COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	2101-0002AC
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REGISTRY OFFICE:	CALGARY
APPLICANT:	ATHABASCA WORKFORCE SOLUTIONS INC.
STATUS ON APPEAL:	APPELLANT
STATUS ON APPLICATION:	APPLICANT
RESPONDENTS:	GREENFIRE OIL & GAS LTD. and GREENFIRE HANGINGSTONE OPERATING CORPORATION
STATUS ON APPEAL:	RESPONDENTS
STATUS ON APPLICATION:	RESPONDENTS
NON-PARTY:	ALVAREZ & MARSAL CANADA INC., IN ITS CAPACITY AS PROPOSAL TRUSTEE OF GREENFIRE OIL & GAS LTD. AND GREENFIRE HANGINGSTONE OPERATING CORPORATION
DOCUMENT:	**MEMORANDUM OF ARGUMENT**
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PART I – INTRODUCTION

1. This memorandum of argument is submitted on behalf of the appellant, Athabasca Workforce Solutions Inc. ("**Athabasca**"), in support of its application for a declaration that it has a right to appeal pursuant to subsection 193(c) of the *Bankruptcy and Insolvency Act* (the "***BIA***"),[1] or in the alternative, leave to appeal pursuant to subsection 193(e) of the *BIA*, with regards to Justice Nixon's approval of the sale approval and vesting order ("**SAVO**") and approval of the interim financing and interim financing change order (the "**Interim Financing Order**", and together with the SAVO, the "**Orders**") granted on December 17, 2020 in response to an application (the "**Application**") brought by Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation (collectively, "**Greenfire**").

2. Athabasca seeks permission to appeal on the basis that Justice Nixon made errors in law by incorrectly applying the test and the factors set out in sections 50.6 and 65.13 of the *BIA* in granting the Interim Financing Order and the SAVO, respectively, and by incorrectly finding that the principles for the approval of a sale of assets in an insolvency proceeding set out in *Royal Bank of Canada v Soundair* ("***Soundair***")[2] could be amended or ignored based upon the circumstances of the present case. Justice Nixon also approved interim financing for use by the Purchaser to pay the purchase price for the assets as set out in the APA, which is not authorized by section 50.6 of the *BIA*. Justice Nixon also made palpable and overriding errors in respect of the facts in evidence and inferences made from those facts.

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[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), at s 193, at **TAB 1** of the Book of Authorities (the "**BOA**").
[2] *Royal Bank of Canada v Soundair* (1991), 83 DLR (4th) 76 (Ont CA) ("***Soundair***") at para 16, at **TAB 2** of the BOA.

PART II – STATEMENT OF FACTS

3. The facts are as set out in the application (the "**Leave Application**") filed in support of the leave to appeal. Capitalized terms not otherwise defined herein shall have the meaning given to them in the Leave Application. A detailed chronology of the steps relating to this Action before the Court of Queen's Bench of Alberta is attached to this Memorandum of Argument, pursuant to rule 14.54(c).[3]

PART III – LAW AND ARGUMENT

4. Pursuant to section 193 of the *BIA*, any order or decision of a judge made under the *BIA* can be appealed in specific circumstances under subsections 193(a) to 193(d), or if a judge of the Court of Appeal grants leave under subsection 193(e).[4] Athabasca submits it has a right to appeal the Orders under subsection 193(c), and in the alternative, submits it should be granted leave to appeal pursuant to section 193(e).

A. 193(c) – the Value of the Property Involved Exceeds Ten Thousand Dollars

5. Section 193(c) of the *BIA* provides there is a right to appeal to the Court of Appeal if "the property involved in the appeal exceeds in value ten thousand dollars".[5] In *2403177 Ontario Inc. v Bending Lake Iron Group Ltd.*, the Ontario Court of Appeal stated that subsection 193(c) does not apply to: (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.[6]

6. First, the Orders are not procedural in nature and provide for a substantive transaction that will impact all of Greenfire's creditors. Second, the Orders bring into

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[3] *Alberta Rules of Court*, Alta Reg 124/2010 ("***Rules of Court***"), Rule 14.54(c), at **TAB 3** of the BOA.
[4] *BIA*, s 193, at **TAB 1** of the BOA.
[5] *BIA*, s 193(c) , at **TAB 1** of the BOA.
[6] *2403177 Ontario Inc. v Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at para 53, at **TAB 4** of the BOA.

play the value of the Assets. Although it is not possible to calculate the sale price of the Assets, Athabasca understands that the majority of the Interim Financing Funds, being $20,000,000.00, will be directed towards the purchase and the operation of the Assets. However, there was no evidence on the record to indicate the value of the Assets approximates $20,000,000.00. Third, the Transaction under the Orders virtually guarantees that Athabasca, and all other creditors, will experience a total loss. Athabasca submits it has a right of appeal pursuant to subsection 193(c).

B. 193(e) – Athabasca Should be Granted Leave to Appeal

7. Outside the enumerated circumstances under subsections 193(a) to (d) of the *BIA*, any appeal may be brought with leave of a judge of this Honourable Court.[7] In *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation* ("***Third Eye***"), the Alberta Court of Appeal set out the factors to be considered in an application under subsection 193(e).[8] For the reasons set out herein, each of the factors set out in *Third Eye* are met, and Athabasca should be granted leave to appeal the Orders.

a. The Appeal is Significant to the Bankruptcy Practice

8. The Transaction under the Orders is unorthodox in that the approval of the Interim Financing Order required the approval of the APA without a proper sales process being conducted and granting the SAVO. The parties, including the Court, all acknowledged at the Application that this Transaction was highly unorthodox due to its structure and circumstances.

9. The purpose of interim financing is to allow the debtor company to continue operating during the proposal period and to preserve the value of the debtor's property

[7] *BIA*, at s 193(e), at **TAB 1** of the BOA.
[8] *DGDP-BC Holdings Ltd. v Third Eye Capital Corporation*, 2020 ABCA 442 ("***Third Eye***") at para 18, at **TAB 5** of the BOA.

for the benefit of the debtor's creditors.[9] However, pursuant to the Orders, Justice Nixon approved the Interim Financing Order, not to preserve the Assets, but to dispose of them in a sale while allowing the Purchaser to utilize the Interim Financing Funds to fund its purchase price of the Assets and perform capital improvements on the Assets for the sole benefit of the Purchaser. Based on Greenfire's continued insistence on the urgency of the situation, Justice Nixon purported to approve the unorthodox Transaction on the basis that it was the best possible outcome for Greenfire's creditors. As set out more fully below, this conclusion was not supported at law, in the evidence before the Court and there was contradictory evidence provided on the record. More particularly, Justice Nixon's decision will have serious impacts on the potential conditions of interim financings and the sale of assets within *BIA* proposals in the future.

10. There is a serous risk that a debtor in conjunction with an interim lender could circumvent the requirements of section 65.13 of the *BIA* and the principles set out in the *Soundair* decision by requiring a court to approve a transaction without a proper sales process or estimate of value of the assets being conducted. Additionally, it is contrary to the principles of section 50.6 to approve interim financing where the majority of the interim financing is not directed towards preserving the value of the debtor's assets, but rather, is utilized by the Purchaser to purchase the assets of a debtor company, to the detriment of the creditors.

11. There was no basis to approve the Interim Financing Order as proposed, in the quantum sought, for use by the Purchaser to purchase the Assets. This would set a dangerous precedent that any party providing interim financing in a future proceeding

[9] See *Re Bearcat Explorations Ltd.* (2004), 3 CBR (5th) 167 (Alta QB) ("***Bearcat***"), at para 15, at **TAB 6** of the BOA.

could require any provision within that interim financing order, including provisions contrary to law and the principles set out in section 50.6 and section 65.13 of the *BIA*.

12. As such, Athabasca's appeal of the SAVO and Interim Financing Order is significant to the larger bankruptcy practice and the Orders could set a potentially dangerous precedent for grounds to approve interim financing and a sale of the assets of a debtor company.

b. The Appeal is Significant in this Action

13. Athabasca's appeal is significant to this action because all of Greenfire's creditors (but one) opposed the Orders, largely because the Transaction would cause significant losses to Greenfire's creditors that may be mitigated if a proper SISP was conducted in respect of the Assets. In fact, a group of investors (the "**Investor Group**") also filed an appeal of the Orders in order to initiate a SISP.

c. The Appeal is *Prima Facie* Meritorious

14. Athabasca's appeal is *prima facie* meritorious as Justice Nixon made several demonstrable errors in law and palpable and overriding errors in respect of the facts in evidence before him.

15. The requirements and factors set out under section 50.6(5) could not be satisfied by Greenfire on the evidence before the Court. In particular, the interim financing was far in excess of what was needed for the period under which Greenfire would be under protection and based upon the cash flows provided by Greenfire and the Proposal Trustee. The management of Greenfire had lost the confidence of its major creditors and no creditors (but one) supported the transaction. There was no evidence on the record that a viable proposal would be made by Greenfire and the interim financing only

benefited the Purchaser. There was no evidence on the record before Justice Nixon as to the true value of OpCo's assets, except for one statement regarding the assessed value of the assets by the Alberta Energy Regulator (the "**AER**") of $86,442,193.33[10]. This was not sufficient to grant the requested interim financing. Finally, the creditors of Greenfire would be materially prejudiced by the interim financing as it required the sale of the assets of OpCo on improvident terms.

16. Similarly, the APA could not be approved on its own terms and based upon the process conducted by OpCo to obtain the APA. The principles set out in Soundair cannot be satisfied based upon the evidence before the Court. The APA was only approved because it was a requirement of the interim financing term sheet. Notably, the process leading to this proposed sale was not reasonable in the circumstances, the creditors all objected to the sale including the senior secured lender, the result of the sale was that all creditors (but one) would receive no amounts under the terms of the APA and the proposed consideration under the APA was not reasonable or fair and no evidence was provided on the market value of the Assets such that the Court could make a determination as to whether the APA should be approved on its own merits.

d. The Appeal will not Unduly Hinder the Progress of this Action

17. The Appeal will not hinder the Action. If the Interim Financing Order is overturned, another party is prepared to provide or replace the Interim Financing Funds that has been funded to Greenfire to date. There would be no prejudice to the interim lender and any amounts advanced for the preservation of assets would be repaid. Further, the APA has not closed and there is likely to be a significant waiting period

[10] First Affidavit of Robert Logan sworn on October 9, 2020 at paragraph 9, at Exhibit 6 of the Affidavit of Joy Mutuku, sworn on December 28, 2020.

necessary before it can close in order to allow for any license transfer for the licenses associated with the Assets to take place. The Assets continue to be maintained by OpCo and have sufficient funding in the interim so that no further damage will be done to them. If the SAVO is overturned in the Appeal, there would be sufficient interim financing available to preserve the assets pending a short sales process that could be conducted by the Proposal Trustee. If the Purchaser wants to participate in any sales process that is conducted, it would have the option to do so and would not be prejudiced.

18. If Athabasca is granted leave to appeal, and the Orders are stayed until the appeal is heard, the process will not unduly hinder the progress of the action.[11]

e. The Orders are Contrary to the Law

19. Justice Nixon made several errors in law and palpable and overriding errors in respect of the facts in evidence when he granted the Orders. In *8527504 Canada Inc. v Sun Pac Foods Ltd.*, the Ontario Court of Appeal stated that the section 193(e) test for leave to appeal is "discretionary, flexible and contextual".[12] The Court also stated that the motion judge's orders were owed deference as they were "grounded in law and reason and based on the facts and documents presented."[13] In contrast, in *Third Eye*, the Alberta Court of Appeal granted leave to appeal a receivership order pursuant to subsection 193(e), finding that although receivership orders are discretionary and owed deference, less deference is owed when the judge's order may be contrary to statute.[14]

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[11] Second Affidavit of Pruden at para 5 and Exhibit "A", at Exhibit 5 of the Affidavit of Joy Mutuku, sworn on December 28, 2020.
[12] *8527504 Canada Inc. v Sun Pac Foods Ltd.* (2015), 23 CBR (6th) 52 (Ont CA) ("***Sun Pac***") at para 12, at **TAB 7** of the BOA.
[13] *Sun Pac*, at para 14, at **TAB 7** of the BOA.
[14] *Third Eye*, at paras 30-31 and 37-38, at **TAB 5** of the BOA.

20. Similarly, the Orders are not grounded in facts in evidence; they are based upon incorrect inferences of the parties' positions and are contrary to the *BIA*. As such, Justice Nixon's decision to grant the Orders should be owed little deference.

21. Beyond bankruptcy law, it is an error of law for a judge to "make a finding of fact for which there is no supporting evidence" or rely on facts not in evidence in coming to its conclusions.[15] Further, under the *Alberta Rules of Court*, where affidavit evidence is not tested through cross-examination it should be given little weight.[16]

22. In applying section 50.6 of the *BIA* and approving the interim financing, Justice Nixon made the following errors: (i) approving interim financing to be used by the Purchaser for the purchase of the Assets of OpCo; (ii) broadly stating there was "no better recovery for the creditors" other than the Transaction proposed by Greenfire, and disregarding the evidence on record of Investor Group's offer it was willing to put forward if given time to do so; (iii) concluding Greenfire had the confidence of its major creditors, when only the Municipality of Wood Buffalo supported the granting of the Orders; (iv) concluding the loans enhanced the prospects of a viable proposal, despite there being no evidence on record that a proposal would ever be made; (v) approving the amount of interim financing without any evidence on the record regarding the value of the Assets in their present condition; (vi) concluding that contrary to Athabasca's and the other creditors' submissions, the Transaction would benefit the creditors; and (vii) concluding that if the Interim Financing Order were not approved, the most likely outcome would be the transfer of Greenfire's assets to the Orphan Well Association ("**OWA**"), despite there being no evidence or argument on record on this point, and

[15] *Barclay v Kodiak Heating & Air Conditioning Ltd.*, 2019 ABQB 850 at para 30, at **TAB 8** of the BOA.
[16] *Kumra v Luthra*, 2010 ABQB 772 at paras 64-65, at **TAB 9** of the BOA; *Reference re Firearms Act (Canada)*, 1998 ABCA 306 at paras 8-10, at **TAB 10** of the BOA**.**

despite there being contrary evidence that the Investor Group would step in before any of the Assets were transferred to the OWA.

23. In approving the SAVO under section 65.13 of the *BIA*, Justice Nixon made the following errors: (i) finding the Assets were exposed to the market on an "agnostic" basis, meaning any and all offers were welcome, despite there being no evidence on record to support this finding, and in fact, the contrary was admitted by Greenfire in argument; (ii) concluding the consideration payable for the Assets was fair and reasonable, despite there being no evidence on record indicating the value of the Assets, the value of the Assets on the record far exceeded the purchase price[17] and what the final purchase price would be; (iii) incorrectly stating the law for approval of a sale of assets by stating that the application of legal principles from the *Soundair* case depended on the circumstances; (iv) concluding the Transaction was in the best interest of the stakeholders, and failing to consider the interest of all of the creditors who opposed the Application; (v) finding the parties did not put any definitive alternatives to the Court, but failing to appreciate this was because there was no opportunity for other parties to participate or obtain information from Greenfire in respect of a sale of the Assets, ignoring evidence on the record that Greenfire actively discouraged parties from bringing forward interim financing offers and did not engage at all with the Investor Group to obtain interim financing; (vi) relying heavily on the steps undertaken in Greenfire's refinancing process conducted prior to filing the NOI, without the oversight or involvement of the Proposal Trustee, and which was solely focused on refinancing and not on sourcing potential purchasers for a sale of the Assets; and (vi) concluding

[17] First Affidavit of Robert Logan, sworn on October 9, 2020, at para 9, at Exhibit 6 of the Affidavit of Joy Mutuku, sworn on December 28, 2020.

the Transaction represented fair market value, when there was no evidence on record to indicate the market value of the Assets and no formal sale process was conducted to determine the market value of the Assets.

24. Justice Nixon also drew an inappropriate inference when he concluded the AER supported the Transaction, when in fact, the AER merely took no position on the record and simply required that Greenfire comply with its regulatory obligations. Justice Nixon also inappropriately preferred the affidavit evidence of Robert Logan, the affiant for Greenfire. Justice Nixon dismissed the parties' request for an adjournment to cross-examine Robert Logan, and went on to prefer his untested evidence over contradicting evidence from other parties. Justice Nixon also ignored the evidence provided by the creditors regarding the conduct of Greenfire and its failure to engage with key stakeholders in obtaining interim financing or seeking a sale of the Assets.

25. In sum, there are a number of errors that justify granting Athabasca leave to appeal from the Orders.

PART IV – RELIEF SOUGHT

26. For the reasons set out above, Athabasca respectfully seeks that this Honourable Court grant its Application for a declaration that it has a right to appeal the Orders under subsection 193(c) of the *BIA*, or in the alternative, granting Athabasca leave to appeal the Orders under subsection 193(e) of the *BIA*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of December 2020.

MLT AIKINS LLP

Ryan Zahara/Jonathan J. Bourchier, Counsel for the Appellant, Athabasca Workforce Solutions Inc.

LIST OF AUTHORITIES

Bankruptcy and Insolvency Act, RSC 1985, c B-3, at sections 50.6, 65.13, and 193. http://canlii.ca/t/543rx	**TAB 1**
Royal Bank of Canada v Soundair (1991), 83 DLR (4th) 76 (Ont CA). http://canlii.ca/t/1p78p	**TAB 2**
Alberta Rules of Court, Alta Reg 124/2010, at Rules 6.7 and 14.54. http://canlii.ca/t/54ts1	**TAB 3**
2403177 Ontario Inc. v Bending Lake Iron Group Ltd., 2016 ONCA 225. http://canlii.ca/t/gp079	**TAB 4**
DGDP-BC Holdings Ltd. v Third Eye Capital Corporation, 2020 ABCA 442. http://canlii.ca/t/jc08c	**TAB 5**
Re Bearcat Explorations Ltd. (2004), 3 CBR (5th) 167 (Alta QB). (Publicly accessible hyperlink not available.)	**TAB 6**
8527504 Canada Inc. v Sun Pac Foods Ltd. (2015), 23 CBR (6th) 52 (Ont CA). (Publicly accessible hyperlink not available.)	**TAB 7**
Barclay v Kodiak Heating & Air Conditioning Ltd., 2019 ABQB 850. http://canlii.ca/t/j3bw3	**TAB 8**
Kumra v Luthra, 2010 ABQB 772. http://canlii.ca/t/fqhcm	**TAB 9**
Reference re Firearms Act (Canada), 1998 ABCA 306. http://canlii.ca/t/5shh	**TAB 10**

CHRONOLOGY

Athabasca Workforce Solutions Inc.'s Application for Permission to Appeal pursuant to section 193(e) of the *Bankruptcy and Insolvency Act*

DATE	EVENT	DESCRIPTION
August 20, 2020	Athabasca Workforce Solutions Inc. ("**Athabasca**") files application for bankruptcy	Athabasca files an application seeking that Greenfire Oil & Gas Ltd. ("**HoldCo**") and Greenfire Hangingstone Operating Corporation ("**OpCo**"; together with HoldCo collectively "**Greenfire**") be declared bankrupt, and a Bankruptcy Order pursuant to sections 42 and 43 of the *Bankruptcy and Insolvency Act* ("***BIA***")
September 17, 2020	Greenfire files Notice of Dispute of bankruptcy	Greenfire files a Notice of Dispute to Athabasca's application for bankruptcy
October 8, 2020	Greenfire files Notice of Intention	Greenfire files a Notice of Intention to make a Proposal ("**NOI**") pursuant to subsection 50.4(1) of the *BIA*
October 13, 2020	Greenfire files application for procedural consolidation, administrative charge and authorization of interim financing facility	Greenfire files application for consolidation of the bankruptcy estates of HoldCo and OpCo, for Greenfire's legal counsel and Proposal trustee to be granted a first ranking administrative charge not to exceed $500,000, and authorization of an interim financing facility pursuant to section 50.6 of the *BIA*
October 16, 2020	Alvarez & Marsal ("**A&M**" or "**Proposal Trustee**") issue Notice to Creditors regarding Greenfire's NOI	Notice sent to Greenfire's creditors informing them that, among other things, Greenfire filed an NOI and A&M was appointed Proposal Trustee
October 16, 2020	Order approving procedural consolidation and administrative charge granted	The Honourable Justice D.R. Mah grants an Order which consolidates the bankruptcy estates of HoldCo and OpCo; Greenfire's legal counsel and Proposal Trustee granted first ranking administrative charge not to exceed $500,000

November 2, 2020	Greenfire serves first application for an extension of the proposal period and authorization of Asset Sale Agreement ("**APA**")	Greenfire files an application requesting that the deadline for filing a proposal to creditors is extended to December 21, 2020, and authorizing Greenfire to enter into an APA with Greenfire Acquisition Company Ltd.
November 4, 2020	A&M files First Report of Proposal Trustee	A&M filed its first report as Proposal Trustee stating, among other things, that Greenfire and A&M were speaking with multiple interested parties about possible interim financing; A&M indicated its support of an extension to the deadline for a proposal to November 20, 2020, to allow Greenfire to facilitate interim financing
November 6, 2020	First Order extending the proposal period is granted	The Honourable Justice K.M. Horner grants order extending Greenfire's deadline to file proposal to creditors, pursuant to section 50.4 of the *BIA,* to November 20, 2020
November 9, 2020	Greenfire files application seeking declaration	Greenfire files an application seeking a court declaration that a marketing agreement (the "**Marketing Agreement**") between it and another entity ("**Warner**") was validly terminated, or in the alternative, a disclaimer notice over the marketing agreement
November 12, 2020	A&M files Second Report of Proposal Trustee	A&M filed its second report as Proposal Trustee providing its reasons for approving the disclaimer of the Marketing Agreement
November 13, 2020	Warner files application for sealing order	Warner files application sealing certain confidential and commercially sensitive information
November 16, 2020	Warner files application seeking declaration	Warner files application seeking direction that the Marketing Agreement has not been and is not to be disclaimed or resiliated
November 16, 2020	Greenfire files second application for an extension of the proposal period	Greenfire files an application requesting that the deadline for filing a proposal to creditors is extended to December 8, 2020

November 17, 2020	A&M files Third Report of Proposal Trustee	A&M filed its third report as Proposal Trustee indicating its support of an extension to the deadline for a proposal to December 8, 2020, to allow Greenfire to facilitate interim financing
November 17, 2020	Second Order extending the proposal period is granted	The Honourable Justice J.S. Little grants order further extending Greenfire's deadline to file proposal to December 8, 2020
November 17, 2020	Order for disclaimer of Marketing Agreement and restricted court access granted	The Honourable Justice J.S. Little grants order that a marketing agreement between Greenfire and Warner is disclaimed or resiliated and grants sealing order over certain confidential materials
November 27, 2020	Warner files notice of appeal and application for permission to appeal	Warner and another appellant ("**Liberator**") file both a civil notice of appeal and an application seeking permission to appeal the Order for disclaimer of Marketing Agreement with this Honourable Court
December 2, 2020	Greenfire files third application for an extension of the proposal period as well as approval of an interim financing facility and Sale and Vesting Order ("**SAVO**")	Greenfire files an application requesting that the deadline for filing a proposal to creditors is extended to January 22, 2021, and seeking approval of an interim financing facility and sale and vesting arrangement with Greenfire Acquisition Corporation (the "**Purchaser**").
December 4, 2020	Greenfire sends letter to the Service List	Greenfire withdraws the relief it is seeking on December 8, 2020, in respect of both the approval of the interim financing term sheet and the approval of the asset purchase agreement with the Purchaser.
December 7, 2020	A&M files Fourth Report of Proposal Trustee	A&M filed its fourth report as Proposal Trustee indicating its support of an extension to the deadline for a proposal to December 14, 2020, to allow Greenfire to facilitate interim financing. The Fourth Report does not provide any comments on the proposed form of the asset purchase agreement or the interim financing because the interim financing term sheet has not been executed.

December 8, 2020	Third Order extending the time for filing a proposal period is granted	The Honourable Justice M.J. Lema grants order further extending Greenfire's deadline to file proposal to December 15, 2020
December 11, 2020	Greenfire files fourth application for an extension of the proposal period	Greenfire files an application on Friday afternoon prior to a Monday hearing requesting that the deadline for filing a proposal to creditors is extended to January 28, 2021, and in the event that the interim financing and SAVO is not granted, an increase to the administrative charge previously issued
December 11, 2020	A&M files Fifth Report of Proposal Trustee	A&M filed its Fifth Report as Proposal Trustee on Friday afternoon indicating its support of an extension to the deadline for a proposal to January 28, 2021, and indicating its support of the Approval and Vesting Order and Interim Financing Order (described below)
December 14, 2020	Fourth order extending the proposal period is granted	The Honourable Justice D.B. Nixon grants order further extending Greenfire's deadline to file proposal to January 28, 2021, the remainder of the relief was adjourned over to December 17, 2020 to complete arguments in respect of the approval of the interim financing term sheet and the approval of the asset purchase agreement
December 17, 2020	SAVO granted	The Honourable Justice D.B. Nixon grants order approving the sale transaction contemplated by an asset purchase agreement between OpCo and the Purchaser and vesting OpCo's right, title and interest in the associated assets in the Purchaser.
December 17, 2020	Interim Financing Order granted	The Honourable Justice D.B. Nixon grants order approving an interim financing facility whereby Greenfire is authorized to borrow up to $20,000,000 from Trafigura Canada General Partnership, to be secured by a priority charge against all present and after-acquired assets, property and undertakings of Greenfire; sealing order over certain confidential information also granted
December 23, 2020	Warner and Liberator discontinue appeal	Warner and Liberator discontinue their appeal with this Honourable Court of the order for disclaimer of the Marketing Agreement

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

L.R.C. (1985), ch. B-3

Current to December 2, 2020

Last amended on November 1, 2019

À jour au 2 décembre 2020

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(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

(4) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Additional factors — related persons

(5) 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.

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

(m) to perform all necessary administrative duties relating to the practice and procedure in the courts; and

(n) to hear and determine appeals from the decision of a trustee allowing or disallowing a claim.

l) de régler et de signer toutes ordonnances et jugements des tribunaux qu'un juge n'a pas réglés ou signés, et d'émettre toutes ordonnances, tous jugements, mandats ou autres procédures des tribunaux;

m) d'exercer toutes les fonctions administratives nécessaires relativement à la pratique et à la procédure devant les tribunaux;

n) d'entendre et de décider les appels de la décision d'un syndic accordant ou refusant une réclamation.

May be exercised by judge

(2) The powers and jurisdiction conferred by this section or otherwise on a registrar may at any time be exercised by a judge.

Peuvent être exercés par un juge

(2) Les pouvoirs et la juridiction, conférés à un registraire par le présent article ou autrement, peuvent être exercés par un juge.

Registrar may not commit

(3) A registrar has no power to commit for contempt of court.

Mandat de dépôt

(3) Un registraire n'a pas le pouvoir de délivrer un mandat de dépôt pour outrage au tribunal.

Appeal from registrar

(4) A person dissatisfied with an order or decision of a registrar may appeal therefrom to a judge.

Appel du registraire

(4) Toute personne mécontente d'une ordonnance ou d'une décision du registraire peut en interjeter appel à un juge.

Order of registrar

(5) An order made or act done by a registrar in the exercise of his powers and jurisdiction shall be deemed the order or act of the court.

Ordonnance du registraire

(5) Toute ordonnance rendue ou tout acte fait par un registraire dans l'exercice de ses pouvoirs et de sa juridiction est réputé être une ordonnance ou un acte du tribunal.

Reference to judge

(6) A registrar may refer any matter ordinarily within his jurisdiction to a judge for disposition.

Renvoi à un juge par un registraire

(6) Un registraire peut renvoyer toute affaire qui relève ordinairement de sa compétence à un juge pour qu'il en dispose.

Judge may hear

(7) A judge may direct that any matter before a registrar be brought before the judge for hearing and determination.

Renvoi à un juge

(7) Un juge peut ordonner que toute affaire devant un registraire soit portée devant le juge pour audition et décision.

Registrars to act for each other

(8) Any registrar in bankruptcy may act for any other registrar.

Peuvent agir l'un pour l'autre

(8) Tout registraire en matière de faillite peut agir pour tout autre registraire.

R.S., 1985, c. B-3, s. 192; 1992, c. 27, s. 67; 2004, c. 25, s. 88.

L.R. (1985), ch. B-3, art. 192; 1992, ch. 27, art. 67; 2004, ch. 25, art. 88.

Appeals

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

Appels

Cour d'appel

193 Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants :

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193; 1992, c. 27, s. 68.

a) le point en litige concerne des droits futurs;

b) l'ordonnance ou la décision influera vraisemblablement sur d'autres causes de nature semblable en matière de faillite;

c) les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars;

d) la libération est accordée ou refusée, lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;

e) dans tout autre cas, avec la permission d'un juge de la Cour d'appel.

L.R. (1985), ch. B-3, art. 193; 1992, ch. 27, art. 68.

Appeal to Supreme Court

194 The decision of the Court of Appeal on any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that Court.

R.S., c. B-3, s. 164; R.S., c. 44(1st Supp.), s. 10.

Cour suprême du Canada

194 La décision de la Cour d'appel sur tout appel est définitive et sans appel, sauf autorisation spéciale, accordée par la Cour suprême du Canada, d'en appeler à ce tribunal.

S.R., ch. B-3, art. 164; S.R., ch. 44(1er suppl.), art. 10.

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

R.S., 1985, c. B-3, s. 195; 1992, c. 27, s. 69.

Suspension d'instance sur un appel

195 Sauf dans la mesure où le jugement dont il est interjeté appel est sujet à exécution provisoire malgré l'appel, toutes les procédures exercées en vertu d'une ordonnance ou d'un jugement dont il est appelé sont suspendues jusqu'à ce qu'il soit disposé de l'appel; mais la Cour d'appel, ou un juge de ce tribunal, peut modifier ou annuler la suspension ou l'ordonnance d'exécution provisoire s'il apparaît que l'appel n'est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable.

L.R. (1985), ch. B-3, art. 195; 1992, ch. 27, art. 69.

No stay of proceedings unless ordered

196 An appeal to the Supreme Court of Canada does not operate as a stay of proceedings, except to the extent ordered by that Court.

R.S., c. B-3, s. 166; R.S., c. 44(1st Supp.), s. 10.

Aucune suspension de procédures, à moins d'ordonnance

196 Un appel à la Cour suprême du Canada ne peut avoir pour effet de suspendre les procédures, sauf dans la mesure où celle-ci l'ordonne.

S.R., ch. B-3, art. 166; S.R., ch. 44(1er suppl.), art. 10.

Legal Costs

Costs in discretion of court

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

Frais judiciaires

Frais à la discrétion du tribunal

197 (1) Sous réserve des autres dispositions de la présente loi et des Règles générales, les frais de toutes procédures judiciaires intentées sous le régime de la présente loi, ou les frais s'y rapportant, sont laissés à la discrétion du tribunal.

TAB 2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

Headnote

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

Court considering its position when approving sale recommended by receiver.

S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.

Held:

The appeal was dismissed.

Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

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

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete

access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.
>
> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the

> perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

49 As a general rule, I do not think it appropriate for the court to go into the minutia of the process or of the selling strategy adopted by the receiver. However, the court has a responsibility to decide whether the process was fair. The only part of this

process which I could find that might give even a superficial impression of unfairness is the failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto.

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

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

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

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

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

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

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

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL.

Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

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

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

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

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

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

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

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

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

McKinlay J.A. **:**

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

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

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

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

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

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

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

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

> I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results

> in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of

an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

TAB 3

ALBERTA

RULES OF COURT

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ALBERTA
RULES OF COURT

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(5) An offeror or tenderer who is not required to be served under subrule (1) must be served with notice of an application in a foreclosure action if one or more offers or tenders have been made on secured property and the application is for one or more of the following:

(a) an order confirming sale to the plaintiff or another person;

(b) an order for possession, but not a preservation order;

(c) an order appointing a receiver and manager;

(d) a foreclosure order.

Information note

Rule 11.24 *[Notice of address for service in foreclosure actions]* specifies the persons who may file and serve on the plaintiff in a foreclosure action a notice of address for service in Alberta.

Subdivision 3
Responses, Replies and Decisions on Applications

Response and reply to application

6.6(1) If the respondent to an application intends to rely on an affidavit or other evidence when the application is heard or considered, the respondent must reply by serving on the applicant a copy of the affidavit or other evidence a reasonable time before the application is to be heard or considered.

(2) The applicant may respond by affidavit or other evidence to the respondent's affidavit or other evidence but must

(a) serve the affidavit or other evidence on the respondent a reasonable time before the application is to be heard, and

(b) limit the response to replying to the respondent's affidavit or other evidence.

(3) If either the respondent or applicant does not give the other reasonable notice, the Court may impose costs on the party who did not give reasonable notice, and the party who did not give reasonable notice is not entitled to rely on that party's affidavit or other evidence unless the Court otherwise permits.

Questioning on affidavit in support, response and reply to application

6.7 A person who makes an affidavit in support of an application or in response or reply to an application may be questioned, under oath, on the affidavit by a person adverse in interest on the application, and

(a) rules 6.16 *[Contents of appointment notice]* to 6.20 *[Form of questioning and transcript]* apply for the purposes of this rule, and

(b) the transcript of the questioning must be filed by the questioning party.

Subdivision 5
Format of Applications and Responses

Format of applications

14.53 An application to a single appeal judge or a panel of the Court of Appeal must be in Form AP-3 and must

(a) state briefly the grounds for filing the application,

(b) identify the material or evidence intended to be relied on,

(c) refer precisely to any applicable provision of an enactment or rule, and

(d) state the remedy sought.

AR 41/2014 s4

Format of memorandum

14.54 A memorandum filed on an application

(a) must be formatted in the same manner as a factum under rule 14.26(1) *[Format of factums]*,

(b) must not be longer than

(i) 10 double-spaced pages for an application for permission to appeal, or

(ii) 5 double-spaced pages for any other application,

(c) may in addition attach a chronology, where that is relevant to the application, and

(d) in an application for permission to appeal, must

(i) include a copy of the reasons for the decision proposed to be appealed, and

(ii) state the exact questions of law on which permission to appeal is requested.

AR 41/2014 s4;85/2016;36/2020

Division 5
Managing the Appeal Process

Subdivision 1
Responsibilities of the Parties and Court Assistance

Responsibility of parties to manage an appeal

14.55(1) The parties to an appeal are responsible for managing the appeal and for planning its resolution in a timely and cost-effective way.

TAB 4

2016 ONCA 225
Ontario Court of Appeal

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.

2016 CarswellOnt 4553, 2016 ONCA 225, 264 A.C.W.S. (3d) 26, 347 O.A.C. 226, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635

2403177 Ontario Inc., Applicant (Respondent/Responding Party) and Bending Lake Iron Group Limited, Respondent (Appellant/Responding Party)

David Brown J.A., In Chambers

Heard: March 8, 2016
Judgment: March 22, 2016
Docket: CA M46061 (C61637)

Counsel: Kenneth Kraft, for Moving Party, A. Farber & Partners Inc.
Robert MacRae, for Responding Party, Bending Lake Iron Group Limited

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Future rights

Debtor went into receivership with one major asset, undeveloped iron ore mine site, and consented to Sales and Investor Solicitation Process — Debtor opposed receiver's motion for court approval of asset purchase agreement with LH and sought postponement of sale — Motion judge approved sale and ordered vesting of property in LH upon filing of receiver's certificate — Debtor filed notice of appeal — Debtor did not perfect appeal within required time, and LH would not close sale agreement until debtor exhausted appeals — Receiver brought motion for declaration that debtor required leave to appeal — Motion granted — Issue was whether approval and vesting order (AVO) fell under s. 193 of Bankruptcy and Insolvency Act or if debtor required leave — Receiver submitted AVO was matter of procedure not falling within s. 193(c) — For order to involve future rights, it must involve future rights of those with economic interest in debtor company and there was no evidence that any affected Aboriginal community had such an interest — AVO affected present, existing rights of debtor's creditors and shareholders, not future rights — Debtor did not raise issue about receiver's constitutional duty to consult until appeal — Debtor's argument that sale process should be postponed to let shareholders re-finance company did not bring into play value of property — Debtor's secured lenders supported sale agreement, notwithstanding they would suffer significant shortfall — Debtor required leave to appeal AVO.

MOTION by receiver for declaration that debtor required leave to appeal sale approval and vesting order.

***David Brown J.A., In Chambers*:**

I. Overview

1 This motion considers the somewhat awkward and anachronistic appeal provisions contained in s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A. Farber & Partners Inc. was appointed receiver of the property of Bending Lake Iron Group Limited (the "Debtor") pursuant to s. 243(1) of the *BIA*. The Receiver moves for directions whether the Debtor requires leave to appeal under s. 193(e) of the *BIA* from the approval and vesting order made by the motion judge on January 8, 2016, 2016 ONSC 199 (Ont. S.C.J.), transferring all the Debtor's property to an unrelated purchaser, Legacy Hill Resources Ltd. ("Legacy Hill"). At the conclusion of the hearing, I held that the Debtor did require leave to appeal and set a timetable for its leave motion. These are my reasons for so ordering.

II. History of the Receivership

2 The Debtor went into receivership on September 11, 2014 on the application of its secured creditor, 2403177 Ontario Inc. (the "Receivership Order"). The Debtor's major asset is an undeveloped iron ore mine site located northwest of Thunder Bay, Ontario.

3 By order dated November 27, 2014, the court approved a Sales and Investor Solicitation Process for the Debtor's property (the "SISP Order"). Significantly, the Debtor consented to the SISP Order.

4 In November 2015, the Receiver moved for court approval of an asset purchase agreement it had entered into with Legacy Hill for substantially all of the Debtor's property (the "Sale Agreement"). The Debtor opposed the motion and, in turn, brought its own motion seeking a variety of relief, including the postponement of the sale of its property.

5 The motion judge approved the Sale Agreement and ordered the vesting of the Debtor's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order"). As well, the motion judge dismissed the Debtor's motion to postpone the sale and for other relief.

6 The Debtor filed a notice of appeal dated January 13, 2016 seeking to set aside the Approval and Vesting Order. Section 195 of the *BIA* provides that all proceedings under an order appealed from are stayed until the appeal is disposed of. However, the Debtor did not perfect its appeal within the time required by the *Rules of Civil Procedure*, and this court has issued a notice of intention to dismiss the appeal for delay unless it is perfected by March 22, 2016.

7 Legacy Hill is not prepared to close the Sale Agreement until the Debtor has exhausted its appeal rights in this court.

8 The Receiver moves for a declaration that the Debtor requires leave to appeal. Granting such relief would quash the Debtor's existing notice of appeal.

III. Issue on the Motion

9 The central issue on this motion is whether the Approval and Vesting Order falls into any of the categories of cases identified in s. 193 of the *BIA* in which an appeal lies as of right to this court, or whether the Debtor must obtain leave to appeal under s. 193(e). Section 193 of the *BIA* provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

10 The Debtor submits that the Approval and Vesting Order falls within ss. 193(a), (b), and (c), and therefore an appeal lies as of right. I shall consider the Debtor's submissions on each sub-section in turn.

IV. Section 193(A): Does the Approval and Vesting Order Involve Future Rights?

A. Positions of the parties

11 The Debtor submits the point in issue in its appeal involves future rights. The Debtor makes the following submissions in its factum:

> [T]here remains outstanding a Notice of Motion seeking a finding that the Receiver has violated the Crown's fiduciary duty to Aboriginal Peoples, as well as the Honour of the Crown, such duties being owed by the Receiver as an Officer of the Court. This motion has not been heard as of yet.
>
> . . . . .
>
> The future rights of the "affected Aboriginal communities" will very much be affected by the confirmation of the Vesting Order as granted by [the motion judge].

12 In order to assess this submission, some review is required of the evidence the Debtor placed before the motion judge on the sale approval motion about "affected Aboriginal communities" and of the relief the Debtor plans to seek in a further motion before the motion judge.

B. Debtor's evidence concerning "affected Aboriginal communities"

13 Mr. Henry Wetelainen, the President and CEO of the Debtor, swore an affidavit which was filed in opposition to the Receiver's motion to approve the Sale Agreement. In it, he deposed that, in early 2015, after the Receivership Order had been made, he held discussions with Legacy Hill about a possible "partnership/co-operative development in rescuing [the Debtor] from receivership." He described his discussions with Legacy Hill as attempts to attract a financial partner to assist in the refinancing of the Debtor in order to terminate the Receivership.

14 At various points in his affidavit, Mr. Wetelainen stated he had pursued those discussions as part of his "continued efforts on behalf of [the Debtor] and its creditors, shareholders, stakeholders and affected Aboriginal communities." He deposed that the termination of the receivership would have a "concurrent benefit to [the Debtor], its creditors, shareholders, stakeholders and affected Aboriginal communities."

15 Despite having pursued discussions with Legacy Hill in early 2015, Mr. Wetelainen opposed the Sale Agreement. He took the position that Legacy Hill had breached a fiduciary duty owed to the Debtor by dealing with the Receiver. Frankly, it is difficult to understand that position given that under the Receivership Order and the SISP Order, Mr. Wetelainen, as an officer of the Debtor, was not permitted to pursue the discussions he did with Legacy Hill without the knowledge and concurrence of the Receiver.

16 In any event, Mr. Wetelainen's evidence disclosed that the main reason he opposed the Sale Agreement was that he wanted more time for the Debtor to find financing to take out its secured creditors and terminate the receivership. In his affidavit, he explained why the Debtor was seeking orders to postpone approval of the Sale Agreement:

> The Orders being sought from the Court will ensure that all of the creditors, shareholders, stakeholders and affected Aboriginal communities be given an appropriate period of time pursuant to Court Order to permit [the Debtor] to complete the Corporate requirement for the purpose of providing the creditors, shareholders, stakeholders and affected Aboriginal communities to invest in Special Shares in [the Debtor] in order to retire the debt that [the applicant] has agreed to reduce to the amount as reflected in the Assets Purchase Agreement.
>
> . . . . .
>
> The net result of the successful refinancing of [the Debtor] will be that all the shareholders will have their share value protected and [the Debtor] will be required to deal with unsecured creditors in a fair fashion. At all times during the financing proceedings with [Legacy Hill], I anticipated that there would be a compromise with respect to the amount of debt owed to the Applicant.

17 In Mr. Wetelainen's view, the Sale Agreement is a "disasterous agreement that will wipe out millions of dollars of shareholder value, creditor obligations to stakeholders and various Aboriginal communities."

18 A further reason given by Mr. Wetelainen for his opposition to the Receiver's sale was that an asset purchase by Legacy Hill ran "a very substantial risk of [Legacy Hill] alienating all of the affected Aboriginal communities as well as the members of the communities where a workforce would have been drawn from and whose cooperation would have been received. The Aboriginal Employment Preferences Policy identifies these clearly articulated goals."

C. The Debtor's pending motion

19 The Debtor intends to bring a motion before the motion judge at the end of May seeking an order that it be granted leave to commence an action against the Receiver "for damages as a result of the failure of the Receiver to uphold the honour of the Crown and the Crown's fiduciary duties to Aboriginal peoples including the Aboriginal communities affected by the actions of the Receiver." In its notice of motion, the Debtor asserts it had provided "continual notice" to the Receiver that Aboriginal communities were directly affected by the receivership, yet the Receiver failed to maintain the honour of the Crown by not notifying affected Aboriginal communities of its intention to seek a sale of the Debtor's assets.

D. Analysis

20 The concept of "future rights" as a category of cases appealable to this court as of right traces its origins to the late nineteenth century federal *Winding-Up Act*.[1] The passage of time has not improved the clarity of the concept. In *Elias v. Hutchison*,[2] McGillivray C.J.A. commented, at para. 20, that "the authorities leave me in a state of uncertainty as to what a future right is at all, let alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights."

21 Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts have attempted to cloak the term "future rights" with some practical meaning. In *Ravelston Corp., Re*,[3] Doherty J.A. stated, at para. 18:

> The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal ... Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights...
>
> [Citations omitted.]

22 Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* "must refer to rights which could not at the present time be asserted but which will come into existence at a future time."

23 More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*,[4] stated, at para. 15:

> "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

24 The Debtor's argument that the Approval and Vesting Order involves the future rights of "affected Aboriginal communities" is vague and difficult to follow. Nevertheless, I do not accept it for several reasons.

25 First, for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company - i.e. its creditors or shareholders.[5] On the sale approval motion, the Debtor did not adduce evidence that any "affected Aboriginal community" had such an economic interest in the Debtor, nor did any "affected Aboriginal community" adduce such evidence on the motion. The Receiver, in its December 21, 2015 Supplemental Report to its Third Report, informed the court that based on its review of the Debtor's creditors listing, "no Aboriginal groups are creditors of [the Debtor]."

26 Second, at this stage of the process it does not lie in the Debtor's mouth to contend that the Receiver failed to give proper notice to "affected Aboriginal communities". The time to raise such an issue was when the Receiver sought approval of the SISP Order, yet the Debtor consented to that order.

27 Third, to the extent that the Approval and Vesting Order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor's creditors and shareholders, not their future rights.

28 Finally, it is clear from Mr. Wetelainen's affidavit that the Debtor's real complaint about the effect of the Approval and Vesting Order is one concerning the "commercial advantages or disadvantages that may accrue from the order challenged on appeal." Mr. Wetelainen objected to the Sale Agreement because its approval would wipe out shareholder equity and preclude efforts by the shareholders to raise financing to pay out the Debtor's secured creditors. That has nothing to do with "future rights" within the meaning of s. 193(a).

29 I conclude that the point in issue in the Debtor's challenge of the Approval and Vesting Order does not involve future rights within the meaning of s. 193(a) of the *BIA*.

V. Section 193(B): Will The Approval and Vesting Order Affect Other Cases of a Similar Nature in This Proceeding?

A. Positions of the parties

30 The Debtor submits that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceeding. In its factum, the Debtor argues that in granting the Approval and Vesting Order the motion judge failed "to deal with the rights of the affected Aboriginal communities," an issue the Debtor wishes to raise on its appeal. The Debtor argues that the same issue will lie at the heart of its motion before the motion judge later in May seeking leave to sue the Receiver. The Debtor contends that because the Approval and Vesting Order likely will affect its motion for leave to sue the Receiver, s. 193(b) of the *BIA* applies.

31 The Receiver disputes that the issues on appeal would impact other issues in the receivership.

B. Analysis

32 The jurisprudence under s. 193(b) of the *BIA* has consistently interpreted the section as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings." [6] The cases have expressed different views on whether the decisions covered by s. 193(b) can only concern rights asserted against the bankrupt by parties other than the bankrupt, or whether the issue may concern rights asserted by multiple persons against the bankrupt, rather than one person's rights arising in multiple contexts. [7] Regardless, s. 193(b) must concern "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings. [8]

33 Section 193(b) possesses several anachronistic features. First, while permitting an appeal of right on an issue that likely will arise again in an insolvency proceeding might appear to foster the efficient conduct of insolvency proceedings, in reality any automatic appeal right will slow down insolvency proceedings which usually operate on a "real-time" basis. As well, the language of s. 193(b) does not measure the overall significance of the issue to the proceeding - minor issues which might arise again are treated in the same fashion as major ones. Finally, most contemporary insolvency litigation sees one judge assigned to manage the proceeding from its inception to its end. Under a "one judge" model of case management, common or repeat issues tend to get grouped together for adjudication at one time, not at different stages of the proceeding.

34 I do not accept the Debtor's submission that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceedings.

35 The Receiver filed evidence on this motion which shows the Debtor did not raise any issue about a receiver's constitutional duty to consult "affected Aboriginal communities" either in its materials or during its submissions on the sale approval motion.

The Debtor does not dispute this evidence. Accordingly, the Debtor will be seeking to raise the duty to consult issue for the first time on appeal.

36 In the normal course, appeals are not the proper forum in which to raise brand new issues that significantly expand or alter the landscape of the litigation. [9] The burden rests on an appellant to persuade the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised in the court below. [10] It is far from clear that the Debtor would succeed in persuading this court that the interests of justice require an exception to this normal course of litigation. The Debtor faces several high hurdles.

37 First, the Debtor consented to the SISP Order which authorized the Receiver to proceed with the sales process. The Debtor did not raise the issue of a duty to consult "affected Aboriginal communities" about a sale at that time; it is difficult to conceive how it can do so now.

38 Second, it is very doubtful that the Debtor has standing to advance on appeal an argument based on the duty to consult. As the Supreme Court of Canada explained in *Moulton Contracting Ltd. v. British Columbia*, [11] at para. 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights.
>
> [Citations omitted.]

39 No evidence was led on this motion to suggest that any Aboriginal group had authorized the Debtor to represent it for the purpose of asserting rights under s. 35 of the *Constitution Act, 1982*.

40 Third, s. 193(b) of the *BIA* requires that the order sought to be appealed is likely to affect "other cases of a similar nature in the bankruptcy proceedings." Here, the Approval and Vesting Order disposed of all the property of the Debtor. Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

41 The final hurdle is that only after the Debtor received the January 8, 2016 reasons of the motion judge granting the Approval and Vesting Order did it launch its motion for leave to sue the Receiver for its alleged breach of the duty to consult. That sequence of events strongly suggests that, having unsuccessfully opposed the Receiver's sale, the Debtor looked for some procedural device to fit itself into s. 193(b). Its motion for leave to sue the Receiver was the result. In my view, a party cannot create a "case" after the impugned order was made in order to invoke s. 193(b). Consequently, the Debtor's pending motion for leave to sue does not qualify as a case of a similar nature in the receivership.

42 For those reasons, the Approval and Vesting Order does not fall within s. 193(b) of the *BIA*.

VI. Section 193(C): Does the Property Involved in the Appeal Exceed in Value $10,000?

A. Positions of the parties

43 The Debtor submits that the Approval and Vesting Order will transfer property in excess of $10,000 and, therefore, falls within s. 193(c) of the *BIA* because "the property involved in the appeal exceeds in value ten thousand dollars."

44 While the actual sale price is subject to a confidentiality order pending the closing of the transaction, there is no dispute that the sale price significantly exceeds $10,000. Nor is there any dispute that if the transaction closes, the Debtor's secured lenders will suffer a significant shortfall. [12]

45 On its part, the Receiver submits that an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).

B. Analysis

46 The history of the interpretation of s. 193(c) is an unusual one. Under the modern approach to statutory interpretation, the words in a statute must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act. [13] By contrast, as the Manitoba Court of Appeal observed at para. 9 in *Dominion Foundry Co., Re*, [14] the interpretation of the phrase "the property involved in the appeal" found in s. 193(c) historically has proceeded in a different fashion, drawing heavily upon cases interpreting a similar provision in the federal *Winding-Up Act*, [15] as well as on the jurisprudence considering former provisions in the *Supreme Court of Canada Act* which linked the right to appeal to "the amount or value of the matter in controversy." [16]

47 Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation. [17] However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) - with the bar set low to fall within s. 193(c) [18] - or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings. [19]

48 In my view, two contextual factors should inform any application of the subsection.

49 First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.*, the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.

50 Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

51 For example, if one were to accept the Debtor's argument that whenever the value of the property transferred by a sales approval and vesting order exceeded $10,000 an appeal as of right to this court exists, then, as the Manitoba Court of Appeal noted, at para. 7, in *Re Dominion Foundry Co.*, an appeal as of right would exist in almost every case because very few insolvency cases would involve property that did not exceed the statutory threshold. Blair J.A. repeated that concern in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, at para. 17. By contrast, a challenge to a sales approval and vesting order obtained by a debtor company under the *CCAA* would require obtaining leave to appeal under s. 13 of that Act.

52 In my view, no principled basis exists to distinguish the treatment of a sale by a receiver or trustee, from that by a *CCAA* debtor company. In each case, approval of the sale would require consideration of the types of principles articulated in *Royal Bank v. Soundair Corp.*. [20] A need for the legislative harmonization of appeal rights in insolvencies is apparent.

53 In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.

Is the order procedural in nature?

54 The caselaw holds that s. 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate's assets.

55 In *Re Dominion Foundry Co.*, the motion judge had dismissed a request to set aside a sale of assets by a trustee in bankruptcy on the grounds that the sale was improvident and the trustee had acted improperly. The Manitoba Court of Appeal held, at para. 20, that although the sale involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c). Consequently, where a person seeks to challenge an order on appeal by calling into question the methods employed by a trustee to dispose of the assets of the bankrupt, the order involves a matter of procedure which does not fall within s. 193(c).

56 The Alberta Court of Appeal reached a similar result in *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*.[21] There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.

57 O'Leary J.A., following *Re Dominion Foundry Co.*, held that Alternative had no right of appeal under s. 193(c). He reasoned, at para. 12, that the bankruptcy judge's order was essentially a procedural direction to the trustee in the face of Alternative's challenge to the method by which the equipment was sold, by-passing the tender process.

58 In the present case, the overwhelming majority of the Debtor's grounds of appeal are process-related, involving issues concerning the Debtor's dealings with Legacy Hill following the Receivership Order, the Receiver's disclosure of information about the Sale Agreement, the negotiation process it followed with Legacy Hill, its treatment of persons affected by the Sale Agreement, and the adequacy of notice it gave to "affected Aboriginal communities." Those grounds of appeal are procedural in nature and do not fall within s. 193(c).

Does the order put into play the value of the Debtor's property?

59 The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not call into play the value of the debtor's property. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, Blair J.A. considered whether an order appointing a receiver over assets of debtor corporations that exceeded $10,000 in value fell within s. 193(c). He concluded that it did not stating, at para. 17, that "an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval."

60 In the present case, the Approval and Vesting Order marked the final step in the Receiver's monetization of the Debtor's assets. The property of the Debtor is to be converted through the Sale Agreement into a pool of cash and, as stated in the Approval and Vesting Order, "the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets." The ground of appeal advanced by the Debtor to the effect that the sale process should be postponed to let shareholders re-finance the company does not bring into play the value of the Debtor's property, so s. 193(c) does not apply.

Does the order result in a gain or loss?

61 Finally, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. In *Trimor Mortgage Investment Corp. v. Fox*,[22] Paperny J.A. described this aspect of s. 193(c) at para. 8:

> The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209,

which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

62 The Approval and Vesting Order did not determine the entitlement of any party with an economic interest in the Debtor to the sale proceeds. In that sense, no interested party gained or lost as a result of the order.

63 However, one ground of appeal set out in the Debtor's notice of appeal is that the motion judge erred in law in finding that the Receiver had not acted improvidently. In its factum, the Debtor contends that the Receiver's sale of its property is improvident because it would result in a loss of $125 million to its shareholders. In support of that ground of appeal, on this motion the Debtor relied on a memo prepared by Broad Oak Associates dated February 3, 2014, half a year before the Receivership Order was made. Using an iron ore pellet price of US$100 per tonne, Board Oak placed the value of a fully-developed Bending Lake iron ore project in the range of US$100 million to $300 million. This, the Debtor argues, shows that the Approval and Vesting Order selling its undeveloped mine site assets resulted in a loss to shareholders of an amount exceeding $10,000 in value, giving it a right to appeal under s. 193(c).

64 I do not accept the Debtor's submission. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the Debtor must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The Debtor must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal. [23]

65 In the present case, the evidentiary record discloses that there were no competing bids for the Debtor's property for the motion judge to consider; only Legacy Hill expressed a serious enough interest to lead to a Sale Agreement with the Receiver.

66 Neither the Debtor nor its shareholders put before the motion judge a valuation of the Debtor made near in time to the execution of the Sale Agreement. Mr. Wetelainen did not attach the pre-receivership Broad Oak memo to the affidavit he placed before the motion judge. By contrast, the Receiver reported to the motion judge that the market price of iron ore had declined to the mid-US$50 per tonne range, making a court sanctioned sales process "very challenging in the current market conditions." The market price for iron ore reported by the Receiver was far below the pre-receivership assumptions used by Broad Oak.

67 Nor did Mr. Wetelainen depose on the sale approval motion that the Debtor's property was worth over $100 million. Instead, in his affidavit he stressed the need to postpone the sale to allow the Debtor's shareholders time to negotiate a compromise of the secured debt and then pay off the compromised debt.

68 Finally, the Debtor's secured lenders supported the Sale Agreement, notwithstanding that they would suffer a significant shortfall on the sale.

69 Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than $10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

70 I conclude that the Approval and Vesting Order does not fall within s. 193(c) of the *BIA*.

VII. Disposition

71 For these reasons, I granted the Receiver's motion and ordered that the Debtor requires leave to appeal from the Approval and Vesting Order. The Debtor's notice of appeal dated January 13, 2016 is quashed.

72 The parties agreed to the following timetable for the filing of materials on the Debtor's leave to appeal motion:

(i) The Debtor would file its leave materials by March 28, 2016;

(ii) The Receiver would file any responding materials by April 4, 2016;

(iii) The Debtor would file reply materials, if any, by April 11, 2016.

73 I directed that the leave materials be placed before a panel for consideration on April 12, 2016. I did so, in part, to obviate the need for Debtor's counsel to travel down to Toronto for an oral Chambers leave motion.

74 The parties may serve their leave materials electronically. Although the parties will need to file the appropriate number of hard copies of their materials in accordance with the *Rules of Civil Procedure*, they may file with the court an electronic copy either by email or by USB key. The date of electronic filing will be deemed the date of the filing of the materials with the court.

75 The parties agreed that the costs of this motion would be reserved to the panel hearing the leave to appeal motion.

Motion granted.

Footnotes

1 Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *Clarke v. Union Fire Insurance Co.* (1886), 13 O.A.R. 268 (Ont. C.A.) at pp. 294-295.

2 (1981), 14 Alta. L.R. (2d) 268, 121 D.L.R. (3d) 95, [1981] A.J. No. 896 (Alta. C.A.).

3 (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

4 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.).

5 See *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at p. 242 quoting with approval *Kern Agencies Ltd., Re* (1931), 12 C.B.R. 279 (Sask. C.A.), at p. 281.

6 *Wong v. Luu*, 2013 BCCA 547 (B.C. C.A.), at para. 21.

7 See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Norbourg Gestion d'actifs inc., Re*, 2006 QCCA 752, 33 C.B.R. (5th) 144 (C.A. Que.) at paras. 9-11.

8 *Global Royalties Ltd. v. Brook*, 2016 ONCA 50 (Ont. C.A.), at para. 19.

9 *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (Ont. C.A.), at para. 11.

10 *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130 (Ont. C.A.), at para. 18.

11 2013 SCC 26, [2013] 2 S.C.R. 227 (S.C.C.).

12 In its Third Report dated November 30, 2015, the Receiver informed the court that the Debtor's liabilities totaled approximately $12.4 million consisting of (i) secured loans from the applicant in excess of $3.5 million, (ii) payroll deduction and HST claims by the Canada Revenue Agency of approximately $405,000, and (iii) unsecured liabilities of close to $8.5 million.

13 *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

14 (1965), 51 W.W.R. 679 (Man. C.A.).

15 Such as *United Fuel Investments Ltd., Re*, [1962] S.C.R. 771 (S.C.C.), at p. 774.

16 *Trimor Mortgage Investment Corp. v. Fox*, 2015 ABCA 44 (Alta. C.A.), at para. 8; *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)*, 2003 BCCA 322, 44 C.B.R. (4th) 218 (B.C. C.A. [In Chambers]) at para. 12; *Newfoundland & Labrador Refining Corp. v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 (N.L. C.A.) at para. 18.

17 *Wong v. Luu*, at para. 23; *Re Norbourg Gestion d'actifs inc*, at para. 9.

18 *Wong v. Luu*, at para. 23.

19 *Stelco Inc., Re* (2005), 8 C.B.R. (5th) 150 (Ont. C.A. [In Chambers]), at para. 4.

20 (1991), 4 O.R. (3d) 1 (Ont. C.A.).

21 1997 ABCA 273 (Alta. C.A. [In Chambers]).

22 2015 ABCA 44 (Alta. C.A.).

23 See, for example, *Faillis and Deacon v. United Fuel Investments Ltd.* where, at pp. 773-774 the Supreme Court of Canada described the specific evidence of loss contained in the record.

End of Document

TAB 5

2020 ABCA 442
Alberta Court of Appeal

DGDP-BC Holdings Ltd v. Third Eye Capital Corporation

2020 CarswellAlta 2308, 2020 ABCA 442

DGDP-BC Holdings Ltd. (Applicant) and Third Eye Capital Corporation (Respondent) and Accel Canada Holdings Limited and Accel Energy Canada Limited (Respondent) and Pricewaterhousecoopers Inc. (Respondent)

J.D. Bruce McDonald J.A.

Heard: December 2, 2020
Judgment: December 4, 2020
Docket: Calgary Appeal 2001-0125-AC

Counsel: S. Babe, I. Aversa, T.L. Czechowskyj, Q.C., for Applicant, DGDP-BC Holdings Ltd
C.D. Simard, K.R. Cameron, A.E. Teasdale (no appearance), I. Rosu (no appearance), for Respondent, Third Eye Capital Corporation
J. Cameron, R. Gurofsky (no appearance), for Respondent, Pricewaterhouse Coopers Inc.
No one, for Respondent, Accel Canada Holdings Limited
No one, for Respondent, Accel Energy Canada Limited

Subject: Civil Practice and Procedure; Insolvency

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles

Parties were involved in bankruptcy proceedings — Receivership order was granted in favour of respondent corporation — Applicant holding company claimed that portion of receivership order was improper, dealing with ranking of charges — Company applied for leave to appeal this portion of order — Company's application granted — Receivership orders generally were discretionary, and subject to deference — In subject case, receivership order was in violation of applicable bankruptcy law on ranked charges — Company did not consent to violation — Defined issue existed for appeal — Appeal was to be heard, on issue of whether court order could override priority of charges previously in place.

APPLICATION by company for leave to appeal, from portion of bankruptcy order.

***J.D. Bruce McDonald J.A.*:**

Introduction

1 This application is brought by the Applicant, DGDP — BC Holdings Ltd, pursuant to section 193(e) of the *Bankruptcy and Insolvency Act* (*BIA*) for permission to appeal a portion of the Receivership Order granted by the supervising judge on June 12, 2020.

2 The Receivership Order determined, amongst other matters, the ranking of charges including subordinating the charges that had previously been set forth in an earlier order granted in proceedings commenced under of the *Companies' Creditors Arrangement Act (CCAA)*.

3 This application is being opposed by both Third Eye Capital Corporation (TECC) as well as Pricewaterhousecoopers Inc (PWC).

4 The interest of 228139 Alberta Ltd (228) in the interim financing loan and all of its claims relating thereto, were formally assigned to the applicant pursuant to the Assignment of DIP Indebtedness and Security Agreement dated June 10, 2020.

Facts

5 Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively the Accel Entities) encountered financial difficulties in 2019 and on October 21, 2019, the companies filed Notices of Intention to make a proposal pursuant to section 50.4 of the *BIA*.

6 On November 22, 2019, the proceedings were taken up and continued under the *CCAA* and PWC was appointed as Monitor over the assets of the Accel Entities.

7 As part of the *CCAA* proceedings, an interim financing loan was approved by the court in November 2019. The interim financing lenders at that time were TECC and 228.

8 Subsequent to the interim financing loan being approved, 228 approached the applicant to fund its portion of the interim financing which it did. 228 subsequently assigned its interest in the loan facility to the applicant as mentioned previously. The applicant ultimately funded the entire amount required to be advanced by 228 throughout the *CCAA* proceedings.

9 The approval in November 2019 provided that the interim financing loans were ordered priority over the other debts of the Accel Entities.

10 At the time of the Receivership Order, the applicant was a co-interim lender with TECC. The amount outstanding was approximately $38,000,000 with the applicant funding approximately 46% of that amount and TECC the balance.

11 On December 13, 2019, the supervising judge approved the Sale and Investment Solicitation Process (SISP) for the sale of the assets of the Accel entities.

12 Prior to the *BIA* proceedings in October 2019, ICC Credit Holdings (ICC) had been a lender to the Accel Entities but had assigned that loan to another company Stream Asset Financial Winterfresh (Stream Asset Financial).

13 The supervising judge granted an order enabling the Accel Entities, ICC and Stream Asset Financial to make cooperative bids for the assets of the Accel Entities. Ultimately, Stream Asset Financial, ICC, and TECC submitted competing bids.

14 On April 29, 2020 the supervising judge granted an order that affirmed ICC's elimination from the process. The remaining two bidders for the assets of the Accel Entities were TECC and Stream Asset Financial. By court order granted on May 29, 2020, TECC's bid for the assets was declared to be the successful bid. TECC's bid was, in part, a credit bid.

15 On June 5, 2020 TECC filed and served an application seeking to appoint PWC (which had been the monitor in the *CCAA* Proceedings) to be the Receiver of the Accel Entities. This was to facilitate the sale of the Accel Entity assets to TECC. This application was heard by the supervising judge on June 12, 2020. It was opposed by the applicant. Notwithstanding that opposition however, the supervising judge granted the Receivership Order.

16 In addition to appointing PWC as the Receiver of the Accel Entities, the Receivership Order provided in paragraph 28 the following priorities:

i. Receiver's Charge;

ii. The Receiver's Borrowings Charge;

iii. The Administrative Charge as defined in the *CCAA* Proceedings;

iv. The Interim Lenders' Charge as defined in the *CCAA* Proceedings;

v. The Intercompany Advance Charged as defined in the *CCAA* Proceedings;

vi. The Directors Charge as defined in the *CCAA* Proceedings.

17 Subsequent to the Receivership Order, TECC has funded an additional $7,200,000 in interim financing required by the Receiver and this is secured by the Receivers Borrowings Charge.

Decision

18 This application is brought pursuant to section 193(e) of the *BIA* seeking permission to appeal paragraph 28 of the Receivership Order. The factors to be considered on an application for permission to appeal under section 193(e) of the *BIA* are as follows:

- Is the point of appeal of significance to the bankruptcy practice generally?
- Is the point of significance to the action itself?
- Is the appeal *prima facie* meritorious?
- Will the appeal will unduly hinder the progress of the action? And,
- Does the judgment or order appear to be contrary to law, amounting to an abuse of judicial power, or involve an obvious error causing prejudice, for which there is no other remedy?

See *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (Alta. C.A. [In Chambers]) at para 12; see also *Dykun v. Odishaw*, 1998 ABCA 220 (Alta. C.A.) at para 4; *Smith v. Pricewaterhousecoopers Inc.*, 2013 ABCA 288 (Alta. C.A.) at para 11; *2003945 Alberta Ltd. v. 1951584 Ontario Inc.*, 2018 ABCA 48 (Alta. C.A.) at para 31.

19 It is the applicant's position that the supervising judge erred when she provided in the Receivership Order what, in effect, amounted to a reorganization of the security priorities that had been previously established in the original *CCAA* proceedings. In support of its contention, the applicant asserts that the court considered no provision of the *BIA* or any other statute allowing a Receiver's Borrowings charges to be granted, let alone be granted a priority to existing court charges.

20 The applicant further argues that section 243(7) of the *BIA* is clear that the discretion in section 243(6) to grant a charge securing the Receiver's fees, does not extend to a Receiver's Borrowing charges incurred in the operation of the debtor's business. Furthermore, the applicant asserts that the reshuffling of the priorities in this case is prohibited by section 11.2(3) of the *CCAA* since it never consented to this re-ordering. Section 11.2(3) of the *CCAA* provides:

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

21 Simply put, the applicant's position is that the court cannot grant an order in Receivership proceedings that would have the effect of changing the ranking of interim financing charges so that it would take priority over the original interim financing charge without its consent as one of the original interim financers.

22 The applicant also argues that there is a danger in permitting the terms of the Receivership Order to stand, as it would set a dangerous precedent that could unduly hinder, if not kill altogether, the ability of a debtor's insolvency proceedings under the *CCAA* or otherwise to obtain any form of interim financing.

23 In other words, the issue that is being raised can be stated as follows:

Can an order made in proceedings under the BIA or pursuant to section 13(2) of the Judicature Act, legally override the validity and priority of the charges contained in an earlier order granted under the CCAA in the same insolvency proceedings, without the consent of the person in whose favour the provision relating to validity and priority was given?

24 As mentioned a moment ago, there are five factors used to consider in determining whether permission to appeal ought to be granted. To reiterate, these are: whether the point raised on appeal is significant to the bankruptcy practice generally; whether the point on appeal is significant to the action itself; whether the appeal is *prima facie meritorious*; whether the appeal will unduly hinder the progress of the action; whether the order appealed seems to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice for which there was no remedy.

25 I will now deal with each factor in turn.

Is the point raised on appeal significant to the bankruptcy practice generally?

26 There has been no authority cited to me dealing with judicial interpretation of section 11.2(3) of the *CCAA*. Indeed no such authority seems to exist.

27 It seems evident that 228 and the applicant did proceed with the interim financing on the basis of the *CCAA* order as to the priority of the security charges for the advancement of their funds.

28 It is further evident that this issue will be of importance to the bankruptcy practice generally. Namely, whether a subsequent Receivership order can re-order the priorities previously granted in a *CCAA* order without the consent of one of the parties for whose benefit it was.

Is the point raised of significance to the action itself?

29 Again it seems clear to me that the applicant and its assignor 228, in advancing the interim funds, relied upon the provisions contained in the *CCAA* order and to have that varied after they have advanced millions of dollars under the assurance of the earlier order, is clearly a matter that is significant to this action as well.

Is the prospective appeal prima facie meritorious?

30 It is argued that the granting of a Receivership Order pursuant to either section 241 of the *BIA* or section 13(2) of the *Judicature Act*, is a discretionary one and that the judge's discretion is owed deference on appeal.

31 However, it seems that there is a credible argument that a judge's discretion cannot override the clear provision of a statute in this case section 11.2(3) of the *CCAA*. As stated previously, no authority has been cited to me dealing with this section and I have not been able to locate any either. Therefore, it seems to me that the applicant has an arguable case and that is all that is required to satisfy this requirement: *Third Eye Capital v. B.E.S.T. Active 365 Fund*, 2020 ABCA 160 (Alta. C.A.) at para 10.

Will the appeal unduly hinder the process of the insolvency proceedings?

32 PWC argued against the application and asserts that the onus is on the applicant to establish, through affirmative evidence, that the appeal will not unduly hinder the progress of the Receivership.

33 Court was advised that PWC has brought an application returnable on December 4 for an order to approve the sale of the assets of Accel Energy Canada Limited. It is asserted that a significant portion of the interim borrowings will be repaid from the sales proceeds.

34 Court was further advised that it is anticipated that the sale of the assets of Accel Holdings Limited, will occur in the first quarter of 2021. At that time likely all the interim financing will be repaid.

35 Presently, nothing is certain regarding the ultimate sale of the assets or the anticipated amount of the proceeds available to repay the interim financing. It may well be that by the time an appeal is argued before this Court, the applicant has been paid out in full and therefore the issue in one sense would be moot. However, we do not know at this time whether that will happen or not.

36 Moreover, the point is an important one to the bankruptcy practice generally and a matter that should be determined.

Is the Receivership Order at paragraph 28 contrary to the law?

37 It has been argued that the Receivership Order was a discretionary one and that the supervising judge's discretion ought to be accorded deference. This generally speaking is quite correct.

38 However, what is being asserted here is that paragraph 28 of the Receivership Order flies in the face of the express provision of section 11.2(3) of the *CCAA* and accordingly cannot stand given the applicant's lack of consent.

39 In conclusion, it seems to me that having regard to the totality of the factors but in particular the first and the fact that there is no authority on point, that the application for permission to appeal ought to be granted and it is on the following issue:

> • *Can an order made in proceedings under the BIA or pursuant to section 13(2) of the Judicature Act, legally override the validity and priority of the charges contained in an earlier order granted pursuant to the CCAA in the same insolvency proceedings, without the consent of the person in whose favour the provision relating to validity and priority was given?*

Discussion Re Costs

40 Each party will bear their own costs of this application.

Application granted.

End of Document

TAB 6

2004 CarswellAlta 1183
Alberta Court of Queen's Bench

Bearcat Explorations Ltd., Re

2004 CarswellAlta 1183, 3 C.B.R. (5th) 167

In the Matter of the Bankruptcy of Bearcat Explorations Ltd.

In the Matter of Bankruptcy of Stampede Oils Inc.

In the Matter of the Proposals of Bearcat Explorations Ltd. and Stampede Oils Ltd.

Romaine J.

Heard: May 27, 2004
Judgment: May 27, 2004
Docket: Calgary BK01-084659, BK01-084660

Counsel: K. Barr for Proposal Trustee
C. Russell for Bearcat Exploration, Stampede Oils
Ms A. Moulton, J. Kruger, D. Vermette for Knox LLC
R. Beeman for Anadarko
T. Czechowskyj for Locke, Stock & Barrel
Ms J. McJannet for Interim Receiver
B. Davison for Trican

Subject: Insolvency; Estates and Trusts

Headnote

Bankruptcy and insolvency --- Administration of estate — Miscellaneous issues

Creditor applied for order granting approval for it to advance debtor-in-possession ("DIP") financing of up to $450,000 to bankrupt oil companies — Application allowed — Court has inherent jurisdiction under Bankruptcy and Insolvency Act to order DIP financing — Funds were to be used only for purpose of funding bankruptcy proceedings, allowing bankrupt companies to continue in business during proposal process and for preservation of bankrupts' assets for benefit of creditors.

APPLICATION by creditor for order granting approval for it to advance debtor-in-possession financing to bankrupt oil companies.

Romaine J. **(orally):**

1 Through the efforts of Mr. Czechowskyj, I have received a letter from the office of the Superintendent of Bankruptcy, Ms. Maj, the Division Assistant Superintendent, that advises me that the Senate Committee on Banking Trade and Commerce issued a report in the fall of 2003 recommending that amendments be made to both the *Bankruptcy and Insolvency Act* and the *Company's Creditors Arrangement Act* to specifically provide for DIP financing in corporate reorganizations. However, she also advises that the Superintendent of Bankruptcy wishes to remain neutral on this issue at this time.

2 Further to my refusal last week to allow DIP financing that would rank in priority to Knox LLC, Locke, Stock & Barrel Company Ltd. now applies for an order granting approval for it to advance debtor-in-possession financing of up to $450,000 to Bearcat Exploration Ltd. and Stampede Oils Inc. to be a second charge on the assets of Bearcat and Stampede, ranking after the security of Knox but prior to all other secured and unsecured creditors.

3 This application is supported by the secured creditors other than Knox, and, albeit reluctantly, by the unsecured creditors who were represented at the hearing. It is opposed by Knox and Anadarko, for many of the same reasons they opposed the previous application.

4 The Proposal Trustee supports the application on the basis that, without this funding, the issues between Knox and Bearcat and Stampede will not be resolved through a trial process, and that finality on these issues is important to the creditors generally.

5 The first issue, which I did not decide at the time of the last application, is whether DIP financing is available or appropriate under proposal proceedings pursuant to the *Bankruptcy and Insolvency Act*, or whether it should only be available pursuant to the *Companies' Creditors Arrangement Act*. Counsel have been unable to refer a case to me where DIP financing was considered by a court overseeing a bankruptcy proposal process, other than *AgriBio Tech Canada Inc.*, which I have previously indicated is not helpful due to its unusual facts.

6 The courts have found authority for the use of DIP financing in CCAA scenarios both under the legislation and through the exercise of their inherent jurisdiction. The brevity of the CCAA and its remedial nature has allowed the courts to be creative in ensuring the objects of the legislation are met.

7 In contrast, the BIA proposal provisions are specific and detailed. They are designed to provide a quick and inexpensive process for an insolvent debtor to resolve issues with its unsecured creditors and emerge from the proposal process. However, there is nothing in these provisions that precludes the concept of super-priority financing, nor would DIP financing be in conflict with the proposal provisions under the BIA.

8 Inherent jurisdiction is a "residual source of powers, which the court may draw upon as necessary whenever it is just and equitable to do so, in particular, to ensure the observance of the due process of law ... to do justice between the parties and to secure a fair trial between them.": in *Royal Oak Mines Inc., Re* (14 March 1999) Ontario Court File No. 98-CL-3278 (O.S.C.J.) (Com. List) [1999 CarswellOnt 988 (Ont. Gen. Div. [Commercial List])], Farley J. at paragraph 22, citing Halsbury, Volume 37, 4th edition, at paragraph 14. Because it is an extraordinary power, it should be exercised only sparingly and in a clear case: *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.), at 480.

9 I am satisfied that I have the authority through the exercise of inherent jurisdiction to order DIP financing in an appropriate case involving a proposal under the BIA, although such cases may be rare. This is an extraordinary case.

10 As in the previous application, the most important factor to consider is whether the benefit of the financing clearly outweighs the prejudice to the creditors whose security is being subordinated to financing: *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]). Given that the proposed financing would no longer have priority over the secured interests of Knox, the balance of equities now rests with granting the order rather than refusing it.

11 The issues before the court relating to Knox's claim are serious issues. In order to ensure that they are determined by a fair trial so that justice will be done between the parties and the interests of all creditors determined in accordance with due process, the application for DIP financing in its present form should be granted.

12 I appreciate that Knox may be prejudiced in its capacity as an unsecured creditor and that it may be a substantial unsecured creditor after the trial has finished. It shares that potential prejudice, however, with the other unsecured creditors, and not as in the previous application, unequally given its status in the litigation.

13 I also take note of the timing of this application and the lack of disclosure given to unsecured creditors prior to their vote on the proposal. That is an issue for another day. So is whether or not the proposal is doomed to failure as that depends, to a great extent, on the outcome of the proceedings before me between Knox and Bearcat and Stampede.

14 I have considered Knox's submission that the funding is only sufficient to take Bearcat and Stampede through the litigation process. While DIP financing orders are normally only made where there is a reasonable prospect of successful restructuring, this is only one of the factors that can be taken into account by a court. In making this decision, I have noted the amount of

financing applied for relative to the large amounts owed to creditors. Without this funding, there appears to be a substantial risk that the issues between Knox and the insolvent companies will not be determined. Therefore the benefit of such financing, in this unusual case, outweighs the potential prejudice to creditors.

15 I direct that the funds be administered through the Interim Receiver who may apply for direction and may enter into the appropriate protocol with the Proposal Trustee to ensure that duplication of effort is avoided. The funds are only to be used for the purpose of funding the litigation as set out in Exhibits 3 and 4 of the examination for discovery of Mr. Locke, to allow Bearcat and Stampede to continue in business during the proposal process and for the preservation of their assets for the benefit of creditors. They are not to be used to repay existing indebtedness to Mr. Locke or any other third party, either principle or interest. The order is to include a two day comeback provision for creditors who did not receive notice of this application.

16 Is there anything else that needs to be discussed with respect to the terms of the order? Mr. Kruger?

MR. KRUGER: My Lady, I think you captured it by giving leave to the Interim Receiver to come back to you because I would think things, such as whether the amount should — the full amount should immediately be paid or not, factor into things. One wouldn't want to have a situation where we get to trial next week, things don't go well for Bearcat and Stampede, and suddenly we have 50 of the $450,000 on the table and the rest not. But I should leave that for Mr. Mann who unfortunately can't be here today either.

THE COURT: Right

MR. KRUGER: Ms. McJannet is in his place. But I think you've captured in the order that matter. Of course what remains is the question of costs of the first application of Locke, Stock & Barrel which we would submit they lost. We won and we should have those costs.

THE COURT: Right, and perhaps Mr. Czechowskyj would have something to say with respect to costs of this application so ...

MR. CZECHOWSKYJ: Right, I think — My Lady, obviously I'd be submitting that we be entitled to costs of this application since they balance each other out and both parties are entitled to one set of costs which should be the same, I would submit.

THE COURT: Okay. Mr. Kruger?

MR. KRUGER: The difference, I would submit, is that this is DIP funding. The company comes to the Court, essentially it's the insolvent's, asking for the indulgence. We oppose on reasonable basis. This is — this is new territory in law and certainly there's no basis for a cost order against us. But where they came with their first application, lost that, where Locke, Stock & Barrel came from the outside we should have those costs with respect.

THE COURT: Mr. Kruger, I appreciate those differences but I am going to direct that each party bear their own costs of both applications. Ms. McJannet, I know you are here for Mr. Mann. It is my direction that the Interim Receiver can come back and ask for direction, is that enough for you today or ...

MS. MCJANNET: I think that that's enough for us today and subject to what Mr. Kruger has said and things —

THE COURT: Right.

MS. MCJANNET: — like that I think that that suffices.

THE COURT: Okay.

MR. KRUGER: The one thing which we should probably deal with in that matter, My Lady, but which I want to give notice is obviously we want payment out of that amount of the $25,000 —

THE COURT: Yes.

MR. KRUGER: — owed to us.

THE COURT: Yes, and I did not mean to exclude that. That is included in Exhibits 3 or Exhibit 4, I believe.

MR. KRUGER: Yes.

THE COURT: And it is not excluded from what I have indicated —

MR. KRUGER: Thank you —

THE COURT: — would be proper. Mr. Czechowskyj, anything?

MR. CZECHOWSKYJ: I don't think so, My Lady. I've got a draft order prepared that I'll circulate to my friends and I'm sure we can work out the terms.

THE COURT: Okay. Why do we not leave that and I will give you an opportunity to look at the order and if there is any issue arising from that then I am available.

MR. CZECHOWSKYJ: Yeah, are you around for the rest of this week, My Lady, or ...

THE COURT: Yes.

MR. CZECHOWSKYJ: Okay.

THE COURT: Well, just not much.

MR. KRUGER: And —

MR. CZECHOWSKYJ: No, but fair enough. We'll get this done this afternoon then is what I'd anticipate.

THE COURT: Right. Okay.

MR. KRUGER: My Lady, what we have before the Court as well is a motion for the stay to be lifted so that we can commence receivership —

THE COURT: Right.

MR. KRUGER: — proceedings and maybe that is something which we should just adjourn to the trial and —

THE COURT: Right.

MR. KRUGER: — come at the end of trial depending upon what you may find.

THE COURT: Okay.

MR. KRUGER: I may or I may not go forward with that application.

THE COURT: Okay. Mr. Czechowskyj?

MR. CZECHOWSKYJ: Fair enough, My Lady. I was just going to comment on that that I also have instruction to bring a cross-motion to have our own Receiver appointed. So just so that everybody's on notice that if we get to that stage that's also supported by Coastline and by Topham.

THE COURT: Okay. So —

MR. CZECHOWSKYJ: But we'll let that —

THE COURT: — I will —

MR. CZECHOWSKYJ: — leave that for another day.

THE COURT: — adjourn your application. Perhaps I should just say sine die, Mr. Kruger, on —

MR. KRUGER: Yes, that's good.

THE COURT: — the basis that —

MR. KRUGER: That's good, My Lady.

THE COURT: — we will deal with that after the trial.

MR. KRUGER: This matter is not going to get less complex, My Lady.

THE COURT: No. Unfortunately. So we are going to continue then the — is it the third week in — I am sorry.

MR. KRUGER: The (INDISCERNIBLE), My Lady.

THE COURT: The third week? We are ready to continue?

THE COURT CLERK: Yeah. See you in June.

THE COURT: If not before. Thank you.

MR. CZECHOWSKYJ: Thank you, My Lady.

THE COURT CLERK: Order in Court.

17 JUDGMENT CONCLUDED

Application allowed.

TAB 7

2015 CarswellOnt 5295
Ontario Court of Appeal

8527504 Canada Inc. v. Sun Pac Foods Ltd.

2015 CarswellOnt 5295, 23 C.B.R. (6th) 52, 252 A.C.W.S. (3d) 193

8527504 Canada Inc., Responding Party (Applicant) and Sun Pac Foods Limited, Respondent

8527504 Canada Inc., Responding Party (Applicant) and Liquibrands Inc., Moving Party (Respondent)

K. Feldman J.A., In Chambers

Heard: March 31, 2015
Judgment: April 2, 2015
Docket: CA M44532, M44533

Proceedings: refusing leave to appeal *8527504 Canada Inc. v. Liquibrands Inc.* (2014), 2014 ONSC 7015, 2014 CarswellOnt 17188, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *8527504 Canada Inc. v. Liquibrands Inc.* (2015), 2015 ONSC 891, 2015 CarswellOnt 1628, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: David E.Wires, Krista Bulmer for Mopving Party, Liquidbrands Inc.
Harvey Chaiton, Sam Rappos for Responding Party, 8527504 Canada Inc.
Anthony O'Brien for Respnding Party, BDO Canada Limited, Court-Appointed Receiver

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

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Motion judge made three orders on motions brought by L Inc., numbered company, and B Ltd., receiver for S Ltd. appointed by court under s. 243 of Bankruptcy and Insolvency Act — First motion was request by B Ltd. for order approving its reports and permitting it to pay amount realized on assets of S Ltd. to numbered company — L Inc., as second secured creditor, asked that those funds by paid into court pending determination by trial of issues raised in lawsuit brought by S Ltd. and L Inc. against numbered company for alleged wrongdoing that caused S Ltd. to fail — Motion judge granted B Ltd.'s motion — Second motion was brought by numbered company for order appointing B Ltd. as receiver of L Inc. — Motion judge found it just and equitable to appoint B Ltd. as receiver of L Inc. — Third issue involved procedure for dealing with lawsuit against numbered company, which was considered by receiver as asset of S Ltd. receivership, and of L Inc. receivership once ordered — L Inc. requested appointment of separate receiver to pursue litigation on grounds that B Ltd. did not intend to spend money on litigation — Motion judge directed B Ltd. to conduct marketing process for sale of action, terms of which were contained in ultimate order — L Inc. brought motion for leave to appeal decision of motion judge — Motion dismissed — Appeal was not prima facie meritorious.

MOTION by moving party for leave to appeal from judgment reported at *8527504 Canada Inc. v. Liquibrands Inc.* (2014), 2014 ONSC 7015, 2014 CarswellOnt 17188 (Ont. S.C.J. [Commercial List]), concerning various motions.

***K. Feldman J.A., In Chambers*:**

1 This is a motion by Liquibrands Inc. ("Liquibrands") for leave to appeal the decision of Newbould J., dated December 4, 2014, wherein he made three orders on motions brought by Liquibrands, 8527504 Canada Inc. ("852") and BDO Canada

Limited ("BDO"), the receiver for Sun Pac Foods Limited ("Sun Pac") appointed by the court under s. 243 of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3.

2 For the reasons that follow, leave to appeal is denied.

Background

3 The factual background was succinctly explained by the motion judge, at paras. 3-17 of his reasons:

> [3] Sun Pac was a Canadian manufacturer of private label and branded beverage products, and a manufacturer of croutons and bread crumbs and other private label brands (the "Breadcrumbs Division").
>
> [4] Sun Pac was acquired by Liquibrands in November 2011. Liquibrands is the sole shareholder of Sun Pac. Mr. Csaba Reider is the sole shareholder, officer and director of Liquibrands. He was also the sole officer and director of Sun Pac.
>
> [5] [Bridging Canada Inc. ("Bridging")] provides middle-market commercial customers with alternative financing solutions to borrowers who are unable to obtain financing from traditional lenders. 852 is a company related to Bridging and took an assignment of the loans and security for loans made by Bridging to Sun Pac.
>
> [6] On October 1, 2012, Bridging advanced a revolving loan of up to $5 million based on a lending formula under Facility A, $500,000.00 (before facility fees) on January 18, 2013 under a Facility B term loan on equipment, and the balance of the facility B loan, $1,182,524.00 (before facility fees), was advanced on January 31, 2013. The loans were secured on the assets of Sun Pac. Liquibrands guaranteed $1 million of the Sun Pac Facility A loan and provided security over all of its assets to support the guarantee.
>
> [7] Mr. Reider was in discussion with Loblaws to produce private label drinks for Loblaws. However Sun Pac was running short of working capital and in August 2013 was in default of its loan obligations to 852. He decided to sell the Breadcrumbs Division for $3.1 million and he requested additional funding to continue operating.
>
> [8] On September 11, 2013 852, Sun Pac and Liquibrands signed a Forbearance and Amending Agreement dated September 11, 2013. The Forbearance Agreement was entered into to provide Sun Pac with a temporary bridge loan in the hopes of obtaining equity and debt financing for the anticipated Loblaws contract and to complete a sale of the Breadcrumbs Division to repay the bridge loan. In the Forbearance Agreement, Sun Pac acknowledged that it was in default of the terms of its loans.
>
> [9] Notwithstanding the default, 852 agreed not to take any steps to enforce any of the loans or its security prior to the earlier of December 9, 2013 or the occurrence of an Event of Default.
>
> [10] In the Forbearance Agreement, 852 agreed to extend a temporary bridge loan to Sun Pac in two tranches. Facility C was a demand non-revolving loan in the amount of $500,000 less fees. Facility C was advanced to Sun Pac in the amount of $475,000 on or about September 13, 2013.
>
> [11] Facility D was a demand non-revolving loan in the maximum amount of 2 times EBITDA of the Breadcrumbs Division as determined by a report from BDO Canada Limited, less the amount advanced under Facility C. Paragraph 13 of the Forbearance Agreement provided:
>
> > Provided that 852 has received and is satisfied with the report to be prepared by BDO at the expense of Sun Pac, 852 shall, promptly following the execution of this Agreement, advance to Sun Pac as a Facility D Loan advance a single advance in an amount equal to 2 times EBITDA of the Breadcrumbs Division (as defined below) (as determined by BDO in its report to Sun Pac and 852 in its sole discretion), less the Facility C Principal Amount... Each advance shall be conditional on there being no Event of Default under this Agreement and the Loan Agreement.

[12] One event of default contained in the Forbearance Agreement was if Sun Pac failed to have a binding agreement for the sale of the Breadcrumbs Division by November 6, 2013 that was acceptable to 852 in its sole and absolute discretion and failed to close it by December 6, 2013.

[13] BDO prepared a report dated September 25, 2013, which it delivered to Sun Pac and 852 on September 30, 2013. Based on the report, the Facility D loan was to be approximately $1.15 million. 852 took no issue with the amount of the EBITDA as reported by BDO.

[14] 852 did not advance the Facility D loan. There is a dispute among the parties as to whether 852 was in breach of the Forbearance Agreement in failing to advance the loan. I do not intend to get into that issue, although was invited to do so.

[15] On October 4, 2013, 852 informed Mr. Reider that it was not prepared to advance Facility D without certain matters being addressed. According to 852, they were not addressed.

[16] On November 11, 2013, 852's lawyers were informed by Sun Pac's insolvency lawyers that Sun Pac's operations had been shut down on November 7, 2013, at which time all but a few employees were terminated. As a result, 852 commenced an urgent receivership application heard on November 12, 2013. Sun Pac and Liquibrands had counsel attend the hearing but did not oppose the receivership application. BDO was appointed as receiver of Sun Pac on November 12, 2013.

[17] On the morning of November 12, 2013, Liquibrands and Sun Pac commenced an action against 852 and Bridging seeking, *inter alia*, general damages of $100 million for breach of the Forbearance Agreement by not advancing Facility D in the amount of approximately $1.15 million. Sun Pac had signed an agreement with Loblaws made as of September 18, 2013 containing terms regarding the sale of drink products by Sun Pac to Loblaws, and the damage claim is for alleged lost profits that would have been earned under that agreement.

Decision Below

4 The first motion before Newbould J. was a request by the receiver, BDO, for an order approving its reports and permitting it to pay the amount realized on the assets of Sun Pac to 852. Liquibrands, as second secured creditor, asked that those funds be paid into court pending the determination by a trial of the issues raised in the lawsuit brought by Sun Pac and Liquibrands against 852 for alleged wrongdoing that caused Sun Pac to fail. Pursuant to rule 45.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Liquibrands framed its claim as a right to a specified fund.

5 The motion judge granted the receiver's motion. He held that rule 45.02 did not assist Liquibrands. As 852 had valid security that ranked ahead of Liquibrands' security, Liquibrands was essentially attempting to secure judgment on its claim for damages against 852. Furthermore, Liquibrands' action against 852 was commenced hours before the Sun Pac receivership order was made. Both Sun Pac and Liquibrands were represented at the receivership proceeding by experienced insolvency counsel who did not object to the receivership order being made. The motion judge concluded that the debtors could not now contend that the money was not owing to 852, as that would amount to a collateral attack on the receivership order.

6 It followed that there was no serious issue to be tried regarding 852's entitlement to the funds. The fact that there may be a serious issue to be tried in the lawsuit against 852 did not affect its entitlement, over any alleged entitlement of Liquibrands, to the realized assets of Sun Pac.

7 The second motion was brought by 852 for an order appointing BDO as receiver of Liquibrands. Demand was made under Liquibrands' guarantee in April 2014 and no payment was received. There was therefore an event of default in respect of valid security.

8 Liquibrands submitted that no receiver should be appointed pending the outcome of its action against 852. It argued that, following the decision in *Bank of Montreal v. Wilder*, [1986] 2 S.C.R. 551 (S.C.C.), it might be relieved of liability under its guarantee if the lawsuit were successful based on wrongdoing by the lender.

9 The motion judge rejected that argument. He found that Liquibrands had contracted out of its equitable rights by the wording of paragraph 2 of the guarantee: *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 (S.C.C.). Moreover, in the Subordination, Assignment, Postponement and Standstill Agreement, Liquibrands had agreed to not to take steps to challenge or impede 852's enforcement of its security.

10 As Liquibrands was therefore precluded from asserting priority over 852, the motion judge found it just and equitable to appoint BDO as receiver of Liquibrands.

11 The third issue involved the procedure for dealing with the lawsuit against 852, which was considered by the receiver as an asset of the Sun Pac receivership (and of the Liquibrands receivership once ordered). Liquibrands requested the appointment of a separate receiver to pursue the litigation on the grounds that the current receiver, BDO, did not intend to spend money on the litigation. The motion judge, following the procedure endorsed in *Central 1 Credit Union v. UM Financial Inc.*, 2012 ONSC 1893 (Ont. S.C.J. [Commercial List]), directed the receiver to conduct a marketing process for the sale of the action, the terms of which were contained in the ultimate order.

Analysis

12 The exercise of granting leave to appeal under s. 193 of the *Bankruptcy and Insolvency Act* is discretionary, flexible and contextual. In the recent case *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.), at para. 29, this court stated that the three "prevailing considerations" are whether the proposed appeal (1) raises an issue of general importance to bankruptcy law or the administration of justice that this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of the proceedings.

13 Liquibrands asserts that the issue of importance for this appeal is whether the lender should be entitled to profit from its breach of the Forebearance Agreement by creating a *fait accompli* of the receivership and the disposal of the litigation against it. The motion judge determined that he did not need to address the merits of the proposed litigation in order to determine the three issues before him. That is disputed by Liquibrands. It wants to see the litigation continued and concluded before the rights of the debtors and the lender to the proceeds of the receivership are finally determined.

14 Mr. Wires, on behalf of Liquibrands, has presented this issue in a very interesting and compelling way. However, to proceed as he suggests would essentially turn the process inside out. It would effectively allow the debtors, through a funded receiver, to use the funds realized in the receivership to fund their litigation, rather than to pay the lender, 852. That is not to say that the motion judge could not have made the orders sought by Liquibrands had he determined that such orders were warranted in the circumstances. However, his decisions not to do so and to make the orders he did were grounded in law and reason and were based on the facts and the documents presented. They are owed deference by this court.

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.

Conclusion

16 In my view, leave to appeal should not be granted, particularly on the ground that the appeal is not *prima facie* meritorious. The motion for leave to appeal is therefore dismissed with costs to 852 fixed at $15,000 inclusive of disbursements and HST.

Motion dismissed.

2015 CarswellOnt 5295, 23 C.B.R. (6th) 52, 252 A.C.W.S. (3d) 193

End of Document

TAB 8

2019 ABQB 850
Alberta Court of Queen's Bench

Barclay v. Kodiak Heating & Air Conditioning Ltd

2019 CarswellAlta 2437, 2019 ABQB 850, [2019] A.W.L.D. 4455, 312 A.C.W.S. (3d) 445

Shelly Barclay (Appellant / Plaintiff) and Kodiak Heating & Air Conditioning Ltd. and Ramton Homes Ltd. (Respondents / Defendants)

D.B. Nixon J.

Heard: June 6, 2019
Judgment: November 8, 2019
Docket: Lethbridge 1806-00729

Proceedings: affirmed *Barclay v. Kodiak Heating & Air Conditioning Ltd* (2018), 2018 CarswellAlta 3379, 2018 ABPC 233 (Alta. Prov. Ct.)

Counsel: Alexander G. McKay, Q.C., for Applicant, Plaintiff
Nolan B. Johnson, for Respondent, Defendant, Kodiak Heating & Air Conditioning Ltd.
Steven G. Osmond, for Defendant, Ramton Homes Ltd.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Torts

Headnote

Construction law --- Contracts — Breach of terms of contract — Negligence

Plaintiff hired defendant R Ltd. to construct home — R Ltd. hired defendant K Ltd. to supply and install two fireplaces in home — After taking possession of home, plaintiff encountered operational problems with both fireplaces — No one was able to determine why fireplaces did not operate properly — Plaintiff commenced action against defendants in Provincial Court for replacement of fireplaces — K Ltd. applied for summary judgment — Trial judge found no evidence of warranty from K Ltd. and that there was no allegation of negligence against K Ltd. — Judge found no genuine issue for trial and dismissed action — Plaintiff appealed — Appeal dismissed — Trial judge considered all evidence — There was no palpable and overriding error in respect of evidence that judge reviewed — Judge did not fail to apply correct principles of law with respect to negligence — Judge had lack of evidence concerning negligence that plaintiff now alleged — Factual record was sufficient to allow judge to summarily dismiss action.

APPEAL by plaintiff from dismissal of Provincial Court action.

***D.B. Nixon J.*:**

I. Introduction

1 This is an appeal from a Provincial Court decision. It is an appeal on the record.

2 The Trial Judge in the Provincial Court granted the Application by Kodiak Heating & Air Conditioning Ltd ("*Kodiak*") for summary dismissal of the claim that Ms. Shelly Barclay had made against it: *Barclay v Kodiak Heating & Air Conditioning Ltd*, 2018 ABPC 233 [*Barclay PC*]

3 The Trial Judge found that there was no merit to the claim by Ms. Barclay against Kodiak. In particular, that decision effectively states that Ms. Barclay did not specify a cause of action in the pleadings, and the facts do not suggest one. The Trial Judge then concluded that a fair and just adjudication of the Application was to summarily dismiss the action by Ms. Barclay against Kodiak.

II. Facts

4 Ms. Barclay was building a house. She hired Ramton Homes Ltd ("*Ramton*") to construct the home (the "*Barclay Home*").

5 Ramton hired Kodiak to supply and install two fireplaces (collectively, the "*Fireplaces*") into the Barclay Home.

6 Kodiak purchased the Fireplaces from 4 Seasons Home Comfort. Those Fireplaces were installed into the Barclay Home by Kodiak.

7 After taking possession of the Barclay Home, Ms. Barclay encountered operational problems with both Fireplaces.

8 All parties agree that the operational challenges with the Fireplaces continue. No one has been able to determine why the Fireplaces do not operate properly. In particular, Kodiak states that no one knows if the faulty operations stem from the manufacture of the Fireplaces or from their installation.

9 On July 22, 2016, Ms. Barclay filed a civil claim in the Provincial Court of Alberta (the "*Barclay Claim*").

10 Ms. Barclay was a self-represented litigant during the proceedings within the Provincial Court. The pleadings that she filed concerning the Barclay Claim state that the Fireplaces have had continuous issues, and that they are still not functioning properly. The pleadings also state that she is seeking new fireplaces, with proper installation and warranty.

11 Kodiak filed a Notice of Application on September 13, 2018 in the Provincial Court of Alberta. In that Application, Kodiak sought summary judgment pursuant to rule 7.3 of the Alberta Rules of Court (the "*Rules*").

12 Ms. Barclay filed an Affidavit on September 21, 2018 (the "*Barclay 2018 Affidavit*"). That Barclay 2018 Affidavit states that it was filed to " . . . [k]eep ...Kodiak...on the Civil Claim".

13 The Barclay 2018 Affidavit included the following statements:

a. That Kodiak attended the Barclay Home to begin the warranty work on the Fireplaces.

b. That the original warranty claim was still ongoing because both Fireplaces were not operating.

c. That there were more than 35 attempts at warranty repair.

14 The Barclay 2018 Affidavit included the following particulars:

a. That Kodiak indicated on April 24, 2017 that it would do everything possible to get the Fireplaces running to the manufacturer's specifications.

b. That Ms. Barclay communicated to Kodiak on June 10, 2017 that she was looking forward to hearing from Kodiak concerning the warranty, and to ensuring that the Fireplaces would be fixed.

III. Standard of Review

15 The standard of review for civil appeals from the Provincial Court Civil Division to the Alberta Court of Queen's Bench falls into one of three categories:

a. The standard of review for questions of law is correctness.

b. The standard of review for factual inferences is one of palpable and overriding error.

c. The standard of review for questions of mixed fact and law is palpable and overriding error.

See *McCallum v. Edmonton Frame and Suspension (2000) Ltd.*, 2016 ABQB 271 (Alta. Q.B.) at paras 48 to 50.

16 The question for determination on a summary disposition is whether there is a genuine issue requiring a trial. This is a question of mixed fact and law, which is subject to the standard of palpable and overriding error: *Weir-Jones Technical Services Incorporated v. Purolator Courier Ltd.*, 2019 ABCA 49 (Alta. C.A.) at para 10; see also *Amack v. Yu*, 2015 ABCA 147 (Alta. C.A.) at para 27; see also *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at paras 81-84; see also *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at para 36.

IV. Issues

17 Ms. Barclay frames her appeal on the following three grounds:

a. That the Trial Judge failed to properly consider the entirety of the evidence before her.

b. That the Trial Judge failed to apply the correct principles of law with respect to negligence.

c. That the factual record before the Trial Judge was insufficient to allow her to summarily dismiss the Plaintiff's claims as against Kodiak.

V. Analysis

A. The Provincial Court Decision

18 In their application to the Provincial Court, Kodiak sought summary dismissal of the Barclay Claim on the basis that Ms. Barclay did not allege any cause of action, including neither breach of contract nor negligence.

19 In her decision, the Trial Judge acknowledged that Ms. Barclay referred to an ongoing warranty. However, the Trial Judge reported that Ms. Barclay conceded in oral argument that she did not know the source of the warranty. The Trial Judge also found that there was neither evidence of the alleged warranty nor evidence that Kodiak had granted a warranty.

20 Kodiak described its work with respect to the Fireplaces as "diagnosis and repair". In her pleadings, Ms. Barclay stated, " . . . during diagnosing and attempted repair, both fireplaces incurred damages".

21 Ms. Barclay did not particularize or describe the damage or the cause of the purported damage in her pleadings or in the Barclay 2018 Affidavit.

22 The Trial Judge reported that Ms. Barclay made no reference to negligence on the part of Kodiak, nor did she allege a contractual relationship between herself and Kodiak or any breach of any such relationship.

23 The Trial Judge found that the record was deficient. In particular, the record did not present evidence of negligence or of a breach of contract. As such, the Trial Judge asserted that no cause of action was revealed.

24 In her analysis, the Trial Judge referenced Rule 7.3(1) which allows a party to apply for summary judgment if there is no merit to a claim. The Trial Judge also canvassed the legal framework for summary judgment.

25 The Trial Judge stated that summary judgment is appropriate where there is no genuine issue requiring a trial. The Trial Judge went on to state that there is no genuine issue requiring a trial when a judge is able to reach a fair and just determination on the merits on a motion for summary judgment. It stated that this is the case when the process (a) allows the judge to make the necessary findings of fact, (b) allows the judge to apply the law to the facts, and (c) is a proportionate, more expeditious and less expensive means to achieve a just result.

26 On the basis of the findings that (a) Ms. Barclay did not specify a cause of action, and (b) the facts did not suggest a cause of action, the Trial Judge found that there was no merit to the Barclay Claim. Given these determinations, the Trial Judge concluded that the fair and just adjudication was to summarily dismiss the Barclay Claim.

27 In addition to addressing the cause of action argument, the Trial Judge also accepted Kodiak's argument that there was no privity of contract between Kodiak, a subcontractor, and Ms. Barclay. The privity of contract was between Ramton and Ms. Barclay and therefore Ms. Barclay did not have a cause of action for breach of contract against Kodiak.

B. The Law

28 A pleading requires facts, not conclusions: *O. (J.) v. Alberta*, 2012 ABQB 599 (Alta. Q.B.) at para 137. A pleading need only include salient facts: *Klemke Mining Corp. v. Shell Canada Ltd.*, 2008 ABCA 257 (Alta. C.A.) at para 30; see also *677960 Alberta Ltd. v. Petrokazakhstan Inc.*, 2013 ABQB 47 (Alta. Q.B.) at para 46. It need not name the cause of action: *Petrokazakhstan* at para 48; see also *MDI Industrial Sales Ltd. v. McLean*, 2000 ABQB 521 (Alta. Q.B.) at para 7. While the difference between facts and evidence is sometimes a question of degree, the general rule is that evidence is not to be pleaded: *Wenzel v. Nenshi*, 2015 ABQB 788 (Alta. Q.B.) at para 12.

29 While pleadings need not name a cause of action, they do govern (*i.e.*, regulate) the evidence to be led at trial: *R. (W.) v. Alberta (Attorney General)*, 2006 ABCA 219 (Alta. C.A.) at para 26. However, in order to have a cause of action, a pleading must include every fact that would be necessary for the plaintiff to prove in order to support his or her right to a judgment: see *Read v. Brown* (1888), 22 Q.B.D. 128 (Eng. Q.B.), Lord Esher M. The classical definition of a cause of action is simply a factual situation, the existence of which entitles one person to obtain from a judicial forum a remedy against another person: see *Letang v. Cooper*, [1964] 2 All E.R. 929 (Eng. C.A.) at 934, (1964), [1965] 1 Q.B. 232 (Eng. C.A.), Diplock LJ; and *Consumers Glass Co. v. Foundation Co. of Canada / Cie fondation du Canada* (1985), 51 O.R. (2d) 385 (Ont. C.A.) at 8, (1985), 20 D.L.R. (4th) 126 (Ont. C.A.). If the pleadings do not include the facts necessary to establish an entitlement to a remedy (*i.e.*, negligence), then no cause of action exists.

C. The Application of the Law to the Record

1. Did the Trial Judge fail to properly consider the entirety of the evidence before her?

30 In making its decision, the Trial Judge can only consider the evidence before it. It would be an error of law for that court to make a decision that is based on alleged facts that are not in evidence: *R. v. Bentley*, 2015 BCCA 251 (B.C. C.A.) at para 33. Further, it is an error of law for a trial judge to assess the evidence piecemeal: *R. v. H. (J.M.)*, 2011 SCC 45 (S.C.C.) at para 40.

31 Evidence in our Courts only comes in two forms. Evidence that is provided in affidavit format and evidence that is provided in *viva voce* format. The evidence provided in each of these formats may be subject to cross-examination. Documents can be introduced as evidence under either format.

32 In this case, the Trial Judge found that there was neither evidence of negligence nor breach of contract.

33 The Trial Judge noted that Ms. Barclay made no reference to negligence in the Barclay 2018 Affidavit nor was any evidence of negligence provided at the hearing. I comment further on the negligence allegation below.

34 The Trial Judge also found that there was no evidence concerning the alleged damages. The Trial Judge noted that Ms. Barclay stated in her pleadings that the Fireplaces incurred damages during diagnosing and attempted repair. However, the Trial Judge noted that Ms. Barclay did not particularize the damage in her pleadings nor did she do so in the Barclay 2018 Affidavit. *Barclay PC* at para 11.

35 The Trial Judge also acknowledged that Ms. Barclay referred to an ongoing warranty. However, the Trial Judge noted that during oral argument Ms. Barclay conceded she did not know the source of the alleged warranty: *Barclay PC* at para 10. As such, the Trial Judge effectively found that there was neither evidence of the alleged warranty nor evidence that Kodiak had granted a warranty.

36 In addition, the Trial Judge acknowledged the assertion advanced by Kodiak that Ms. Barclay did not allege a breach of contract: *Barclay PC* at para 7. The Trial Judge further found that there was no evidence that a contract had been breached:

Barclay PC at para 10. In the circumstances, the Trial Judge dismissed the breach of contract claim against Kodiak on the basis that the Ms. Barclay did not specify a cause of action and the evidence did not suggest one: *Barclay PC* at para 13. This conclusion by the Trial Judge is supported by an inference that I find appropriate to make that Ms. Barclay had no documentation to evidence the alleged warranty. This inference is strongly supported by the fact that Ms. Barclay effectively conceded during oral argument that she did not know of the source the alleged warranty.

37 I return to the question posed by Ms. Barclay, as I have framed it above. That is, did the Trial Judge fail to properly consider the entirety of the evidence before her.

38 I find no evidence that the Trial Judge did not consider all of the evidence before her. To the extent that she was assessing the evidence before her, the Trial Judge was performing her function as the trier of fact. That function is not a question of law alone: *Bentley* at para 60. That being the case, this evidentiary question in the context of this appeal is subject to the standard of palpable and overriding error: *Weir-Jones* at para 10.

39 Given my review of the record before me, I find that there is no palpable and overriding error in respect of the evidence that the Trial Judge reviewed.

2. Did the Trial Judge fail to apply the correct principles of law with respect to negligence?

40 To be successful in a negligence action, Ms. Barclay would need to prove four elements on a balance of probabilities: *Brough v. Yipp*, 2016 ABQB 559 (Alta. Q.B.) at para 7. Those elements are as follows:

a. That Kodiak owed Ms. Barclay a duty of care.

b. That Kodiak breached the applicable standard of care.

c. That Ms. Barclay suffered a loss.

d. That Kodiak's actions were the actual and legal cause of Ms. Barclay's loss.

41 I have reviewed the pleadings and the Barclay 2018 Affidavit, both of which were before the Trial Judge. In my view, those documents do not raise particulars of the alleged negligence. That is, those documents do not establish a duty of care, a standard of care or causation. Ms. Barclay's evidence simply contained claims that Kodiak is bound by an alleged warranty that is not in evidence. That is a contractual argument, rather than a negligence argument.

42 A trial court is not required to engage in its own investigation to identify possible causes of action: see *Meads v. Meads*, 2012 ABQB 571 (Alta. Q.B.) at para 632. In circumstances such as these, the Trial Judge was not required to engage in an extensive review of the law of negligence when neither the claim has been alleged nor the evidence apparent on record. Indeed, it would be an error of law for a trial judge to do so. A trial judge is a referee in judicial proceeding, and not an advocate of either side. In order for a court to address a claim of negligence, the necessary prerequisites must be included in the pleadings and necessary evidence must be before the trial judge.

43 Given my review of the record before me, I find that the Trial Judge did not fail to apply the correct principles of law with respect to negligence. To the contrary, I find that the Trial Judge had a lack of evidence concerning the negligence that Ms. Barclay now alleges. Indeed, the Trial Judge specifically found that there was no evidence concerning the negligence allegation: *Barclay PC* at para 10.

3. Was the factual record before the Trial Judge insufficient to allow summary dismissal of the Plaintiff's claims as against Kodiak?

44 In a summary judgment application, the parties must "put their best foot forward": *Canada (Attorney General) v. Lameman*, 2008 SCC 14 (S.C.C.) at para 11. This case is no exception. Ms. Barclay cannot resist summary judgment merely by speculating as to what may arise at trial: *Weir-Jones* at para 37.

45 A full trial may be necessary in the following circumstances:

a. Where there is a dispute concerning material facts or one depending on credibility: *Weir-Jones* at para 35.

b. Where a trial will create a better record: *Weir-Jones* at para 39.

c. Where the factual issues are sufficiently complicated that a trial is appropriate (*i.e.*, scientific matters): *Weir-Jones* at para 45.

46 Based on my review of the case advanced by Ms. Barclay, it is not complicated. Further, I see no reason why a trial would create a better record.

47 The question for determination on a summary disposition is whether there is a genuine issue requiring a trial. This is a question of mixed fact and law. A question of that nature is subject to the standard of palpable and overriding error.

48 The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations: *Weir-Jones* at para 36. I also acknowledge that summary judgment may be appropriate where the facts are not seriously in dispute, and the real question is how the law applies to those facts: *Weir-Jones* at para 21.

49 In any event, the presiding judge retains the discretion to send a matter to trial if necessary to achieve a just result. However, doing so should not be used as a pretext to avoid resolving the dispute when possible: *Weir-Jones* at para 21.

50 The fundamental question is whether a trial is required as a matter of fairness, taking into account that there is no right to take an unmeritorious claim to trial: *Weir-Jones* at paras 42 and 46. Where a defendant, such as Kodiak, can show that a claim does not have merit, it should not have to suffer a trial: *Weir-Jones* at para 43.

51 The Alberta Court of Appeal summarized the test as follows:

a. Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b. Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level, the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c. If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d. In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute: *Weir-Jones* at para 47.

52 In this case, Kodiak sought summary dismissal of the Barclay Claim. The Trial Judge was required to assess whether Kodiak had established, with respect to the issues raised by the Barclay Claim, that the record made it possible to resolve the dispute on a summary basis.

53 I must assess whether Kodiak demonstrated on a balance of probabilities that, on the facts as proven, there is no merit to Ms. Barclay's claim. Assuming Kodiak discharged this burden in the decision of the Provincial Court, I must assess whether Ms. Barclay nonetheless established that there is a genuine issue requiring a trial, based on the nature of the issue or its merits. Finally, I must determine whether I am sufficiently confident in the state of the record that the Trial Judge properly exercised her discretion to summarily dismiss the claims of Ms. Barclay.

54 I am of the view that the record allowed the Trial Judge to summarily assess the claims of Ms. Barclay. There was little dispute on the facts and, where there was, the dispute was either immaterial or could be satisfactorily resolved based on the materials before the Trial Judge or through the use of appropriate assumptions.

55 A central issue in this case concerned the warranty. The Trial Judge acknowledged that Ms. Barclay referred to an ongoing warranty. However, that Trial Judge effectively found that there was neither evidence of the alleged warranty nor evidence that Kodiak had granted a warranty. This finding of the Trial Judge was supported by the concessions made in Ms. Barclay's oral argument. Overall, the Trial Judge found that there was no cause of action.

56 In conclusion, I am satisfied that the record was sufficient for Kodiak to prove, on a balance of probabilities, that there was no merit to Ms. Barclay's claim. I am also satisfied that the Trial Judge determined on the record that Ms. Barclay did not establish a genuine issue requiring trial.

57 The factual record was sufficient for the Trial Judge to summarily dismiss the claims Ms. Barclay was making against Kodiak in this action. I find that there is no palpable and overriding error in respect of the assessment of the factual record by the Trial Judge

VI. Conclusion

58 In summary, I conclude as follows:

a. First, I find no evidence that the Trial Judge did not consider all of the evidence before her. To the extent that she was assessing the evidence before her, the Trial Judge was performing her function as the trier of fact. That function is not a question of law alone. That being the case, this evidentiary question in the context of this appeal is subject to the standard of palpable and overriding error. Given that standard, I find that there is no palpable and overriding error in respect of the evidence that the Trial Judge reviewed.

b. Second, the Trial Judge did not fail to apply the correct principles of law with respect to negligence. To the contrary, I find that the Trial Judge had a lack of evidence concerning the negligence that Ms. Barclay now alleges. Regarding this matter, a trial court is not required to engage an investigation to identify possible causes of action

c. Third, I find that the factual record before the Trial Judge was sufficient to allow her to summarily dismiss the Barclay Claim. In this regard, there is no palpable and overriding error in respect of the assessment of the factual record.

Appeal dismissed.

TAB 9

2010 ABQB 772
Alberta Court of Queen's Bench

Kumra v. Luthra

2010 CarswellAlta 2687, 2010 ABQB 772, [2010] A.J. No. 1581, [2011] A.W.L.D. 2847, [2011] A.W.L.D. 2886, 195 A.C.W.S. (3d) 1170, 79 C.B.R. (5th) 77

Usha Kumra (Plaintiff / Respondent) and Romesh Luthra, Ancieta Luthra (Defendants / Applicants) and Harjit S. Judge (Defendant / Not a Party to this Application)

Donald Lee J.

Heard: November 30, 2010
Judgment: December 3, 2010
Docket: Edmonton 9703-10692

Counsel: Nestor Makuch for Usha Kumra
P. Daryl Wilson, Q.C. for Romesh Luthra and Aniceta Luthra

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

Headnote

Real property --- Sale of land — Miscellaneous

Two properties were initially owned by plaintiff — Dispute arose concerning transfer of shares of company that operated restaurant to plaintiff and transfer of one of properties to defendant AL — It was alleged, inter alia, that defendant legal agent who prepared transfer documents at issue mistakenly described property — Plaintiff brought action — Order was made transferring first property to plaintiff and second property to AL, and requiring defendants AL and RL to pay security for costs — When order was not complied with, plaintiff obtained order transferring second property back into her name — That order was set aside by another order, later confirmed by Court of Appeal — AL and RL brought application to transfer title to them in second property, and for order appointing receiver/manager of property — Plaintiff brought cross-application for summary dismissal of AL and RL's counterclaim, and for order discharging caveats — Application granted in part and cross-application dismissed — Request of AL and RL regarding transfer of property was denied, but their caveats would remain on title — Allowing their application regarding transfer would resolve dispute in favour of them at this time without trial, although plaintiff could again sue them — There had been no final determination of merits of either plaintiff's or AL and RL's claims in matter — Granting AL and RL title would be prejudicial to plaintiff as she resided in property, which she said was her principal residence — AL and RL's caveats would remain on title — Receiver/manager was appointed of property in dispute — Cross-application for summary judgment and summary dismissal was dismissed as there were directly contradictory affidavits in matter.

Debtors and creditors --- Receivers — Appointment — General principles

Two properties were initially owned by plaintiff — Dispute arose concerning transfer of shares of company that operated restaurant to plaintiff and transfer of one of properties to defendant AL — It was alleged, inter alia, that defendant legal agent who prepared transfer documents at issue mistakenly described property — Plaintiff brought action — Order was made transferring first property to plaintiff and second property to AL, and requiring defendants AL and RL to pay security for costs — When that order was not complied with, plaintiff obtained order which transferred second property back into plaintiff's name — That order was later set aside by another order, which was later confirmed by Court of Appeal — Plaintiff sold first property — AL and RL brought application to transfer title to them in second property, and for order appointing receiver/manager of property — Plaintiff brought cross-application for summary dismissal of AL and RL's counterclaim, and for order discharging caveats — Application granted in part and cross-application dismissed — Request of AL and RL regarding transfer of property was denied, but their caveats would remain on title — Receiver/manager was appointed of property in dispute, which would manage and obtain fair market value rent for each of two suites located in property, and would collect any rentals, which would be paid

into court — It was just and convenient in circumstances surrounding matter, notwithstanding plaintiff's express current denial that there were any tenants, that property manager ought to be appointed, and that surplus income should be lodged with court pending determination of action.

APPLICATION by certain defendants to transfer title to them in certain property, and for order appointing receiver/manager of property; CROSS-APPLICATION by plaintiff for summary dismissal of counterclaim and for discharge of certain caveats.

***Donald Lee J.*:**

Introduction

1 Usha Kumra ("Kumra") is the Respondent in the Application by the Defendants Romesh Luthra and Ancieta Luthra to transfer title to the Defendants in Plan 7823024, Block 8, Lot [...] municipally described as [...] - 17 Avenue, Edmonton, Alberta. This property is according to Kumra her current residence. Kumra is also applying for summary dismissal of the Defendants Romesh Luthra and Ancieta Luthra's counterclaim against her.

2 The specific relief Kumra seeks is:-

> (a) An Order granting summary dismissal of the Luthras' counterclaim.
>
> (b) An Order discharging Ancieta Luthra's caveats filed against the Kumra's current residence at the Land Titles office on 3 December 1996 as instrument 962 333 542, and on 22 October 2008 as instrument 082 464 457. In these caveats, Ancieta Luthra claims an interest as equitable owner pursuant to an agreement of August 6, 1996, by which she alleges to have purchased the land and fully paid for it.

3 In 1996 Kumra, a widow, says that she was approached by Romesh Luthra and Kul Bhatia to work in a restaurant called the Sirloiner Restaurant. She agreed to do so as they promised to pay her more than the $11.00 per hour she was making at her job with the Good Samaritan Society.

4 A few months later it is alleged that Romesh Luthra asked to borrow $10,000 from Kumra, and Kul Bhatia asked for a $25,000 loan, and that Kumra complied with both requests, and lent the monies requested to both individuals.

5 In August 1996 Romesh Luthra took Kumra to sign some papers at Harjit Judge's office, who is a legal agent. Kumra says that she signed these papers without Romesh Luthra or Harjit Judge explaining them to her because at the time she says that she trusted Romesh Luthra. She also did not receive any independent legal advice, and apparently did not have any idea of what she was signing.

6 Kumra was later told by her current lawyers that she had signed documents transferring the shares of 699566 Alberta Ltd., which operated the Sirloiner Restaurant, to her.

7 On October 4, 1996 the City of Edmonton seized most of the restaurant's assets due to 699566 Alberta Ltd.'s failure to pay business taxes. Kumra also discovered that 699566 Alberta Ltd. was being sued by the owner of the trade name "Sirloiner". The restaurant had to be shut down as a result of these matters. Kumra believes that Romesh Luthra and Kul Bhatia schemed to have the shares of the company which was clearly on its last legs, transferred to her so that they could avoid both of these problems.

8 One of the documents that Kumra was asked to sign by Harjit Judge was apparently a transfer of title of one of her properties to Ancieta Luthra. Again she now alleges that the documents were not explained to her, she did not receive any independent legal advice, and she received no monies for the transfer.

9 Kumra says that she first discovered her property had been transferred when she saw a "For Sale" sign in front of it. One of the documents Romesh Luthra allegedly had Kumra sign was a Real Estate Purchase Contract dated August 6, 1996, which agreement purported to sell Plan 4997TR, Block 3, Lot [...] to Romesh Luthra. Kumra submits that that property was

mistakenly described in the agreement as [...] - 17 Avenue, Edmonton, Alberta, which is the municipal address for Kumra's current residence legally described as Plan 7823024, Block 8, Lot [...].

10 Plan 4997TR, Block 3, Lot [...] was another property owned by Kumra, and is municipally described as [...] - 86 Street, Edmonton, Alberta (the "Revenue Property"). It is submitted that the municipal address in the Purchase Contract did not match the legal description given in the agreement.

11 It is submitted that the Kumra residence described as [...] - 86 Street, Edmonton, Alberta was mistakenly transferred to Ancieta Luthra pursuant to a transfer signed at Harjit Judge's office, being one of the documents she was not aware of what it was she was signing, instead of the property described as [...] - 17 Avenue, Edmonton, Alberta.

12 Subsequently Master Wacowich's Order of December 10, 2003 transferred the Revenue Property to Kumra, and the Kumra residence Plan 7823024, Block 8, Lot [...] described as [...] - 17 Avenue, Edmonton, Alberta to Ancieta Luthra. Master Wacowich's Order also ordered the Luthras to pay security for costs of $10,000.

13 When that Order was not complied with, Kumra obtained an Order before Justice Clackson on December 19, 2006 which transferred Plan 78323024, Block 8, Lot [...] described as [...] - 17 Avenue, Edmonton, Alberta back into Kumra's name. My colleague Clackson, J. later set aside his first Order of December 19, 2006 by another Order dated October 17, 2008. The Court of Appeal confirmed the October 17, 2008 Order due to the procedural deficiencies in service of notice of the Orders on the Luthras by Kumra.

14 Kumra wishes to determine the merits of the respective parties' claims now through summary dismissal of the Luthra's counterclaim.

15 It is submitted that the only document founding Ancieta Luthra's claim to Plan 7823024, Block 8, Lot [...] municipally described as [...] - 17 Avenue, Edmonton, Alberta is the Real Estate Purchase Contract of August 6, 1996.

16 It is submitted that the Real Estate Purchase Contract does not give Ancieta Luthra any interest in Plan 7823024, Block 8, Lot [...] municipally described as [...] - 17 Avenue, Edmonton, Alberta for the following reasons:-

> (a) The agreement is fatally uncertain as it refers to a sale of [...] - 17 Avenue, Edmonton, Alberta but refers to a legal description of Plan 4997TR, Block 3, Lot [...], which is not the correct legal description for [...] - 17 Avenue;
>
> (b) Ancieta Luthra is not a party to that agreement as that document is signed solely by Romesh Luthra. Ancieta Luthra never entered into any agreement with Usha Kumra;
>
> (c) Paragraph 10 of the Luthra's original Statement of Defence confirmed that:
>
> > Ancieta Luthra denies that she had appointed Romesh Luthra, either expressly or impliedly, to act as her agent with respect to any dealings with the Plaintiff and expressly denies that she had given to Romesh Luthra any authority to make representations on her behalf with respect to sale of the shares of the Corporation owned by her;
>
> (d) Romesh Luthra was not the owner of any shares in 69956 Alberta Ltd., and as such could not effect the transaction; and
>
> (e) Neither of the Luthra's assumed or paid off the CIBC mortgage of approximately $56,000 as part of the consideration for the Agreement.

17 It is submitted that the entire Counterclaim by the Luthras is founded on the allegation that the Luthras are entitled to a conveyance of "a rental property at 4807 - 17 Avenue, Edmonton, Alberta and legally described as Plan 7823024, Block 8, Lot [...] pursuant to an agreement in writing dated August 6, 1996", where there is no such agreement since the Real Estate Purchase Contract refers to a property legally described as Plan 4997TR, Block 3, Lot [...], and is invalid for all the reasons set out above.

18 It is submitted that as Ancieta Luthra has never entered in any Agreement dated August 6, 1996 as alleged in her caveats, and has no interest in the lands caveat, her two caveats are invalid and should be discharged.

Analysis

19 This is an application by the Luthras, further to the written decision of the Court of Appeal of May 6, 2009 for an Order to re-establish the *status quo ante* of the property legally described as Plan 7823024, Block 8, Lot [...] and municipally described as [...] - 17 Avenue, Edmonton, Alberta as reflected in the Order of Master Wacowich of December 10, 2003 pending the determination of the within Action.

20 Specifically the Defendants seek an Order directing the Registrar of Land Titles to reregister the Revenue Property in the name of Aniceta Luthra, subject to existing encumbrances on title.

21 In addition the Defendants also seek an Order appointing MacDonald Realty Edmonton East as the Receiver/Manager of the Revenue Property, to manage and obtain a fair market value rent for each of the two suites located on the Revenue Property pending the determination of the within Action.

22 The Luthras' application is supported by the Affidavit of the Defendant Romesh Luthra.

23 Kumra advances a cross-application for summary judgment and summary dismissal of the Luthras' counterclaim. The cross-application is supported by Affidavit of Kumra.

24 Prior to 1996 Kumra was the owner of two properties in Edmonton, one being Plan 7823024, Block 8, Lot [...] municipally described as [...] - 17 Avenue, Edmonton, Alberta, and the other a property legally described as Plan 4997TR, Block 3, Lot [...] municipally described as [...] - 86 Street, Edmonton, Alberta.

25 The Sirloiner Restaurant was owned jointly by Ancieta Luthra and Kul Bhatia who each owned 50 shares in 699556 Alberta Ltd., the company that operated the restaurant. Romesh Luthra and Aniceta Luthra lived in Vancouver, British Columbia. Kul Bhatia resided in Edmonton, Alberta. Bhatia retained the services of Kumra to manage the restaurant.

26 As manager of the restaurant, Kumra was apparently conversant with the financial operations of the restaurant and allegedly made a request to purchase Aniceta Luthra's shares in the restaurant.

27 It is alleged that as Kumra did not have liquidated funds to effect the purchase, she suggested that as part payment for the proposed purchase of the shares, she would transfer the title to the so called Revenue Property to Aniceta Luthra.

28 The Defendant Harjit Judge ("Judge") who is not a party to this application operates as a legal agent in Edmonton under the business name of "Judge & Associates", and he prepared the transfer documents at issue in this action for the transfer of shares and properties.

29 Unknown to the Parties, Judge then apparently mistakenly transferred the Kumra residence to Aniceta Luthra instead of the Revenue Property as agreed by the parties.

30 On or about September 18, 1996 Aniceta authorized Kumra as her agent to receive rent on the Revenue Property and to apply such rent to the mortgage to be assumed by Aniceta Luthra with effect from October 10, 1996.

31 Once the error was discovered, Aniceta Luthra allegedly offered on or about September 27, 1996 to transfer title in the Kumra residence back to Kumra, and requested Kumra effect the proper transfer of the Revenue Property as originally agreed.

32 Aniceta Luthra executed a transfer of the Kumra residence back to Kumra, but Kumra apparently refused to execute her transfer, although she recovered title to the residence under the transfer by Aniceta Luthra.

33 On or about December 19, 2006 my colleague Clackson, J. granted an Order on an *ex parte* application by Kumra (the "2006 Order") which directed:-

> (a) Judgment of $10,000 against the Defendant Romesh Luthra; and
>
> (b) The Registrar of Land Titles to register and issue a new certificate of title in the name of the Plaintiff for the Revenue Property.

34 On or about October 17, 2008 Clackson, J. gave another Order (the "2008 Order"):-

> (a) Rescinding the 2006 Order;
>
> (b) Setting aside the amending Order of Master Wacowich dated October 11, 2006, which had amended his earlier Order dated December 10, 2003 regarding the Provision of Security for Costs; and
>
> (c) Granting leave for the Luthras to file a caveat against the Revenue Property.

35 Kumra continues to refuse to transfer the Revenue Property to Aniceta Luthra based on her *ex post facto* argument of changed circumstances regarding the restaurant business in which she purchased shares.

36 Although claiming that the business was sold to her under fraud and misrepresentations, Kumra has not filed any claim against Bhatia who also sold his 50% shareholding to her under similar terms as to the condition of the business.

37 On or about May 6, 2009 our Court of Appeal dismissed the appeal filed by Kumra against the 2008 Order.

38 The effect of the Court of Appeal's decision is that both properties were restored to their pre-December 19, 2006 status. The December 10, 2003 Order of Master Wacowich paraphrased below sums up that *status quo ante*:

> (a) The Property legally described as Lot [...], Block 3, Plan 4997TR and municipally described as [...] - 86 Street, Edmonton AB is in the name of Usha Kumra;
>
> (b) The Property legally described as Lot [...], Block 8, Plan 7823024 and municipally described as [...] - 17 Avenue Edmonton AB is transferred to Aniceta Luthra;
>
> (c) Security for Costs are to be paid into Court by the Luthras;
>
> (d) Costs were awarded against the Luthras in the amount of $750.00; and

39 However the Court of Appeal in approving Clackson, J.'s decision also stated at paragraph 13:

> The Chambers judge, wisely in my view, did not decide on a final basis whether or not the respondent's had, as a result of that rescission, an enforceable interest in that land.

40 It is the above decision of our Court of Appeal dismissing the Kumra appeal that the Luthras seek to enforce in this application.

41 The Luthras have since paid the Security for Costs in the amount of $10,000.00 into Court, and paid the costs of $750.00 to the Kumra.

42 Kumra recently sold the property municipally described as [...] - 86 Street legally described as Plan 4997TR, Block 3, Lot [...].

43 Since the within Action was filed, the Luthras have been deprived of any rents, use, or enjoyment of the Revenue Property.

44 The Luthras allege that the two suites in the Revenue Property have been tenanted over the years, and despite Kumra's authorization to receive rent on behalf of Aniceta Luthra, Kumra has not accounted for the rents received thereon. Kumra says that she now lives in the Revenue Property, and that there are no tenants or rentals.

45 On October 25, 2010 Kumra filed a Notice of Motion for Summary Judgment of the Luthras' Statement of Defence, and she seeks summary dismissal of the Luthras' Counterclaim. The Notice of Motion was supported by her Affidavits deposed to on August 27, 2010 and December 11, 2006.

46 Kumra then received notice of the Luthras' intention to cross-examine her on her Affidavits, however she allegedly refused to cooperate in arranging a date for her crossexamination despite several repeated requests. On or about October 12, 2010 the Luthras served Kumra with an Appointment for Cross-Examination on her Affidavits.

47 On the afternoon of October 25, 2010 the day before the scheduled cross-examination of Kumra, Kumra informed the Luthras that she would be availing herself of the services of a third party to be her interpreter.

48 The Luthras objected arguing that the third party was not-at-arms length, and was not a Court recognized interpreter. Due to the decision by Kumra to hire an interpreter for herself, and to avoid the generation of disjointed evidence tainted by arguments on both sides, the Luthras on the morning of the scheduled cross-examination retained the services of an independent interpreting and translations company, Able Translations Ltd.

49 On the morning of October 26, 2010 Kumra attended at her scheduled cross-examination on her Affidavits but she refused to subject herself to cross-examination, unless she had the assistance of being examined through her interpreter. If this third-party was not allowed to participate, she refused to be cross-examined.

50 Kumra argues that her interpreter was "arms length", and better qualified than the Luthras' interpreter in the Punjabi language. In any event the cross-examination on Kumra's Affidavits never occurred.

Law

51 Rule 159 of the *Alberta Rules of Court* govern orders for summary judgment. The test is set out in *Royal Bank v. McLean*, [1997] A.J. No. 1172 (Alta. Q.B.) at paragraphs 29 to 31 which reads as follows:-

> 29 The plaintiff, as applicant, must prove each fact required to make out its cause of action (*Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (C.A.); *Principal Savings & Trust Co. (Liquidator of) v. Hunter* (1993), 13 Alta. L.R. (3d) 401 (M) at 408). In this case, the plaintiff Bank has shown the details of the mortgage agreements made with the defendants, that the amounts were advanced under the mortgage to the solicitors for the defendants and disbursed on the defendants' direction, and the Bank has proven default. The claim of the plaintiff has been verified by Mr. Gate, an officer of the Bank, on affidavit. Without more, the plaintiff has proved its case.
>
> 30 Once the plaintiff has proven its cause of action on a balance of probabilities, it is up to the defendants to satisfy the court that there is a defence on the merits (M. Trussler and F. Price, *Mortgage Actions in Alberta* (Calgary: Carswell, 1985) at 106). The plaintiff does not have to disprove each defence. If it is not beyond doubt that there is no genuine issue, the court will not deprive the defendants of a trial (*Investors Group Trust Co. Ltd. v. Royal View Apts. Ltd.* (1986), 70 A.R. 47 (Q.B.)). Moreover, summary judgment will follow where,"analysis shows that the law is settled and that the conclusions are inevitable in similar cases" (*Suncor Inc. v. Canada Wire & Cable Ltd.* (1993), 7 Alta. L.R. (3d) 182 (Q.B.) at 186).
>
> 31 The defendants must show that they have a genuine issue to be tried. Rule 159(1) requires this be done on affidavit evidence by someone who can swear positively to the facts. The affidavit evidence may be presented by the plaintiff, or by the defendant. It is essential that the plaintiff claim in its affidavit that in its belief, there is no genuine issue to be tried. The plaintiff Bank has done this.

52 Kumra as the moving party for summary judgment of the Statement of Defence of the Luthras, and summary dismissal of the Counterclaim of the Luthras bears the ultimate burden of proving each fact required to make out her cause of action: *Bank of Montreal v. Kalin* (1992), 131 A.R. 397 (Alta. C.A.) at paragraph 2.

53 Kumra alleges fraud, misrepresentations and negligent mis-statements claiming that the Luthras are con artists, but advances limited, if any, evidence in support of these assertions.

54 Kumra also bears the initial evidentiary burden that there is no defence to her claim or that the only genuine issue is as to amount.

55 Summary judgment would not ordinarily be granted if opposing Affidavits clash on relevant facts: *Shuchuk v. Wolfert*, 2003 ABCA 109 (Alta. C.A.) at paragraph 10. Weighing the quality of the evidence is a function reserved for a trial judge.

56 There are several directly opposing Affidavits that have been filed since the initiation of this action 13 years ago.

57 The Luthras bear the corollary burden to satisfy the Court that there is a defence on the merits or that the only genuine issue is as to amount. The Statement of Defence of the Luthras, and the Affidavits of Romesh Luthra filed show an apparent defence on the merits.

58 Kumra as occupant of the Revenue Property would benefit from any revenue generated by the Property particularly since the mortgage of the Revenue Property has been paid off. Any rental income would exceed any expenditure associated with the revenue.

59 Section 13(2) of the *Judicature Act*, R.S.A. 2000, c. J-2 provides that:-

> (2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

60 The test for granting an Interlocutory Order appointing a receiver is whether the Court finds that the Order is "just or convenient": *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABCA 191 (Alta. C.A.) at paragraph 12.

61 Various factors ought to be considered by a Court in determining the just and convenient test, and such factors should include:-

(a) Whether irreparable harm might be caused if no order is made;

(b) The risk to the parties;

(c) The risk of waste debtor's assets;

(d) The preservation and protection of property pending judicial resolution; and

(e) The balance of convenience.

62 Kumra purchased shares to a restaurant and obtained transfer of said shares, but has retained control and enjoyment of the consideration she gave for the shares. Seeing as she has already sold the only other property which was the subject of the within Action, an Order of this Court should preserve the Revenue Property. The balance of convenience is apparently weighted in favour of maintaining the *status quo ante*, as but for the mistake of Harjit Judge in the transfer of title to the two properties, title in the Revenue Property would in all likelihood not be in the possession of Kumra.

63 I conclude that it is just and convenient in the circumstances surrounding this matter notwithstanding Kumra's express current denial that there are any tenants, that a property manager ought to be appointed by this Court, and that the surplus income should be lodged with this Court pending the determination of the within Action.

64 The basic rules of evidence require the accused to submit to cross-examination because the right to cross-examine is essential to give any weight to an Affidavit.

65 In *Saskatchewan Wheat Pool v. Steffenson*, 2006 SKQB 103 (Sask. Q.B.) the Court held at paragraph 28 that:-

> ... when the party adducing this affidavit evidence fails to produce the affiant for the purpose of cross-examination, the court must be extremely cautious if it is to rely on the affidavit evidence. Further, when the affidavit evidence is critical to the resolution of the case, and particularly when the opinions contained therein are contradicted by evidence adduced by the opposing party, such caution must be all the greater. Where the affiant fails to attend to be cross-examined the issue is not one of admissibility but the weight or probative value to be given to such affidavit evidence.

66 Given the conflicting versions of the evidence before me with respect to what transpired at the cross-examination on Affidavit however, I draw no adverse inference on Kumra for the failure of that examination to take place.

Conclusion

67 The Luthras' request that the property legally described as Plan 7823024, Block 8, Lot [...] and municipally described as [...] - 17 Avenue, Edmonton, Alberta be transferred back to Aniceta Luthra subject to existing encumbrances on title; that the Registrar of Land Titles to reregister the property legally described as Plan 7823024, Block 8, Lot [...] in the name of Aniceta Luthra; and that the Registrar of Land Titles register a new Certificate of Title in the name of Aniceta Luthra notwithstanding the provisions of subsection 191(1) of the *Land Titles Act*, R.S.A. 2000, c. L-4 is denied.

68 Allowing that application by the Luthras would resolve this dispute in favour of them at this time without a trial, although Kumra could again sue the Luthras. Ultimately our Court of Appeal stated what is clear in this case, and that is there has been no final determination of the merits of either Kumra or the Luthras' claims in this matter. Granting the Luthras title would also be prejudicial to Kumra as she resides in the property, which she says is her principal residence. The Luthras' caveats will remain on title however.

69 MacDonald Realty Edmonton East is appointed as the Receiver/Manager of the (Revenue) Property in dispute, and they will manage and obtain a fair market value rent for each of the two suites located on the Revenue Property, and they will collect any rentals, which will be paid into Court.

70 The cross-application of Kumra for Summary Judgment and Summary Dismissal is also dismissed as there are directly contradictory Affidavits in this matter.

71 The costs of this Application and Cross-Application will be "in the cause".

Application granted in part; cross-application dismissed.

TAB 10

1998 ABCA 306
Alberta Court of Appeal

Reference re Firearms Act (Canada)

1998 CarswellAlta 1463, 1998 ABCA 306, 188 W.A.C. 35, 228 A.R. 35, 3 C.P.C. (5th) 245, 86 Alta. L.R. (3d) 59

In the Matter of Section 27(1) of the Judicature Act, R.S.A. 1980, Chapter J-1

In the Matter of a Reference by the Lieutenant Governor in Council to the Court of Appeal of Alberta for Hearing and Consideration of the Questions set out in Order in Council 461/96 Respecting the Firearms Act, S.C. 1995, Chapter 39

Fraser C.J.A., Hetherington, Irving, Conrad, Berger JJ.A.

Judgment: September 29, 1998
Docket: Edmonton Appeal 9603-0497-AC

Counsel: *R.A. McLennan, Q.C.*, *B.R. Burrows, Q.C.* and *T.W.R. Ross*, for Government of Alberta.
P.W.L. Martin, Q.C., *S.L. Martin, Q.C.* and *J.N. Shaw* (not present), for Government of Canada.
B.A. Crane, Q.C. and *P. Shaw*, for Shooting Federation.
D.P. Jones, Q.C., for Alberta Fish & Game Association.
D.J. Miller, Q.C., for Government of Manitoba.
A.D. Pringle, Q.C. and *J. Ross*, for Alberta Council of Women's Shelters.
C.C. Ruby and *J. Copeland*, for Coalition for Gun Control.
E. Maksimowski and *R.E. Charney*, for Government of Ontario.
G. Mitchell, for Government of Saskatchewan.
E. Stewart, for Government of N.W.T.
H.L. Kushner, for Government of Yukon.
M. Sherry (not present), for Chiefs of Ontario.

Subject: Civil Practice and Procedure

Headnote

Practice --- References and inquiries — Conduct of reference or inquiry — Evidence

Case management judge determined that all parties must obtain leave to cross-examine on rebuttal evidence and set April 28, 1997 as date by which cross-examinations to be completed — Coalition on Gun Control filed affidavit on April 18 as rebuttal evidence, on which Crown sought leave to cross-examine — Coalition opposed Crown's motion and contested hearing occurred on May 8 — Motion was allowed and extension of time for cross-examination was granted to May 15 — Coalition advised Crown on May 13 that affiant would not be available in time — Coalition's motion for order permitting cross-examination by teleconferencing or permitting affidavit into evidence without cross-examination was dismissed on basis that cross-examination by teleconferencing was inadequate and that affiant's busy schedule was not sufficient reason to dispense with cross-examination — Coalition brought motion before Court of Appeal — Motion dismissed — Affidavit could not be accorded any weight absent opportunity to cross-examine — Affidavit could not be regarded as "inherently reliable" because it contradicted other affidavits in evidence.

Evidence --- Affidavits — Cross-examination — Right to cross-examination

Case management judge determined that all parties must obtain leave to cross-examine on rebuttal evidence and set April 28, 1997 as date by which cross-examinations to be completed — Coalition on Gun Control filed affidavit on April 18 as rebuttal evidence, on which Crown sought leave to cross-examine — Coalition opposed Crown's motion and contested hearing occurred on May 8 — Motion was allowed and extension of time for cross-examination was granted to May 15 — Coalition advised Crown on May 13 that affiant would not be available in time — Coalition's motion for order permitting cross-examination by

teleconferencing or permitting affidavit into evidence without cross-examination was dismissed on basis that cross-examination by teleconferencing was inadequate and that affiant's busy schedule was not sufficient reason to dispense with cross-examination — Coalition brought motion before panel of Court of Appeal — Motion dismissed — Affidavit could not be accorded any weight absent opportunity to cross-examine — Affidavit could not be regarded as "inherently reliable" because it contradicted other affidavits in evidence.

The case management judge, on a reference concerning the *Firearms Act*, determined that all parties to the action must obtain leave of the court to cross-examine on rebuttal evidence and set April 28, 1997 as the date by which cross-examinations were to be completed. On April 18, the Coalition for Gun Control filed the affidavit of a Swiss academic in rebuttal. The Crown brought a motion for leave to cross-examine the affiant. The coalition opposed the motion not on the ground that there was no basis for cross-examination, but on the basis that the affiant's many responsibilities overseas would make scheduling of cross-examination difficult. Leave to cross-examine was granted, along with an extension of the time available to do so to May 15.

On May 13, the coalition advised the Crown that the affiant would not be available for cross-examination within the deadline. On May 14 the coalition brought a motion seeking an extension of time and seeking leave to permit cross-examination of the affiant either in Switzerland or by means of teleconferencing. The case manager dismissed the motion and allowed the Crown's cross-motion to strike the affidavit for lack of cross-examination. The coalition brought the motion before a panel of the Court of Appeal.

Held: The motion was dismissed.

Per Fraser C.J.A., Irving and Conrad JJ.A.: The case manager did not err in striking the affidavit. The coalition was aware at the time of the original motion for leave to cross-examine that the affiant was extremely busy, that he was a likely candidate for cross-examination and that the case required very tight case management deadlines. Notwithstanding, it vigorously and unjustifiably opposed the proposed cross-examination, thus consuming time which would otherwise have been available for scheduling the cross-examination. The coalition waited until two days before expiry of the extended time allowed for cross-examination to advise the Crown that the affiant would not be available until July.

While the right to cross-examine is not absolute, unusual circumstances are required to justify its refusal. No such circumstances existed in the case at bar, nor was this an appropriate case to allow the affidavit into evidence subject only to a caution as to the weight to be accorded it.

Per Hetherington and Berger JJ.A. (dissenting): The motion should be allowed. While the coalition was wrong to have resisted cross-examination prior to the April 28 deadline, the case management judge ought to have allowed its motion to permit cross-examination by teleconferencing. Even in the absence of any cross-examination, the lack of cross-examination should go to weight rather than admissibility. The court was entitled to receive the deposition and give it such consideration as was appropriate in all the circumstances.

MOTION by Coalition for Gun Control for order permitting them to adduce affidavit without producing affiant for cross-examination.

***Fraser C.J.A., Irving, Conrad JJ.A.*:**

I. Summary

1 The Coalition for Gun Control, the Canadian Association of the Chiefs of Police, the City of Toronto and the City of Montreal [the Coalition] brought a motion before this Court for an Order permitting them to adduce the affidavit of Professor Martin Killias without cross-examination. At the hearing of this Reference, we declined to make that Order and denied admission of the Killias affidavit. The following are our written reasons for this decision.

II. Facts

2 On December 2, 1996, the Case Manager in this Reference, Côté J.A., determined that all parties to this action must obtain leave of the Court to cross-examine on rebuttal evidence. In February 1997, Côté J.A. set April 28, 1997 as the date for cross-examination on rebuttal evidence.

3 On April 14, 1997, Professor Killias, a professor of criminology and criminal law at the University of Lausanne, swore an affidavit addressing the correlation between access to guns and gun-related deaths. The affidavit was filed as rebuttal evidence on April 18, 1997. Counsel for Her Majesty the Queen in Right of Alberta [Alberta] asked Côté J.A., by way of two letters dated April 23 and April 24, for leave to cross-examine the rebuttal evidence of Professor Killias. The Coalition *opposed* Alberta's motion for cross-examination on May 8, 1997. At the hearing of Alberta's motion, the Coalition requested that if leave to cross-examine were granted, such cross-examination should take place by written interrogatories.

4 Côté J.A. granted Alberta's motion for leave to cross-examine and the extension of time sought. His Lordship ordered that cross-examination was to take place in Toronto no later than May 15, 1997. On May 13th, the Coalition advised Alberta that Professor Killias' busy schedule prevented his attendance in Toronto for the purpose of cross-examination. Counsel for the Coalition described Professor Killias' schedule as follows:

> We have now had an opportunity to confirm Dr. Killias' schedule, as he has just returned from Vienna. He is unable to travel to Canada to be cross-examined before early July, when his classes end. His schedule simply does not permit it. He currently has a double teaching load, and in addition must supervise, coordinate and defend the ongoing research projects of the Institute where he teaches. In addition, he sits as a part-time judge on the Swiss Federal Supreme Court. As a result of these responsibilities, he is unable to travel to Canada before classes end in early July.

5 The Coalition then brought a motion before Côté J.A. on May 14th seeking an extension of time and seeking leave to permit the cross-examination of Professor Killias in Switzerland, or alternatively, by video-conferencing. Justice Côté denied the Coalition's motion on the ground that the timetable for filing documents in this Reference prevented an extension of time. His Lordship then granted Alberta's consequent motion to strike out the Killias affidavit for lack of cross-examination. Côté J.A.'s oral reasons for judgment provide in pertinent part:

> I will point out that at the time the motion for leave to cross-examine Killias was granted, a motion which had been outstanding or foreshadowed for quite some time, there was no indication then that one day was good for him but another was bad for him. There was just a general indication that he was a very busy man and it would be a great bother for him to be cross-examined at all.
>
> In the realm of excuses for a witness not coming to Court to be cross-examined, the fact that he is a very busy man surely is one of the weaker ones. On the original motion for leave to cross-examine, that was the only objection. There was no suggestion that cross-examination, if permitted, would be useless or that there was no basis for it, and it was agreed between counsel that the affidavit of Dr. Martin Killias contradicted that of one or two other witnesses whose affidavits had been filed on the other side.
>
> One might think that cross-examination or the right to cross-examine only goes to weight, and not to admissibility. By one of life's strange coincidences, I was looking up the law of cross-examination for a different case this morning and stumbled across a passage in Halsbury's Laws (v. 15, p. 443 n. (c), 3d ed.) which says that inability to cross-examine is a ground to exclude evidence; the case cited is *Allen v. Allen*, [1894] P. 248 (C.A.) @ pp. 253-54, a decision of the English Court of Appeal which supports that view. That was a case where the trial judge denied a certain party the right to cross-examine a witness called by a party on the same side as the one who wished to cross-examine. The Court of Appeal held that the denial had been improper, and that that rendered the evidence inadmissible.
>
> On the other hand, it is true that weight is not for me, but for the panel, and I suppose that my decision would be open to an appeal. It is also true that the panel will have a grasp of what all the issues and the evidence on both sides are.
>
> My decision, therefore, is as follows.
>
> I strike out the affidavit of Martin Killias....

III. Issue

6 Did the learned Case Manager err in striking out Professor Killias' affidavit for lack of cross-examination?

IV. Analysis

7 We view the problem with scheduling the cross-examination of Professor Killias as the product of three factors: (1) Professor Killias is apparently an extremely busy man; (2) the number of parties and the sheer volume of material in this case required tight case management deadlines; and (3) the Coalition opposed Alberta's motion to cross-examine. We note that it has never been suggested that there was *no basis* for the cross-examination of Professor Killias. To the contrary, the parties agreed that the Killias affidavit contradicted other affidavits already admitted into evidence. It is clear that the Coalition had full knowledge of the circumstances which prevented timely cross-examination in this case. The Coalition knew Professor Killias was a busy man; it knew the Killias affidavit contradicted other evidence; it knew Professor Killias a likely candidate for cross-examination; it knew this case had to proceed on a tight procedural schedule; but despite all this, when there was still ample time to cross-examine Professor Killias, the Coalition vigorously opposed his proposed cross-examination by Alberta.

8 Against this factual backdrop, we must evaluate the law to see whether Côté J.A. was in error to strike the affidavit without cross-examination. Although the rule requiring cross-examination may not be absolute, it does provide that a party is entitled to cross-examination "as of course": *ITT Industries v. Jolin Holdings Ltd.* (7 June 1979) (Alta. C.A.) [unreported]; *Zalkowski v. Brewster Transport Co.* (1956), 18 W.W.R. 190 (Alta. C.A.). As Veit J. explained in *R.O.M. Construction Ltd. v. Heeley* (1982), 20 Alta. L.R. (2d) 200 (Alta. Q.B.) at 204:

> Rule 314(1) states that a person who has made an affidavit filed in any action or proceeding may be cross-examined on the affidavit without order.Such an examination, given as a right in the Rules, should be denied only in unusual circumstances.

9 No unusual circumstances exist in this Reference sufficient to deny Alberta the opportunity to cross-examine Professor Killias on his affidavit. The Coalition knew in advance that Professor Killias was an extremely busy man. The Coalition was warned, along with all other participants in this Reference, that the case management deadlines would be demanding and necessary to bring this action to a timely hearing on the merits. The Coalition challenged cross-examination when it had no substantive ground to do so. Even then there was time remaining to schedule cross-examination before the revised May 15th deadline, but the Coalition *waited* until May 13th to advise anyone that Professor Killias would be unavailable. In light of these facts, the instant situation does not present one of the "clearest of situations" necessary to deny the right to cross-examine: *Canada (Attorney General) v. Sandford* (1995), 34 Alta. L.R. (3d) 170 (Alta. Q.B.).

10 We also disagree with the Coalition's argument that any problems with the lack of cross-examination go to weight, not admissibility. The Coalition submits that the usual approach is to admit evidence not tested by cross-examination and address the resulting problems by giving the evidence less weight. The cases the Coalition cites in support of this proposition are easily distinguishable from the instant facts. Professor Killias was not cross-examined because he could not find the time to travel to Canada. In the cases relied upon by the Coalition there was no cross-examination because the witness died before cross examination (*Randall v. Atkinson* (1899), 30 O.R. 242 (Ont. H.C.); *Eastern Trust Co. v. Hume* (1964), 48 W.W.R. 575 (B.C. S.C.); *Cook v. Laba* (1986), 52 Alta. L.R. (2d) 187 (Alta. Q.B.)), or immigration authorities would not permit the witness to enter Canada (*R. v. Son* (1995), 30 Alta. L.R. (3d) 36 (Alta. Prov. Ct.)). In the cases cited, the lack of cross-examination was beyond the control of the deponents. In this Reference, it was not. In our view, the Killias affidavit cannot be given any weight absent the opportunity to cross-examine Professor Killias on key pieces of information that Alberta clearly disputes.

11 Nor can the Coalition argue that the affidavit is "inherently reliable", which might justify admitting it without cross-examination. Professor Killias' affidavit contradicts other affidavits already in evidence. All this being so, it would be inappropriate for this Court to "weigh" such an affidavit without the benefit of cross-examination.

12 Finally, we disagree that the Case Manager erred in not permitting cross-examination by teleconferencing. Justice Côté, the Case Manager, was in the best position to evaluate whether meaningful cross-examination could have been achieved by teleconferencing on a timely basis. This Court must accord some deference to the understanding and familiarity a Case Manager has with the case before him: *Esso Resources Canada Ltd. v. Stearns Catalytic Ltd.* (1991), 79 Alta. L.R. (2d) 1 (Alta. C.A.).

Where there has been no error in principle, the "unreasonableness" standard of review applies to a case manager's exercise of discretion. Justice Kerans explained this point in his book *Standards of Review Employed by Appellate Courts* (Edmonton: Juriliber, 1994) at 126:

> decisions about trial management and preparation for trial are very much about the internal management of the first courts, and reviewing courts instinctively acknowledge that this is not a matter for close review. This again is a sound reaction, and reflects a sense of role. Only egregiously unfair management decisions require intervention.

13 We decline to second-guess the decision made on these facts. Moreover, Justice Côté properly notes that the Coalition waited until two days before the revised deadline for cross-examination before advising anyone of Professor Killias' busy schedule. In our view, the Coalition's "eleventh hour" objection and unfounded opposition to Alberta's motion for cross-examination places the Coalition in a position where it cannot now complain of the way in which events unfolded.

V. Conclusion

14 Motion denied.

Hetherington, Berger JJ.A. **(dissenting):**

15 We are of the view that the motion brought by the Coalition for Gun Control, Canadian Association of Chiefs of Police, the Corporation of the City of Toronto and the City of Montreal permitting the affidavit of Professor Killias to be adduced, should be allowed. The Case manager, Côté, J.A., determined at a hearing conducted on December 2, 1996 that all parties to this Reference required leave of the Court to cross-examine on rebuttal evidence. April 28, 1997 was set as the date for cross-examination. Professor Killias' affidavit was filed by the Coalition in a timely manner on April 18, 1997 (the deadline specified by the Court). Unfortunately, the parties did not contemplate that an application for leave to cross-examine might be contested. The scheduling of a hearing for such a contested application, in the result, precluded the cross-examination of Professor Killias prior to the deadline of April 28, 1997.

16 The evidence reveals that Professor Killias was unable to travel to Canada after that date to submit to cross-examination. The Coalition, however, offered to arrange for cross-examination by teleconferencing or, in the alternative, to produce Professor Killias in Switzerland. Only the former alternative was seriously considered by Côté, J.A. He was of the view that contested procedural issues in the course of such a cross-examination could not be readily resolved and, further, that teleconferencing *might* produce unacceptable impediments to the introduction of and examination upon documents. On that basis, the alternatives were rejected, and Côté, J.A. granted a motion on May 26, 1997, brought by Alberta, that the affidavit of Professor Killias be struck. Côté, J.A. expressly granted leave to the Applicants to bring the present motion before the full panel hearing this Reference.

17 Côté, J.A. was properly concerned with the cascading effect of further delay. And it now emerges that the Coalition was wrong to have resisted cross-examination prior to the April 28 deadline. Moreover, it cannot be seriously contested that the Coalition knew that their expert, who was not available to travel to Canada after April 28 until July of 1997, would not be cross-examined in a timely manner, absent an order permitting written interrogatories, commission evidence or cross-examination by teleconferencing. On the other hand, the Coalition made a clear and unequivocal offer to produce the witness for cross-examination by teleconferencing. It is true that some of the difficulties contemplated by Côté, J.A. may have presented had that format been adopted, but not necessarily so. Moreover, if such impediments had presented, the cross-examination would, more than likely, still have been effective, though perhaps incomplete.

18 In all the circumstances, we are of the view that the affidavit should form part of the record, mindful that it has not been tested by cross-examination. The panel, in our opinion, is nonetheless entitled to receive the deposition and give to it such weight and consideration as may be appropriate in the context and circumstances in which it is received.

Motion dismissed.

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