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December 15, 2025

Halifax Regional  
Municipality

99 Wyse Road, Suite 600  
Dartmouth  
NS Canada B3A 4S5

The Honourable Justice John Bodurtha  
Supreme Court of Nova Scotia  
The Law Courts  
1815 Upper Water Street  
Halifax, NS, B3J 1M3

Correspondence:  
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Dartmouth Main  
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Dear Presiding Justice:

**Re: In the matter of the Receivership of 4488127 Nova Scotia Limited  
Hfx No. 547515**

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This is the submission of BDO Canada Limited ("**Receiver**"), which was appointed Receiver by this Honourable Court on October 21, 2025, (the "**Receivership Order**") over the assets, undertakings, and properties of the Respondent, 4499127 Nova Scotia Limited, in support of its motion for, *inter alia*, the following:



1. an order abridging time (if required) pursuant to Rule 6 of the *Bankruptcy and Insolvency Act and Insolvency General Rules*;
2. a Sale Approval and Vesting order pursuant to section 243(1)(c) of the *Bankruptcy and Insolvency Act*, approving the sale by the Receiver of:
  - a. 4 Roseway Lane, Upper Onslow, Nova Scotia (PID 20498671);
  - b. 19/21 Summer Hill Place, Upper Onslow, Nova Scotia (PIDs 20501300 and 20501318);
  - c. 2 Roseway Lane, Upper Onslow, Nova Scotia (PID 20498515).

(the "**Properties**"), on the terms and conditions set out in the **Receiver's Second Report providing that:**

- a. the Property shall vest in the Purchaser thereof free and clear of any claims, liens, or encumbrances other than Permitted Encumbrances;



- b. that the monies paid to the Receiver pursuant to the sale of the Property shall stand in the place and stead of it for the purpose of determining the nature of the properties and claims thereto; and
3. an order approving the contents of the Second Report and the conduct and activities of the Receiver therein.

The Second Report and Affidavit of Joshua J. Santimaw are being filed in support.

### **Concise Statement of Facts**

#### **1. Receiver's Mandate**

The Receiver's mandate is set out in paragraph three (3) of the Receivership Order, which states, in part, the following:

##### Receiver's Powers

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

...

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

(i) without the approval of this Court in respect of any transaction not exceeding \$50,000, provided that the aggregate consideration for all such transactions does not exceed \$200,000; and

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

and in each such case notice under section 60 of the *Personal Property Security Act* shall not be required.

(n) to sell the right, title, interest property, and demand the Respondent in and to the Property at the time the Respondent granted a security interest or at any time since, free of all claims including the claims of subsequent encumbrancers bound as named respondents but, bound as parties joined as unnamed respondents, or bound under Rule 35.12.

...

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

and in each case where the Receiver takes such actions or steps it shall be authorized and empowered to do so...

## 2. The Properties

The Receiver has acted pursuant to its mandate to market the Property for sale in accordance with the Receivership Order. The Receiver engaged a Realtor and listed the Property on MLS.

The Receiver also engaged an Appraiser to provide a market value for the properties

The Receiver also undertook a robust marketing campaign pursuant to the Sales Process order by:

- Retaining a Realtor and listing the Property on MLS;
- Obtaining appraisals;
- Conducting viewings and adjusting the pricing for the Properties in accordance with the Realtor; and
- Negotiating and accepting an agreements of purchase and sale.

Following consultation with the stakeholders, the Receiver accepted an offer on each of the properties (the "**Successful Offers**") subject to the approval of this Honourable Court. The Successful Offers are appended to the Second Report Supplement.

### Issues

Should this Honourable Court grant the Order and approve the sale transactions?

### Law and Argument

#### 1. Abridgement of Time

Service of this Motion and its supporting materials will be made pursuant to the BIA and, in particular, §6 of the *Bankruptcy and Insolvency General Rules* which states, in part:

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

(2) Unless otherwise provided in these Rules, every notice or other document given or sent pursuant to the Act or these Rules

(a) must be received by the addressee at least four days before the event to which it relates, if it is served, delivered personally, or sent by facsimile or electronic transmission; or

(b) must be sent to the addressee at least 10 days before the event to which it relates, if it is sent by mail or by courier.

(3) A trustee, receiver or administrator who gives or sends a notice or other document shall prepare an affidavit, or obtain proof, that it was given or sent, and shall retain the affidavit or proof in their files.

(4) The court may, on an ex parte application, exempt any person from the application of subsection (2) or order any terms and conditions that the court considers appropriate, including a change in the time limits.

The Receiver intends to make its best efforts to serve the interested parties within the timelines set forth in Rule 6; however it presently seeks to abridge time.

## **2. Sale Approval — Governing Principles**

This Honourable Court held that the duties a court must perform when deciding whether a Receiver who has sold a property acted properly were enunciated in *Bank of Montreal v. Sportsclick Inc.*, 2009 NSSC 354 [Tab 1], when Duncan, J., as he then was, states, in part, the following:

[32] In *Royal Bank v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized 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.

[33] Certain principles have been enunciated by the courts in consideration of these points:

- The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation... in any but the most exceptional circumstances... 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." see, Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), at 112;
- the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. see, *Soundair* at para 40;
- the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg, supra*, at page 124, Anderson J. said:

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.

- a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co., supra*. [Tab 2]

#### **4. Sale Approval — Present Case**

As set out in the Second Report of the Receiver, the Receiver recommends the proposed sale of the Property pursuant to the Agreements of Purchase and Sale. The Receiver's recommendation is based upon:

- (a) the sale process for the Residential Properties subject to the Purchase Agreements being fair and transparent, with sufficient effort made to obtain the best price for each property



- (b) the opinion that further marketing of the applicable Residential Properties may not result in higher net proceeds of sale after considering costs to terminate the Proposed Transactions and find alternative buyers;
- (c) the view that the purchase prices contemplated in the Proposed Transactions are fair and reasonable as compared to the associated appraisals for the Residential Properties;

The Receiver considers the successful offer will maximize recovery for the Estate and its stakeholders, and it accordingly recommends the proposed sale be approved by this Honourable Court.

### **5. Approval and Vesting Order**

The Receiver was appointed pursuant to §243 (1) of the BIA which states, in part, the following:

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

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or a bankrupt that was acquired for or used in relation to a business carried on by the insolvent person of a bankrupt.
- (b) exercise any control that the court considers advisable over that property and over the insolvent persons or bankrupt's business; or
- (c) take any other action that the court considers advisable.

This Honourable Court has held that it is empowered through this provision to grant an Order vesting assets in a purchaser pursuant to a sale by a Receiver. See, *Royal Bank of Canada v. Eastern Infrastructure Inc.*, 2019 NSSC 297 [Tab 3].

The Receiver respectfully submits that the completion of the proposed sale transaction is in the best interests of stakeholders, and recommends that this Honourable Court grants the AVO.

The AVO confirms the authority of the Receiver to take such reasonable steps and execute any additional documents as may be necessary or desirable for the completion of the sale. Further, the AVO vests title in the Applicant, free and clear of all liens, charges, or encumbrances other than permitted encumbrances.



It is respectfully submitted that the issuance of the AVO: (i) will facilitate the Receiver in exercising its mandate; (ii) is in the best interests of the general body of creditors; and (iii) will not operate to prejudice any party.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

**BOYNECLARKE LLP**

Joshua J. Santinaw

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Bank of Montreal v. Sportsclick Inc., 2009 NSSC 354

**Date:** 20091117

**Docket:** Hfx 314220

**Registry:** Halifax

**Between:**

Bank of Montreal

Plaintiff

v.

Sportsclick Inc.

Defendant

**Judge:**

The Honourable Justice Patrick Duncan.

**Heard:**

November 10 and 12, 2009, in Halifax, Nova Scotia  
Orally on November 12, 2009

**Counsel:**

Stephen Kingston and Benjamin Durnford, for the  
Plaintiff  
Christopher Robinson, for the Defendant  
Dennis Pickup and Jonathan Saulnier, Articled Clerk,  
For Third Party T &A Venture Properties Inc.

**By the Court:**

**Introduction**

[1] This is a motion that seeks an order to approve the sale by the Receiver of Sportsclick Inc. of a certain asset of Sportsclick, being the shares of a company known as Southprint Inc. The application is supported by T & A Venture Properties Inc., the intended purchaser of the asset, who is participating as an interested non party. The motion is opposed by Sportsclick.

**Background**

[2] Upon application of the plaintiff, Bank of Montréal, an order was issued on July 14, 2009 by the Registrar of Bankruptcy appointing Ernst & Young Inc. as the interim Receiver of Sportsclick Inc. and Sun Vette Racing Inc. pursuant to section 47 (1) of the **Bankruptcy and Insolvency Act** (Canada), R.S. 1985, c. B-3.

[3] Following appointment the Receiver offered the personal assets of the defendant for sale by tender, excepting the Southprint shares, which the Receiver characterizes as a unique asset.

[4] The Receiver learned that the defendant is the parent company of Southprint Inc. a Martinsville, Virginia, USA based company which carries on business selling hats, jackets, shirts, toys and other items with NASCAR logos and designs. It prepares various artwork to customer specifications and silkscreens these designs on apparel and other textile products.

[5] The evidence indicates that Sportsclick completed the purchase of all shares of Southprint on or about May 12, 2009. The CEO and sole director of the company is Jack Ross, who is also the president, CEO and director of the defendant.

[6] During its investigations, the Receiver determined that the plaintiff has a charge on the shares of Sportsclick in Southprint. It does not have direct security or other agreements with Southprint.

[7] The information initially gathered by the Receiver indicated the following:

- Southprint had a net operating loss of \$1.4 million in 2008 and \$1.04 million in 2007;

- Southprint lacked operating capital, was in default in payments to trade suppliers and licensors, and did not have access to a bank operating line of credit;
  
- the majority of Southprint's accounts receivable were factored;
  
- important licensing agreements of its' major products were tied to the personal relationships of a small group of management personnel within Southprint;
  
- that on the eve of the appointment of the Receiver in July, 2009, \$75,000 US was withdrawn from a then balance of \$76,000 US that Southprint held in a US bank. This was done on the direction of Mr. Ross. Because of the concern that this may have been done as a preferential payment, the Receiver acted as a catalyst to have the signing authority of Mr. Ross, among others, removed from the Southprint bank accounts.

[8] The Receiver sent a representative to the Virginia plant to do a preliminary review of the business and operations of Southprint. The information indicated that the company was downsizing with declining sales, employees and facilities.

[9] On July 31, 2009 the Receiver was presented with an offer in the amount of \$100,000 for the purchase of the Southprint shares. The prospective purchaser included the previous shareholders who had, only months before, sold their interest to Sportsclick. One of these persons was understood to be Butch Hamlet, one of the founders of Southprint, and a key player in the company's operation and management. The offer was reaffirmed in a letter of August 7 from counsel for the purchasers. It set 5 PM on August 12, 2009 as the deadline for acceptance.

[10] The fact of this offer was communicated to Mr. Ross and others associated with Sportsclick by counsel for the Bank of Montréal. He set out various adverse conditions associated with Southprint and states:

The Bank of Montréal is not prepared to fund a very expensive receivership of Southprint in the United States to take control and operate the company. In light of the real and adverse situation presented by Mr. Hamlet, the receiver has to consider acceptance of the offer.

[11] The Receiver discussed a potential sale of the shares to Green Swan Capital Corporation, a company that held a subordinate security interest against Southprint. It was not in a position to make an offer and so the Receiver entered into negotiations with Mr. Hamlet and others, sometimes referred to as the “US group”.

[12] In deciding to attempt a private sale of the shares, the Receiver considered the information identified previously, and also:

- that the assets of Southprint were fully encumbered, including accounts receivable factored to Amerisource Funding;

- the machinery and equipment were secured to River Community Bank. This bank, in view of the default by guarantor Sportsclick ( by its being put into receivership), made a demand for repayment of the debt owed to it in the amount of \$487,705 as of August 6, 2009;

- a review of the United States UCC filings and of the company financial statements indicated that there were multiple secured and unsecured

creditors of the company, which claims against Southprint assets would rank in priority to the plaintiff's security interest.

- that a legal opinion obtained by the Receiver indicated that under the laws of the state of Virginia, a claim by a shareholder to the assets of the company is subject to secured and unsecured creditors, making a shareholder a junior creditor;

- the Bank of Montréal again confirmed that it would not fund an action for the carrying on of the business of Southprint;

- the management team of Southprint was prepared to resign unless a deal was completed to assure the company's viability.

[13] The Receiver concluded that sale as a "going concern" represented the best option.

[14] A Nova Scotia-based group contacted the Receiver in mid-August indicating an interest in the Southprint shares. Believing that it should allow this new

expression of interest to be explored, it advised the US group who, as a result, withdrew their offer of \$100,000.

[15] No other offers were forthcoming and so the Receiver proceeded with a public tender of the Southprint shares owned by Sportsclick. This was also in response to pressure being exerted by Sportsclick management who favored a public tender process.

[16] An advertisement of the sale was posted in newspapers in Nova Scotia and in Virginia in four successive weeks commencing September 5, with the deadline for offers by September 30, 2009.

[17] In addition, Ernst & Young developed a direct marketing list of prospective buyers who were contacted and advised of the opportunity to purchase the Southprint shares. Of this listing, 17 groups requested and were provided a copy of the Information Package.

[18] The advertising costs alone are valued at in excess of \$24,000.

[19] Mr. Ross was also invited on various occasions to provide a list of names of any potentially interested parties for the purchase of these shares. No suggestions came forward.

[20] At the tender close date there was a single offer in the amount of \$25,000US made by T & A Venture Properties Inc. There has been representations by counsel for T & A that this is a company that is separate from the previous shareholders. The evidence provided by Mr. Kinsman, being the only evidence I have on this issue, is that it consists of individuals who currently have a managerial or operational role in Southprint and is the same group that previously made the \$100,000 offer.

[21] If the offer is accepted then it will barely cover the cost of the advertising.

[22] On October 13, 2009 Justice McDougall of this court issued an order appointing Ernst & Young Inc. as Receiver of all of the assets, property and undertaking of Sportsclick Inc. with broad powers that included:

- 2 (i) To market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such

terms and conditions of sale as the Receiver in its discretion may deem appropriate;

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

(o) to exercise any shareholder ... rights which the Company may have; and

(p) take any steps reasonably incidental to the exercise of these powers.

[23] The Receiver has recommended to this court that it approve the sale of the Southprint shares for the sum of \$25,000US because this is the value which presented itself to the Receiver when the asset was widely exposed to the market for sale, and after Sportsclick's principals and others (such as Green Swan capital Corporation) were consulted for assistance with marketing the asset.

### **Position of Sportsclick**

[24] Jack Ross, in his affidavit, concisely sets out the basis of the defendant's opposition to approval of the sale.

[25] He says that the value of Southprint was, "...after considerable effort and due diligence, determined to be in the region of \$4 million as at the date of acquisition by May 12, 2009." He rejects the suggestion that the assets deteriorated to \$25,000US.

[26] He says that from the commencement of the receivership until September 2, 2009 the Southprint bank balance "consistently averaged \$200,000 +" which challenges the accuracy of the assertions that there were cash flow problems in Southprint.

[27] He questions the effort expended by the Receiver in trying to achieve reasonable value for the asset alleging that the Receiver acted improvidently, without commercial reasonableness, and without regard for the best interests of the shareholders and creditors of Sportsclick. He maintains that the assistance and guidance of members of the Sportsclick management group should have been utilized to achieve reasonable value for the shares.

[28] In his submissions, counsel for the defendant expanded on these points. He argues that there were several failings of the Receiver which led to the current situation:

- that there is no evidence before the court to demonstrate that the Receiver conducted a proper valuation of the asset at any point during the receivership;

- that in eliminating the participation of Sportsclick management from a position where they could oversee the operations of Southprint, and by allowing the previous shareholders and management group of Southprint to have unfettered control of the company, the Receiver created the current situation where those same people are able to inhibit the marketability of the asset by threatening to withdraw or engage in activities that would be detrimental to the value of Southprint;

- that the most current value by which the offer should be measured is the acquisition price paid in May, 2009 which is so substantially more than the

amount offered in the tender process as to demonstrate that it is not commercially reasonable to accept it;

- that because of the unique nature of the asset, the marketing attempt of the Receiver was inadequate in that:

1. Newspaper advertising only referred to the “shares of Southprint” as being made available for sale. In Virginia the company operated under a different business name and so the Southprint name would not be meaningful to prospective purchasers;
2. The newspaper advertising in Virginia was confined to one paper with a circulation of 170,000 people;
3. The advertisement should have provided more detail about the nature of the asset in order to generate interest and should have been more widely disseminated through newspapers with larger circulation and broader geographic appeal;

- that the targeted group was not large enough.

### **Position of the Receiver**

[29] The applicant submits that the nature of this asset, with its adverse characteristics for operation as a going concern, was unique and of interest to a very limited class of potential purchasers who it attempted to reach with its marketing efforts. It stands by the tender process as being a commercially reasonable effort to maximize the realization value of the shares.

[30] I have been referred to the principles set out in the decision of *Royal Bank of Canada v. Soundair Corporation* [1991] O.J. 1137 (Ont. C.A.) as addressing the criteria applicable to this court's review of the Receiver's sale of assets. I am urged that all of the criteria contained therein have been met.

[31] In response to the specifics of the allegations of Mr. Ross and Sportsclick the Receiver says:

- that Mr. Kinsman, acting on behalf of Ernst & Young in this matter, is an experienced and savvy Receiver who made adequate inquiries throughout to ensure that he understood the nature and financial characteristics of Southprint;
  
- that he was prepared to accept the risk in walking away from the \$100,000 offer which demonstrates his commitment to achieve the best possible realization value;
  
- that the advertising of the shares undertaken in the tender process was consistent with the industry-standard;
  
- that the Receiver generated inquiries from 17 different parties through targeted marketing efforts;
  
- that due to the position taken by the Bank of Montréal in refusing to undertake the management or control of Southprint there was no direct route to liquidate the assets of Southprint. Further that it would be subject, as a shareholder, to taking a junior position as a creditor;

- that in triggering the removal of Sportsclick's management from signing authority at Southprint it was acting to preserve the value of the asset. The Receiver was concerned that on the direction of Sportsclick management \$75,000US was transferred from Southprint to a principle of Sportsclick on the eve of the receivership in July. Fearing a preferential payment the Receiver sought to block future such transactions. The Receiver did not intend to, nor did it communicate to Mr. Ross that he was barred from otherwise taking an operational role in Southprint;

- And finally, that it has consistently invited the assistance of Mr. Ross, but that none has been forthcoming, except to the extent that Mr. Ross indicated he would assist in return for a six month contract paying him his then current salary of approximately \$10,000 per month, an offer that the Receiver rejected. Mr. Ross rejected a counter proposal to be paid on an hourly rated basis. He also did not respond to an invitation by the Receiver to present another proposal to assist the Receiver.

**Law**

[32] In *Royal Bank of Canada v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized 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.

[33] Certain principles have been enunciated by the courts in consideration of these points:

- The decision must be assessed as a matter of business judgment on the elements then available to the Receiver. That is the function of Receiver and “... to reject [such] recommendation... in any but the most exceptional circumstances... 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.” *see*, Anderson J. in *Crown Trust v Rosenberg* (1986), 60 O.R.(2d) 87 at 112;
  
- the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see*, *Soundair* at para 40;

- the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. V.*

*Rosenberg, supra*, at page 124, Anderson J. said:

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.

- a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. see, *Crown Trust Co., supra*.

## ANALYSIS

[34] I agree that the shares of Southprint presented as a unique or unusual asset. Southprint opened in 1991 and began operating under that name in 1992. It developed a customer base of large branded companies that grew to include Adidas, Big Dog Sportswear, J. America (college licensee), and MJ Soffe (U.S. Army exclusive licensee). In 1994 it purchased Checkered Flag Sports and

developed and marketed NASCAR apparel to retail outlets. It was owned and managed privately, with Mr. Hamlet being the president and majority shareholder.

[35] The evidence suggests the company became successful on the strength of the personal relationships of its management team, particularly with the licensors whose business was crucial to the viability of the company.

[36] Sportsclick had a Business Acquisition Plan that was intended to improve profitability in a relatively short time. i.e. within 12 months of acquisition. However, two months after acquisition, Southprint was in receivership and unable to carry out its plan.

[37] While Sportsclick made some initial changes to the operations of Southprint, including financing and some staffing changes, it does not appear from the evidence that it had any major influence on the operations. There is no evidence that Sportsclick provided an infusion of capital for Southprint nor did anything that substantially attacked the problems affecting its financial operating capabilities.

[38] In consequence thereof, the previous management team, that included its founders, remained in place. They have continued to operate the business under the benign oversight of the Receiver who has made it clear that it was never in the Receiver's mandate to operate or manage Southprint. There is no persuasive evidence on which to conclude that the financial situation of Southprint has improved.

[39] The prospective purchaser, I am told, includes members of the current management team. Those persons have threatened to walk away from the business if a purchaser is not in place to guarantee the financial viability of the company. Their participation in the operation of the company at this time is crucial if it is to continue as a going concern.

[40] The defendant complains that this is a situation that should not have been allowed to take place and that it has negatively impacted on the market for the shares of Southprint. The inference I am asked to draw is that either by the continued involvement of the Sportsclick management team, or the more active oversight of the Receiver, the shares of this company would have made a more attractive buying opportunity. It is also suggested that the equity in the assets

alone should attract a substantially greater purchase price. All of this presupposes that there is a person or company who sees that potential as significant enough to offset the problems that acquisition will inevitably entail.

[41] The Receiver says that the market place determines value and that the marketplace has spoken. No one agrees with the defendant's view of the value that this opportunity presents. Only T & A has an interest now.

[42] For its part the Bank of Montreal, a significant secured creditor of Sportsclick, has also accepted that it is not worth pumping more money into selling the shares. They have gauged the marketplace and obviously have come to the same conclusion as the Receiver.

[43] Neither have other creditors stepped up to offer, even a dollar, to acquire these shares in hopes of somehow realizing some greater return, in a break up of the assets of Southprint, or as a going concern.

[44] Unfortunately there is no evidence on which I could conclude that any marketing scheme would attract a better price or more interest. It is speculative to

suggest that it would. It is not sufficient, in my mind, to challenge the business judgment of an experienced Receiver on the basis of speculation.

[45] The underlying assumption of the defendant's argument is that the limited interest in the company is derived from the Receiver's handling of the company and the marketing effort. In support of this view, I have been referred to the valuation put on Southprint by Sportsclick at the time of purchase which closed in May, 2009.

[46] It is suggested that that is the best, if not the only reliable way to measure the value of the shares.

[47] I have examined Southprint's financial statements, the PWC due diligence draft report of January 2009 and the Southclick Inc. Business and Acquisition Plan, also dated January 2009. I have also considered the affidavits of Jack Ross.

[48] The following is a snapshot of what I view as indicators of the relative financial health of Southprint in the years 2004-2008:

	2004	2005	2006	2007	2008
Sales	20.1 M	18.8 M	16.7 M	14.01 M	13.9 M
Operating Loss	601.5 K	221 K	398 K	1.38 M	1.73 M
Net Operating Loss	396 K	242 K	306 K	1.04 M	1.4 M

[49] As can be seen, sales were dropping long before the current economic downturn. Net operating losses climbed to the point where they totaled \$2.44 million on sales of \$28 million in the last 2 years before Sportsclick made its purchase.

[50] Southprint was reliant for day to day operations on approximately \$4.0 million in financing that was dependent on its then shareholders' personal financing backed by a traditional lender. It closed one plant in 2008, cut back shifts, laid off employees and in January 2009 closed completely for a short period of time.

[51] As at January 2009 a number of the 2009 licencing agreements had not been signed, including the contract thought to have the most value. One account that had generated sales of almost \$2.0 million in 2007-2008 was not expected to be part of sales in 2009. It is not clear in the business plan how this significant loss of revenue was going to be replaced or how expenses were going to be controlled to off set such a loss.

[52] Notwithstanding its capital and real property assets Southprint is a company that has been in serious financial decline for several years.

[53] According to Mr. Ross's affidavit, Sportsclick acquired all of the outstanding shares of Southprint in exchange for the issuance of 6 million shares of Sportsclick to various of the former Directors and Officers of Southprint . The book value of the shares was \$3 million. The value of the Sportsclick shares on the TSX Venture Exchange at the close of business on May 12, 2009 was \$.15 per share, or \$900,000. In addition, shareholder loans owed by the two previous principals of Southprint were treated as goodwill and taken off the books of the company in a non-cash transaction. While I agree that the purchase price was

approximately \$4,000,000 in value, it was not put up in cash, which is the expectation of a Receiver.

[54] Put another way, there are certain methods of effecting a sale that would be available in an unfettered sale between a willing and financially stable vendor and a willing and financially stable purchaser that are not feasible on a liquidation. It is one of the reasons why it is common for assets to be sold off at significantly reduced prices in a Receivership from what might be negotiated in the ordinary course of business. In a liquidation the sale is typically for cash and is to be achieved in an abridged time frame. The longer the time extends, the greater the costs of the Receiver, and the greater the deterioration of the asset values to the creditors.

[55] The Sportsclick business plan for Southprint had the following general features:

- to improve the sales culture
- to reduce salary and benefit commitments by reducing staff and capping compensation

- renegotiating royalties
- reduction of some promotional costs
- to reorganize the financing
- to take advantage of the “synergies between Sportsclick and Southprint.”

[56] The result was predicted to reduce overhead by \$1 million.

[57] Sportsclick intended to sell 2 pieces of real property for \$150,000 and to obtain direct financing of \$4.0 million by factoring accounts receivable, mortgage financing, term financing and inventory financing.

[58] These forms of financing would be dependent upon the financial soundness of Sportsclick as the owner and guarantor. At no point does the plan speak to the infusion of capital by Sportsclick to Southprint.

[59] Under its current situation, Sportsclick has no ability to guarantee, nor to otherwise financially support the operations of Southprint. Creditors of Southprint

who stand ahead of the shareholder have seen this and issued demand for payment. Neither is there a prospect for the predicted benefits of the “synergies” between parent and subsidiary.

[60] Southprint can only survive as a going concern with a purchaser that has the financial ability and the will to take on a company that is now losing almost \$2 million per year on declining sales, has limited creditworthiness, and is largely dependent on the willingness of the existing management team to continue to use their knowledge of the company and of its existing business relationships to the benefit of Southprint.

[61] The Receiver has no mandate to operate Southprint. The only other option is to simply close Southprint down and liquidate the assets, hoping that the equity will cover the cost of acquisition. That option is not open to the Receiver in this case. None of the creditors of Sportsclick have seen fit to step forward to take on this challenge. Whether that is a good business decision is not relevant to the position of the Receiver, who can only act with the resources that it has available to it. As Mr. Durnford indicated in his submissions, there may be collateral issues to

this matter that arise for resolution in the principal action as between the Bank and Sportsclick, but that is not determinative of the considerations before me.

[62] Finally, I am urged to accept that the accumulated financial acumen of the management of Sportsclick in making this purchase is a reliable indicator of the accuracy of the value they attached to Southprint. With respect, even good business people fail as a result of unexpected conditions, or because of errors, some within their control, some beyond their control. In this case the fate of Sportsclick speaks to a business model that failed. I will not defer to the judgement of those who oversaw that failure over the judgment of the Receiver.

### **Conclusion**

[63] In *Greyvest Leasing Inc. v. Merkur* [1994] O.J. 2465, the Ontario Court of Justice held at paragraph 45 as follows:

Commercial reasonableness depends upon the circumstances of the sale, including a consideration of variables such as the method of sale, the subject matter of the sale, advertising or other methods of exposure to the public, the time and place of the sale, and related expenses. A Receiver is under a particular duty to make a sufficient effort to get the best possible price for the assets. [See *Royal Bank v. Soundair Corp.* 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1

(C.A.)] This duty is not to obtain the best possible price but to do everything reasonably possible with a view to getting the best possible price.

[64] I am satisfied that the Receiver in this case did that. It is a most disappointing result for the creditors, and the debtor. It will at best cover some of the disbursements on sale. No one benefits greatly from this, except perhaps the principals of T & A, but the evidence suggests that they have significant challenges ahead of them to make this a profitable company, in difficult economic times. They may be the only ones who have the ability to do so.

[65] The decisions made by the Receiver were made in good faith, cognizant of the duties that a Receiver is subject to. It made business judgments that may be easy, with the benefit of hindsight, to criticize, but they were reasonable having regard to the circumstances in existence at the time. No alternatives to the targeted marketing approach have been shown to exist that would provide, beyond speculation, the potential for a greater return.

[66] The tender process, once decided upon, was carried out in a transparent and fair manner, consistent with industry standards.

[67] Having regard to the facts as set out herein, and the duties on a court as enunciated in *Soundair*, I am satisfied that the Receiver's recommendation should be accepted. I am prepared to grant an Order to give effect to the sale of the shares of Southprint to T & A Venture Property Inc for the sum of \$25,000 US.

[68] Delivered orally at Halifax, Nova Scotia this 12<sup>th</sup> day of November 2009.

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Duncan J.

Crown Trust Co. et al. v. Rosenberg et al.

60 O.R. (2d) 87

ONTARIO  
HIGH COURT OF JUSTICE  
ANDERSON J.  
6TH NOVEMBER 1986.

1986 CanLII 2760 (ON SC)

Civil procedure -- Parties -- Intervention -- Receiver not recommending highest offer for court approval -- Offeror seeking to be added as intervenor on motion for approval -- No right to be added on motion -- No interest in matter -- Not adversely affected -- Considerations -- Rules 1.03, paras. 15, 22, 13.01.

Courts -- Jurisdiction -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Moving for approval of offers -- Duties of court on motion.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Receiver acted reasonably, properly and fairly -- Offers to be approved.

Debtor and creditor -- Receivers -- Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions -- Receiver developing complex disposition strategy with court approval -- Not accepting highest offer because of various concerns -- Moving approval of other offers -- Highest offeror submitting

new offer after commencement of hearing -- New offer not to be considered.

In 1983, C Inc. was appointed by court order as interim receiver and manager of the defendants' properties. Subsequently in 1983, an order was made with respect to the marketing of the properties pursuant to a disposition strategy. That strategy involved first, a negotiation stage which included meetings between C Inc. and prospective offerors. This stage ended on September 3, 1986, with offers from prospective purchasers to the receiver wherein all terms and conditions of the transaction except the final offering price were settled. The second stage required prospective purchasers wishing to bid on individual properties, groups of properties, or all of the properties to submit sealed bids by September 10th. The third stage called for the receiver to notify the bidders of the acceptance or rejection of their offers within 15 days of September 10th. Pursuant to the disposition strategy, C Inc. received approximately 200 offers on September 3, 1986. Also pursuant to the strategy, C Inc. received approximately 230 sealed bids on September 10th. The receiver selected 26 offers by 14 offerors and brought a motion recommending approval of those offers by the court.

L Inc. submitted four draft offers on September 3rd and four sealed bids on September 10th. The receiver rejected three of them and held the fourth open pending the disposition of this motion, but did not recommend it. L Inc. was the highest bidder. The reason the receiver did not recommend the L Inc. fourth offer was because the receiver was concerned to maintain the integrity and fairness of the tender process and because it believed that the offer, as supplemented by letters, was not in acceptable form, nor in accordance with the rules of the process. Among other things, L Inc. proposed to finance the purchase in a novel fashion by the use of a promissory note, which caused problems with the discount rate and the sale and purchase of the note; inserted a financing condition in the sealed bid which was not in its offer; failed to identify the mortgages to be discharged; and waived the financing condition on September 18th by letter from its solicitors. Further, the terms and conditions of the offer were unclear and were not

clarified by L Inc. to the satisfaction of the receiver. In addition, the receiver was concerned, in view of the history of the properties and the attention they attracted in political circles, among the tenants of the properties, in the media and from the public, that L Inc.'s inflated nominal purchase price might be regarded as intended to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. If so, this might cause intervention in the transaction which would imperil a successful closing.

On the return of the motion, L Inc. moved to be added as an intervenor and several days later presented an entirely new offer for a still higher amount.

Held, the offers recommended by the receiver should be approved; L Inc.'s motion to be added as an intervenor should be dismissed, and L Inc.'s newest offer should not be considered.

(1) The court has jurisdiction under rule 13.01 to add a person as an intervenor to a proceeding where the person claims an interest in the subject-matter of the proceeding and that he or she may be adversely affected by a judgment in it. L Inc.'s motion to be added should be dismissed, because the rule applies only to a proceeding, defined in rule 1.03, para. 22, as an action or application. Further, para. 15 defines "judgment" as a decision that finally disposes of an application or action. Hence, rule 13.01 does not apply to a motion. In any event, L Inc. had no interest in the question whether approval of the offers recommended by the receiver was in the best interests of the parties to the action, but only in seeking to have its offer accepted. Nor would L Inc. be adversely affected by any "judgment" in the proceedings in respect of any legal or proprietary right, since it had no such right. Furthermore, the consequences of making the orders sought would likely cause delay and complication in the completion of the transactions.

(2) The late offer by L Inc. should not be considered even though it was approximately \$15 million higher than those the

receiver recommended for approval, that is, approximately 3% of the aggregate of the purchase price of all the properties. To consider the offer at this date in the proceedings would make a mockery of the elaborate process devised and followed in the marketing of the property. Further, it would cause inevitable confusion and delay. There was no issue of unfairness towards L Inc. Rather, its belated offer was a blatant effort to circumvent the bidding process and to acquire the properties over those who had abided by the rules.

(3) On a motion by a receiver for approval of offers to purchase, the court must consider: (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (b) the interests of all parties; (c) the efficacy and integrity of the process by which the offers were obtained, and (d) whether there has been unfairness in the working out of the process.

(4) The concerns that the receiver had about L Inc.'s fourth offer and the questions the receiver raised about the offer were reasonable and were not answered promptly, frankly or fully. Among other things, the financing condition should have been contained in the offer in accordance with the invitation to tender, and not inserted in the sealed bid. Moreover, in a transaction of this importance and magnitude, the receiver was properly concerned about the fact that waiver of the condition came from L Inc.'s solicitors and not from L Inc. All of these factors taken together, were reasonably considered by the receiver as adverse to and to weigh against approval of the L Inc. offer. Further, throughout the process, it was clear that L Inc. was not misled by the receiver about the disposition process.

(5) Although the L Inc. fourth offer was substantially higher than the others in absolute amount, it was not so much higher relative to the over-all amounts involved in the transactions. Hence, in view of the receiver's concerns about the L Inc. fourth offer, the receiver acted properly and reasonably in not recommending it for approval and instead recommended the other offers, about which it had no such concerns. For those reasons, the court should not intervene in the process, but approve the

receiver's recommendations.

Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242; Re Selkirk (1986), 58 C.B.R. (N.S.) 245; Bank of Montreal v. Maitland Seafoods Ltd. et al. (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20; Cameron v. Bank of Nova Scotia et al. (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1; Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237, folld

The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72, 35 N.R. 40, distd

Other cases referred to

Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5

Rules and regulations referred to

Rules of Civil Procedure, rules 1.03, paras. 15, 22, 1.04(1), 1.05, 13.01 (am. O. Reg. 221/86, s. 1)

MOTION by a court-appointed receiver and manager approving the sale of certain property; MOTION to add an offeror as an intervenor; RULING on disposition of a new offer to purchase.

P.S.A. Lamek, Q.C., and I.V.B. Nordheimer, for interim receiver, Clarkson Gordon Inc.

W.G. Horton, for plaintiffs.

H.T. Strosberg, Q.C., and R.E. Carr, for defendant, Leonard Rosenberg.

B.P. Bellmore, Q.C., for defendant, Maysfield Property

Management Inc.

D. Stockwood, Q.C., and N.J. Spies, for defendant, Victor Prousky.

C.L. Campbell, Q.C., G.D. Lemon and M.M. Thomson, for applicant, Larco Enterprises Inc.

R.L. Falby, Q.C., F.T. Richmond and L. Walton, for defendant, Green Door Investments Ltd.

J.B. Laskin, for Canada Deposit Insurance.

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

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

In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has

been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

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

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

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

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

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

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

On the return of the motion Larco moved to be added as an

intervenor under rule 13.01. I dismissed that application on the following day. The reasons for that ruling are an appendix to these reasons. (See App. I [not reproduced]).

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

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

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

The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court in an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In *Canada Permanent Trust Co. v. King Art Developments Ltd. et al.* (1984), 12 D.L.R. (4th)

161, [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an on-going business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

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

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

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

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

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

In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the

creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.

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

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

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

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

function of endeavouring to obtain the best price for the property. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

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

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

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

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

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

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

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

no criticism has been made of the process by which the offers were obtained. Attention has focused on the different economic returns which it is anticipated would flow from the recommended offers on the one hand and the Larco offer on the other. Depending upon whose data and calculations are accepted, that difference may be as high as \$7 million odd, or as low as \$1 million odd. I do not propose to analyze the data or the calculations which have been advanced, because in the view which I take of the matter they are not material.

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

38. Clarkson did not accept Enterprises' Enterprises was the initial name used for Larco Enterprises Inc. Offer, and does not recommend its acceptance and approval by this Court, for the following reasons:

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

Nevertheless, Clarkson does not believe that Enterprises'

Offer as supplemented by the letters delivered after the Bid Deadline was in acceptable form or in accordance with the rules of the tender process established by and embodied in the Invitation to Tender in that, inter alia,

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

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

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

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

(C) as mentioned in paragraph 36 above, Clarkson did not

receive, on or before September 17, 1986, the purchase undertaking from one of the designated financial institutions in accordance with Enterprises' Sealed Bid, and in lieu thereof the solicitors for Enterprises, by means of the aforesaid letter dated September 18, 1986, a copy of which is annexed hereto as Schedule H, purported to amend Enterprises' Offer to provide that Enterprises would cause the Note to be purchased on closing "on the same terms and conditions as contemplated in [Sealed Bid Schedule 3] paragraph 8";

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

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

(b) despite repeated requests by Clarkson and Fraser & Beatty for an explanation of the commercial reason for the use of the Note purchase mechanism (which on its face only serves to reduce the purchase price for the subject Properties from a high nominal value to a lower real value), in the view of Clarkson and Fraser & Beatty no clear and consistent reasons were given. Accordingly, a written explanation was requested and a reason was cited in the letter annexed hereto as Schedule I, but Clarkson did not and does not regard the explanations received as satisfactory;

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

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

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

including in particular:

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

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

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

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

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

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

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

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

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

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

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

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

1. A negotiation stage culminating on September 3, 1986 with an offer as between the Interim Receiver and Manager and prospective purchasers wherein all terms and conditions respecting the transaction, exclusive of the final offering price, are settled ("Approved Offers").
2. After the Approved Offers are settled prospective purchasers wishing to bid on individual Properties, groups of Properties or all of the Properties are directed to forward Sealed Bids to the Office of the Registrar of the Supreme Court of Ontario addressed to the Interim Receiver and Manager. The Sealed Bids must be submitted to the Registrar on or by 3:00 p.m. September 10, 1986 (Bid Deadline Date).
3. After reviewing and analyzing the Sealed Bids, in context with the Approved Offers, bidders will be notified whether or not their offers are accepted within 15 days of the Bid Deadline Date.

4. The Standard Form of Offer and the Invitation to Tender stipulate that offerors must submit with their Sealed Bids deposits amounting to the greater of \$100,000 or 2 1/2% of the price offered in the Sealed Bid in the form of a certified cheque or bank draft.

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

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

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

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

1. the Approved Offer contains fewer onerous and time consuming conditions.
2. the prospective purchaser establishes his "credit worthiness". This aspect can best be established if conclusive third party evidence of the purchaser's ability to arrange the necessary financing to close the transaction is

provided; and

3. Property inspections are completed in advance of the final Bid Deadline Date, September 10, 1986.

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

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

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

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

On September 3rd offers were submitted. On September 8th Clarkson replied in writing with certain comments. Between September 3rd and September 9th there were meetings and telephone conversations between the representatives of Larco and representatives of the Receiver. On September 10th there were consultations and there was a subsequent exchange of correspondence. When the final decision of the Receiver was

announced September 25th the Larco offers were not recommended.

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

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

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

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

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

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

just referred:

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

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

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

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

encumbered or accepted payment on the said note as Citibank may require. Any such sale of the Citibank Guaranteed Note by the Interim Receiver will be on a non-recourse basis."

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

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

The position of Larco, in part made explicit and in part to be inferred from conduct and from the evidence, was that this was largely none of the Receiver's business. Larco was perfectly entitled to take that position. I should say by way of digression that if in any previous ruling or in these reasons I appear to be critical of what was done by Larco, it is within the limited framework of the process with which I am concerned and not otherwise. Larco is not a charitable organization. It is a commercial corporation entitled, within the limits of the law, to carry on its commercial affairs as those having the charge of those affairs deem appropriate. But if in some respects it produced adverse reactions in the Receiver, and adverse consequences for the reception of its offer, it cannot be heard to complain.

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

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

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

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

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

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

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

I turn now to the question of the mortgages to be discharged which proved to be a bone of contention. In view of the

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

#### 4. Assumed Mortgages

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

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

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

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

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

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

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

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

In outlining initially the obligations of the court on a motion of this kind, I adverted to the question of whether the

Receiver has in any way misled a bidder. It is clear that if a bidder has been misled that may constitute a circumstance upon which the court will intervene upon the motion for approval. Though it was not passed in argument, there was clear indication in the evidence, particularly that of Mr. Shiraz Lalji, that Larco had been misled as to the acceptability of a conditional offer. This was relevant to the much discussed financing condition.

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

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

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

from Mr. Lalji's evidence that he recognized that it was bizarre and had it been said I doubt very much that he would have taken it seriously.

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

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

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

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

There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made

during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

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

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

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

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

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

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

The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and

its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

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

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

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

Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be

had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

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

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

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

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

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

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

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

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

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

It is clear on the one hand that the court is not to apply an

automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

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

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

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.

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

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

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

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

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

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.

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

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

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

The importance of this motion, and the measure of interest which it has for the parties and for the public, might have made desirable a period under reserve of sufficient duration to permit the writing of formal reasons for judgment. The circumstances related to the prospective sales were such that prompt disposition of the motion seemed more important than elegance of expression. The worst grammatical solecisms will be massaged out in the editorial process. As to the substance of

the reasons, I feel as much confidence as is possible when one is dealing with matters of difficulty, of importance and of some notoriety.

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

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

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

MR. LAMEK: I did not, my lord.

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

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

HIS LORDSHIP: You can let me know?

MR. LAMEK: Thank you, my lord.

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

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

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

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

Motion granted.

RULING ON MOTION BY LARCO ENTERPRISES INC.  
TO BE ADDED AS AN INTERVENOR

HIS LORDSHIP: There is a motion before the court brought by the interim receiver and manager Clarkson Gordon Inc. to approve the sales of certain properties on the recommendation of Clarkson, and for direction as to details relating to the completion of the sales which are approved.

The motion comes on pursuant to leave reserved by the order of the Honourable the Associate Chief Justice of the High Court made on November 29, 1985. Service of notice of motion was effected in accordance with an order of the Honourable Mr. Justice Catzman made on July 25, 1986.

On the return of the Receiver's motion, a motion was made on behalf of Larco Enterprises Inc. That motion seeks an order adding Larco Enterprises Inc. as an intervenor in the action and allowing the intervenor access to the report of the Receiver dated October, 1986, with respect to the proposed purchase of properties as set out.

The properties affected by the Receiver's motion are numerous

and various in their quality. Details as to those matters are not necessary for present purposes. Because of the nature and number of the properties and the consequent difficulties in marketing them effectively, a complex and sophisticated plan was evolved and pursued under the authority of the order of the Honourable Mr. Justice Catzman to which I have referred. Again, details of that process are not necessary for present purposes. It is sufficient to say that a very large number of offers were made to and considered by the Receiver, of which some 26 are recommended for the approval of the court.

Among the offers received, but not recommended for approval, was one from Larco. As to its disposition of the Larco offer, it is useful to refer very briefly to two portions of the report of Clarkson which is filed in support of the substantive motion.

The first reference is to para. 33 of the report which is found at p. 52:

Annexed hereto as Schedule E is a photocopy of one of the four sealed bids, (the "Enterprises' Sealed Bid") submitted by a particular offeror ("Enterprises") and a photocopy of Enterprises' form of offer in connection therewith, in each of which the name of Enterprises has been deleted and which together comprise one of the offers ("Enterprises' Offer") in respect of which Clarkson exercised its discretion to extend the date by which such offer may be accepted as aforesaid. Clarkson does not want the fact that this offer has been kept open to permit an inference that it in any way endorses the Enterprise Offer. Clarkson has chosen to extend such acceptance date in order that this court may effectively assess the rationale behind Clarkson's decision not to accept and recommend Enterprises's Offer. Clarkson has advised Enterprises that it has chosen not to accept any of the other three offers submitted by Enterprises.

And also for present purposes only a portion of para. 37 which is found at p. 56 of that report:

It will be noted that if the value put by Enterprises on its

offer in its letter of September 15th, 1986 referred to in paragraph 35 hereof is accepted, and if that amount is coupled with the offers accepted in respect to the Bretton Place and Bay Charles Tower Properties, the value of these offers is approximately \$422,000,000 which is estimated to be, at the most, about \$9,900,000 or 2.4% in excess of the cash equivalent value of those offers which Clarkson has accepted. However, Clarkson, after considering the matter at length in conjunction with Fraser & Beatty and Cogan, decided not to accept Enterprises' Offer for the reasons set forth in paragraph 38 hereof.

I need not refer at present to those reasons. Fraser & Beatty are the solicitors advising the Receiver and Cogan is the real estate expert also advising the Receiver.

I turn now to the nature and relief sought in the Larco motion and the grounds upon which it is based. Reliance is placed on rule 13.01 of the Rules of Civil Procedure. That rule, in so far as it is germane for my purposes, reads as follows:

13.01(1) Where a person who is not a party to a proceeding claims,

- (a) an interest in the subject matter of the proceeding;
- (b) that he or she may be adversely affected by a judgment in the proceeding;

[then I miss a clause which is not material]

the person may move for leave to intervene as an added party.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

In support of the Larco motion, it has filed the affidavit of

one John Hunt Nolan, and I propose to read briefly from that affidavit at p. 8 of the motion record commencing at para. 10 of the affidavit:

10. In the report, Clarkson has placed Bid 4 before this Court and has raised some concerns with respect to it.

11. It is clear from the report (paragraph 37) that the Larco bid is the highest value of all submitted bids.

12. In order to properly respond to Clarkson's concerns, I believe that it is necessary for Larco to be added as a party to these proceedings.

13. Larco, through its officers, was of the understanding that at all material times Clarkson had recognized the status of Larco herein and believed that Larco would be able to make representations to the Court with respect to Clarkson's report, insofar as it respected Larco's bid.

14. I believe that Larco has a valid commercial interest in these proceedings. I further believe that those interests may be adversely affected if Larco is not given standing in these proceedings and an opportunity to examine and reply to the Clarkson report. Indeed, I believe that the various defendants in these proceedings may be adversely affected if Larco is not given standing in light of its apparent highest value bid.

Larco's motion for intervention is opposed by counsel for Clarkson and by counsel for the trust companies, and is supported by counsel for the defendants Rosenberg and Prousky and for Green Door Investments Ltd. and Leonard Walton.

The first question to be addressed is whether Larco can be brought within the ambit of rule 13.01. In considering this, it is necessary to decide what is the "proceeding" to take that word from the rule.

The notice of motion says that an order is sought adding Larco "as an intervenor in the action". As the argument

proceeded I think it was common ground that the "proceeding" was the motion for approval of the sales.

Counsel for Clarkson submits that the rule does not apply to such a motion, indeed does not apply to an interlocutory motion at all. In that connection reference is made to rule 1.03 and in particular to para. 22 of that rule which defines "proceeding" in these terms:

22. "proceeding" means an action or application;

It is also useful to consider para. 15 of that subrule where "judgment" is defined in these terms:

15. "judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party;

There can be no doubt that the motion brought by Larco is neither an action nor an application as those terms are defined in the rules. It is, I think, questionable whether the result of the substantive motion can properly be designated as a judgment, and I do not consider it necessary to trace my way through the procedural maze which would be necessary in order to arrive at a reasonable conclusion as to whether it was or not.

I am referred by counsel for Larco to other provisions of the rules, in particular the opening words of rule 1.03 which contains the definitions to which I have referred and which says:

1.03 In these rules, unless the context requires otherwise

...

I am also referred to rule 1.04(1):

1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

And, finally, reference is made to rule 1.05:

1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

I find nothing in the context of rule 13.01 which requires me to give to the word "proceeding" any other meaning than as defined in rule 1.03, para. 22. Nor do I consider that rule 1.04(1) gives me any licence to do so.

Thus, on purely technical grounds I hold that the Larco motion is not a motion related to a "proceeding" within the meaning of rule 13.01 and should be dismissed.

The disposition by a judge of first instance of what is essentially a question of law may well prove to be ephemeral in its nature. For that reason, and because I would prefer that my decision not be perceived as resting on grounds so narrow as technical, I intend to explore some other aspects of the matter.

If the proceeding were one to which the rule applied, the next question to explore would be whether Larco has an "interest" in the subject-matter of the proceeding.

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

Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect

to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

When this offer was made it knew that the Receiver need not accept the highest or any bid. I see no force in the argument that Larco has some special right by reason of the decision of Clarkson to extend the date for acceptance having regard for the limited and special reason for which that extension was made.

While I would not give it substantial weight, I am not unmindful that the consequences of such an order, that is an order adding Larco, would be extremely difficult to predict in terms of delay and in terms of complications in the completion of the transactions under review, consequences which I have decided would not be satisfactorily resolved by any conditions which I could devise and attach.

In the course of argument I expressed the view that there would be some advantage for the court in having Larco's submissions on the Receiver's reasons for rejecting its offer. My concern on that score has been resolved by the realization that there are many counsel present in a position to extol such advantages as the Larco offer may have, and by the expressed position taken by counsel for the defendant Rosenberg that it was prepared to advance the advantages of that offer.

It has not escaped my attention that the Larco motion, however dealt with, has a potential for complication and delay of the proceedings. That is simply a fact of life and nothing within my power can alter it. Fully conscious of that I have arrived at the disposition I propose as being consistent with the law as I see it, and with, at least, no greater potential for adverse consequences.

The matter appears to be one of first impression. I would have preferred for that reason the opportunity to reserve and to deliver a written judgment. It seemed apparent, however,

that the circumstances were such that expedition in the result was to be preferred over elegance in its expression.

I was referred to several cases, none of which I considered to be sufficiently on point to make it useful or necessary to refer to them.

The motion of Larco to intervene is dismissed.

Motion dismissed.

ORAL RULING REGARDING LARCO ENTERPRISES  
INC.'S LATE OFFER

The ruling which I must make this morning involves what disposition is to be made of a new offer by Larco Enterprises Inc., an offer delivered by counsel for the defendant Rosenberg to the counsel for the Receiver during the luncheon recess on Wednesday, October 22, 1986.

Before proceeding to the substance of my ruling, I wish to review briefly the progress of this motion to date. The notice of motion, the substantive motion that is to approve sales, is dated October 10, 1986, and it was on that date served on agents for the solicitors for the defendant Rosenberg. It was made returnable on Monday, October 20th, and according to its return date came before me.

Also made returnable on that date was a motion by Larco for status as an intervenor in the application for approval. The supporting material filed upon that motion indicates that it was prepared not later than October 17th when the affidavit of Nolan was sworn. It is an inescapable inference that Larco knew by that time at least that the Receiver was not recommending its offer and knew the bases advanced by the Receiver for refusing to do so. It would not be unfair to surmise that Larco knew some time before that.

In the affidavit of Nolan filed in support of that motion to intervene there is no reference made to any new offer, or to the possibility of any new offer, but only an intention to

address the concerns of the liquidator about the offer which was then under consideration.

The disposition of that motion to intervene was not without difficulty. It came before me as a matter of first impression. It had obvious implications whatever its disposition was and for that reason I reserved my judgment and made my ruling on the following morning at 10:00 a.m. on Tuesday, October 21, 1986.

At the request of counsel, I adjourned to chambers to discuss what method of proceeding with the substantive motion should be followed in light of that ruling, and in light of the possibility that an appeal would be taken from that ruling. After considerable discussion and the submissions of counsel, I decided not to resume the argument that day but to do so on the morning of Wednesday, October 22nd.

At the opening of court on Wednesday, October 22nd, Mr. Lamek, as counsel for the Receiver, requested leave to adduce viva voce evidence of an officer of the Receiver company, the vice-president of Clarkson and Gordon Inc. and such leave was granted.

Mr. Shaver was examined in-chief during the forenoon, and it was after the luncheon recess, as I have indicated, that the new offer of Larco was tendered by counsel for Rosenberg. The precise time of its tendering I do not know, but it was first drawn to my attention when the court resumed in the afternoon.

I am urged by counsel for Rosenberg and for some other defendants to receive this offer in evidence and to consider it upon the disposition of this motion. The new offer, the details of which I have not reviewed, is said to be some \$15 million higher than that which is proposed by the trustee for acceptance. This amounts to something in excess of 3% of the aggregate amount of the purchase price of all of the properties.

It is the submission of counsel for the defendant Rosenberg and some other defendants that I should receive the offer in

evidence, permit the representative of the Receiver to be cross-examined with respect to it, and, at the conclusion of the motion, decide whether it should be accepted in place of that recommended by the Receiver.

I do not intend to do either. The conclusion I may say I have reached without hesitation or doubt, the reasons I am now expressing are expressed only because there is some public interest in the question, and it should be made manifest that I am deciding what I am deciding and, of course, it should be available to a reviewing court should such a court review the discretion which I have now exercised.

The sale procedure in this case was carefully devised and carefully applied. I need not review either the details of the plan or its application. They are matters of record.

Larco knew early in the procedure that its offer was perceived by the Receiver to present difficulties. Various efforts were made to resolve those difficulties. They were not successful. Larco moved to intervene in these proceedings and failed.

On the third day of the motion an entirely new offer was tendered. My reasons for refusing to admit or consider that offer are simple and basic. To do so would make a farce and a mockery of the elaborate process devised and followed in the marketing of these properties. Indeed, it would make completion of a sale such as this potentially impossible as it would deprive the process of any finality.

A judge is not equipped by training nor required in the nature of his office to assess immediately the merits or demerits of an offer so complex as this without previous analysis and advice. Inevitably, therefore, when such an offer is presented at this stage, the judge is either required to do that which he is not properly able to do, or must direct the Receiver to do so. The latter, of course, is the only rational manner of proceeding if it is to be dealt with at all.

The potential for confusion and delay, if that were done in

this case, is so obvious as not to require elaboration. The dilemma with which I am presented is not new, although it has not perhaps been presented before in circumstances so adverse and so complex as those which are before me.

It was dealt with by the Honourable Mr. Justice Saunders of this court in two judgments to which I was referred in argument, the first being the judgment in *Re Selkirk* (1986), a report of which is in 58 C.B.R. (N.S.) 245. There the circumstances under consideration involved the sale by the sheriff and the appearance after the sheriff had accepted an offer of a new and higher offer.

Mr. Justice Saunders in dealing with the matter says at p. 246 of his reasons the following:

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

He then quotes a judgment of the Nova Scotia Court of Appeal [*Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1, per Macdonald J.A.] in the following terms:

"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."

Continuing with Mr. Justice Saunders' judgment [at pp.

246-7]:

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

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

The second judgment of Mr. Justice Saunders is one in *Re Beauty Counsellors of Canada Ltd.*, again in 58 C.B.R. (N.S.) at p. 237. There the facts were very similar to those in the *Selkirk* case. At p. 242 Mr. Justice Saunders makes the following observation:

I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:

1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or

2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

At p. 243 he says:

Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

I consider that the concluding observation made by Mr. Justice Saunders in that context was something of an understatement:

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. 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.

In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

I consider that these cases should be followed in this case. I refer especially to what I just read from the judgment of Mr. Justice Saunders. The logic is, in my view, impeccable and, in application to this case, unanswerable. The processes discussed there apply with even greater force in a case such as this where the process of sale has been so complex, so demanding and so exhausting.

No question of fairness as raised by Mr. Justice Saunders arises in respect to Larko. If there is a want of fairness involved it has been exhibited by Larko. The present offer is a belated and blatant effort to circumvent the bidding process and to acquire the property over the heads of those who have dealt according to the rules prescribed. Only most extraordinary circumstances would justify the court in putting its approval on such conduct. No such circumstances exist here.

Counsel for the defendant Rosenberg submits with his customary vigour that \$15 million is a lot of money; that the court must have regard for commercial reality; that this last offer represents the current state of a buoyant real estate market; and, that it is notorious that court-conducted sales always realize less than the full potential value of the subject property.

Let me deal with those submissions in order. \$15 million is a lot of money in absolute terms even in the debased currency of 1986, but in relative terms it is something over 3% of the aggregate value of the properties. There is no such shortfall or disproportion as to call in question the fundamental soundness of the sale procedure ordered by the court, or the application of that procedure by the Receiver.

The court must, of course, have regard for commercial reality. One aspect of commercial reality is that there are certain inherent limitations in a court sale, limitations which are unavoidable. The court has not the capacity to wheel and deal as an individual entrepreneur is able to do, and the court must have regard not only for commercial reality but for commercial morality, a conditioning factor which is not always apparent in private deals.

This last offer may represent the current market. It may also represent simply the desire of the offeror to acquire an advantage over other bidders. It is customary that court sales and sales in foreclosure or liquidation or under other constraint, tend to obtain less advantageous prices than those which might be obtained by a skilful and unfettered vendor free to manoeuvre in an open market. But it must not be forgotten that court sales or other liquidation or forced sales are symptoms of a commercial collapse or dispute or disease of some kind, and the sale cannot wholly escape the consequences of the disease.

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.

Some suggestion was made by counsel for the defendant Rosenberg that the extra recovery which this new offer purports to make available might significantly reduce the ambit of the litigation of which this motion is an offshoot. That would be a consummation much to be desired. But in my view, this prospect is too indefinite, too amorphous, and too remote to be given weight in the disposition of the matter which is now before me.

When the offer was produced I said to Mr. Lamek with what may have been an unfortunate air of flippancy that it would not go away, nor will it. But it will have no role in the conduct of this motion so long as I am seized with the motion.

The offer or a copy will be marked ex. A to these proceedings for the purpose of identification only and so that it may be available to any other court in any review of the discretion which I have exercised in excluding it from present consideration. It will not be the subject of examination or

cross-examination of any witness.

Ruling accordingly.

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** Royal Bank of Canada v. Eastern Infrastructure Inc., 2019 NSSC 297

**Date:** 20191010

**Docket:** 483616

**Registry:** Halifax

**Between:**

Royal Bank of Canada

*Plaintiff*

v.

Eastern Infrastructure Inc. and Allcrete Restoration Limited

*Defendant*

**Decision**

**Judge:** The Honourable Justice Peter P. Rosinski

**Heard:** September 19, 2019, in Halifax, Nova Scotia

**Counsel:** Gavin MacDonald, for Royal Bank of Canada  
Stephen Kingston, for the Receiver

By the Court:

**Introduction**

[1] The companies herein have previously been placed into receivership. The Receiver has requested that, *inter alia*, I authorize an Approval and Vesting Order (Auction) to allow it to sell assets of the companies that are encumbered. While it appears that such orders had been granted by this court as recently as 2011 (re-Scanwood Canada Limited, Halifax number 342377, per John Murphy, J.), more recent decisions have concluded that, absent legislation providing this court the authority to do so, this court has no jurisdiction to grant such vesting orders.

[2] Speaking only for myself on this issue and with the greatest of respect to those holding contrary opinions, I am satisfied that, although there is no distinctly expressed basis in Nova Scotian legislation to do so, this court does have jurisdiction pursuant to s. 243(1)(c) the Bankruptcy and Insolvency Act (BIA) to grant such vesting orders. I find it appropriate to do so in the circumstances of this case<sup>1</sup>.

**The authority for vesting orders pursuant to s. 243(1)(c ) BIA**

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<sup>1</sup> Attached hereto as Appendix "A" is the order granted.

[3] Regarding the concern that such orders should no longer be granted on the basis of the authority provided by section 243 (1)(c) BIA, based on decisions by Justices Michael Wood (as he then was) and Moir, wherein they concluded there was no such jurisdiction to do so (*Enterprise Cape Breton Corp. v Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420 and *Royal Bank of Canada v 2M Farms Ltd.*, 2017 NSSC 105), I note that Justice Wood relied on an Ontario Court of Appeal decision, *Regal Constellation Hotel Ltd., Re*, [2004] O.J. No. 2744, in making his *obiter dicta* (para 22) comment regarding jurisdiction. That decision suggested that such vesting orders must be grounded in legislation, such as the Ontario legislation, the *Courts of Justice Act* (para. 31 *Regal*).

[4] As Justice Blair stated for the court in *Regal*:

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

[24] In *Soundair*, at p. 6 O.R., Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

- (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
- (b) the interests of the parties;

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

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

[25] In *Soundair* as well, McKinlay J.A. emphasized [at p. 19 O.R.] the importance of protecting the integrity of the procedures followed by a court-appointed receiver "in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers".

[26] A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto-Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57 (Ont. C.A.), per Austin J.A. at paras. 28-31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": Bennett on Receiverships, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto-Dominion Bank v. Usarco*, supra, at p. 459 D.L.R.

**[27] The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.**

...

**[31] In Ontario, the power to grant a vesting order is conferred by the Courts of Justice Act, R.S.O. 1990, c. C.43, s. 100, which provides as follows:**

100. A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

**[32] The vesting order itself is a creature of statute**, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 195, D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the court to effect the change of title directly: see McGhee, *Snell's Equity*, 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.

(Emphasis added)

[33] A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title, its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

[34] I reach this conclusion for the following reasons.

...

[45] Vesting orders properly registered on title, then -- like other conveyances -- are not immune from attack. However, any such attack is limited to the remedies provided under the Land Titles Act and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order qua order has been spent."

[5] Notably, the BIA has changed since the issuance of the *Regal* decision, however it does not appear that that factor was brought to Justice Wood's attention. As a result of the legislative change the Ontario Court of Appeal itself has given a much more comprehensive decision recently that comes to the opposite result, namely, in *Third Eye Capital Corporation v Ressources Dianor Inc.*, 2019 ONCA 508 per Pepall JA:

**“(e) Section 243 of the BIA**

**43** The BIA is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Motor Company of Canada, Limited v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146, at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247, at para. 9; *Re Bell*, 2013 ONSC 2682, at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

The Wording and Purpose of s. 243

**44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so.** As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the CJA, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

**45** Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

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

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
- (c) take any other action that the court considers advisable.

**46** "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control -- of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt -- under

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

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

**47** *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. **The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies.** It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

...

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

#### Section 243 -- Jurisdiction to Grant a Sales Approval and Vesting Order

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

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

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (in Chambers), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230, *Skyepharm PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.), *aff'd* (2000), 47 O.R. (3d) 234 (C.A.).

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

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

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

[6] Thus, the *obiter dicta* in *Crown Jewel* has been superseded by legislative change. Justice Moir did not cite any other authority than *Crown Jewel*.

[7] *Lemare Logging* was released one year after Justice Wood made his comments in *Crown Jewel*. Although Nova Scotia does not have express provincial legislation giving the court jurisdiction to make such vesting orders, it is clear that in appropriate circumstances courts can rely on s 243(1)(c) BIA to do so. In *Dianor*, the court cited *Crown Jewel* at para. 78, noting that "...the case law on vesting orders in the insolvency context is limited."

[8] Regarding what are the appropriate circumstances to make such orders, I keep in mind Justice Duncan's list of considerations set out in *Bank of Montréal v. Sportsclick Inc.*, 2009 NSSC 354 at paras 32-33, which the court will eventually apply to all such sales:

**"Law**

**32** In *Royal Bank of Canada v. Soundair Corp.*, *supra*, Galligan J.A. set out at paragraph 16, the duties which a court must perform when deciding whether a Receiver who has sold a property acted properly, which duties he summarized 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.

**33** Certain principles have been enunciated by the courts in consideration of these points:

The decision must be assessed as a matter of business judgment on the

elements then available to the Receiver. That is the function of Receiver and "... to reject [such] recommendation ... in any but the most exceptional circumstances ... 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." *see*, Anderson J. in *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87 at 112;

the primary interest is that of the creditors of the debtor although that is not the only nor the overriding consideration. The interests of the debtor must be taken into account. Where a purchaser has bargained at some expense in time and money to achieve the bargain then their interest too should be taken into account. *see*, *Soundair* at para. 40;

the process by which the sale of a unique asset is achieved should be consistent with commercial efficacy and integrity. In *Crown Trust Co. v. Rosenberg, supra*, at page 124, Anderson J. said:

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.

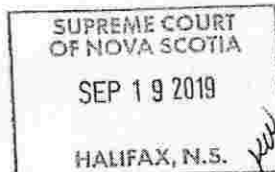
a court should not reject the recommendation of Receiver except in special circumstances where the necessity and propriety of doing so is plain. *see*, *Crown Trust Co., supra*."

## Conclusion

[9] As a matter of law, and on the circumstances in this case, I am prepared to grant the Approval and Vesting Order (Auction) as drafted.

Rosinski, J

# Appendix “A”



2018

Hfx. No. 483616

Supreme Court of Nova Scotia  
in Bankruptcy and Insolvency

Between:

Royal Bank of Canada

Plaintiff

and

Eastern Infrastructure Inc. and  
Allcrete Restoration Limited

Defendants

**APPROVAL AND VESTING ORDER (AUCTION)**

Before the Honourable Justice Peter P. Rosinski in Chambers:

**UPON HEARING** Stephen Kingston on behalf of Ernst & Young Inc. (the "Receiver") in its capacity as Court-appointed Receiver for Eastern Infrastructure Inc. and Allcrete Restoration Limited (collectively, the "Debtor");

**AND UPON** appearing that appropriate Notice of this Motion has been provided to all interested parties;

**AND UPON** having read the First Report of the Receiver dated September 11, 2019 (the "Receiver's First Report") and all other materials filed in connection with this Motion;

**AND UPON** the Receiver having negotiated an Auction Agreement (the "Auction Agreement") with Mirterra Industrial Appraisers & Auctioneers (the "Auctioneer") as more particularly described in the Receiver's First Report;

**AND UPON** the Receiver having applied for an Order authorizing and approving the Receiver to execute the Auction Agreement as regards the sale of the Debtor's Alberta Assets as described in the Receiver's First Report (the "Alberta Assets"), and vesting the Debtor's right, title and interest in and to the Alberta Assets in the purchasers thereof free and clear of all claims.

**NOW UPON MOTION:**

**IT IS ORDERED THAT:**

1. This Honourable Court does hereby grant its approval and authorization to the Receiver to execute the Auction Agreement on the same or substantially the same terms as described in the Receiver's First Report.


2. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the "Transactions") contemplated by the Auction Agreement and for the conveyance of items sold at auction (the "Purchased Assets").
3. Upon the Auctioneer completing the sale of any of the Alberta Assets to a successful bidder (the "Purchaser") and upon receipt of the purchase price by the Auctioneer and delivery by the Auctioneer of a Bill of Sale or similar evidence of purchase to the Purchaser (the "Purchaser Bill of Sale"), all rights, title and interest of the Debtor in and to the assets described in the Purchaser Bill of Sale shall vest in such Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges or other financial or monetary claims, whether or not they attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "Claims") including, without limiting the generality of the foregoing:
  - (a) any encumbrances or charges created by Orders of this Honourable Court dated February 4, 2019 and June 7, 2019; and
  - (b) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Nova Scotia) or any other personal property registry system.
4. For the purposes of determining the nature and priority of Claims, the monies payable to the Receiver under the Auction Agreement from the sale of the Alberta Assets shall stand in the place of and stead of the Alberta Assets, and that from and after the delivery of the Purchaser Bill of Sale all claims shall attach to the net proceeds from the sale of the Alberta Assets with the same priority as they had with respect to the Alberta Assets immediately prior to the sale, as if the Alberta Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.
5. Notwithstanding:
  - (a) the pendency of these proceedings;
  - (b) any application for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the debtors and any bankruptcy order issued pursuant to any such applications; and
  - (c) any assignment of bankruptcy made in respect of the Debtor;

the vesting of the Alberta Assets in a purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtor and shall not be void or avoidable by creditors of the Debtor, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

- 3 -

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

Dated at Halifax, Nova Scotia this 19 day of September, 2019

  
Prothonotary

KIMBERLEY WEBBER  
Deputy Prothonotary

2019 NSSC 297 (CanLI)