), leave to appeal to SCC granted, [2017] S.C.C.A. No. 231 (S.C.C.) ("*Redwater Appeal Decision*"), which upheld the *Redwater Trial Decision*, the Receiver excluded the renounced assets from its calculation of Sydco's liability management rating, leaving Sydco with a rating of 2.02. Thus, Sydco met the requirement of AER Bulletin 2016-21, which requires that as a condition for obtaining the AER's approval to transfers of licenses, both the transferee and the transferor must have a liability management ratio of 2.0 or higher immediately following the transfer.

11 There is little dispute that, in the normal course, the AER would inform an applicant for a BA Code of its decision on an application within 30 days. However, in this case, it took 109 days for 203 to receive a decision.

12 In the meantime, since the AER had indicated that at least one officer of 203 had to be resident in Alberta, Mr. Catherwood became President and CEO of 203. The AER was informed that Rothwell was the sole shareholder of 203 and that Mr. Hekle was the only director.

13 Mr. Catherwood's affidavit details a record of 203's frequent inquiries of the AER as to the status of its application for a BA Code in the months that followed, with only one response on June 20, 2017, indicating that:

> [a]s set out in Bulletin 2016-21, the AER will consider and process all applications for license eligibility under Directive 067 as non-routine. Non-routine applications require a minimum of 30 days to complete our review and are subject to longer timelines depending on the complexity of the application. ... Please be advised that we are experiencing an unusually high volume of applications and endeavor to process within the 30 days.

14 The next day, Mr. Hekle received a letter from an "Insolvency Management Specialist" at the AER indicating the following:

> James Catherwood and yourself are listed as directors in Section D of *Directive 067 - Schedule 1 AER Business Associate Code License Eligibility Type* and/or the Alberta Corporate Registry for 2032951 AB. Further to this, you and Mr. Catherwood have been associated with another company, namely Sydco Energy Inc. (Sydco) that is currently in receivership proceedings and has disclaimed assets. Please submit a written explanation detailing why Sydco failed to meet its end-of-life obligations while under your control and direction, and why it would be appropriate for the AER to consider approval of this application.
>
> AER may request additional security as deemed appropriate in order to offset the estimated costs of suspending, abandoning or reclaiming a well, facility, well site or facility site and as otherwise provided for in Part 1.1 of the *Oil and Gas Conservation Rules*.
>
> Failure to provide the required information by July 7, 2017 will result in the application being closed without further notice.

15 Mr. Catherwood responded on June 27, 2017, advising the AER that Mr. Hekle was the sole director of 203. Mr. Catherwood also attached a lengthy chronology of events from Sydco's incorporation to its receivership. This chronology included the following details:

> a) In September 2012, Grant and Wayne Hekle, together with their corporation Rothwell, owned in excess of 83% of the shares of Sydco. The Hekles reside in Manitoba. The principals of Sydco were Bruce Curlock and Ron Gerlitz, who managed the company.
>
> b) In November 2012, the Canadian Western Bank called Sydco's operating loan of approximately $6.25 million.
>
> c) In December 2012, Rothwell acquired $4 million of the Sydco debt from the Canadian Western Bank. In 2013, Rothwell bought out the remainder of the debt and advanced additional funds to Sydco in 2013 and 2014.
>
> d) In March, 2016, Rothwell commissioned a forensic financial audit of Sydco. PriceWaterhouseCoopers LLP recommended that Mr. Coles, as an experienced chief financial officer in the oil and gas business, perform the audit.
>
> e) In July 2016, upon completion of the audit, Rothwell removed Mr. Curlock as a director and officer of Sydco, and asked the remaining directors to resign.

16 Mr. Catherwood advised the AER that neither he nor Mr. Hekle had control or direction over Sydco prior to the fall of 2016, and thus were not responsible for Sydco's insolvency or its failure to meet its end-of-life obligations.

17 With respect to the AER's reference to "additional security" in the June 21, 2017 letter, Mr. Catherwood wrote:

> With respect, any arbitrary and unlimited additional security deposit to the AER pursuant to AER Bulletin 2016-21 is not reasonable under the circumstances, as is the AER's request that the Corporation agree in advance to whatever presently

unknown security deposit may in future be requested by the AER. The Corporation does not yet have any oil and gas assets and it would be unreasonable to expect the Corporation to agree to such terms given that it would be highly prejudicial and put the Corporation at a competitive disadvantage to the rest of industry. Furthermore, given the experience of the management team of the Corporation and that they did not control or direct Sydco at the relevant time, there should be no requirement for any additional security deposit.

18 On July 11, 2017, Mr. Catherwood, Mr. Coles, and their counsel met with Ms. Johnston and two other AER employees. Mr. Catherwood described the meeting in his affidavit. According to this affidavit, one of the AER employees confirmed that the AER tries to achieve a 30-day turnaround on Directive 067 applications and that the employee had no explanation for the delay with respect to 203's application.

19 Mr. Catherwood deposes that he explained the involvement of the Hekles and Rothwell with Sydco in detail, including how Rothwell had bought the Canadian Western Bank debt in an attempt to avoid a receivership. He also explained the Hekles' reliance on Sydco's former management until the fall of 2016.

20 According to Mr. Catherwood's affidavit, Ms. Johnston advised the 203 delegation that:

a) because Mr. Coles and Mr. Catherwood had become part of Sydco, the AER would use its discretion to refuse to issue BA Codes to any company in which either of them were involved in future; and

b) the situation was different from a situation where the lender was a traditional lender, like the ATB, because traditional lenders do not apply for BA Codes.

21 Mr. Catherwood was not cross-examined on his affidavit. At the hearing, Ms. Johnston stated that she did not believe she would have said this.

22 In response to his comment at the meeting that, if a credit bid did not proceed, there may be unintended consequences that would be worse for the Orphan Well Fund, Mr. Catherwood deposes that Ms. Johnston said that the AER "would not give second chances to principals who were associated with entities that have disclaimed assets to the Orphan Well Association."

23 On July 31, 2017, the AER granted 203's application for a BA Code with the following conditions:

a) 203 would only be permitted to acquire AER licensed assets "from arm's length transferors"; and

b) 203 "must post full security for all liabilities associated with any AER licenses it acquires regardless of [203's] post transaction liability management rating".

24 The decision letter states that the conditions imposed were directly related to the fact that the principals of 203 and Sydco were virtually the same and to Sydco's outstanding non-compliances. The AER in its brief states that the "fact that the outstanding non-compliances related to unpaid levies and outstanding end of life liabilities" is irrelevant.

25 As Mr. Catherwood notes, these conditions made the BA Code approval useless to 203. The security requirement would require 203 to post security of about $19.4 million, which is far more than the amount of the credit bid, and the requirement that such a full security provision would apply to future licenses would leave 203 unable to compete in the oil and gas industry in Alberta. 203 advised the Receiver that it could not meet the condition that it obtain a BA Code that would allow it to purchase the Sydco assets.

26 On August 11, 2017, counsel for Rothwell and 203 advised the Receiver's counsel that Wormwood Resources Ltd, a corporation wholly owned by Fred Rumak, might be willing to step into the shoes of 203 and complete the purchase, provided that the 203 purchase and sale agreement was amended to make Wormwood the purchaser, reduce the purchase price slightly, exclude certain assets that Wormwood was not interested in purchasing, and make certain other inconsequential amendments. Wormwood is a newly incorporated corporation that had been seeking acquisition opportunities. It holds an unconditional BA Code.

27 On August 22, 2017, Wormwood, by assignment agreement, agreed to purchase a portion of the Rothwell secured debt equivalent to the agreed purchase price for the Sydco assets, an interest in the Rothwell loan agreement and the security to govern and secure such purchased debt. 203 assigned its interest in the purchase and sale agreement for the Sydco assets to Wormwood with the Receiver's consent. Rothwell financed Wormwood's acquisition of the Rothwell debt security and the purchase and sale agreement in return for a debenture from Wormwood.

III. Positions of the Parties

28 The Receiver recommended the Wormwood transaction for, among others, the following reasons:

a) all other bids submitted in the sale process had expired;

b) the amendment to the purchase price was relatively minor and the amended purchase price was still greater than the purchase prices offered in the bids submitted by any of the bidders other than 203;

c) Wormwood has a BA Code that is not subject to conditions imposed by the AER that would have the effect of preventing the completion of the transaction;

d) based on the calculations of the Receiver's consultants, the post-closing liability management rating of Wormwood, excluding the assets that have been renounced by the Receiver, would be 2.27, and therefore Wormwood would be in compliance with the requirements of AER Bulletin 2016-21;

e) the proposed transaction results in a significantly larger proportion of the assets being sold than any of the competing bids;

f) the negative impact of Sydco's insolvency upon the Orphan Well Fund and the municipalities in which the assets are located is less as a result of the completion of the Wormwood transaction than it would have been had the Receiver accepted any of the bids submitted by the parties other than 203 in the sale process;

g) it is not known whether, had the Receiver accepted any of the competing bids, the AER would have approved an application to transfer licenses in respect thereof; and

h) given that Rothwell only assigned a portion of the Rothwell debt to Wormwood, after the completion of the Wormwood transaction, it would still be Sydco's only primary secured creditor. Although Rothwell will suffer a significant shortfall in recovery of the indebtedness owing to it, it supports the transaction.

29 However, given the history of the matter, and the fear that the AER would delay or place conditions upon an application by the Receiver requesting a transfer of the licenses, the Receiver requested an approval and vesting order that departs from the usual form of order, in that it includes the following specific paragraphs taken in large part from the May 19, 2016 Order issued as a result of the*Redwater Trial Decision*

18. The Court declares that the Receiver is not required to comply with or perform and is not liable for abandonment, reclamation and remediation obligations in relation to those PNG Assets that were renounced by the Receiver, ... (the "**Renounced PNG Assets**").

19. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Sydco's AER licenses... shall not consider the deemed asset values and deemed liabilities associated with the Renounced PNG Assets for the purpose of calculating the liability management rating ("**LMR**") of Sydco either before or after the transfer, and shall not consider any of the following:

(a) any obligation of Sydco to pay a security deposit...;

(b) any failure of Sydco, or the Receiver to fail to comply with orders, including abandonment orders, issued from time to time by the AER with respect to the Renounced PNG Assets or provide security deposits therefor;

(c) the renunciation by the Receiver of the Renounced PNG Assets, or any other renunciation by the Receiver of the assets of Sydco pursuant to section 14.06(4) of the *BIA;*

(d) the compliance record of Sydco, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order;

(e) Sydco's status under the AER's *Directive 019 - Compliance Assurance* or any successor thereof, prior to the pronouncement of the Receivership Order;

(f) any outstanding debt owed by Sydco to the Crown, the AER, or to the AER to the account of the "orphan fund"... including but not limited to any administrative fees, any orphan well fund levy, the costs of suspension, abandonment or reclamation, or any other fee, levy, deposit, find, penalty or charge of any kind whatsoever (collectively, the "Sydco Characteristics"); or

(g) the imposition of any condition to approving such transfer requiring the payment or rectification of any of the above.

20. The Court directs the AER to not deny applications to transfer licenses based on the Sydco Characteristics, and to not impose conditions on such transfer requiring the posting of security for any and all liabilities associated with those licenses.

21. The Court declares that the provisions of the *OGCA [Oil and Gas Conservation Act]*, the *Pipeline Act* and Directive 006 are inapplicable to the extent they require or permit the AER to deny applications by the Receiver to transfer licenses based on the Sydco Characteristics or impose conditions on such transfer requiring that they be paid or complied with.

22. The Court directs that, in determining whether to approve or deny any application to transfer licenses under the *OGCA* and/or *Pipeline Act*, the AER shall not consider or take into account the Sydco Characteristics or any other factors that are similar in form and/or substance to them, or impose as a condition to any approval of said applications an obligation that Sydco or the Receiver make payments or take actions to rectify the Sydco Characteristics, or any conditions similar in form or substance to them.

23. The Court directs that the AER shall make a determination on any application for license transfers pursuant to the Sales Process (provided the purchaser meets all of the requirements of the AER to hold the applicable licenses) promptly after receipt of a duly accepted electronic license transfer request from the Receiver or Purchaser and in any event within thirty (30) days of the submission of the application by the Receiver or the Purchaser.

24. The Court directs that any refusal by AER to process or approve a license transfer request pursuant to the Sales Process shall be accompanied by written reasons, explaining in reasonable detail the basis for such refusal.

30 The AER responded to the application materials on August 28, 2017 by indicating that these paragraphs were unnecessary and inappropriate, in that the AER was well aware of the *Redwater* decisions, and that:

Should the Receiver and Wormwood submit license transfer applications, the AER will consider same in accordance with the laws in effect without the need of a court order. In considering license transfer applications, the AER would primarily focus its review on the compliance history of Wormwood as transferee of licenses and its directors and officers and ensuring that Wormwood satisfies AER requirements at the time of the license transfer going forward. This is consistent with the AER's current and past practice in reviewing license transfer applications both before and since the issuance of the *Redwater* decision [emphasis added]

> In specific response to proposed paragraph 23 of the draft [approval and vesting order], the AER advises that as per section 31 of the *Responsible Energy Development Act*, section 5.2 of the *AER Rules of Practice*... and AER Bulletin No. 2017-13, the AER now publishes notice of license transfers applications for a minimum period of 30 days. Accordingly, the AER cannot disposition license transfer applications prior to 30 days following publication, or later if the AER receives statements of concern relating to the application. However, the AER can advise that it will make best efforts to issue a decision as soon as possible following expiry of the 30 day period and would encourage the receiver to submit the applicable transfer applications as soon as possible in order to commence the notice period and address any timing concerns. However, it bears reiterating that, if the AER receives any statements of concern in response to the applications, it must consider and follow its process regarding same. Should you choose to submit a license transfer application now, the AER can confirm it will not issue a decision on the matter until such time as it receives an order confirming court approval of the proposed sale.

31 The Receiver's counsel attempted to reach agreement with the AER on a time period in which the AER would respond to an application to transfer, and attempted to explain its concerns about whether the AER was respecting the *Redwater* decisions, citing issues that have arisen with the AER in connection with various receivership proceedings since the release of the decision. The Receiver also questioned why the AER continued to include renounced assets in its monthly calculation of Sydco's liability management ratings. In response, the AER indicated that "in each and every case where the AER has appeared before the court to object to the various matters outlined in your letter, it has done so in a manner consistent with its position in its current and outstanding appeal in the *Redwater* proceedings."

32 Ms. Johnston attempted to explain why the AER continued to include renounced assets in the calculation of Sydco's liability management rating, and indicated that the AER was prepared to agree to language requiring it to dispose of an application within five business days of the expiration of the 30-day public notice period of any application for transfer of AER licenses held by Sydco, provided the AER is not in receipt of any statements of concern in response to such application. She noted, however, that in the event that the AER received one or more statements of concern, it would process the applications and related statements as per its normal process.

33 The AER continued to take the position that paragraphs 18 through 24 were "self serving and completely irrelevant to the proposed transferee" and requested their deletion. Ms. Johnston noted, however, that "based and in reliance on representations by counsel for Wormwood", the AER was prepared to confirm that Wormwood was arm's length with respect to 203.

34 The representation referred to by Ms. Johnston was an e-mail from Wormwood's counsel that stated that "Fred Rumak owns 100% of the issued and outstanding shares in Wormwood Resources, and that he is the sole director of that company." That e-mail also confirmed that the only legal relationship as between [203] and Wormwood relates to the assignment of the purchase and sale agreement to Wormwood by 203 and ancillary matters necessary to implement the asset purchase.

35 In a letter dated August 30, 2017, the Receiver repeated its concerns about the AER's interpretation of the *Redwater* decisions, and asked for guidance on how the AER interprets "arm's length". The Receiver advised that, in its view, paragraphs 18 to 24 of the draft order were consistent with the *Redwater* decisions.

36 Ms. Johnston responded on August 31, 2017 that

> ... the AER considers a party to be non-arm's length if it has common directors, officers, insiders or controlling shareholders, consistent with the *Securities Act* Multi-lateral Instrument 61-101, [the "Securities Instrument definition"]... the definition of "related party" in that instrument excludes a person that is "solely a bona fide lender" from the definition.

37 She also indicated that, if the AER receives a response to a public notice of application, it must determine whether an objecting party may be directly and adversely affected by the application and, if so, may decide that a hearing is appropriate.

38 The Receiver submitted that the AER's opposition to the proposed form of order was of concern and added force to its submission that the paragraphs are necessary and would avoid the necessity for further applications to deal with rejections of, or conditions placed upon, transfer applications that are inconsistent with the *Redwater* decisions. The Receiver also submitted

that the AER's insistence that it will only approve license transfers to parties that are arm's length to Sydco is contrary to the *Redwater* decisions, and was further evidence of a need to include the special provisions in the order.

39 The Receiver noted that Wormwood is not a related party to Rothwell, Sydco or 203 under the Securities Instrument definition of control. However, the Receiver remained concerned that the arm's length requirement was an attempt to force the payment of abandonment obligations with respect to assets that have been renounced under section 14.06(4) of the *Bankruptcy and Insolvency Act*, RSC 1985, C B-3 *(BIA)*, for the following reasons:

a) although none of the officers, directors or shareholders of Sydco have been named under section 106(1) of the *Oil and Gas Conservation Act*, RSA 2000, C 0-6 ["*OGCA*"], or charged with or convicted of offences under section 108 of the *OGCA* or section 52 of the *Pipeline Act*, RSA 2000, cP-15, the AER appears to be intent on "piercing the corporate veil" of Sydco;

b) in justifying its decision, the AER referred to the unpaid abandonment liabilities of Sydco and therefore, the "contravention" of these officers, directors and shareholders is simply that they were officers, directors and shareholders of an entity that, as a result of its insolvency, had insufficient funds to pay all of its abandonment, reclamation and remediation liabilities;

c) the AER's conduct in imposing conditions on the grant of a BA Code as it did with 203 has the appearance of contravening the single proceeding model of insolvency legislation by essentially preventing such officers, directors and shareholders from investing in other oil and gas producers in Alberta if abandonment, reclamation and remediation obligations remain unpaid;

d) in these proceedings, the direct effect of the AER's actions was to prevent the completion of a purchase and sale transaction between the Receiver and 203, notwithstanding that the transaction was clearly to the benefit of the creditors and other stakeholders of Sydco; and

e) it stretches credulity to suggest there is any reason for the AER's actions other than to ensure the abandonment, reclamation and remediation obligations of Sydco are repaid, notwithstanding that there are insufficient funds in the estate to do so in accordance with the AER's priority ranking under the *BIA*.

40 The Receiver described a number of recent receivership applications where it submits that the AER took positions contrary to the *Redwater Trial Decision*, including *Re Verity Energy Ltd*. (Action No 1501-04191); *Nordegg Resources Inc*. (Action No. 1601-07435); *Cansearch Resources Ltd v. Regent Resources Ltd* (Action No. 1601-16147); and *Alberta Treasury Branches v. COGI Limited Partnership* [2016 CarswellAlta 73 (Alta. Q.B.)] (Action No. 1501-12220).

41 The Receiver also noted that, after the *Redwater Appeal Decision*, the AER changed its decision process for transfer applications to provide for a longer standardized review period of 30 days, and to provide that, if within that 30-day period, a statement of concern is filed, the AER has the discretion to require a hearing, all of which has the potential of being an impediment to transactions.

42 The AER in its brief submitted that an application for court approval of a sales and vesting order is not the appropriate forum to challenge the AER's legislation and potential exercise of discretion should a license transfer application be submitted. The AER conceded that it took positions inconsistent with the*Redwater Trial Decision* in previous applications, but said that its positions in the *Verity*, *Regent*, *Nordegg* and *COGI* matters were consistent with its position on the *Redwater* appeal, on the basis that, since it had an outstanding appeal and a stay application, it "must act consistent with its position in those proceedings and take steps to mitigate the harm arising from [the *Redwater Trial Decision*]."

43 The AER noted that the order arising from the *Redwater Trial Decision* provides the AER with discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, but it did not refer to the entirety of the provision in question, which reads:

> 11. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Redwater's AER licenses... shall not consider any of the following:
>
> (d) The compliance record of Redwater. its directors. officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order (but not including any legitimate health, safety and environmental matters associated with the specific Retained Licensed Assets ... that are the subject of a particular license transfer application) provided that the AER shall have the discretion to deny a transfer where a shareholder of Redwater has control of the transferee of such license or licenses, as the term "control" is defined in the *Securities Act* RSA 2000, c S-4.
>
> [emphasis added]

44 The AER submitted that, to the extent that Wormwood is not arm's length to Sydco, the AER was entitled to consider that fact "as it goes to the risk associated with permitting Wormwood to be a licensee", and should be allowed to condition approval accordingly "to mitigate such harm". It submitted that if Wormwood is arm's length, the Receiver should not have a problem amending the approval order to achieve the AER's objective, which it describes as follows:

> The Receiver has refused to amend the [approval order] to address the AER's concerns that the amendments prohibit the AER from considering the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to the proposed transfer of Sydco's licenses ...

45 The AER made it clear at the hearing that it seeks continuing discretion with respect to license transfers, including the right to deny or approve with conditions a license transfer where the AER has concerns regarding the past conduct of the principals of the holder of a current AER license. In other words, the AER takes the position that, despite the wording of section 11(d) of the *Redwater* order, which prohibits the AER from considering the compliance record of directors, officers, employees, security holders and agents of the debtor company in approving a transfer of a license, the language at the end of section 11(d) allows the AER to do so where the transferee is non-arm's length to any of those parties that are caught by the definition of non-arm's length adopted by the AER.

46 The AER submitted that this case was the type of situation described in the dissent of Martin, J.A. in the*Redwater Appeal Decision*, where she commented on the unfairness of allowing an insolvent entity to preserve any assets and avoid the costs of public obligations. It submitted that "(p)arties should not be permitted to place themselves into insolvency proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

47 The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

48 The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

49 It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decision*specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

IV. Analysis

A. Approval of the Wormword Transaction

50 The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6, and endorsed in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 12, are as follows:

> a) whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> b) the interests of all parties;
>
> c) the efficacy and integrity of the process by which offers are obtained; and
>
> d) whether there has been unfairness in the working out of the process.

51 The only issue with respect to the whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

52 Counsel for the Receiver, who was involved in the *Redwater* decisions and in the drafting of the order that arose from the trial decision, submits that the *Redwater* order, which was consensual, does not have precedential effect. He argues that the Respondents in *Redwater* consented to the exception set out in section 11(d) of the order because it was unlikely to be a factor in the Redwater situation. However, I must consider the wording of the order on its face, interpreted in context and in accordance with the *Redwater* decisions, which have precedential effect.

C. Should the Approval Order Include the Redwater Provisions?

53 Given the history of this matter, I find that it is both reasonable and prudent for the Receiver to seek to include the specific declarations set out in the *Redwater* order in this approval and vesting order.

54 The original winning bidder, 203, chosen by the Receiver as being in the best interests of stakeholders, encountered lengthy and inexplicable delay in the consideration of its application for a BA Code. Inquiries were left unanswered, meetings with AER staff were tense and confrontational and the conditions attached to the approval of 203's application prevented it from completing its credit bid.

55 The relationship between the AER, the Receiver and Wormwood, the new bidder, has also been fraught with conflict and uncertainty over the AER's position and its stated intentions.

56 It is no secret that the AER disagrees with the *Redwater* decisions, and its conduct in this receivership illustrates its resistance to the principles set out in these decisions. However, as noted by Wakeling, J.A. in refusing the AER's application for a stay of enforcement of the *Redwater Appeal Decision* pending appeal to the Supreme Court of Canada, 2017 ABCA 278 (Alta. C.A.) at paras 11 and 121:

> A Court of Appeal judgment resolves not only the dispute that the parties presented to a court for resolution but the basis for resolution provides a principle that governs all future similar disputes. I cannot stay the precedential effect of a Court of Appeal opinion and create a new legal regime that affects other receivers and trustees in bankruptcy and other secured

> creditors who pursue their rights in different and future debt enforcement proceedings. To do so would mean that similar cases are adjudged differently. This [is] not an attribute of the legal system committed to the rule of law ...
>
> The rights of receivers and bankruptcy trustees, secured creditors and the Alberta Energy Regulator whose interests are juxtaposed will in the future be adjudged according to the principles set out in *Grant Thornton Ltd v Alberta Energy Regulator* unless the Supreme Court of Canada grants leave to appeal and allows the appeal. It is inconsequential what the law was three, five or twenty-five years ago.

57 The AER naturally has concerns about the impact of orphaned and abandoned wells on the public purse, but it must, in insolvency situations as in all others, act in accordance with the law of Alberta, which now includes the principles and declarations set out in the *Redwater* decisions.

58 This receivership has already encountered many obstacles, from the lack of a market for most of Sydco's assets to the delay caused by the now-abandoned 203 bid, and it is reasonable for the Receiver to attempt to control further delay and cost by having the *Redwater* provisions spelled out in the vesting and approval order.

59 Eventually, the parties were able to agree to some minor modifications in the order requested by the Receiver. The final order provisions that refer to the AER are set out in Appendix A to this decision.

D. What Do Sections 11(d) of the Redwater Order and Section 19(d)] of the Sydco Order Mean?

60 Does section 11(d) of the *Redwater* order, now included as section 19(d) in the Sydco order, allow the AER to take the compliance record of a debtor's directors, officers, employees, security holders and agents into account when exercising its authority to approve, deny or impose conditions upon any transfer of a debtor's AER licenses?

61 The AER clearly takes the position that it can do so if a shareholder of a debtor has control of the transferee of such license within the meaning of "control" under the *Securities Act* definition. In fact, it submits that it has the power to do so with respect to a debtor's directors and officers as well. This interpretation of Section 11 (d) would mean that, although the AER could not take the compliance record of such individuals or entities into account when considering the granting or transfer of licences to an arm's length entity, it could do so if the transferee is non-arm's length. In other words, the AER takes the position that the exception that ends the declaration in section 11(d) of the order allows it to take into account the prohibited factor of what occurred as a result of the receivership if the transferee is a non-arm's length party. This position is set out clearly in the AER's August 28, 2017 letter and in its stated objective in argument that it should be allowed to consider the non-compliance of Sydco, its directors, officers, security holders and agents where those parties are non-arm's length to a proposed transferee.

62 This interpretation of section 11 (d) cannot succeed.

63 First, it is inconsistent with and contrary to the *Redwater* decisions and the decision of the Supreme Court of Canada in *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 (S.C.C.), and contrary to the rehabilitation goals of insolvency legislation. Second, the AER's interpretation of section 11(d) of the *Redwater* provisions would preclude receivers from accepting credit bids from parties who fall within the AER's definition of non-arm's length, and thus interfere with a valid tool in insolvency that enables the Receiver to obtain the best outcome for stakeholders and creditors.

64 With respect to the inconsistency of the AER's interpretation of Section 11(d) with the *Redwater* decisions, the Court of Appeal in *Redwater* recognized that the purpose of the BIA includes providing the bankrupt with a "fresh start", free of the burden of crushing debt: para 42. It noted that the fresh start is subject to some limits, including that any regulatory or environmental obligations that are not provable in bankruptcy will continue to bind the bankrupt. However, with respect to whether such obligations can be transferred to third parties, Slatter, J.A. commented that, while the fresh start concept does not apply to corporations that cease to exist after a bankruptcy, "(a)ny regulatory or environmental obligations that were not provable in bankruptcy may exist in theory, but there is no entity against which they could be enforced:" para 44. Even if any of the AER claims could be considered to have survived the bankruptcy, they cannot be enforced against the directors, officers, security holders or agents of Sydco when it ceases to exist. However, it is clear that the claims of the AER at issue in this

proceeding are all claims provable in bankruptcy. Thus, they cannot be revived and enforced against a third party, even if that third party is non-arm's length to the debtor. What the AER is attempting to do by considering the compliance record of officers, directors, shareholders and agents of insolvent companies before granting them, or corporations associated with them, new licences is to seek to enforce the claims against third parties, rather than the debtor who was responsible for the abandonment. This is contrary to the polluter-pay principle endorsed by the Supreme Court in *AbitibiBowater Inc., Re*, 2012 SCC 67 (S.C.C.) at para 40, contrary to the fresh start objective of the *BIA* and contrary to the single proceeding model of insolvency legislation.

65 The Court of Appeal also described what the AER was trying to do in the *Redwater Appeal Decision* at para 82:

> Therefore, what the Regulator is attempting to do is attach conditions on the 20 AER licences that might be transferred, which really relate to the 107 wells that have been disclaimed by the Trustee and are not being transferred. The effect is to transfer economic value from the producing wells to the non-producing wells in order to enforce the environmental obligations attached to the latter. This clearly has the effect of disrupting the distribution scheme under the *BIA*. Even if the Trustee must take the licences "warts and all", there is no justification for the Regulator transferring warts from one licence to another.
>
> [emphasis added]

66 Any attempt to connect eligibility for future licences to environmental obligations provable in a bankruptcy, or assets renounced as part of an insolvency proceeding, is another attempt to transfer "warts from one licence to another," again with the effect of frustrating the rehabilitative objectives of the *BIA* and disrupting the distribution scheme.

67 The Court of Appeal's position on the AER's submission that it is entitled to consider the compliance record of individuals associated with an insolvent corporation is made clear in para 88 of the*Redwater Appeal Decision*

> In this appeal, the regulatory regime controlling the transfer of AER licences is also premised on the assumption that there is no obligation outstanding. That obligation is the actual or potential cost of abandoning the well. However, if the environmental obligation is provable in bankruptcy, it cannot be enforced indirectly outside the bankruptcy regime under the Regulator's licensing scheme: *Moloney; 407 ETR*. The Alberta Energy Regulator's licensing scheme depends on the enforcement of environmental liabilities outside the bankruptcy regime, in violation of the "single proceeding" model. The Regulator cannot sidestep the problem by artificially distinguishing between "managing obligations" and "recovering claims". The Regulator cannot establish a parallel process to collect claims.
>
> [emphasis added]

68 Slatter, JA conceded at paragraph 84 that the Regulator can control the transfer of AER licenses of bankrupt companies, but, he said, not by placing financial conditions on transfer that disrupt priorities under the *BIA*. He noted that the Regulator can limit transfers to qualified transferees, but cannot, however, indirectly interfere with the disposition of the value of the assets in bankruptcy by placing financial preconditions on the transfer of permissive AER licenses.

69 It could be argued that this is what the AER in effect did by placing draconian financial conditions on 203's application for a BA Code, As Slatter, J A commented at para 76 of the *Redwater Appeal Decision* "the reality of the Regulator's position should prevail over any narrow and technical interpretation". As a result of these restrictions, the AER stymied a credit bid by a related party that would have been better for both creditors and the Orphan Well Fund. That issue, however, is not before me. Rather than appealing the 203 decision, the bidder found an acceptable way to credit bid through an arm's length third party.

70 However, the reality of the AER's stated intention to consider the compliance record of principals, directors, employees and agents of insolvent companies in making decisions with respect to the transfer of licences is that it is an impermissible, after-the-fact method of attempting to collect debts discharged in bankruptcy not from the debts but from third parties associated with the debtor.

71 The AER's position that it remains free to exercise its discretion to deny BA Codes or the transfer of licenses to the directors, officers, controlling shareholders or "agents" of a debtor that, as a result of its insolvency, had insufficient funds to pay all of its abandonment and remediation liabilities is doing exactly what the Court of Appeal in *Redwater* said it could not do: indirectly enforcing outside the bankruptcy regime an environmental obligation that has been, or will be, compromised in the bankruptcy and can no longer be enforced.

72 In *Moloney*, Gascon, J noted at para 28:

> Assessing the effect of the provincial law requires looking at the substance of the law, rather than its form. The province cannot do indirectly what it is precluded from doing directly ...

73 In *Moloney*, a provision of the Alberta *Traffic Safety Act* allowed the Registrar to suspend the debtor's driver's license and vehicle permits until a judgment debt that had been released in bankruptcy was paid. The Province submitted that this was not a debt enforcement scheme, but merely an additional monetary condition to obtain the privilege of driving, that it was "inherently regulatory in nature". The Supreme Court disagreed, noting that the distinction Alberta sought to make was irrelevant, that the section was clearly aimed at the repayment of a judgment debt, and that "even if it were aimed at recovering of the resulting regulatory charge, such charge would nonetheless be a claim provable in bankruptcy, and as such, it would remain a debt subject to the bankruptcy process": para 50.

74 Gascon, J. noted at para 56:

> Therefore, whether one considers the province's claim as a judgment debt or as the resulting regulatory charge, it is still provable in bankruptcy. It follows that the effect of s. 102 is to allow a judgment creditor to deprive the debtor of his or her driving privileges until the debt is paid. In the end, the provision thus compels the payment of a provable claim. Driving is unlike other activities. For many, it is necessary to function meaningfully in society. As such, driving often cannot be seen as a genuine "choice": *R. v White*, [1999], 2 S.C.R. 417, at para. 55. The effect of the provincial scheme undoubtedly amounts to coercion in that regard.

75 The enhanced scrutiny proposed by the AER has equally severe consequences for its subjects: a serious interference with their ability to work or invest in the oil and gas industry. Mr. Catherwood justifiably describes this in his affidavit as "blackballing". The effect is coercive and intimidating. It is also a tool that is focused not on the debtor but on individuals who were involved with the debtor, whether or not they had any personal responsibility for the debtor's insolvency. In this case it is clear that Mr. Catherwood and Mr. Coles could have had no such responsibility, yet it appears that they would be caught by the policy. Rothwell, as a shareholder of Sydco attempted by assuming the Canadian Western Bank debt and investing more money in Sydco to prevent an insolvency, yet it would appear to be caught by the policy.

76 The Supreme Court in *Moloney* found that the impugned provision of the *Traffic Safety Act* created an operational conflict between the provincial and federal provisions, and thus was constitutionally inoperative by reason of the doctrine of federal paramountcy. However, Gascon, J went further to consider whether the provision fell within the frustration of federal purpose category, noting at para 77 that the effect of the provision directly contradicted and defeated the financial rehabilitation of the debtor, and that the province's use of the provision undermined that purpose. He cited *Houlden, LW, B Morawetz and Janis Sarra, Bankruptcy and Insolvency Law of Canada*, 4th ed (rev), Toronto: Carswell, 2013 as follows:

> The *BIA* permits an honest but unfortunate debtor to obtain a discharge from debts subject to reasonable conditions. The *Act* is designed to permit a bankrupt to receive, after a specified period a complete discharge of all his or her debts in order that he or she may be able to integrate into business life of the country as a useful citizen free from the crushing burden of debts ...

77 He commented further at para 82 on the Province's submission that Parliament's power over bankruptcy does not extend to the regulation of driving privileges:

> The financial responsibility of drivers is a valid matter of provincial concern and jurisdiction, and the province can set the conditions for driving privileges with this consideration in mind. Nonetheless, when the province denies a person's driving privileges on the sole basis that he or she refuses to pay a debt that was discharged in bankruptcy, the province's condition conflicts with s. 178(2) of the *BIA* and is, to that extent, inoperative. To so conclude does not transfer the power to regulate driving privileges to Parliament. The obligation to grant those privileges flows from the provisions of the provincial law that remain operative.

78 Thus, section 11(d) of the *Redwater* order and section 19(d) of the Sydco order, read in context and in accordance with the law as established in the *Redwater* decisions and by the Supreme Court in *Moloney*, does not entitle the AER to refuse to grant a BA Code or to transfer licenses on the basis of the compliance record of Sydco, its directors, officers, employees, security holders and agents as such compliance record relates to claims provable in bankruptcy, or on the basis of the Receiver's renouncement of Sydco assets during the course of the receivership, as this would be an indirect method of enforcing a debt discharged on bankruptcy.

79 Second, the AER's interpretation of section 11(d) of the *Redwater* provisions and section 19(d) of the Sydco order would preclude receivers from allowing credit bids from parties who fall within the AER's definition of non-arm's length.

80 In addition to being an interference with one of the ways in which the Receiver can fulfil its duties to maximize the return to creditors of the estate, the policy would discourage any efforts made by non-arm's length parties, such as occurred here with Rothwell, to invest further in a debtor in an attempt to save the debtor from insolvency, to preserve employment and to continue to pay unsecured creditors. This is contrary to the goals of the insolvency regime and crosses the boundary between legitimate regulatory function and interference in the insolvency process. This presumably unintended consequence creates a trap for the unwary, and eliminates a common-sense solution that preserves value that is in frequent use in receiverships and reorganizations.

81 In summary section 11(d) of the *Redwater* order and section 19(d) of the Sydco order, properly interpreted, do not give the AER the authority to take into account in exercising its authority to approve, deny or place conditions upon any transfer of the debtor's licenses the compliance record of the debtor, its directors, officers, employees, security holders and agents as such record relates to debts discharged or assets renounced in an insolvency. Likewise, the AER may not consider the compliance record of the debtor, its directors, officers, employees, security holders and agents in determining their eligibility for future license grants or transfers if such compliance record refers to debts discharged or assets renounced through bankruptcy. Thus, the provisions of Directive 006 that appear to allow the AER to do so are inoperative by reason of the *Redwater* and *Moloney* decisions. While the AER continues to have discretion to review transfer applications, it must exercise that discretion in accordance with the law in force in this Province. This does not prevent the AER from reviewing such applications in accordance with non-prohibited factors.

82 It follows that, in deciding whether or not concerns expressed by third parties during the 30 day review process warrant any further delay in the approval process, the AER cannot take into account any prohibited factors expressed by such third parties in exercising its discretion on whether to require a hearing.

V. Conclusion

83 The AER submits that it is concerned that the Wormwood bid is an example of the unfairness of allowing an insolvent entity to voluntarily place itself into insolvency in order to preserve assets for itself and avoid the costs of public obligations. There is no evidence that this is a valid concern in this case: the evidence is to the contrary. Rothwell purchased the bank debt of Sydco in an attempt to rescue the company. It sent in new management to determine whether a receivership could be avoided. None of the individuals or entities that are the subject of the AER's focus in this proceeding can be said to have been responsible for Sydco's insolvency. Rothwell may have been acting in its own interests in attempting to salvage Sydco, but it still stands to lose a substantial amount of its investment.

84 If this was one of those proceedings where receivership was a voluntary step to avoid environmental liabilities, which, as the Court of Appeal notes in *Redwater* is not an easy solution to financial problems, "there is enough judicial discretion in the

insolvency regime to prevent abuses": para 105. It is the Court's responsibility to deal with this type of abuse of the insolvency regime. The AER has the power to object to a sale by the Receiver to a control party in a situation where it alleges that this kind of abuse is present, and the Court has the authority to consider the possibility of abuse in determining whether to grant orders in the process. Much of the relief that may be granted to insolvent entities under the *BIA* or the *CCAA* is dependent upon evidence of good faith or fairness in the process and can be denied upon evidence of abuse.

85 With respect to whether this Court has the jurisdiction to restrain the AER from exercising its discretion regarding licence transfer applications, the Supreme Court in *AbitibiBowater* made it clear that, while generally a regulatory body has discretion to decide how best to ensure that regulatory obligations are met, and the court should avoid interfering with that discretion, "the action of a regulatory body is nevertheless subject to scrutiny in insolvency proceedings": *AbitibiBowater* at para 48.

86 The current environmental regulatory regime in Alberta allows oil and gas companies to defer the financial consequences of addressing environmental liabilities relating to individual wells as long as their portfolio of assets is able to achieve a positive liability management rating. It is clear that, while this may not have caused difficulties when energy prices were high, in this period of economic downturn in Alberta caused primarily by the substantial and sustained drop in energy prices, the result has been a greatly increased number of abandoned and orphaned wells. There are hard choices to make at the intersection of insolvency law with environmental, pension and employment law, and attempting to balance competing public interest objectives is a difficult task for an insolvency court. The pain of insolvency trickles down to many stakeholders, including unresolved environmental conditions, unfunded or underfunded pension plans, terminated employees, affected trades-people and small businesses, shareholders large and small and even entire communities that may rely on an insolvent industry for their financial welfare.

87 There are compelling arguments for super priority for many of these stakeholder groups, but, as pointed out in the *Redwater Appeal Decision*, Parliament considered the competing policies and "undoubtedly was concerned that giving environmental claims a super priority would drive away lenders, and deprive highly leverage industries (like the oil and gas industry) of necessary financing": para 96.

88 Parliament in the most recent amendments to insolvency legislation, the Supreme Court in its decision in *AbitibiBowater* and now the Alberta Court of Queen's Bench and the Court of Appeal in *Redwater* have tried to delineate the boundary between creditor and regulatory claims in the environmental sphere, but there are still difficult issues that must be determined. This decision attempts to address one of them.

Application granted.

Appendix A

LICENSE TRANSFER PROCESS

1. The Court declares that the Receiver is not required to comply with or perform and is not liable for abandonment, reclamation and remediation obligations under the *Oil and Gas Conservation Act*, RSA 200, c 0-6 ("*OGCA*") or the *Pipeline Act*, RSA 2000, c P-15 in relation to any wells, pipelines, facilities and sites in which Sydco has an interest that were renounced by the Receiver pursuant to section 14.06(4)(c) of the *BIA* the (the "*Renounced PNG Assets*")

2. The Court declares that the AER, in exercising its authority to approve, deny or impose conditions upon any transfer of Sydco's AER licenses pursuant to sections 24(1), 24(2), and 106(3) of the *OGCA*, sections 18(1), 18(3) and 51 of the *Pipeline Act*, Article 6 of *Directive 006: Licencee Liability Rating (LLR) Program and License Transfer Process* ("*Directive 006*"), and Articles 4, 8 and 10 of Directive 006, shall not consider the deemed asset values and deemed liabilities associated with the Renounced PNG Assets for the purposes of calculating the liability management rating ("*LMR*") of Sydco either before or after the transfer, and shall not consider any of the following:

> (a) any obligation of Sydco to pay a security deposit under section 5 of Directive 006 or section 8 of Appendix II to Directive 006 or under the *OGCA* or *Pipeline Act;*

(b) any failure of Sydco, or the Receiver to fail to comply with orders, including abandonment orders, issued from time to time by the AER with respect to the Renounced PNG Assets or provide security deposits therefor;

(c) the renunciation by the Receiver pursuant to section 14.06(4) of the *BIA* of Renounced PNG Assets;

(d) the compliance record of Sydco, its directors, officers, employees, security holders and agents, prior to the pronouncement of the Receivership Order, other than with respect to any legitimate health, safety and environmental matters associated with the Purchased Assets licensed under the *OGCA* or *Pipeline Act* that are subject to a license transfer application by the Receiver and/or Purchaser pursuant to the Sale Agreement, provided that nothing herein shall prevent the AER from exercising a discretion to deny, or to place conditions on any approval of, an application to transfer licenses in respect of Purchased Assets where, as of the effective date of transfer, a control person (as such term is defined in section 1(1) of the *Securities Act*, RSA 2000, Chapter S-4) of Sydco is also a control person of the Purchaser;

(e) Sydco's status under the AER's *Directive 019 - Compliance Assurance* or any successor thereof, including whether or not Sydco is in a "Global Refer" or "Refer" status; or

(f) any outstanding debt owed by Sydco to the Crown, the AER, or to the AER to the account of the "orphan fund" (as that term is defined in the *OCGA)*, including but not limited to any administrative fees, any orphan well fund levy, the costs of suspension, abandonment or reclamation, or any other fee, levy, deposit, fine, penalty or charge of any kind whatsoever

(collectively, the "Sydco Characteristics"), provided that section 19(d) shall not have precedential effect on or bind this Court with respect to any application by the Receiver for an approval and vesting order other than with respect to the Transaction.

3. The Court directs that, in determining whether to approve or deny any application to transfer licenses under the *OGCA* and/or *Pipeline Act*, the AER shall not consider or take into account the Sydco Characteristics or any other factors that are similar in form and/or substance to them, or impose as a condition to any approval of said applications an obligation that Sydco or the Receiver make payments or take actions to rectify the Sydco Characteristics, or any conditions similar in form or substance to them.

4. The Court directs that the AER shall make a determination on any application to it to approve transfers of licenses by the Receiver or the Purchaser in connection with the Transaction (a "*License Transfer Application*") within five (5) business days following the expiry of the thirty (30) day notice of application period in respect of such License Transfer Application, provided that in the event that a party files a statement of concern in respect of such License Transfer Application, then the AER will communicate to the Receiver and Purchaser within five (5) business days following a final determination by the AER or any other body contemplated by the *Alberta Energy Regulator Rules of Practice*, AR 99/2013 of the determination on the License Transfer Application

5. The Court directs that any refusal by the AER to process or approve a license transfer request pursuant to the Sales Process shall be accompanied by written reasons, explaining in reasonable detail the basis for such refusal.

TAB 4

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.
The conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court. The order appointing the receiver did not say how the receiver was to negotiate the sale. The order obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially to the discretion of the receiver.

To determine whether a receiver has acted providently, the conduct of the receiver should be examined in light of the information the receiver had when it agreed to accept an offer. On the date the receiver accepted the OEL offer, it had only two offers: that of OEL, which was acceptable, and that of 922, which contained an unacceptable condition. The decision made was a sound one in the circumstances. The receiver made a sufficient effort to obtain the best price, and did not act improvidently.
The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them.
Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.
Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

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

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

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*

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

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

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

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

3 In the latter part of 1989 and the early part of 1990, Soundair was in financial difficulty. Soundair has two secured creditors who have an interest in the assets of Air Toronto. The Royal Bank of Canada (the "Royal Bank") is owed at least $65 million dollars. The appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation (collectively

called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

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

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

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

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

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

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

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

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

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

10 The first 922 offer contained a condition which was unacceptable to the receiver. I will refer to that condition in more detail later. The receiver declined the 922 offer and on March 8, 1991, accepted the OEL offer. Subsequently, 922 obtained an order allowing it to make a second offer. It then submitted an offer which was virtually identical to that of March 7, 1991, except that the unacceptable condition had been removed.

11 The proceedings before Rosenberg J. then followed. He approved the sale to OEL and dismissed a motion for the acceptance of the 922 offer. Before Rosenberg J., and in this court, both CCFL and the Royal Bank supported the acceptance of the second 922 offer.

12 There are only two issues which must be resolved in this appeal. They are:

(1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?

(2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

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

14 Before dealing with that issue, there are three general observations which I think I should make. The first is that the sale of an airline as a going concern is a very complex process. The best method of selling an airline at the best price is something far removed from the expertise of a court. When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. Therefore, the court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver. It should also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

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

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

2. It should consider the interests of all parties.

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg* , supra, at p. 112 [O.R.]:

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air

> Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

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

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

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

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important considera tion is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , where he said at p. 11:
>
> > In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.
>
> While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of

OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate

was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

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

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

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

***McKinlay J.A.* :**

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

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

***Goodman J.A.* (dissenting):**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron* , supra, quoted by Galligan J.A. in his reasons. In *Cameron* , the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

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

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

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

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

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

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

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

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

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of $18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other

persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL

with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

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

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

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

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

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

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

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

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

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

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

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

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

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

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

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

Appeal dismissed.

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TAB 5

2019 ABCA 47
Alberta Court of Appeal

Jaycap Financial Ltd v. Snowdon Block Inc

2019 CarswellAlta 160, 2019 ABCA 47, [2019] A.W.L.D. 951, 301 A.C.W.S. (3d) 475, 68 C.B.R. (6th) 7

Jaycap Financial Ltd. (Respondent / Plaintiff) and Snowdon Block Inc., Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation (Appellants / Defendants)

Brian O'Ferrall, Barbara Lea Veldhuis, Ritu Khullar JJ.A.

Heard: November 7, 2018
Judgment: February 4, 2019
Docket: Calgary Appeal 1701-0314-AC

Counsel: A. Henderson, for Respondent
K.W. Jesse, for Appellants

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.1 General principles
Headnote
Bankruptcy and insolvency --- Bankruptcy and receiving orders — General principles
Appeal arose in context of insolvency proceedings — Guarantors appealed chambers judge's decision vacating earlier order and approving agreement between receiver and nominee of main secured creditor for purchase of debtor's assets — Appeal allowed, order was set aside and matter returned to Queen's Bench for rehearing before different judge — Receiver provided no evidence about termination nor did it explain why it failed to deliver final closing documents, giving rise to termination, when first asset purchase agreement reflected its understanding of purchase price — Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with assistance of legal counsel, will be held to their bargain — Had receiver sought to compel J Ltd. to close first asset purchase agreement, instead of abandoning it, its application may well have been successful.
Table of Authorities
Cases considered:
Beazer v. Tollestrup Estate (2017), 2017 ABCA 429, 2017 CarswellAlta 2689, 63 Alta. L.R. (6th) 25, [2018] 4 W.W.R. 513 (Alta. C.A.) — referred to
Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to
Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, (sub nom. *Penner v. Niagara (Police Services Board)*) 118 O.R. (3d) 800 (note) (S.C.C.) — referred to
Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered
Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — followed
Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40

Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — followed

Toronto Dominion Bank v. Canadian Starter Drives Inc. (2011), 2011 ONSC 8004, 2011 CarswellOnt 15140, 90 C.B.R. (5th) 152 (Ont. S.C.J. [Commercial List]) — referred to

APPEAL by guarantors from chambers judge's decision vacating earlier order and approving agreement between receiver and nominee of main secured creditor for purchase of debtor's assets.

***Per curiam*:**

Introduction

1 This appeal arises in the context of insolvency proceedings. The guarantors appeal a chambers judge's decision vacating an earlier order and approving an agreement between the receiver and a nominee of the main secured creditor for the purchase of the debtor's assets. These parties had earlier entered into an agreement for the same assets and obtained a court order approving that sale. However, they terminated this agreement after court approval on the basis of a mistake about the purchase price. The parties then entered into a second asset purchase agreement for a lower purchase price, which exposed the guarantors to a significant deficiency judgment. The guarantors (and as discussed below, the court) were provided very little information about what transpired between the execution of first and second agreements. The guarantors were unsuccessful before the chambers judge in arguing that the first asset purchase agreement should not be rectified because mutual mistake was not established on the record. The guarantors appeal to this Court alleging errors with the chambers judge's finding of mutual mistake and that the receiver's conduct challenged the integrity of the process.

2 We agree with the guarantors that there are some significant deficiencies with how the receiver proceeded and that the integrity of the process was seriously compromised. As a result, we allow the appeal.

Background

3 MNP Ltd. (the Receiver) was appointed receiver and manager of the debtor company, Snowdon Block Inc. (Snowdon) in February 2016. The only material asset of Snowdon was a parcel of land and a building in Calgary. In July 2016 the Receiver commenced a sales process to solicit offers for the assets. In October 2016 the Receiver finally received two offers for the assets and accepted a conditional offer from a third party. After months of extensions and negotiations, the would-be purchaser was unable to remove its conditions and the sale did not proceed.

4 Jaycap Financial Ltd. (Jaycap) was the primary creditor of Snowdon and was financing the Receiver's costs. Over time Jaycap became concerned with the increasing costs and protecting its investment. The Receiver advised Jaycap that a credit bid would be a viable option to obtain title to the assets and bring the receivership to an end. On July 5, 2017 Jaycap emailed the Receiver that it would credit bid its "current costs" noted to be a certain amount. Jaycap arranged for a numbered company it controlled to be the purchaser, but for simplicity, we will refer to Jaycap's nominee as Jaycap.

5 An asset purchase agreement was prepared and executed by Jaycap and the Receiver on August 2, 2017. The total debt was defined to be the amount contained in the July 5, 2017 email and that amount was also the purchase price.

6 On August 2, 2017 a representative of the Receiver and a representative of Jaycap also emailed about a request from one of the guarantors, the appellant Mr. Richardson, about the pending transaction. As part of this exchange, the two sides set out their understanding of the purchase price and the impact on the guarantors' liability. This was their exchange:

> Reid [*Jaycap's representative*]. Neil Richardson [*one of the appellants*] has contacted us asking for an adjournment of the application next week as he is out of town. His concern is that he does not have any idea of what #Co's offer is and is concerned about his personal guarantee. As #Co is offering Jaycap's total indebtedness, Neil would not be exposed to any shortfall payable under his guarantee. We can't be giving him any legal or other advice but should you wish you could let

> Neil know that you would not be going after him for any amount. Otherwise we will likely have to adjourn the application until such time as he is available.
>
> Please let us know what you wish to do.
>
> Best regards,
>
> Vic [*Receiver's representative*]
>
> . . . .
>
> Vic, [*Receiver's representative*]
>
> I believe that is incorrect actually.
>
> Neil Richardson[*one of the appellants*] has guaranteed the debt which has been accruing.
>
> Our Numbered Co is offering our full debt (carrying value) *NOT everything* we are legally entitled to.
>
> Please don't adjourn and please don't communicate anything to [N]eil, we will do that.
>
> Thanks,
>
> Reid [*Jaycap's representative*]

7 It appears from the record that the Receiver did not respond to this email nor did it obtain any clarification from Jaycap about what exactly was incorrect about its understanding of the purchase price and resulting impact on the guarantors.

8 On August 21, 2017 the Receiver obtained an approval and vesting order approving the first asset purchase agreement. The guarantors did not oppose this application as they were not facing a deficiency.

9 What happened next is a little unclear because of the lack of evidence and the Receiver's reliance on evidence from legal counsel about legal conclusions instead of the facts underlying those conclusions. The Receiver states in its third report that on August 28, 2017 counsel for Jaycap indicated that there was an error in the purchase price. The report then goes on to state that the Receiver was advised by its legal counsel that a common mistake occurred regarding the purchase price as set out in the first asset purchase agreement and that court approval was required to amend the mistake.

10 It appears from the evidence of Jaycap that the asset purchase agreement was incorrect when it equated the purchase price (the amount contained in the July 5, 2017 email) to the total debt. The total debt was $1.3 million higher than the purchase price, and continued to accrue with interest and costs.

11 The first asset purchase agreement did not close at the end of August 2017. On September 6, 2017 the Receiver and Jaycap entered into a second asset purchase agreement, which reduced the purchase price. On September 8, 2017 the Receiver filed an application to vacate the first approval and vesting order and sought approval of the second asset purchase agreement.

12 The guarantors were served with this application and the appellant, Mr. Richardson, sent a series of letters to the Receiver's counsel asking for information and documents to support that a mistake had occurred. The Receiver's legal counsel provided answers to some, but not all, of these requests.

13 The application was set for September 19, 2017 but adjourned and heard on October 26, 2017. The chambers judge reserved to consider the submissions and to review Mr. Richardson's materials which had not made it to the court file before the hearing. She issued her decision a week later and granted the second approval and vesting order. She found that she was not precluded from vacating the first order and issuing another. The first approval and vesting order did not direct the Receiver to

close the transaction, but approved the terms of the asset purchase agreement and its execution by the Receiver. Pursuant to the termination clause, the agreement could be terminated by the parties if certain conditions were met.

14 The chambers judge also found that the Receiver and Jaycap terminated the first asset purchase agreement since they had, by error, failed to revise the purchase price in the agreement in accordance with earlier correspondence. The chambers judge found that the parties met the requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

15 The chambers judge then considered the merits of the second asset purchase agreement and whether it met the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.). She was satisfied the second asset purchase agreement was reasonable in the circumstances, and that the Receiver had made sufficient efforts to obtain the best price and was not acting improvidently. She noted the lack of offers, the inability to close an earlier conditional offer, the earlier order approving the sale, and the revised purchase price, which was still higher than the asset's appraised value.

16 The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

17 Jaycap responds that the only real issue is whether the exercise of the court's discretion to accept the second asset purchase agreement was reasonable in the circumstances. Jaycap argues that notwithstanding the lengthy marketing process for the debtor's assets, there were no foreseeable offers. Further, there was no indication that relisting the assets would benefit either the secured creditors or the guarantors and that the chambers judge properly relied upon the Receiver's expertise in this regard.

18 Jaycap also raises a number of contractual law difficulties with the guarantors' position. First, the termination provisions were duly exercised and the first asset purchase agreement no longer exists. Jaycap submits that neither this Court nor the court below can revive or reinstate a contract against the wishes of the actual parties or create a contract on their behalf. As a result, whether there was a mutual mistake or an error in finding mutual mistake is irrelevant. Second, the guarantors do not have standing to force a rectification as strangers to the contract.

Standard of Review

19 The grounds of appeal that challenge facts and inferences are subject to palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 10 and 23, [2002] 2 S.C.R. 235 (S.C.C.). Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36-37.

20 The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.).

Analysis

There was no mutual mistake

21 We agree with the guarantors that the evidence does not establish mutual mistake and it was a palpable and overriding error for the chambers judge to conclude that the test was met. The evidence establishes that on August 2, 2017, the day the first asset purchase agreement was signed, the parties may have had *different* understandings about the purchase price and the Receiver's understanding of the purchase price was incorporated into the agreement. A different understanding is not a common

misapprehension as to the facts: *Beazer v. Tollestrup Estate*, 2017 ABCA 429 (Alta. C.A.) at para 28, (2017), [2018] 4 W.W.R. 513 (Alta. C.A.).

22 This difference was due, in part, to the imprecise language used by Jaycap in its communications with the Receiver about the amount. Jaycap described the purchase price as its "current cost" in July 2017, and later as the "full debt" and "carrying value" in August 2017. Jaycap's counsel could not explain the differences among these terms to this Court nor was he able to explain how the amounts were determined or what the $1.3 million difference was comprised of. As the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the $1.3 million difference cried out for an explanation before this Court and the court below.

23 While the guarantors are successful on this ground of appeal, this does not end the matter as mutual mistake was an alternative argument. The appeal cannot succeed unless the guarantors establish a reviewable error in the chambers judge's *Soundair* analysis.

Lack of fairness and integrity of the process

24 The guarantors raise two issues supporting their allegation that the integrity of the process was compromised. First, the Receiver failed to disclose relevant and material documents about what transpired after August 2, 2017. Second, the Receiver did not appear to be acting independently of Jaycap.

25 We agree that the Receiver's evidence about what transpired after August 2, 2017 is not satisfactory, even considering the evidence contained in the confidential supplement to the third report. Legal counsel's conclusion that there was a common mistake does not provide the evidentiary foundation to establish mutual mistake. That is for the court to decide.

26 A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase price was put forward as a reason why the first transaction did not close. However, because the Receiver was seeking to vacate an earlier court order, some information about why the order needed to be vacated was required.

27 Further, the Receiver provided little information about the critical August 2, 2017 email and why no further clarification was sought from Jaycap about what it meant before the court order approving the first transaction was obtained. There was enough information in that email to put the Receiver on notice that there was a misunderstanding. Had the Receiver been more diligent, this whole situation may well have been avoided.

28 While insolvency proceedings are subject to special procedural rules and are understandably time sensitive in nature, these considerations do not relieve the Receiver from its basic obligations to the parties and the court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application that it brings. As summarized by the court in *Ravelston Corp., Re*, 2007 CanLII 2663, (2007), 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

> [60] A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, 1912 CanLII 365 (UK JCPC), [1913] A.C. 160 at 167 (J.C.P.C.).
>
> [61] When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 1978 CanLII 1934 (BC SC), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.
>
> [62] It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or

> contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1973 CanLII 467 (ON SC), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].
>
> [63] A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

29 The Receiver's materials on their own do not provide the evidentiary basis to support the relief it was seeking. It was only several weeks later, when faced with serious opposition from Mr. Richardson, that Jaycap filed an affidavit with more, although still incomplete, information about what transpired.

30 The lack of information about what happened and the way the Receiver and Jaycap skirted around the issue in its application materials certainly did not help the perception of the Receiver's independence. The optics of the situation likely contributed to the guarantors' suspicion that what transpired merited further inquiries and that the Receiver was following Jaycap's instructions to conceal from the guarantors the true state of affairs. Jaycap and the Receiver were jointly represented before this Court, which was also unusual and unhelpful particularly when counsel for Jaycap could not answer questions the Receiver would be expected to know. During the hearing, the panel found that the guarantors' submissions were persuasive.

31 The termination of the first asset purchase agreement was also left unexplained by the Receiver. Jaycap's evidence is that the Receiver failed to deliver closing documents, which allowed Jaycap to terminate. Jaycap signed a unilateral termination notice and the parties executed a mutual termination notice several weeks after the second asset purchase agreement was signed, and after Mr. Richardson launched his opposition. The chambers judge found that the first asset purchase agreement was terminated, but she did not explain in her reasons which termination was valid or why. Termination in these circumstances is not merely a matter between the parties as suggested by Jaycap. The circumstances surrounding the termination of the first asset agreement ought to have been canvassed as this remained a court-supervised sales process where the Receiver owed fiduciary duties to the parties to act fairly.

32 The Receiver provided no evidence about termination nor did it explain why it failed to deliver the final closing documents, giving rise to termination, when the first asset purchase agreement reflected its understanding of the purchase price. Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with the assistance of their legal counsel, will be held to their bargain. Had the Receiver sought to compel Jaycap to close the first asset purchase agreement, instead of abandoning it, its application may well have been successful.

33 What is missing here is transparency. The process should be transparent. It should enable the court and interested parties to make an informed decision as to whether the sale can be considered fair and reasonable in the circumstances: *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]) at para 5, 2011 CarswellOnt 15140 (Ont. S.C.J. [Commercial List]). Given the significant questions left unanswered by the Receiver, we have serious concerns about the efficacy, fairness and integrity of the process the Receiver followed between August 2, 2017 and the hearing of the application to approve the second asset purchase agreement. As a result, we disagree with the chambers judge that the Receiver met the requirements of *Soundair*.

Conclusion

34 As an aside, and as a further indication of the parties' approach to procedure was the parties' approach to the sealing orders. The court record demonstrates that the parties failed to file a sealing order, failed to file an affidavit they undertook to file, and failed to ensure that the Receiver's certificate met the requirements to release the bans and restore public access to the proceedings if that was the Receiver's intention in filing it.

35 After the hearing concluded, and in preparation for filing this judgment, this Court was unable to discern the scope of the sealing orders, in part because of the missing information and the patchwork of numerous blanket orders that were taken

over information that probably should not have been sealed. We asked for assistance from the parties and were provided with very little useful information.

36 A review of the transcripts suggests to this Court that the parties ought to be more thoughtful in drafting their materials, in seeking bans, and in drafting those ban orders carefully, limiting public access to what is truly sensitive confidential information that could prejudice the insolvency process. The test for a sealing ban is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) and is not merely the consent or non-objection of the parties. Sealing bans are the exception and not the rule because they engage *Charter* interests and materially impact the court's work. Better practices are required.

37 The appeal is allowed, the order is set aside and the matter returned to Queen's Bench for a rehearing before a different judge.

Appeal allowed.

End of Document

TAB 6

2015 ONSC 5912
Ontario Superior Court of Justice [Commercial List]

8527504 Canada Inc. v. Liquibrands Inc.

2015 CarswellOnt 14887, 2015 ONSC 5912, 258 A.C.W.S. (3d) 467

8527504 Canada Inc., Applicant and Liquibrands Inc., Respondent

8527504 Canada Inc., Applicant and Sun Pac Foods Limited, Respondent

Newbould J.

Heard: June 22, 2015
Judgment: September 28, 2015
Docket: CV-14-10543-00CL, CV-13-10331-00CL

Proceedings: additional reasons at *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 CarswellOnt 16770, 2015 ONSC 6853, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Harvey Chaiton, Sam Rappos, for Applicant
David E. Wires, Krista Bulmer, for Csaba Reider
Anthony J. O'Brien, for BDO Canada Limited, receiver of Sun Pac Foods Limited and Liquibrands Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.2 Choses in action
VIII.2.a Right of action of bankrupt
VIII.2.a.i General principles
Debtors and creditors
VII Receivers
VII.7 Actions involving receiver
VII.7.c Actions by debtor in receivership
Headnote
Bankruptcy and insolvency --- Property of bankrupt — Choses in action — Right of action of bankrupt — General principles
Related debtor companies L Inc. and S Ltd. brought action under forbearance agreement against secured creditors B Inc. and 852 Inc. — Court ordered sales process to be undertaken by receiver for action — R, sole officer and director and shareholder of debtors, brought motion for order allowing him to control and advance action — Receiver brought motion to approve sale of action to 852 Inc. — R's motion dismissed on other grounds; receiver's motion granted — Authorities in Ontario are to effect that trustee in bankruptcy has power to sell to defendant an action commenced by bankrupt against that defendant — There was no reason not to apply principles from bankruptcy cases to receivership case — Duty of receiver to maximize assets for benefit of all interested stakeholders is no different from duty of trustee in bankruptcy to maximize assets for benefit of all creditors — There was no reason 852 Inc. as creditor of L Inc. and S Ltd. could not bid for action brought by those debtors against 852 Inc., and no reason it could not make credit bid — Sale to 852 Inc. approved.
Debtors and creditors --- Receivers — Actions involving receiver — Actions by debtor in receivership
Related debtor companies L Inc. and S Ltd. brought action under forbearance agreement against secured creditors B Inc. and 852 Inc. — Court ordered sales process to be undertaken by receiver for action — R, sole officer, director and shareholder of L Inc., brought motion for order allowing him to control and advance action — Receiver brought motion to approve sale of

action to 852 Inc., which made credit bid for action — R's motion dismissed; receiver's motion granted — Order sought by R was impermissible collateral attack on order authorizing receiver to conduct sale process for action — There was no reason 852 Inc. as creditor of L Inc. and S Ltd. could not bid for action brought by those debtors against 852 Inc., and no reason it could not make credit bid — Only party that had interest in action apart from 852 Inc. was R, and he made nominal bid which was far lower than bid of 852 Inc. — Sale to 852 Inc. approved.

Table of Authorities

Cases considered by *Newbould J.*:

Almadi Enterprises Inc., Re (2014), 2014 ONSC 1020, 2014 CarswellOnt 1878, 12 C.B.R. (6th) 162 (Ont. S.C.J. [Commercial List]) — considered

Elleway Acquisitions Ltd. v. 4358376 Canada Inc. (2013), 2013 ONSC 7009, 2013 CarswellOnt 16849, 7 C.B.R. (6th) 25 (Ont. S.C.J. [Commercial List]) — considered

Garland v. Consumers' Gas Co. (2004), 2004 SCC 25, 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 237 D.L.R. (4th) 385, 43 B.L.R. (3d) 163, 319 N.R. 38, 186 O.A.C. 128, 9 E.T.R. (3d) 163, [2004] 1 S.C.R. 629, 72 O.R. (3d) 80 (note), 42 Alta. L. Rev. 399, 72 O.R. (3d) 80, 2004 CSC 25 (S.C.C.) — referred to

Inyx Canada Inc., Re (2007), 2007 CarswellOnt 6244, 36 C.B.R. (5th) 154 (Ont. S.C.J.) — referred to

Katz, Re (1991), 6 C.B.R. (3d) 211, 1991 CarswellOnt 192 (Ont. Bktcy.) — considered

Maple Leaf Foods Inc. v. Markland Seafoods Ltd. (2007), 2007 NLCA 7, 2007 CarswellNfld 83, 29 C.B.R. (5th) 270, 27 B.L.R. (4th) 1, 264 Nfld. & P.E.I.R. 126, 801 A.P.R. 126, 279 D.L.R. (4th) 682 (N.L. C.A.) — referred to

R. v. Litchfield (1993), 14 Alta. L.R. (3d) 1, 161 N.R. 161, 25 C.R. (4th) 137, [1993] 4 S.C.R. 333, 86 C.C.C. (3d) 97, 145 A.R. 321, 55 W.A.C. 321, 1993 CarswellAlta 160, 1993 CarswellAlta 568 (S.C.C.) — referred to

Watt v. Beallor Beallor Burns Inc. (2004), 2004 CarswellOnt 429, 1 C.B.R. (5th) 141 (Ont. S.C.J.) — considered

1239745 Ontario Ltd. v. Bank of America Canada (1999), 1999 CarswellOnt 2665 (Ont. S.C.J.) — considered

Statutes considered:

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

s. 38 — considered

MOTION by officer and director of companies for order allowing him to control and advance action brought by companies; motion by receiver to approve sale of action to numbered company.

***Newbould J.*:**

1 The history of this matter is set out in my previous endorsement of December 4, 2014 and need not be repeated here. In that decision I ordered that a sales process be undertaken by the Receiver for an action previously commenced by Liquibrands and Sun Pac under the Forbearance Agreement against Bridging Canada Inc. ("Bridging") and 8527504 Canada Inc. ("852") (the "Action").

Csaba Reider motion

2 Mr. Reider is the sole officer, director and shareholder of Liquibrands. Reider was the sole officer and director of Sun Pac. He moves for an order that would permit him to control and advance the Action. In particular, he requests an order (i) that he, as the sole director of Liquibrands be granted leave to vote Liquibrands shares in Sun Pac to elect him as a director of Sun Pac for the purpose of advancing the Action, and (ii) that he is entitled to control the Action on behalf of Liquibrands and Sun Pac under the residual authority of the directors of the companies.

3 Mr. Reider relies on authority that a receiver of a debtor is not authorized to be involved in litigation by the debtor against the secured creditor that caused the receivership as there would be a conflict of interest on the part of the Receiver and that control of such litigation is one of the residual powers remaining in the directors of the debtor. See *Maple Leaf Foods Inc. v. Markland Seafoods Ltd.*, 2007 NLCA 7 (N.L. C.A.) and *Inyx Canada Inc., Re*, [2007] O.J. No. 3846 (Ont. S.C.J.).

4 Mr. Reider also relies on an *obiter* statement of Ground J. in *1239745 Ontario Ltd. v. Bank of America Canada*, [1999] O.J. No. 3178 (Ont. S.C.J.) that security that gives a secured creditor the right to pursue actions brought by the debtor should not be interpreted to cover actions of the debtor against the secured creditor. Ground J. stated:

> 74 I accept the submissions of the plaintiff that security agreements must be interpreted in accordance with general principles of contractual interpretation and, as commercial contracts, must be interpreted so as to avoid commercial absurdity. ... In keeping with this principle, if a security agreement gives the lender the right, upon default, to pursue causes of action belonging to the debtor, it should be interpreted to apply to causes of action against third parties and not causes of action against the lender itself. To interpret it as including causes of action against the lender itself would be absurd and manifestly unfair as it would grant lenders an absolute shield in their dealings with debtors with whom they have entered into a general security agreement and would have the effect of precluding virtually all lender liability actions where the lender holds a general security agreement.

5 The difficulty with these submissions is that the order sought by Mr. Reider is directly contrary to the order of December 4, 2014 in which the Receiver was authorized to conduct a sale process for the Action. That order was upheld by Feldman J.A. who denied leave to appeal from that order. The arguments now made by Mr. Reider were not advanced on the motion leading to the order of December 4, 2014 or in the motion for leave to appeal to the Court of Appeal. Mr. Reider has been involved in these proceedings as an active participant. He is a privy to both Liquibrands and Sun Pac. What Mr. Reider seeks amounts to an impermissible collateral attack on the order of December 4, 2014. See *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.), para. 72 and *R. v. Litchfield*, [1993] 4 S.C.R. 333 (S.C.C.), para. 19. The order of December 4, 2014 is a final order and is a matter of *res judicata* and issue estoppel to the parties and their privies, one of whom is Mr. Reider.

6 Mr. Reider says that the order of December 4, 2014 directing a sales process for the Action was not a head of relief sought by 852 in its motion material leading to that order. It was, however, raised in the supplementary factum filed on behalf of 852 and it was thoroughly argued. No request for an adjournment was made at the time by Mr. Wires on behalf of Liquibrands and Sun Pac to deal with the point. The point was raised by Liquibrands and Sun Pac in their factum on their application to the Court of Appeal for leave to appeal from the December 4, 2014 order, but leave to appeal was denied. I see no basis for the point to be argued now.

7 Mr. Reider was aware that the Receiver was interested in selling the Action. In its second report, the Receiver stated:

> 52. The Receiver neither has the funding nor sufficient knowledge of the history or allegations to pursue [the Action].
>
> 53. The Receiver has contacted Liquibrands through its counsel, Wires Jolly LLP, to enquire about Csaba Reider and/or Liquibrands' interest in purchasing the [Action]. To date, the Receiver has not received a response.

8 In argument, Mr. Wires conceded that his client never expressed to the Receiver an interest in pursuing the litigation. Whether or not this was a tactical decision, it is now too late to be seeking control of the Action other than by way of a bid in the sales process previously ordered.

9 In all of the circumstances, the motion by Mr. Reider is dismissed.

Sale approval motion

10 The Receiver moves to approve the sale of the Action to 852, which made a credit bid. Mr. Reider opposes the approval and takes the position that 852 was not entitled to bid for the Action in the sale process directed by the December 4, 2014 order.

11 In my endorsement of December 4, 2014, I held that the Receiver should be permitted to market the Action in a marketing process. I further stated that no specific marketing process had been proposed and that the receiver should propose a marketing process and Sun Pac and Liquibrands could consider whether it was agreeable to the marketing process proposed. If there was agreement to the marketing process, it could be included in the order to be signed. If there was no agreement, a further attendance to settle it could be arranged at a 9:30 a.m. conference. In the end, the order was settled at a 9:30 a.m. conference.

12 The parties were in agreement with the terms of the order directing a sales process for the Action except with respect to subparagraph 9(e), which as drafted stated that 852 could be an offeror and could make its offer by way of a credit bid or otherwise. Mr. Wires for Liquibrands and Sun Pac objected to that provision. In the end, it was agreed to make an addition to the subparagraph to make it without prejudice to the parties' rights. The subparagraph read:

> (e) 8527504 Canada Inc. may be an offeror and may make its offer by way of a credit bid or otherwise, without prejudice to any party to oppose the right of 8527504 Canada Inc. to make an offer or to oppose any offer made.

13 In accordance with the order, the Receiver notified all parties on the service list of the sales process and the opportunity to purchase the Action. Two bids were received. One was a cash bid for $100 from a company named Liquid Brands Inc. signed by Mr. Reider as president of that company. The other was from 852 with a purchase price of $1 million by way of a credit bid. The Receiver stated in its report:

> Given that 852'scredit bid offer was substantially higher than the offer received from Liquid Brands Inc., it is the Receiver's recommendation that this Honourable Court approve 852's offer...

14 Mr. Reider relies on a passage from the decision of Feldman J.A. refusing leave to appeal the order of December 4, 2014 in which she stated:

> [15] Before concluding these reasons, I add the following. On the motion as argued, I did not understand Liquibrands to be objecting to the procedure for the marketing of the lawsuit, in the event that its request that a separate receiver be appointed to pursue the lawsuit was rejected. I raised some issues in oral argument regarding the propriety of that procedure, particularly with respect to who should be permitted to bid and how to fairly determine the value of the lawsuit. Counsel for the receiver advised the court that all issues regarding the propriety of any proposed sale of the action could be raised at the approval hearing. In the circumstances of this case, the denial of leave to appeal is not to be taken as an endorsement of all aspects of the procedure for marketing the lawsuit against the creditor.

15 The authorities in Ontario are to the effect that a trustee in bankruptcy has the power to sell to a defendant an action commenced by the bankrupt against that defendant. In *Almadi Enterprises Inc., Re*, 2014 ONSC 1020 (Ont. S.C.J. [Commercial List]), RBC was an assignee from the defendant in an action commenced by the debtor before its bankruptcy. RBC made an offer to pay the trustee $65,000 in return for an assignment of the trustee's interest in the action. The effect of the offer if accepted would mean the end of the litigation. The trustee informed all creditors of the offer. No other offer was received. Brown J. (as he then was) approved the actions of the trustee and the sale to RBC, and in so doing stated:

> The Trustee was required to maximize the realization of the assets of the bankrupt's estate for the benefit of all interested parties. Its interest in the AEI action was one such asset. When faced with an offer by one entity to purchase that asset, though what, in effect, would be a settlement of AEI's claim in that action, the Trustee put in place a bidding process which would enable any other person to acquire its interest in the AEI Action. By exposing that chose in action to a larger market, the Trustee sought to maximize the amount it secured for that asset.

16 In *Katz, Re* (1991), 6 C.B.R. (3d) 211 (Ont. Bktcy.), the trustee invited sealed tenders for an action commenced by the bankrupt. The purchaser of the lawsuit was a company owned by one or more defendants in the action. The trustee accepted the offer of the company, which essentially resulted in a settlement of the lawsuit in the amount of the purchase price. In dismissing the bankrupt's motion to set aside the sale, Farley J. stated:

> While Katz may complain that the purchaser in this case merely wants to eliminate the action, I do not see this as improper on their part. It is a legitimate business consideration to resolve a lawsuit (which may or may not have merit and which may, if meritorious, expose the defendants to financial risk of some degree but will involve some unrecoverable expense in the litigation process, some imposition on the time of witnesses and the uncertainties of litigation) at the least cost.

17 In *Watt v. Beallor Beallor Burns Inc.* (2004), 1 C.B.R. (5th) 141 (Ont. S.C.J.) the bankrupt commenced an action against various Beallor interests. The trustee applied for directions as to whether he could assign the action to Beallor under section 38 of the BIA. Farley J. held that he could, stating:

> When a creditor is proceeding under s. 38, even if the creditor is a defendant in the action, the creditor can join in as a plaintiff and participate, even though this will mean that the creditor will be both a plaintiff and defendant in the action: see *Carex Distributors Inc., Re*(1981), 43 C.B.R. (N.S.) 209 (Ont. C.A.).

18 In this case, there is no bankruptcy but rather a receiver. I see no reason however not to apply the principles from these bankruptcy cases to a receivership case. The duty of a receiver to maximize the assets for the benefit of all interested stakeholders is no different from the duty of a trustee in bankruptcy to maximize the assets for the benefit of all creditors. I see no reason why 852 as a creditor of Liquibrands and Sun Pac cannot be a bidder for the Action brought by those debtors against 852.

19 Mr. Reider contests the right of 852 to make a credit bid.

20 Credit bids by secured creditors are widely used now in Canadian insolvency proceedings. In *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List]), Morawetz J. (as he then was) stated:

> 38. It is well established in Canada insolvency law that a secured creditor is permitted to bid its debt in lieu of providing cash consideration.

21 In this case, after the distribution of funds to 852 pursuant to the order of December 4, 2014, 852 is still owed in excess of $3.5 million. The reduction of the indebtedness owed to 852 by the $1 million credit bid will still leave a shortfall. If the bid by 852 were a cash bid of $1 million, that money would be required to be paid by the Receiver to 852. In *Elleway*, the situation was the same and Morawetz J. stated:

> 40. ... The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.
>
> 41. Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

22 I do not see in this case any argument that a credit bid should not be allowed. It cannot be said that the credit bid by 852 had a chilling effect on would-be bidders deterring potentially interested parties from submitting a bid. The person most knowledgeable of the Action, Mr. Reider, made a bid on only a nominal amount. It could not be expected that unconnected and unrelated third parties would be interested in bidding on the litigation since they would need the full cooperation and participation of the principals of the company to successfully pursue it, and the agreed sales process that provided for notice to be given just to parties on the service list was a reflection of that reality.

23 Mr. Reider raises an issue regarding the value of the underlying asset being sold, i.e. the value of the Action in which $100 million has been claimed by Liquibrands and Sun Pac against 852 and Bridging. He contends that the Action should be valued in order to compare its value to the bid by 852, taking into account the *Soundair* principles to be applied in considering the approval of a sale of an insolvent's assets by a receiver, and that the only way to value it is to permit the action to proceed to a trial. If that were the case, the sales process ordered on December 4, 2014 could not proceed as it would require the action to be prosecuted by someone such as Mr. Reider, a result that I have rejected.

24 The *Soundair* principles deal with the steps taken by a receiver to market the assets being sold in order to be satisfied that the sale for which approval is sought was fair and reasonable. In this case, the sales process was agreed. There is no suggestion that the time given to respond was insufficient. As a practical matter, the only party that had an interest in the Action apart from 852 was Mr. Reider, and he made a bid which was lower than 852's bid. He was the person who had the most knowledge of the

merits of the Action and he could have chosen to bid higher than $100. His bid may have been tactical in the hope that the bid of 852 would be knocked out on legal grounds, but whether that is so, Mr. Reider has to live with the consequences.

25 In the circumstances, the sale to 852 is approved. The Receiver may execute any further documentation required to complete the sale. There shall be a vesting order vesting all right, title and interest of Sun Pac and Liquibrands in the Action to 852 in the form provided.

Other issues

26 The Receiver's activities set out in its report dated June 2, 2015 are approved, as are the fees and disbursements of the Receiver and its counsel as set out in that report.

27 The Receiver and 852 are entitled to their costs. If costs cannot be agreed, brief written submissions may be made within 10 days along with appropriate cost outlines and Mr. Reider shall have 10 days to deliver brief written submissions in reply.

Motion by officer and director dismissed; receiver's motion granted.

End of Document

TAB 7

2013 ONSC 7009
Ontario Superior Court of Justice [Commercial List]

Elleway Acquisitions Ltd. v. 4358376 Canada Inc.

2013 CarswellOnt 16849, 2013 ONSC 7009, 235 A.C.W.S. (3d) 602, 7 C.B.R. (6th) 25

In the Matter of an Application Pursuant to Section 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3, as Amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c.C.43, as Amended

Elleway Acquisitions Limited Applicant and 4358376 Canada Inc. (Operating as Itravel 2000.com), The Cruise Professionals Limited (Operating as the Cruise Professionals), and 7500106 Canada Inc. (Operating as Travelcash) Respondents

Morawetz J.

Heard: November 4, 2013
Judgment: November 4, 2013
Docket: CV-13-10320-00CL

Counsel: Jay Swartz, Natalie Renner for Applicant
John N. Birch for Respondents
David Bish, Lee Cassey for Grant Thornton, Proposed Receiver

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.5 Miscellaneous
Headnote
Bankruptcy and insolvency --- Receivers — Miscellaneous
Sale of Assets — On November 4, 2013, receiver was appointed over assets, property and undertaking of number of related companies — Receiver brought motion for order approving entry by receiver into three asset purchase agreements ("APAs") — APAs provided for sale of assets as going concern and retention of almost all employees — Motion granted — Court was satisfied that economic realities of business vulnerability and financial position of companies militated in favour of approval of issuance of orders — Approval of orders and consummation of sale transactions to purchasers pursuant to APAs was warranted as best way to provide recovery for senior secured lender of companies and with sole economic interest in assets — Sale process was fair and reasonable, and sale transactions was only means of providing maximum realization of purchased assets under current circumstances — Fact that purchasers may have some relationship to companies did not preclude approval of orders provided that receiver verified that process was performed in good faith — Receiver was of view that market for purchased assets was sufficiently canvassed through sales and marketing processes and that purchase prices under APAs were fair and reasonable under current circumstances.
Table of Authorities
Statutes considered:
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 65.13(5) [en. 2005, c. 47, s. 44] — considered
Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

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

s. 100 — considered

MOTION by receiver for order approving entry by receiver into three asset purchase agreements.

***Morawetz J.*:**

1 At the conclusion of argument on November 4, 2013, the motion was granted with reasons to follow. These are the reasons.

2 On November 4, 2013, Grant Thornton Limited was appointed as Receiver (the "Receiver") of the assets, property and undertaking of each of 4358376 Canada Inc., (operating as itravel 2000.com ("itravel")), 7500106 Canada Inc., (operating as Travelcash ("Travelcash")), and The Cruise Professionals Limited, operating as The Cruise Professionals ("Cruise" and, together with itravel 2000 and Travelcash, "itravel Canada"). See reasons reported at 2013 ONSC 6866.

3 The Receiver seeks the following:

(i) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "itravel APA") between the Receiver and 8635919 Canada Inc. (the "itravel Purchaser") dated on or about the date of the order, and attached as Confidential Appendix I of the First Report of the Receiver dated on or about the date of the order (the "Report");

(b) approving the transactions contemplated by the itravel APA;

(c) vesting in the itravel Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the itravel APA) (collectively, the "itravel Assets"); and

(d) sealing the itravel APA until the completion of the sale transaction contemplated thereunder; and

(ii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Cruise APA", and together with the itravel APA and the Travelcash APA, the "APAs") between the Receiver and 8635854 Canada Inc. (the "Cruise Purchaser"), and together with the itravel Purchaser and the Travelcash Purchaser, the "Purchasers") dated on or about the date of the order, and attached as Confidential Appendix 2 of the Report;

(b) approving the transactions contemplated by the Cruise APA; and

(c) vesting the Cruise Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Cruise APA) (the "Cruise Assets", and together with the itravel Assets and the Travelcash Assets, the "Purchased Assets"); and

(d) sealing the Cruise APA until the completion of the sales transaction contemplated thereunder; and

(iii) an order:

(a) approving the entry by the Receiver into an asset purchase agreement (the "Travelcash APA") between the Receiver and 1775305 Alberta Ltd. (the "Travelcash Purchaser") dated on or about the date of the order, and attached as Confidential Appendix 3 of the Report;

(b) approving the transactions contemplated by the Travelcash APA;

(c) vesting in the Travelcash Purchaser all of the Receiver's right, title and interest in and to the "Purchased Assets" (as defined in the Travelcash APA) (collectively, the "Travelcash Assets"); and

(d) sealing the Travelcash APA until the completion of the sale transaction contemplated thereunder.

4 The Receiver further requests a sealing order: (i) permanently sealing the valuation reports prepared by Ernst & Young LLP and FTI Consulting LLP, attached as Confidential Appendices 4 and 5 of the Report, respectively; and (ii) sealing the Proposed Receiver's supplemental report to the court dated on or about the date of the order (the "Supplemental Report"), for the duration requested and reasons set forth therein.

5 The motion was not opposed. It was specifically noted that Mr. Jonathan Carroll, former CEO of itravel, did not object to the relief sought.

6 The Receiver recommends issuance of the Orders for the factual and legal bases set forth herein and in its motion record. The purchase and sale transactions contemplated under the APAs (collectively, the "Sale Transactions") are conditional upon the Orders being issued by this court.

General Background

7 Much of the factual background to this motion is set out in the endorsement which resulted in the appointment of the Receiver (2013 ONSC 6866), and is not repeated.

8 The Receiver has filed the Report to provide the court with the background, basis for, and its recommendation in respect of the relief requested. The Receiver has also filed the Supplemental Report (on a confidential basis) as further support for the relief requested herein.

9 In the summer of 2010, Barclays Bank PLC ("Barclays") approached Travelzest and stated that it no longer wished to act as the primary lender of Travelzest and its subsidiaries, as a result of certain covenant breaches under the Credit Agreement. This prompted Travelzest to consider and implement where possible, strategic restructuring arrangements, including the divestiture of assets and refinancing initiatives.

10 In September 2010, Travelzest publicly announced its intention to find a buyer for the Travelzest business.

Travelzest's Further Sales and Marketing Processes

11 In the fall of 2011, a competitor of itravel Canada contacted Travelzest and expressed an interest in acquiring the Travelzest portfolio. Negotiations ensued over a period of three months. However, the parties could not agree on a Purchase Price or terms, and negotiations ceased in December 2011.

12 In early 2012, an informal restructuring plan was developed, which included the sale of international companies.

13 The first management offer was received in April 2012. In addition, a sales process continued from May to October 2012, which involved 50 potential bidders within the industry. Counsel advised that 14 parties pursued the opportunity and four parties were provided with access to the data room. Four offers were ultimately made but none were deemed to be feasible, insofar as two were too low, one withdrew and the management offer was withdrawn after equity backers were lost.

14 In September 2012, a second management offer was received, which was subsequently amended in November 2012. The second management offer did not proceed.

15 In January 2013, discussions ended and the independent committee was disbanded.

16 In March and April 2013, three Canadian financial institutions were approached about a refinancing. However, no acceptable term sheet was obtained.

17 In May 2013, Travelzest entered into new discussions with a prior bidder from a previous sales process. Terms could not be reached.

18 In May 2013, a third management offer was received which was followed by a fourth management offer in July, both of which were rejected.

19 In July 2013, a press release confirmed that Barclays was not renewing its credit facilities with the result that the obligations became payable on July 12, 2013. However, Barclays agreed to support restructuring efforts until August 30, 2013.

20 In August 2013, a fifth management offer was made for the assets of itravel Canada, which included limited funding for liabilities. This offer was apparently below the consideration offered in the previous management offers. The value of the offer was also significantly lower than the Barclays' indebtedness and lower than the aggregate amount of the current offer from the Purchasers.

Barclays' Assignment of the Indebtedness to Elleway

21 On August 21, 2013, a consortium led by LDC Logistics Development Corporation ("LDC"), which included Elleway (collectively, the "Consortium") submitted an offer for Barclays debt and security, as opposed to the assets of Itravel Canada. On August 29, 2013, Elleway and Barclays finalized the assignment deal, which was concluded on September 1, 2013.

22 The consideration paid by Elleway was less than the amount owing to Barclays. Barclays determined, with the advice of KPMG London, that the sale of its debt and security, albeit at a significant discount, was the best available option at the time.

23 itravel Canada is insolvent. Elleway has agreed pursuant to the Working Capital Facility agreement to provide the necessary funding for itravel Canada up to and including the date for a court hearing to consider the within motion. However, if a sale is not approved, there is no funding commitment from Elleway.

Proposed Sale of Assets

24 The Receiver and the Purchasers have negotiated the APAs which provide for the going-concern purchase of substantially all of the itravel Canada's assets, subject to the terms and conditions therein. The purchase prices under the APAs for the Purchased Assets will be comprised of a reduction of a portion of the indebtedness owed by Elleway under the Credit Agreement and entire amount owed under the Working Capital Facility Agreement and related guarantees, and the assumption by the Purchasers of the Assumed Liabilities (as defined in each of the Purchase Agreements and which includes all priority claims) and the assumption of any indebtedness issued under any receiver's certificates issued by the Receiver pursuant to a funding agreement between the Receiver and Elleway Properties Limited. The aggregate of the purchase prices under the APA is less the amount of the obligations owed by itravel Canada to Elleway under the Credit Agreement and Working Capital Facility Agreement and related guarantees.

25 Pursuant to the APAs, the Purchasers are to make offers to 95% of the employees of itravel Canada on substantially similar terms of such employees current employment. The Purchasers will also be assuming all obligations owed to the customers of itravel Canada.

26 In reviewing the valuation reports of FTI Consulting LLP and Ernst & Young LLP and considering the current financial position of itravel Canada, the Receiver came to the following conclusions:

> (a) FTI Consulting LLP and Ernst & Young LLP concluded that under the circumstances, the itravel Canada companies' values are significantly less than the secured indebtedness owed under the Credit Agreement;
>
> (b) Barclays, in consultation with its advisor, KPMG London, sold its debt and security for an amount lower than its par value;

(c) the book value of the itravel Canada's tangible assets are significantly less than the secured indebtedness; and

(d) Elleway has the principal financial interest in the assets of itravel Canada, subject to priority claims.

27 The Receiver is of the view that the Sale Transactions with the Purchasers are the best available option as it stabilizes itravel Canada's operations, provides for additional working capital, facilitates the employment of substantially all of the employees, continues the occupation of up to three leased premises, provides for new business to itravel Canada's existing suppliers and service providers, assumes the liability associated with pre-existing gift certificates and vouchers, allows for the uninterrupted service of customer's travel arrangements and preserves the goodwill and overall enterprise value of the Companies. In addition, the Receiver believes that the purchase prices under the APAs are fair and reasonable in the circumstances, and that any further marketing efforts to sell itravel Canada's assets may be unsuccessful and could further reduce their value and have a negative effect on operations.

28 The Receiver's request for approval of the Orders raises the following issues for this court.

A. What is the legal test for approval of the Orders?

B. Does the legal test for approval change in a so-called "quick flip" scenario?

C. Does partial payment of the purchase price through a reduction of the indebtedness owed to Elleway preclude approval of the Orders?

D. Does the Purchasers' relationship to itravel Canada preclude approval of the Orders?

E. Is a sealing of the APAs until the closing of the Sale Transactions contemplated thereunder and a permanent sealing of the FTI Consulting LLP and Ernst & Young LLP valuation and the Supplemental Report Warranted?

A. What is the Legal Test for Approval of the Orders?

29 Receivers have the powers set out in the order appointing them. Receivers are consistently granted the power to sell property of a debtor, which is, indeed, the case under the Appointment Order.

30 Under Section 100 of the *Courts of Justice Act (Ontario)*, this Court has the power to vest in any person an interest in real or personal property that the Court has authority to order be conveyed.

31 It is settled law that where a Court is asked to approve a sales process and transaction in a receivership context, the Court is to consider the following principles (collectively, the "*Soundair* Principles"):

a. whether the party made a sufficient effort to obtain the best price and to not act improvidently;

b. the interests of all parties;

c. the efficacy and integrity of the process by which the party obtained offers; and

d. whether the working out of the process was unfair.

Royal Bank of Canada v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.); *Skyepharma PLC v. Hyal Pharmaceutical Corp*. (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J.) appeal quashed, (2000), 47 O.R. (3d) 234 (Ont. C.A.)).

32 In this case, I am satisfied that evidence has been presented in the Report, the Jenkins Affidavit and the Howell Affidavit, to demonstrate that each of the *Soundair* Principles has been satisfied, and that the economic realities of the business vulnerability and financial position of itravel Canada (including that the result would be no different in a further extension of the already extensive sales process) militate in favour of approval of the issuance of the Orders.

B. Does the Legal Test for Approval Change in a So-called "Quick Flip" Scenario?

33 Where court approval is being sought for a so-called "quick flip" or immediate sale (which involves, as is the case here, an already negotiated purchase agreement sought to be approved upon or immediately after the appointment of a receiver without any further marketing process), the court is still to consider the *Soundair* Principles but with specific consideration to the economic realities of the business and the specific transactions in question. In particular, courts have approved immediate sales where:

> (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and
>
> (b) delay of the transaction will erode the realization of the security of the creditor in sole economic interest.

Fund 321 Ltd. Partnership v. Samsys Technologies Inc. (2006), 21 C.B.R. (5th) 1 (Ont. S.C.J.); *Bank of Montreal v. Trent Rubber Corp.* (2005), 13 C.B.R. (5th) 31 (Ont. S.C.J.).

34 In the case of *Re Tool-Plas*, I stated, in approving a "quick flip" sale that:

> A "quick flip" transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a "quick flip" transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the "quick flip" transaction would realistically be any different if an extended sales process were followed.

Tool-Plas Systems Inc., Re (2008), 48 C.B.R. (5th) 91 (Ont. S.C.J.).

35 Counsel submits that the parties would realistically be in no better position were an extended sales process undertaken, since the APAs are the culmination of an exhaustive marketing process that has already occurred, and there is no realistic indication that another such process (even if possible, which it is not, as itravel Canada lacks the resources to do so) would produce a more favourable outcome.

36 Counsel further submits that a "quick flip" transaction will be approved pursuant to the *Soundair* Principles, where, as in this case, there is evidence that the debtor has insufficient cash to engage in a further, extended marketing process, and there is no basis to expect that such a process will result in a better realization on the assets. Delaying the process puts in jeopardy the continued operation of itravel Canada.

37 I am satisfied that the approval of the Orders and the consummation of the Sale Transactions to the Purchasers pursuant to the APAs is warranted as the best way to provide recovery for Elleway, the senior secured lender of itravel Canada and with the sole economic interest in the assets. The sale process was fair and reasonable, and the Sale Transactions is the only means of providing the maximum realization of the Purchased Assets under the current circumstances.

C. Does Partial Payment of the Purchase Price Through a Reduction of the Indebtedness Owed to Elleway Preclude Approval of the Orders?

38 Partial payment of the purchase price by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owned under the Working Capital Facility Agreement does not preclude approval of the Orders. This mechanism is analogous to a credit bid by a secured lender, but with the Purchasers, instead of the secured lender, taking title to the purchased assets. As noted, the Receiver understands that following closing of the transactions contemplated under the APAs, that Elleway (or an affiliate thereof) will hold an indirect equity interest in the Purchasers. It is well-established in Canada insolvency law that a secured creditor is permitted to credit bid its debt in lieu of providing cash consideration.

Re White Birch Paper Holding Co. (2010), 72 C.B.R. (5th) 74 (Qc. C.A.); *Re Planet Organic Holding Corp*. (June 4, 2010), Toronto, Court File No. 10-86699-00CL, (S.C.J. [Commercial List]).

39 This court has previously approved sales involving credit bids in the receivership context. See *CCM Master Qualified Fund, Ltd., v. Blutip Power Technologies Ltd.* (April 26, 2012), Toronto, Court File No. CV-12-9622-00CL, (S.C.J. [Commercial List]).

40 It seems to me that, in these circumstances, no party is prejudiced by Elleway reducing a portion of the debt owed to it under the Credit Agreement and the entire amount owed under the Working Capital Facility Agreement as part of the Purchasers' payment of the purchase prices, as the Purchasers are assuming all claims secured by liens or encumbrances that rank in priority to Elleway's security. The reduction of the indebtedness owed to Elleway will be less than the total amount of indebtedness owed to Elleway under the Credit Agreement. As such, if cash was paid in lieu of a credit bid, such cash would all accrue to the benefit of Elleway.

41 Therefore, it seems to me the fact that a portion of the purchase price payable under the APAs is to be paid through a reduction in the indebtedness owed to Elleway does not preclude approval of the Orders.

D. Does the Purchasers' Relationship to itravel Canada preclude approval of the Orders?

42 Even if the Purchasers and itravel Canada were to be considered, out of an abundance of caution, related parties, given that LDC is an existing shareholder of Travelzest and part of the Consortium or otherwise, this does not itself preclude approval of the Orders.

43 Where a receiver seeks approval of a sale to a party related to the debtor, the receiver shall review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. It is not sufficient for a receiver to accept information provided by the debtor where a related party is a purchaser; it must take steps to verify the information. See *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

44 In addition, the 2009 amendments to the BIA relating to sales to related persons in a proposal proceedings (similar amendments were also made to the *Companies' Creditors Arrangement Act* (Canada)) are instructive. Section 65.13(5) of the BIA provides:

> If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that:
>
> (a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and
>
> (b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

45 The above referenced jurisprudence and provisions of the BIA (Canada) demonstrate that a court will not preclude a sale to a party related to the debtor, but will subject the proposed sale to greater scrutiny to ensure a transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. In this case, the Receiver is of the view that the market for the Purchased Assets was sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APAs are fair and reasonable under the current circumstances. I agree with and accept these submissions.

46 The Receiver requests that the APAs be sealed until the closing of the Sale Transactions contemplated thereunder. It is also requesting an order permanently sealing the valuation reports prepared by Ernst & Young LLP and FIT Consulting LLP and, attached as Confidential Appendices 4 and 5 of the Report, respectively.

47 The Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, held that a sealing order should only be granted when:

> (a) an order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 53; *Re Nortel Networks Corporation* (2009), 56 C.B.R. (5 TH) 224, (Ont. S.C.J. [Commercial List]), at paras. 38-39.

48 In my view, the APAs subject to the sealing request contain highly sensitive commercial information of itravel Canada and their related businesses and operations, including, without limitation, the purchase price, lists of assets, and contracts. Courts have recognized that disclosure of this type of information in the context of a sale process could be harmful to stakeholders by undermining the integrity of the sale process. I am satisfied that the disclosure of the APAs prior to the closing of the Sale Transactions could pose a serious risk to the sale process in the event that the Sale Transactions do not close as it could jeopardize dealings with any future prospective purchasers or liquidators of itravel Canada's assets. There is no other reasonable alternative to preventing this information from becoming publicly available and the sealing request, which has been tailored to the closing of the Sale Transactions and the material terms of the APAs until the closing of the Sale Transactions, greatly outweighs the deleterious effects. For these same reasons, plus the additional reason that the valuations were provided to Travelzest on a confidential basis and only made available to Travelzest and the Receiver on the express condition that they remain confidential, the Receiver submits that the FTI Consulting LLP and Ernst & Young LLP valuations be subject to a permanent sealing order. Further, the Receiver submits that the information contained in the Supplemental Report also meets the foregoing test for the factual basis set forth in detail in the Supplemental Report (which has been filed on a confidential basis). I accept the Receiver's submissions regarding the permanent sealing order for the valuation materials. For these reasons, (i) the APA is to be sealed pending closing, and (ii) only the valuation material is to be permanently sealed.

Disposition

49 For the reasons set forth herein, the motion is granted. Orders have been signed to give effect to the foregoing.

Motion granted.

TAB 8

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
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity
XIV.8.a Crown privilege
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

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

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s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (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) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (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) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

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

I. Introduction

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

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

II. Facts

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

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

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

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998*, SOR/98-106

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments below

A. Federal Court of Canada, Trial Division, [2000] 2 F.C. 400

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. Federal Court of Appeal, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEAA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEAA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais*, *supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais*, *supra*, dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick*, *supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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

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

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right*. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter*: *New Brunswick*, *supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, *supra*, at para. 22.

(3) Adapting the Dagenais Test to the Rights and Interests of the Parties

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

> A confidentiality order under R. 151 should only be granted when:
>
> > (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
> >
> > (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, *supra*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest," the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35

(S.C.C.), at para. 10, the open court rule only yields" where the *public* interest in confidentiality outweighs the public interest in openness" (emphasis added).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.

57 Finally, the phrase "reasonably alternative measures" requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. Application of the Test to this Appeal

(1) Necessity

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been" accumulated with a reasonable expectation of it being kept confidential" (para. 14) as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits" may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) Salutary Effects of the Confidentiality Order

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan*, *supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck*, *supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) Deleterious Effects of the Confidentiality Order

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, *supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, *per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents

relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

> It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a

confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would

be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

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