COURT FILE NUMBER:	2201-13687
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	MGT MANAGEMENT INC. and MGT AGGREGATE PRODUCTS INC.
APPLICANT	BDO CANADA LIMITED, in its capacity as the Court-appointed Receiver of MGT MANAGEMENT INC. AND MGT AGGREGATE PRODUCTS INC.
DOCUMENT:	**AUTHORITIES TO THE BRIEF OF THE RECEIVER – SALE APPROVAL AND VESTING ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT AIKINS LLP 2100, 222 - 3rd Ave SW Calgary, AB T2P 0B4 Telephone: 403.693.4310/4347 Fax: 403.508.4349 Attention: Jonathan Bourchier/Catrina Webster File: 0064652.00095

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TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to December 23, 2021

Last amended on November 1, 2019

À jour au 23 décembre 2021

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file a report thereof in the prescribed form with the official receiver, who shall thereupon issue a certificate of assignment in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed pursuant to section 49.

R.S., 1985, c. B-3, s. 63; 1992, c. 27, s. 28; 2004, c. 25, s. 34(F).

la présente loi, le même effet qu'une cession déposée en conformité avec l'article 49.

L.R. (1985), ch. B-3, art. 63; 1992, ch. 27, art. 28; 2004, ch. 25, art. 34(F).

Removal of directors

64 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor in respect of whom a notice of intention has been filed under section 50.4 or a proposal has been filed under subsection 62(1) if the court is satisfied that the director is unreasonably impairing or is likely to unreasonably impair the possibility of a viable proposal being made in respect of the debtor or is acting or is likely to act inappropriately as a director in the circumstances.

Révocation des administrateurs

64 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur d'un débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) s'il est convaincu que l'administrateur, sans raisons valables, compromet ou compromettra vraisemblablement la possibilité de faire une proposition viable ou agit ou agira vraisemblablement de façon inacceptable dans les circonstances.

Filling vacancy

(2) The court may, by order, fill any vacancy created under subsection (1).

R.S., 1985, c. B-3, s. 64; 1992, c. 27, s. 29; 1997, c. 12, s. 40; 1999, c. 31, s. 20; 2005, c. 47, s. 42.

Vacances

(2) Le tribunal peut, par ordonnance, combler toute vacance découlant de la révocation.

L.R. (1985), ch. B-3, art. 64; 1992, ch. 27, art. 29; 1997, ch. 12, art. 40; 1999, ch. 31, art. 20; 2005, ch. 47, art. 42.

Security or charge relating to director's indemnification

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

Biens grevés d'une charge ou sûreté en faveur d'administrateurs ou de dirigeants

64.1 (1) Sur demande de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, en faveur d'un ou de plusieurs de ses administrateurs ou dirigeants pour l'exécution des obligations qu'ils peuvent contracter en cette qualité après le dépôt de l'avis d'intention ou de la proposition.

Priority

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

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Restriction — assurance

(3) Il ne peut toutefois rendre une telle ordonnance s'il estime que la personne peut souscrire, à un coût qu'il estime juste, une assurance permettant d'indemniser adéquatement les administrateurs ou dirigeants.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific

Négligence, inconduite ou faute

(4) Il déclare, dans l'ordonnance, que la charge ou sûreté ne vise pas les obligations que l'administrateur ou le

obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

2005, c. 47, s. 42; 2007, c. 36, s. 24.

dirigeant assume, selon lui, par suite de sa négligence grave ou de son inconduite délibérée ou, au Québec, par sa faute lourde ou intentionnelle.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Court may order security or charge to cover certain costs

64.2 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of

(a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;

(b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.

Priority

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

Individual

(3) In the case of an individual,

(a) the court may not make the order unless the individual is carrying on a business; and

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

2005, c. 47, s. 42; 2007, c. 36, s. 24.

Biens grevés d'une charge ou sûreté pour couvrir certains frais

64.2 (1) Le tribunal peut par ordonnance, sur préavis aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens de la personne à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) sont grevés d'une charge ou sûreté, d'un montant qu'il estime indiqué, pour couvrir :

a) les dépenses et honoraires du syndic, ainsi que ceux des experts — notamment en finance et en droit — dont il retient les services dans le cadre de ses fonctions;

b) ceux des experts dont la personne retient les services dans le cadre de procédures intentées sous le régime de la présente section;

c) ceux des experts dont tout autre intéressé retient les services, si, à son avis, la charge ou sûreté était nécessaire pour assurer sa participation efficace aux procédures intentées sous le régime de la présente section.

Priorité

(2) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la personne.

Personne physique

(3) Toutefois, s'agissant d'une personne physique, il ne peut faire la déclaration que si la personne exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

2005, ch. 47, art. 42; 2007, ch. 36, art. 24.

Where proposal is conditional on purchase of new securities

65 A proposal made conditional on the purchase of shares or securities or on any other payment or contribution by the creditors shall provide that the claim of any creditor who elects not to participate in the proposal

Cas où la proposition est subordonnée à l'achat de nouvelles valeurs mobilières

65 Une proposition faite subordonnément à l'achat d'actions ou de valeurs mobilières ou à tout autre paiement

shall be valued by the court and shall be paid in cash on approval of the proposal.

R.S., 1985, c. B-3, s. 65; 2004, c. 25, s. 35(F).

ou contribution par les créanciers doit stipuler que la réclamation de tout créancier qui décide de ne pas participer à la proposition sera évaluée par le tribunal et payée en espèces lors de l'approbation de la proposition.

L.R. (1985), ch. B-3, art. 65; 2004, ch. 25, art. 35(F).

Certain rights limited

65.1 (1) If a notice of intention or a proposal has been filed in respect of an insolvent person, no person may terminate or amend any agreement, including a security agreement, with the insolvent person, or claim an accelerated payment, or a forfeiture of the term, under any agreement, including a security agreement, with the insolvent person, by reason only that

(a) the insolvent person is insolvent; or

(b) a notice of intention or a proposal has been filed in respect of the insolvent person.

Limitation de certains droits

65.1 (1) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit de résilier ou de modifier un contrat — notamment de garantie — conclu avec cette personne ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif que la personne en question est insolvable ou qu'un avis d'intention ou une proposition a été déposé à son égard.

Idem

(2) Where the agreement referred to in subsection (1) is a lease or a licensing agreement, subsection (1) shall be read as including the following paragraph:

"(c) the insolvent person has not paid rent or royalties, as the case may be, or other payments of a similar nature, in respect of a period preceding the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed."

Idem

(2) Lorsque le contrat visé au paragraphe (1) est un bail ou un accord de licence, l'interdiction prévue à ce paragraphe vaut également, avec les mêmes modalités, dans le cas où la personne insolvable n'a pas payé son loyer ou ses redevances, selon le cas, ou n'a pas effectué quelque autre paiement de nature semblable à l'égard d'une période antérieure au dépôt de l'avis d'intention ou, à défaut d'avis d'intention, de la proposition.

Idem

(3) Where a notice of intention or a proposal has been filed in respect of an insolvent person, no public utility may discontinue service to that insolvent person by reason only that

(a) the insolvent person is insolvent;

(b) a notice of intention or a proposal has been filed in respect of the insolvent person; or

(c) the insolvent person has not paid for services rendered, or material provided, before the filing of

(i) the notice of intention, if one was filed, or

(ii) the proposal, if no notice of intention was filed.

Idem

(3) En cas de dépôt d'un avis d'intention ou d'une proposition à l'égard d'une personne insolvable, il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès de cette personne au seul motif qu'elle est insolvable, qu'un avis d'intention ou une proposition a été déposé à son égard ou qu'elle n'a pas payé certains services rendus, ou du matériel fourni, avant le dépôt de l'avis d'intention ou, à défaut d'avis d'intention, de la proposition.

Certain acts not prevented

(4) Nothing in subsections (1) to (3) shall be construed

Exceptions

(4) Les paragraphes (1) à (3) n'ont pas pour effet :

(b) in the case of an insolvent person, to the insolvent person and to all creditors of the insolvent person that the receiver, after making reasonable efforts, has ascertained.

b) s'agissant d'une personne insolvable, à celle-ci, à tous ceux de ses créanciers dont il a pu, en y allant de ses meilleurs efforts, dresser la liste.

Idem

(2) A receiver in respect of property of an insolvent person shall forthwith send notice of his becoming a receiver to any creditor whose name and address he ascertains after sending the notice referred to in subsection (1).

Idem

(2) Le séquestre de tout ou partie des biens d'une personne insolvable est tenu de donner immédiatement avis de son entrée en fonctions à tout créancier dont il prend connaissance des nom et adresse après l'envoi de l'avis visé au paragraphe (1).

Names and addresses of creditors

(3) An insolvent person shall, forthwith after being notified that there is a receiver in respect of any of his property, provide the receiver with the names and addresses of all creditors.

1992, c. 27, s. 89.

Nom et adresse des créanciers

(3) La personne insolvable doit, dès qu'elle est avisée de l'entrée en fonctions d'un séquestre à l'égard de tout ou partie de ses biens, fournir à celui-ci la liste des noms et adresses de tous ses créanciers.

1992, ch. 27, art. 89.

Receiver's statement

246 (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Déclaration

246 (1) Le séquestre doit, dès sa prise de possession ou, si elle survient plus tôt, sa prise de contrôle de tout ou partie des biens d'une personne insolvable ou d'un failli, établir une déclaration contenant les renseignements prescrits au sujet de l'exercice de ses attributions à l'égard de ces biens; il en transmet sans délai une copie au surintendant et :

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Rapports provisoires

(2) Le séquestre doit, conformément aux Règles générales, établir des rapports provisoires supplémentaires portant sur son mandat et en fournir un exemplaire au surintendant, à la personne insolvable ou, dans le cas d'un failli, au syndic et à tout créancier de la personne insolvable ou du failli qui en demande un exemplaire dans les six mois suivant la fin du mandat du séquestre.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall

Rapport définitif et état de comptes

(3) Dès qu'il cesse d'occuper ses fonctions, le séquestre établit, en la forme prescrite, un rapport définitif et un état de comptes contenant les renseignements prescrits relativement à l'exercice de ses attributions; il en transmet sans délai une copie au surintendant et :

forthwith provide a copy thereof to the Superintendent and

(a) to the insolvent person or the trustee (in the case of a bankrupt); and

(b) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

a) à la personne insolvable ou, en cas de faillite, au syndic;

b) à tout créancier de la personne insolvable ou du failli qui en fait la demande au plus tard six mois après que le séquestre a complété l'exercice de ses attributions en l'espèce.

1992, ch. 27, art. 89.

Intellectual property — sale or disposition

246.1 (1) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition by the receiver, that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

Propriété intellectuelle — disposition

246.1 (1) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle qui est compris dans une disposition d'actifs par le séquestre, cette disposition n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

Intellectual property — disclaimer or resiliation

(2) If the insolvent person or the bankrupt is a party to an agreement that grants to another party a right to use intellectual property, the disclaimer or resiliation of that agreement by the receiver does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

2018, c. 27, s. 268.

Propriété intellectuelle — résiliation

(2) Si la personne insolvable ou le failli est partie à un contrat qui autorise une autre partie à utiliser un droit de propriété intellectuelle, la résiliation de ce contrat par le séquestre n'empêche pas l'autre partie d'utiliser le droit en question ni d'en faire respecter l'utilisation exclusive, à condition que cette autre partie respecte ses obligations contractuelles à l'égard de l'utilisation de ce droit, et ce, pour la période prévue au contrat et pour toute prolongation de celle-ci dont elle se prévaut de plein droit.

2018, ch. 27, art. 268.

Good faith, etc.

247 A receiver shall

(a) act honestly and in good faith; and

(b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Obligation de diligence

247 Le séquestre doit gérer les biens de la personne insolvable ou du failli en toute honnêteté et de bonne foi, et selon des pratiques commerciales raisonnables.

1992, ch. 27, art. 89.

Powers of court

248 (1) Where the court, on the application of the Superintendent, the insolvent person, the trustee (in the case of a bankrupt), a receiver or a creditor, is satisfied that the secured creditor, the receiver or the insolvent person is failing or has failed to carry out any duty imposed by sections 244 to 247, the court may make an order, on such terms as it considers proper,

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à

(a) directing the secured creditor, receiver or insolvent person, as the case may be, to carry out that duty, or

(b) restraining the secured creditor or receiver, as the case may be, from realizing or otherwise dealing with the property of the insolvent person or bankrupt until that duty has been carried out,

or both.

a) ordonner au créancier garanti, au séquestre ou à la personne insolvable de se conformer à ses obligations;

b) interdire au créancier garanti ou au séquestre de réaliser les biens de la personne insolvable ou du failli, ou de faire toutes autres opérations à leur égard, jusqu'à ce qu'il se soit conformé à ses obligations.

Idem

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

1992, c. 27, s. 89.

Idem

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

1992, ch. 27, art. 89.

Receiver may apply to court for directions

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

1992, c. 27, s. 89.

Instructions du tribunal

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

1992, ch. 27, art. 89.

Right to apply to court

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

Ordonnance d'un autre tribunal

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

Where inconsistency

(2) Where there is any inconsistency between an order made under section 248, or a direction given under section 249, and

(a) the security agreement or court order under which the receiver acts or was appointed, or

(b) any other order of the court that appointed the receiver,

the order made under section 248 or the direction given under section 249, as the case may be, prevails to the extent of the inconsistency.

1992, c. 27, s. 89.

Incompatibilité

(2) Les dispositions d'une ordonnance rendue aux termes de l'article 248 ou d'une instruction donnée aux termes de l'article 249 l'emportent sur les dispositions incompatibles du contrat de garantie ou de l'ordonnance du tribunal portant nomination du séquestre, de même que sur les dispositions incompatibles de toute autre ordonnance rendue par le même tribunal.

1992, ch. 27, art. 89.

Protection of receivers

251 No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a

Protection du séquestre

251 Le séquestre est à l'abri de toute poursuite pour le préjudice ou les pertes résultant de l'envoi ou de la

TAB 2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

> Its decision was made as a matter of business judgment *on the elements then available to it* . It is of the very essence of a receiver's function to make such judgments and in the making of them to act seriously and responsibly so as to be prepared to stand behind them.

> If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

33 Counsel for the appellants complained about the manner in which Rosenberg J. conducted the hearing of the motion to confirm the OEL sale. The complaint was that when they began to discuss a comparison of the two offers, Rosenberg J. said that he considered the 922 offer to be better than the OEL offer. Counsel said that when that comment was made, they did not think it necessary to argue further the question of the difference in value between the two offers. They complain that the finding that the 922 offer was only marginally better or slightly better than the OEL offer was made without them having had the opportunity to argue that the 922 offer was substantially better or significantly better than the OEL offer. I cannot understand how counsel could have thought that by expressing the opinion that the 922 offer was better, Rosenberg J. was saying that it was a significantly or substantially better one. Nor can I comprehend how counsel took the comment to mean that they were foreclosed from arguing

that the offer was significantly or substantially better. If there was some misunderstanding on the part of counsel, it should have been raised before Rosenberg J. at the time. I am sure that if it had been, the misunderstanding would have been cleared up quickly. Nevertheless, this court permitted extensive argument dealing with the comparison of the two offers.

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

McKinlay J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL's objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support

such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an

amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

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

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

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

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

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

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

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

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

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

the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately $3 million to $4 million.

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

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

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

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

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

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

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

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

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who

then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

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

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

Appeal dismissed.

TAB 3

2011 ABQB 726
Alberta Court of Queen's Bench

Computershare Trust Co. of Canada v. Venti Investments Corp.

2011 CarswellAlta 2304, 2011 ABQB 726, 213 A.C.W.S. (3d) 203, 86 C.B.R. (5th) 71

Computershare Trust Company of Canada (Plaintiff) and Venti Investments Corporation, Shariff Chandran and Qualia Real Estate Investment Fund VI Limited Partnership (Defendants)

B.E. Romaine J.

Judgment: November 25, 2011
Docket: Calgary 1101-03154

Counsel: Kevin E. Barr for MNP Ltd. in its capacity as Court-appointed Receiver
Ryan P. Pelletier, Richard Billingston, Q.C. for Venti Investment Corporation
David Wood, Jared Spindel for Computershare Trust Company of Canada
Terry L. Czechowskyj for Proposed Purchaser
Michael B. Niven, Q.C. for Durum Real Estate Holdings Inc.

Subject: Corporate and Commercial; Insolvency

Headnote

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

Receiver brought application to approve sale of property — V Corp. brought cross-application for order rejecting any agreement of sale, directing that it was entitled to redeem arrears on mortgage on property in question or make such payments as were necessary to bring mortgage back into good standing, directing hearing to set amount of arrears, and discharging receiver — Application granted; cross-application dismissed — Receiver made more than sufficient effort to get best price for property and had not acted improvidently — Sale price was not low in relation to appraised value, there was plenty of time for bids and adequate notice of sale process — As to interests of parties, sale was supported by major creditor — It was also important and appropriate to note interests of proposed purchaser, which tendered its bid in good faith and presumably at some expense and which opposed V Corp.'s cross-application — No issue with respect to efficacy and integrity of process by which offers were obtained — Certain objection of V Corp. concerning possibility of unfairness in working out of process had to be viewed in context — There was nothing in history in issue that cast doubt on fairness of process or role of receiver — To accept V Corp.'s proposal would be unfair to parties who participated in bidding process in good faith, and proposed purchaser who entered bona fide into agreement with receiver — It would lead to kind of chaos referred to in certain case law and would be unwarranted interference with properly-run process conducted by receiver — V Corp. had plenty of time in last 21 months to bring arrears up to date and avoid sale, and what it offered now was too little and too late — Submission that there was no urgency about application was not accepted.

APPLICATION by receiver to approve sale of property; CROSS-APPLICATION by company for order rejecting any agreement of sale, directing that it was entitled to redeem arrears on mortgage on property in question or make such payments as were necessary to bring mortgage back into good standing, directing hearing to set amount of arrears, and discharging receiver.

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

1 This was an application to approve a sale of property brought by the Receiver of the assets and property of Venti Investment Corporation and Qualia Real Estate Investment Fund VI Limited Partnership. Venti cross-applied for an order rejecting any agreement of sale, directing that it is entitled to redeem the arrears on a mortgage on the property in question or make such payments as are necessary to bring the mortgage back into good standing, directing a hearing to set the amount of the arrears and discharging the Receiver.

2 Despite efforts to characterize the application as a sale in foreclosure proceedings, this was a sale within a receivership that resulted from a consent order granted on March 4, 201*1*. I find that the consent order is correctly characterized as a liquidating order. This order first appointed MNP Ltd. as a Monitor to oversee the sale of the property under an existing agreement of sale and purchase. When the proposed sale terminated in April, 2011, MNP became the Receiver under the order, authorized by its terms to complete the sale of the property and to enter into a replacement agreement of purchase and sale. It has now done so.

3 The criteria to be applied when considering the approval of a sale recommended by a receiver were first set out by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The *Soundair* principles have been applied many times by this Court.

4 When deciding whether a receiver who has sold a property has acted properly, a court is 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 all parties;

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

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

5 In considering whether the Receiver has made a sufficient effort to get the best price, I note that there has been a thorough and extensive process undertaken to sell the property, and the agreement of purchase and sale finally executed by the Receiver represents a sale at or above fair market value. However, Venti submits in essence that the Receiver acted improvidently on the basis of information Mr. Chandran, the principle of Venti, says was obtained from the sale and leasing agent retained by the Receiver that the Receiver's report in support of the application failed to include material information. Mr. Chandran submits through his counsel that there have been two undisclosed written offers to lease the property in question that would affect approximately half of the vacant space in the building and that could dramatically affect its appraised value.

6 Given the nature of the application, its urgency and the allegations made, I took the unusual step of inviting counsel for the Receiver to respond to this allegation by having the Receiver testify and be subject to cross-examination on this limited issue. I accept the Receiver's testimony, corroborated by that of the Receiver's leasing agent, that he was informed the morning of the application that an existing tenant was expressing some unwritten, informal interest in leasing approximately 2,000 to 4,000 additional square feet. This is not material information that either should have been disclosed in the report or that would affect fair market value. At any rate, the Receiver's conduct is to be examined in light of the information the Receiver had at the time it agreed to accept the offer, which was November 8, 2011. I find that the Receiver made more than a sufficient effort to get the best price for the property and has not acted improvidently. The sale price is not low in relation to the appraised value, there was plenty of time for bids and adequate notice of the sale process.

7 With respect to the interests of the parties, the sale is supported by the major creditor, Computershare Trust Company of Canada. Venti submits that it should not matter to Computershare if a sale of the property is the result of this application or if Venti is able to bring the mortgage into good standing, but Computershare has made it clear that it has lost faith in Venti and that it has a reasonable and valid preference for a sale rather than merely allowing Venti to extinguish the arrears. It points out that the cash flow from the property is insufficient to cover the monthly mortgage payments, and Venti has offered no more than to bring the arrears up to date and cover future mortgage payments for an indeterminate period.

8 It is also important and appropriate to note the interests of the proposed purchaser of the property, which tendered its bid in good faith and presumably at some expense and which opposes Venti's cross-application: *Soundair* at para. 40.

9 There is no issue with respect to the efficacy and integrity of the process by which offers were obtained.

10 With respect to the possibility of unfairness in the working out of the process, Venti suggests that the Receiver was deficient in failing to control or intervene with respect to what it characterizes as unfair behaviour by Computershare in communicating to Venti the amount it would cost to bring the arrears up to date.

11 This objection must be viewed in context. This became a receivership on April 12, 2011. On August 31, 2011, Venti enquired of the Receiver through counsel as to amount necessary to bring the mortgage back into good standing, and "*in theory*" discharge the Receiver.

12 On September 2, 2011, the Receiver's counsel advised of a figure of about $850,000, subject to adjustment, additional interest, additional legal and other expenses, implementation of a realty tax reserve and payment of all receivership costs.

13 On September 29, 2011, in anticipation of a meeting requested by Venti to discuss a possible reorganization, Computershare notified Venti that the amount required to bring the mortgage into good standing would be $1.07 million, plus certain processing and assumption fees, plus additional costs with respect to the receivership, the listing of the property, the property manager and the lender's counsel and subject to additional interest, the implementation of a monthly tax escrow amount and payment of the Silvercrest lease obligation.

14 It was only on October 24, 2011, having received the September 29, 2011 estimate (which was clearly characterized as an estimate) and advice from the Receiver on that date that the Receiver was dealing with interested parties and expected a binding agreement of sale shortly, that Venti's counsel expressed the intention of bringing the mortgage up to date "this week". This email from Venti's counsel repeats the September 29, 2011 estimate, with its references to additional costs.

15 On October 26, 2011, Computershare provided its revised estimate, which incorporated the items that had previously been referenced, including the costs of the receivership, the Silvercrest lease obligation, the costs of the listing and leasing agent, the immediate amount of tax escrow and updated payments due.

16 Computershare advised that Venti should confirm that it would pay these amounts that week. Instead, on October 27, 2011, Venti disputed the amount payable. On November 3, 2011, Computershare provided its explanation of the amounts owing, and reduced the previous amount said to be immediately owing by $65,000.

17 On November 7, 2011, the Receiver received a reorganization proposal from a third party which included the concept of bringing the mortgage into good standing, and considered this proposal together with the two other proposals it had received. On November 8, 2011, the Receiver executed a purchase and sale agreement with the proposed Purchaser.

18 It was not until November 10, 2011 that Venti sent Computershare's counsel $1 million towards the arrears, and then only under unacceptable trust conditions. While another $700,000 was promised to be available during the course of the hearing, it did not materialize.

19 There is nothing in this history that casts doubt on the fairness of the process or the role of the Receiver. The first estimate of payout cost was clearly subject to upward adjustment, and subsequent estimates identified why the payout figure increased over time. Venti had the opportunity to payout the mortgage prior to the Receiver entering into a binding offer subject only to court approval on November 8, 2011, and plenty of warning that the sales process was unfolding and nearing completion.

20 At page 19 of *Soundair*, McKinlay J.A. emphasized 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". That concern for the integrity of the process has been expressed in many cases in Alberta, including by our Court of Appeal: *Bank of Montreal v. River Rentals Group Ltd.*, [2010] A.J. No. 12 (Alta. C.A.) at para. 18.

21 While the concern for the integrity of the process is often expressed in terms of whether it is appropriate to consider a last-minute higher offer to purchase, it is equally important here, where the debtor is not offering a higher amount for the property, nor even to redeem the entire debt, but only to bring the arrears up to date. Venti does not even accept the amount of arrears set by the mortgagee, but asks that there be a subsequent hearing to establish that amount. To accept Venti's proposal would be

unfair to the parties who participated in the bidding process in good faith, and the Proposed Purchaser who entered *bona fide* into an agreement with the Receiver. It would lead to the kind of chaos referred to in *Soundair* at para. 30 and would be an unwarranted interference with a properly-run process conducted by the Receiver. Venti had plenty of time in the last 21 months to bring the arrears up to date and avoid the sale, and what it offers now is too little and too late.

22 Venti submits that there is no urgency about this application. I must disagree. As I indicated when I refused an adjournment, I agree with Computershare that there is no reason to delay the application, and considerable prejudice in terms of mounting arrears, a limited recourse loan and little or no equity.

23 Given the decision I have reached, it is not necessary that I consider whether Venti is in effect seeking relief from forfeiture, and if so, whether it is entitled to such relief.

24 The Receiver's application is granted and Venti's cross-application is dismissed.

25 This decision was originally scheduled to be delivered orally the day after the application was heard. At that time, counsel for Venti indicated that his client had changed his position and was prepared to consent to the application. I advised the parties that I would grant an order of sale and would issue subsequent written reasons.

26 If the parties are unable to agree on costs, they may make submissions on that issue.

Application granted; cross-application dismissed.

End of Document

TAB 4

2021 ABCA 144
Alberta Court of Appeal

1705221 Alberta Ltd v. Three M Mortgages Inc

2021 CarswellAlta 968, 2021 ABCA 144, [2021] A.W.L.D. 4108, 336 A.C.W.S. (3d) 283

1705221 Alberta Ltd (Appellant / Plaintiff) and Three M Mortgages Inc and Avatex Land Corporation (Respondents / Plaintiffs) and Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming (Defendants) and BDO Canada Limited (Interested Party) and Shelby Fehr (Interested Party)

Three M Mortgages Inc and Avatex Land Corporation (Respondents / Plaintiffs) and Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming (Appellants / Defendants) and BDO Canada Limited (Interested Party) and Shelby Fehr (Interested Party)

Jack Watson J.A., Dawn Pentelechuk J.A., and Kevin Feehan J.A.

Heard: April 1, 2021
Judgment: April 21, 2021
Docket: Edmonton Appeal 2003-0076AC, 2003-0077AC

Proceedings: additional reasons at *1705221 Alberta Ltd v. Three M Mortgages Inc* (2021), 2021 ABCA 192, 2021 CarswellAlta 1232, Dawn Pentelechuk J.A., Jack Watson J.A., Kevin Feehan J.A. (Alta. C.A.)

Counsel: D.R. Bieganek, Q.C., for Appellant, 1705221 Alberta Ltd
K.A. Rowan, Q.C., for Respondents, Three M Mortgages Inc and Avatex Land Corporation
K.G. Heintz, for Respondents, Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming, and the Estate of Albert Oeming
M.J. McCabe, Q.C., for Interested Party, BDO Canada Limited
B.G. Doherty, for Interested Party, Shelby Fehr

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

Headnote

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

Loan was granted by plaintiff creditors to investment corporation, OI Ltd, which was secured by mortgage on lands owned by OI Ltd and guaranteed by defendant guarantors — Creditors foreclosed on OI Ltd's land and obtained deficiency judgment and judgment on guarantors — Guarantors' assets included shares in third party corporation, which owned lands at issue, and receiver was appointed for third party corporation — Receiver was authorized to list lands for sale and received two offers from prospective purchaser at price slightly below what receiver advised it would have accepted and also received offer from SF — Receiver filed application for court approval of SF's offer and invited prospective purchaser to submit improved offer to purchase — Chambers judge approved sale to SF — Guarantors and prospective purchaser brought appeals seeking to set aside order approving sale of lands to SF — Appeals dismissed — Receiver demonstrated reasonable efforts to market lands and did not act improvidently and receiver's acceptance of SF's offer was reasonable in circumstances and unassailable — SF's offer was significantly better than prospective purchaser's second offer and clearly reasonable given that it exceeded appraised value of lands — Integrity of sale process was not compromised — Having concluded that both sale process and SF offer were fair and reasonable, there was no reason for chambers judge to compare prospective purchaser's third offer to offer accepted, nor to enter into new bid process.

APPEALS by guarantors and prospective purchaser seeking to set aside order approving sale of lands to SF.

Per curiam:

Overview

1 These appeals involve challenges to a sale approval and vesting order granted by a chambers judge in the course of receivership proceedings. The appellant guarantors, Todd Oeming, Todd Oeming as Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming (collectively, Oeming) seek to set aside the order approving the sale of lands to Shelby Fehr, as does an unsuccessful prospective purchaser, the appellant 1705221 Alberta Ltd (170).

2 These appeals engage consideration of whether the Receiver, BDO Canada Limited, satisfied the well-known test for court approval outlined in Royal Bank of Canada v Soundair Corp(1991), 83 DLR (4th) 76, 4 OR (3d) 1 (CA) [*Soundair*]. The arguments of both appellants coalesce around the suggestion that the sale process lacked the necessary hallmarks of fairness, integrity and reasonableness.

3 The chambers judge applied the correct test in deciding whether to approve the sale recommended by the Receiver; therefore, for either appeal to succeed, one or both appellants must demonstrate that the chambers judge erred in the exercise of his discretion in approving the sale. This attracts a high degree of deference. Since the chambers judge did not misdirect himself on the law, this Court will only interfere if his decision was so clearly wrong that it amounts to an injustice or where the chambers judge gave no or insufficient weight to relevant considerations: Jaycap Financial Ltd v Snowdon Block Inc, 2019 ABCA 47 at para 20.

4 We have concluded that neither Oeming nor 170 has demonstrated any error that would warrant setting aside the order. For the reasons that follow, the appeals are dismissed.

Background

5 The genesis of this long-standing indebtedness is a loan granted by the Respondents, Three M Mortgages Inc and Avatex Land Corporation (the creditors) to Al Oeming Investments Ltd (Oeming Investments), which was secured by a mortgage on lands owned by Oeming Investments. The loan was guaranteed by Oeming.

6 In March 2015, the creditors foreclosed on the Oeming Investments lands, obtaining a deficiency judgment in the sum of $ 941,826.09. In February 2016, the creditors sued Oeming on the guarantees and in December 2018, obtained judgment in this amount.

7 Oeming's assets included shares in Wild Splendor Development Inc, which company owned lands formerly known as the Alberta Game Farm, later Polar Park, in Strathcona County (the lands). These lands are the subject of the present appeals.

8 The creditors enforced their judgment against Oeming by applying under the *Business Corporations Act*, RSA 2000, c B–9, the *Judicature Act*, RSA 2000, c J–2 and the Civil Enforcement Act, RSA 2000, c C–15, for the appointment of BDO Canada Limited as Receiver of Wild Splendor. The Receivership/Liquidation Order was granted in June 2019. The Receiver moved to sell the lands, obtaining an order on October 10, 2019, authorizing it to list the lands for sale with Avison Young Canada Inc at a price of $1,950,000.

9 Two parties were interested in purchasing the lands: 170 and Shelby Fehr, both adjacent landowners. 170 made an offer to purchase on January 11, 2020, but it was not in a form acceptable to the Receiver. 170 submitted a second offer on February 3, 2020 at a price slightly below what the Receiver advised it would accept. While 170 believed its offer would be accepted by the Receiver, it never was and 170 withdrew its offer on February 7, 2020 out of concern its offer was being "shopped".

10 Fehr made an offer to purchase the lands on February 7, 2020. On Avison Young's recommendation of this "extremely strong offer", the Receiver promptly accepted it, subject to court approval.

11 The Receiver filed an application for court approval of Fehr's offer, returnable February 27, 2020. On February 10, 2020, the Receiver invited 170 to submit an improved offer to purchase and to attend the upcoming application.

12 At the application, spanning February 27-28, 2020, 170 raised concerns regarding the sale process. It urged the chambers judge to consider its third offer, dated February 18, 2020, or to establish a bid process to allow both Fehr and 170 to submit further offers.

13 Oeming also opposed the application, seeking an adjournment on the basis that the County of Strathcona was scheduled in April 2020 to vote on a land use bylaw changing the zoning of the lands to seasonal recreational resort use, which Oeming said would dramatically increase the value of the lands. This re-zoning would in turn facilitate their ability to refinance. They also argued that the anticipated bylaw would result in Fehr experiencing a financial windfall. Oeming took issue with the appraisal relied on by the Receiver, suggesting the lands had been undervalued and the sale process rushed, all of which served to prejudice their interests.

Decision of the Chambers Judge

14 The chambers judge declined to adjourn the application, noting that the anticipated land use bylaw question had been raised previously, including before the chambers judge who granted the order approving the sale process. He also observed that there was no certainty the bylaw would be passed or when the lands would ever be permissibly developed.

15 The chambers judge next considered whether the process should be re-opened to allow bids from 170 and Fehr. He found the Receiver's sale process to be adequate and found nothing in the evidence to warrant permitting further bids. The chambers judge concluded that "If receivership and the exercise of receivership powers by officers of the court are to have meaning, the court itself must abide by the process it has set out". However, the chambers judge permitted 170 to present its third offer to the court and adjourned the proceedings to the following day to allow 170, Oeming and the Receiver to put forward affidavit evidence on whether the sale process was unfair.

16 On February 28, 2020, after reviewing the affidavit evidence and hearing full submissions, the chambers judge made the following findings:

- 170's February 3, 2020 offer was never accepted;
- There was no consensus between 170 and the Receiver regarding the structure of the purchase price; this was being negotiated;
- There was no evidence 170's offer was shopped around beyond the normal course;
- 170, through its realtor, was aware of other potential purchasers;
- 170's suspicion something untoward had happened was not grounded in the evidence.

17 The chambers judge concluded that allowing 170's offer to be considered "would be manifestly unfair and lend uncertainty to the process of sales under receiverships, which would be untenable in the commercial community and would erode trust in that community and its confidence in the court-supervised receivership process". The sale to Fehr was approved.

18 The chambers judge later granted a stay of the order pending appeal.

The Soundair Test

19 Court approval of the sale requires the Receiver to satisfy the well-known test in *Soundair*. As this Court summarized in Pricewaterhousecoopers Inc v 1905393 Alberta Ltd, 2019 ABCA 433 at para 10 [, the test requires satisfaction of four factors:

i. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;

ii. Whether the interests of all parties have been considered, not just the interests of the creditors of the debtor;

iii. The efficacy and integrity of the sale process by which offers are obtained; and

iv. Whether there has been unfairness in the working out of the process.

20 Although the grounds of appeal of 170 and Oeming differ, they all lead to the central question of whether the Receiver satisfied the *Soundair* requirements. 170 seeks to set aside the order and asks that a bid process involving 170 and Fehr be allowed, on the condition that neither party be allowed to submit an offer for less than their last and highest offer. Oeming asks that the order be set aside and that they be provided additional time to refinance or alternatively, that the lands be re-marketed for a minimum of six to nine months.

21 We will address each of the four *Soundair* factors in turn, from the perspective of both 170 and Oeming.

i. Sufficient Efforts to Sell

22 A court approving a sale recommended by a receiver is not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances: *Soundair* at paras 21, 58. A receiver plays the lead role in receivership proceedings. They are officers of the court; their advice should therefore be given significant weight. To otherwise approach the proceedings would weaken the receiver's central purpose and function and erode confidence in those who deal with them: Crown Trust Co v Rosenberg(1986), 39 DLR (4th) 526, 60 OR (2d) 87 (ONSC) at p 551.

23 Oeming argues that the chambers judge erred in relying on the Receiver's appraisal of the lands which was not appended to an affidavit and therefore constituted inadmissible hearsay. Oeming further alleges that the Receiver acted improvidently in listing the lands for sale at $1,950,000, an amount they insist is significantly below property value. They point to their appraisal from Altus Group, appended to the appraiser's affidavit, in support of their claim that the lands are worth far more than the amount suggested by the Receiver.

24 These arguments cannot succeed. Neither the Receivership/Liquidation Order nor the Order Approving Receiver's Activities and Sale Process required the Receiver to submit its reports by way of affidavit. To the contrary, the Receivership/Liquidation Order was an Alberta template order containing the following provision expressly exempting the Receiver from reporting to the court by way of affidavit:

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

25 The draft Altus Group appraisal (identical in form to the signed appraisal appended to the affidavit) and the Glen Cowan appraisal obtained by the Receiver were included in the Receiver's First Report that was before the chambers judge who issued the Order Approving Receiver's Activities and Sale Process. No one, least of all Oeming, took exception to the appraisals being considered in this form at that time.

26 Further, the Receiver addressed the disparity in valuations in its First Report. Briefly, the Altus Group appraisal included two parcels of land that were not part of the sale process. Of the three lots to be sold, Altus had a higher value per acre on Lots 1 and 2 which the Receiver advised was intrinsically related to the purchase of Lot 3 for the purposes of commercial/recreational development, which was not the zoning then existing.

27 The Receiver also advised it had requested proposals from eight realtors, receiving four. It set out why it was recommending that Avison Young's proposal (suggesting a list price of $1,950,000) be accepted.

28 The respondents argue this amounts to a collateral attack on this earlier-in-time order, which, notably, was never appealed. We agree. All of this information was before the chambers judge who granted the order approving the sale process. If his

decision was unreasonable or amounted to a miscarriage of justice, Oeming should have appealed that order. It cannot now do so indirectly vis-à-vis the subsequent Sale Approval and Vesting Order.

29 Before the chambers judge, 170 emphasized its perception that its second offer had been shopped, rendering the sale process unfair. This suggestion was roundly rejected by the chambers judge, who found no evidence that the amount of 170's offer had been disclosed, and any disclosure to Fehr that there was another interested party was in the normal course.

30 For the first time on appeal, 170 focuses on Avison Young's listing proposal, found in the Confidential Supplement to the Receiver's First Report. It is unclear whether the Confidential Supplement was available to 170 when the chambers judge heard the application to approve the sale to Fehr, but it was requested by 170's appellate counsel and provided to him prior to these appeals. 170 argues the court-approved marketing proposal was not transparent and not followed by Avison Young and the Receiver, making the sale process unfair. 170 relies specifically on the following references found within the five-phase marketing strategy:

- Phase 2- Solicit Offers from Buyers (option to use template prior to bid date);
- Phase 3- Selection of preferred Buyer(s):
    - Potential to short list and request improved resubmission.

31 170 suggests the proposal *directed* a bid process and the opportunity to resubmit highest and best offers, similar to a formal tender process. As offers were not elicited through a bid process and no opportunity was given to the preferred buyers to resubmit a further, improved offer, 170 alleges the sale process was neither transparent, fair, nor commercially reasonable.

32 Aside from concerns that this issue is raised for the first time on appeal, the argument fails on its merits. On a plain reading of the impugned portions of the marketing proposal, neither a bid process, nor the option to resubmit offers, is mandated; rather, they are framed as possible options Avison Young *could* employ. A receiver relies on the advice and guidance of the court-approved listing agent in how best to market and sell the asset in question and its own commercial expertise in accepting an offer subject to court approval. Avison Young's realtor deposed that in some circumstances, he will recommend a receiver seek "best and final offers" from interested purchasers. However, in this instance, given the nature of the lands, the present economy, the level of interest and the potential that the Fehr offer could be withdrawn at any moment, his advice to the Receiver was that the unconditional and irrevocable Fehr offer be accepted without delay.

33 Second, prospective purchasers like 170 are not parties to the listing agreement. While 170 suggests it is entitled to the benefit of the marketing process, there are sound policy reasons militating against this proposition. The insolvency regime depends on expediency and certainty. It is untenable to suggest that a "bitter bidder" like 170 can, after another offer has been accepted, look to particulars of the agreement between the listing agent and the Receiver to mount an argument that the sale process was unfair. We agree with the chambers judge's conclusion that the court-approved sale process was followed and that there was nothing unfair about it.

34 It must be remembered that the position of 170 as a bidder in this context is not analogous to the Contract A/Contract B reasoning in the law of tenders. Even if 170's disappointment stemming from its wishful optimism of being able to purchase the lands is understandable, this is not the same as 170 having an enforceable legal right arising from sales guidance of the listing agent. In any event, it would appear that 170 was not even aware of the guidance from the listing agent, which is now suggested to be a condition precedent to the Receiver accepting the Fehr offer.

35 In this instance, it appears the chambers judge declined to consider 170's third offer in his determination of whether the sale to Fehr should be approved. On the present facts, we see no error in this approach. The Fehr offer was significantly better than 170's second offer and clearly reasonable given that it exceeded the appraised value of the lands. We are satisfied the Receiver demonstrated reasonable efforts to market the lands and did not act improvidently. Its acceptance of the Fehr offer was reasonable in the circumstances and unassailable.

ii. Whether the Interests of All Parties Have Been Considered

36 This segues to the question of whether 170 has any standing to appeal. The Receiver raised this issue in its factum, but did not strenuously pursue it at the appeal hearing. We understand the Receiver's position is grounded by the fact the Receiver had invited 170 to participate in the application to approve the sale and that 170's standing was not raised in the proceedings before the chambers judge, at least until the stay application pending appeal on March 12, 2020. 170 suggests its standing to appeal was given tacit approval.

37 Given the position taken by the Receiver and the particular circumstances before us, we decline to comment on this issue at this time. However, we note that the issue of standing for an interested entity like 170 has not yet been decided by this Court and remains a live issue.

38 We equally do not purport to define or delineate the scope of "party" for the purposes of determining whether a receiver has met the *Soundair* test. Under the current state of the law, what is and is not a "party" has yet to be resolved with absolute precision and clarity. Its definition is a matter of importance in the functionality of the four factors, and the conduct of receivership proceedings generally, and deserves proper debate best reserved for another day. As noted, the specific facts of this case have obviated the need to definitively and directly address this question.

39 Nonetheless, it is helpful to examine the policy reasons why a prospective purchaser's ability to challenge a sale approval application should be closely circumscribed. As noted by the Ontario Court of Appeal in Skyepharma PLCv , the prospective purchaser has no legal or proprietary right in the lands being sold. Normally, an examination of the sale process and whether the Receiver has complied with the *Soundair* principles, is focussed on those with a direct interest in the sale process, primarily the creditors.

40 In that regard, the creditors acknowledge they will be paid in full through acceptance of either offer. It is the interests of Oeming that are front and center. Unfortunately, Oeming repeats the same themes they have raised throughout these proceedings. It may come to pass that the new land use bylaw will result in a dramatic increase in the land value but that is a speculative concept beyond this Court's proper consideration. The Receiver's decision to accept the Fehr offer must be assessed under the circumstances then existing: *Pricewaterhousecoopers* at para 14; *Soundair* at para 21. Challenges to a sale process based on after-the-fact information should generally be resisted.

41 On the record before us, we agree with the chambers judge that the opportunity for Oeming to obtain refinancing has passed. While Oeming argues their efforts at refinancing have been hamstrung by the receivership proceedings, there is evidence the debt could have been paid through the Oeming estate, but decisions were made to distribute those funds elsewhere.

42 Consideration must also be given to Fehr who negotiated an offer to purchase in good faith over a year ago, yet continues to live with uncertainty. Beyond affecting Fehr's interests, this also undermines the integrity of receivership proceedings generally. As neatly summarized in Soundairat para 69:

> I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

iii. The Efficacy and Integrity of the Sale Process

43 In obtaining an order approving the sale process, the Receiver satisfied the court of its efforts to engage an appraiser to value the lands for sale. The Receiver also satisfied the court of its efforts to determine the best sale process and why it was recommending Avison Young from the list of four realtors submitting proposals. As we have indicated, the marketing proposal outlined by Avison Young was followed.

44 Oeming also argues the marketing period was unduly rushed. Avison Young's marketing efforts included contacting 407 individual prospective buyers and brokers. It fielded inquiries from 15 interested parties and toured the lands with three interested parties. Signage visible from Highway 14 was placed on the lands and the listing was placed on Avison Young's website. The only offers received were from the two adjacent landowners. Marketing an asset is an unpredictable exercise. It is pure speculation that a longer marketing period would have generated additional, let alone better, offers.

45 We are not persuaded that the integrity of the sale process was compromised. It bears repeating that 170's second offer was *below* the amount the Receiver advised it would accept. 170 had full autonomy over that decision. Its offer was never accepted. While 170 may have believed its offer was going to be accepted, it chose to withdraw its offer, suspecting that same was being shopped around. As the chambers judge found, there is no evidence to support that suspicion.

46 The Fehr offer was significantly higher than 170's. Since it exceeded the appraised value of the land, was irrevocable and unconditional, it is hardly surprising that Avison Young recommended its immediate acceptance.

iv. Whether there was Unfairness in the Working Out of the Process

47 While courts should avoid delving "into the minutia of the process or of the selling strategy adopted by the receiver", courts must still ensure the process was fair: *Soundair* at para 49. The chambers judge afforded both Oeming and 170 the opportunity to make full submissions and tender further evidence before deciding to approve the sale to Fehr. Having concluded that both the sale process and the Fehr offer were fair and reasonable, there was no reason for the chambers judge to compare 170's third offer to the offer accepted, nor to enter into a new bid process.

Conclusion

48 These proceedings have become long and unwieldy. Courts cannot lose sight of two of the overarching policy considerations that articulate bankruptcy and insolvency proceedings: urgency and commercial certainty. Delay fuels increased costs and breeds chaos and confusion, all of which risk adversely affecting the interests of parties with a direct and immediate stake in the sale process.

49 The appeals are dismissed and the stay granted by order dated March 12, 2020 is lifted.

Appeals dismissed.

TAB 5

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): CWB Maxium Financial Inc v. 2026998 Alberta Ltd | 2021 ABQB 137, 2021 CarswellAlta 392, 88 C.B.R. (6th) 196, [2021] A.W.L.D. 2089, [2021] A.W.L.D. 2090, [2021] A.W.L.D. 2091, [2021] A.W.L.D. 2092, [2021] A.W.L.D. 2093, [2021] A.W.L.D. 2126, [2021] A.W.L.D. 2127, [2021] A.W.L.D. 2128, [2021] A.W.L.D. 2135, [2021] A.W.L.D. 2152, 331 A.C.W.S. (3d) 229, [2021] 7 W.W.R. 299, 25 Alta. L.R. (7th) 3 | (Alta. Q.B., Feb 23, 2021)

2000 ABQB 766
Alberta Court of Queen's Bench

Cobrico Developments Inc. v. Tucker Industries Inc.

2000 CarswellAlta 1211, 2000 ABQB 766, [2000] A.J. No. 1295, [2001] A.W.L.D. 349, 273 A.R. 297

Cobrico Developments Inc., Plaintiff and Tucker Industries Inc. and Tucker Enterprises Corp., Defendants

Lee J.

Heard: October 25, 2000
Judgment: November 1, 2000
Docket: Edmonton 0003-17053

Proceedings: additional reasons at 2000 ABQB 817 (Alta. Q.B.)

Counsel: *Richard N. Billington*, for Receiver/Manager.
Barry M. King and *Kevin Ozubko*, for Unnamed party, Ritchie Bros. Auctioneers (Canada) Ltd.
Thomas R. Benson, for Unnamed party, All Peace Auctions Ltd.

Subject: Corporate and Commercial; Insolvency
Headnote
Personal property security --- Remedies — Sale or realization — Miscellaneous issues
Receiver was appointed with respect to property and assets of T Inc. and T Corp. — Receiver approached three auction houses to submit proposals for public sale of assets — R Ltd. was unsuccessful and A Ltd. was chosen — Receiver brought application for order permitting disposition of T Inc. and T Corp.'s assets by way of public sale — R Ltd. objected to bid process and receiver's conclusions — Application granted — Receiver's discretion should not be lightly interfered with without strong evidence — R. Ltd. did not bring forward anything that would vitiate or interfere with wide powers granted to receiver — Receiver acted in good faith and in commercially reasonable manner — Creditor who held General Security Agreement and PMSI holders supported auction and receiver's recommendation of A Ltd. — A Ltd. guaranteed that it would recover amount at least sufficient to pay out PMSI indebtedness and R Ltd. did not — R Ltd. was not creditor of T Inc. or T Corp. and did not have standing to object to receiver's exercise of discretion.
Receivers --- Conduct and liability of receiver — General conduct of receiver
Receiver was appointed with respect to property and assets of T Inc. and T Corp. — Receiver approached three auction houses to submit proposals for public sale of assets — R Ltd. was unsuccessful and A Ltd. was chosen — Receiver brought application for order permitting disposition of T Inc. and T Corp.'s assets by way of public sale — R Ltd. objected to bid process and receiver's conclusions — Application granted — Receiver's discretion should not be lightly interfered with without strong evidence — R. Ltd. did not bring forward anything that would vitiate or interfere with wide powers granted to receiver — Receiver acted in good faith and in commercially reasonable manner — Creditor who held General Security Agreement and PMSI holders supported auction and receiver's recommendation of A Ltd. — A Ltd. guaranteed that it would recover amount at least sufficient

to pay out PMSI indebtedness and R Ltd. did not — R Ltd. was not creditor of T Inc. or T Corp. and did not have standing to object to receiver's exercise of discretion.

APPLICATION by receiver for order permitting disposition of assets by public sale.

***Lee J.*:**

1 On September 7, 2000, my colleague, Lefsrud, J., appointed Myers Norris & Penny Limited (hereinafter referred to as the "Receiver") to be the Receiver and Manager with respect to the property and assets of the Defendants Tucker Industries Inc. and Tucker Enterprises Corp. (hereinafter referred to as ("Tucker").

2 On Wednesday, October 25, 2000, the Receiver made an Application before me for an Order pursuant to s. 60 of the *Personal Property Security Act* (hereinafter referred to as the "PPSA") permitting the disposition by public sale of assets of the Defendants, and for an Order pursuant to s. 60(15) of the *Act* permitting the disposition of collaterals secured by a charge under the *Act* without notice to the debtor, or to any person with an interest in the collateral.

3 Cobrico Developments Inc. ("Cobrico") was the petitioning creditor in this matter

4 Ritchie Bros. Auctioneers (Canada) Ltd. [hereinafter referred to as "Ritchie Bros."] was one of the three auction houses that had been approached by the Receiver/Manager to submit a proposal with respect to Tucker on approximately October 13, 2000. Their proposal with respect to Tucker, dated October 17, 2000, provides for a gross guarantee of two million dollars, a 12% commission of $240,000.00, for a net of $1.76 million dollars. With respect to proceeds over two million dollars, 88% would go to the debtor's estate, and 12% would be retained by Ritchie Bros.

5 Ritchie Bros. and Century Sales Inc. were the unsuccessful public auction houses not chosen to dispose of the debtor's estate. All Peace Auctions Ltd. [hereinafter referred to as "All Peace"] based in Grande Prairie was the successful auction house chosen by the Receiver/Manager.

6 Ritchie Bros. now comes before this Court and objects to both the bid process used by the Receiver/Manager and to the conclusions it reached, and wishes to submit a revised bid based on a fair process that it submits was not present in the first place.

7 Ritchie Bros. alleges that certain material information was not supplied to it (that was supplied to All Peace), and submits that as a result of this, the creditors of Tucker will not benefit as much as they could if the present proposed Order sought by the Receiver/Manager is granted. Ritchie Bros. also argues that the Receiver's Grande Prairie office provides accounting and audit services over many years to All Peace constituting a real or apparent conflict of interest on the part of the Receiver/Manager.

8 The Receiver/Manager strongly objects to Ritchie Bros.'s intervention, describing it as nothing more than "vexatious intermeddler", for the purposes which include determining essentially what the competing auction house bids were. The Receiver/Manager submits that Ritchie Bros. has absolutely no standing in this matter and should not be heard.

9 The General Manager of All Peace, Kevin Tink, disputed many of Ritchie Bros's claims with respect to the bidding process, and described their state of preparedness for the proposed mid-November, 2000 public auction in an Affidavit filed October 27, 2000. Further, Mr. Tink claimed that Ritchie Bros. was also involved in a similar last-minute intervention, or inter-meddling, with respect to a Calgary matter that was similar to the present Application before me, in the matter of Serval Corporation.

10 The Receiver/Manager argues that any delay in this matter would be very prejudicial to all parties involved (with the possible exception of Ritchie Bros.) because of the fact that the equipment of Tucker essentially is oil and gas drilling equipment for which there is primarily a market before drilling season commences. Therefore, the mid-November auction of this equipment is essential. It is estimated that approximately ten million dollars will be received from this auction.

The Law

11 Ritchie Bros. submits *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1 (N.S. C.A.) to support its argument that it has standing before me. At paragraph 18, Hart JA indicates that there is no merit to the suggestion that the unsuccessful bidders have no standing:-

> A preliminary question was raised as to whether Mr. Treby or Mr. Cameron had any right to appear at the original hearing before Burchell, J., or any status which would enable them to appeal from his decision, but, in my opinion, there is no merit in such a suggestion. Both parties were persons to be affected directly by the decision of the court and, in my opinion, were proper parties to the proceedings.

12 *Cameron*, supra, was followed by the Alberta Court of Appeal in *Salima Investments Ltd. v. Bank of Montreal* (1985), 21 D.L.R. (4th) 473 (Alta. C.A.). *Salima* involved an appeal of an Order approving the sale of property by a receiver. The appellant had submitted the highest tender and, subject to court approval, the receiver had agreed to convey the property to the appellant. A higher offer was submitted; by another party prior to the motion for approval. The motion was adjourned and the appellant and two other parties submitted bids. The chambers judge directed the receiver to complete the sale to the party that submitted the highest offer.

13 Kerans, J.A. concluded that the Court had jurisdiction to consider other offers on the motion to approve the sale, and could conduct what was, in essence, a judicial auction. No issue was raised as to the standing of Salima Investments Ltd., as an unsuccessful bidder, to appeal.

14 Ritchie Bros. submits that the *Salima* case makes it clear that the Court has jurisdiction to exercise judicial discretion and consider other offers as well as to direct an alternative process. In *Salima*, Kerans J.A. states the following at pages 466-467:-

> We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has mad a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the court may consider. As Macdonald J.A. said in the ***Cameron*** case at pp. 11-2:
>
> > There are, of course, many reasons why a court might not approve an agreement of purchase and sale, viz., where the offer accepted is so low in relation to the appraised value as to be unrealistic; or, where the circumstances indicate that insufficient time was allowed for the making of bids or that inadequate notice of sale by bid was given (where the receiver sells property by the bid method); or, where it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

15 It is submitted that this is not a total catalogue of those factors which might lead a court to refuse to approve a sale. In *Salima*, supra, the Court concluded the following at page 477:-

> We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver - while always in good faith - had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 The factors in the case at bar that Ritchie Bros. object to as against the Receiver/Manager include:-

(a) The longstanding accountant/client relationship between the Receiver/Manager and All Peace raises an appearance or potential of conflict on the part of the Receiver;

(b) All Peace had an advantage in terms of access to information, the assets and to the Receiver/Manager;

(c) The Receiver/Manager may have made the decision to engage All Peace prior to receipt of the proposal of Ritchie Bros.;

(d) The asset and equipment list used by the Receiver/Manager to request proposals appears to have varied from case to case and has not yet been finalized; and

(e) The instructions by the Receiver/Manager to All Peace and Ritchie Bros. with respect to preparation of proposals appear to have been inconsistent and were capable of multiple interpretations which effected the integrity of the proposals and the process.

17 The Receiver/Manager rely on the case of *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), a decision of Farley, J. of the Commercial List of the Ontario Superior Court of Justice which deals with a fact situation that is somewhat similar to the case at bar.

18 In *Skyepharma*, supra PWC as Court appointed receiver of Hyal made a motion on October 15, 1999 for an Order approving and authorizing the Receiver's acceptance of an Agreement of Purchase and Sale with Skye designated as Plan C. Ground, J. expressed some doubt in Oral Reasons as to the activity of the Receiver.

19 Certain confidential information was not available to Ground, J., as it is not available to me in the case at bar.

20 In *Skyepharma*, Farley, J. concluded that as a result of that confidential information and the complexity of what was available for sale by the receiver, there were various other potentially important considerations surrounding the asset sale and/or sale of shares.

21 Eventually the confidential lists were distributed, and one of the arguments for re-opening the bid auction process would be to put all potential bidders on an equal footing, knowing what everyone else's present position was. It was argued in *Skyepharma* that the best offer would, therefore, be improved, and whatever procedural defects existed would be remedied.

22 Farley, J. concluded as follows:-

3 Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. **In a motion to approve a sale by a receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back doored in some way**. See *Soundair* at pp. 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg et* ***al.*** (1986), 60 O.R. (2d) 87 (H.C.J.). **The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated**: see ***Soundair*** of pp. 5 and 11. Specifically the court's duty is to consider as per *Soundair* at p. 6:

(a) **whether the receiver made a sufficient effort to obtain the best price and did not act improvidently**;

(b) **the interests of all parties**;

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

(d) **whether the working out of the process was unfair**.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Soundair* at p. 7. A receiver's duty is not to obtain the best possible price but to do everything reasonable possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur*, [1994] O.J. No. 2465 (Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonable low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Soundair* at pp. 9-10.

5 In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that

far) may accept an unconditional offer rather than risk delay or jeopardize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See ***Crown Trust*** at p. 107 where Anderson, J. stated:

> The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it.

See also ***Soundair*** at p. 8. Obviously if there are conditions in offers, they must be analysed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

6 Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Soundair* at p. 12 and *Re Central Capital Corporation* (1996), 38 C.B.R. (3d) 1 at pp. 31-41 (per Weiler, JA) and pp. 50-53 (Laskin, JA).

7 Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Soundair* at p. 14 and *Crown Trust* at p. 109.

8 Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust* at pp. 114-119 and *British Columbia Development Corporation v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C.S.C.) at p. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor qua creditor as to its offer to purchase the assets. [Emphasis Added]

23 *Skyepharma* was taken to the Ontario Court of Appeal and their Reasons are reported at (2000), 47 O.R. (3d) 234 (Ont. C.A.). The Ontario Court of Appeal's Reasons, issued on February 18, 2000, dealt with the appeal by BP plc with respect to the Approved Sale Order made by Farley, J., which appeal the Receiver moved to have quashed on the ground that the Court did not have jurisdiction. The Receiver submitted that a potential purchaser does not have any legal or any proprietary right that is affected by the Court's approval of a sale and accordingly the potential purchaser does not have standing to challenge the Order approving the sale.

24 The Ontario Court of Appeal held:-

> ...the question raised by the receiver's motion to quash was whether BP plc had a right that was finally disposed of by the sale approval order.

25 The Ontario Court of Appeal held that there was no such right for two reasons:-

> First, a prospective purchaser has no legal or proprietary right in the property being sold. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court. Second, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors, and an unsuccessful purchaser has no interest in that issue.

26 Continuing on, the Ontario Court of Appeal then stated as follows:

> [**8**] On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hal to Skyepharma In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realization for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and time-frames contained in other offers. The receiver said that these risks were not immaterial.
>
> [**9**] At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.
>
> [**10**] It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:
>
> > Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.
>
> The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hal in the amount of $40,000.
>
> [**11**] The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.
>
> . . . . .
>
> [**22**]I adopt both his reasoning and his conclusion. At p. 118, he said:
>
> > **The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its' only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule**.
> >
> > **Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1)-which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.**

Conclusion

27 The *Skyepharma* case was cited with approval in *Sonoma, Re*, decided by Lovecchio, J. on October 6, 2000 in Calgary (Action No. 0001-06953).

28 Further, the Alberta Court of Appeal has favoured preserving the integrity of the process and allowing the Receiver to exercise its discretion without fetter from the Court in the case of *Royal Bank v. Fracmaster Ltd.* (1999), 209 W.A.C. 93 (Alta. C.A.) approving (1999), 245 A.R. 138 (Alta. Q.B.). Paperny J. wrote at paragraph 58:-

> This court appointed the Receiver based on its experience and expertise. It is the Receiver's function to do the business analysis necessary to develop a disposition strategy, to analyse the proposed offers and to make a recommendation to the Court. As Anderson, J. stated in ***Crown Trustco v. Rosenberg*** (Supra) the Court ought not: "enter into the marketplace" ... the Court out not to sit as on appeal from the decision of the Receiver, reviewing in minute detail every element of the process by which the decision is reached. To do so would be a futile and duplicitous exercise... The Court should not proceed against the recommendations of its Receiver except in special circumstances and where the necessity and propriety of doing so are plain. Any other rule or approach would emasculate the role of the Receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval.

29 Paperny J.'s decision was expressly upheld by the Court of Appeal. At paragraph 32 the Alberta Court of Appeal considered the *Salima* decision, but reiterated the provisions of the *Soundair* [*Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.)] decision which were quoted by Farley, J., in the *Skyepharma* case, supra at page 4. At paragraph 33 they deferred to the recommendation of the Receiver/Manager.

30 The *Salima* case specifically did not deal with the standing issue of Salima Investments, as an unsuccessful bidder, to appeal.

31 The *Cameron* decision referred to in *Salima* dealt with a Nova Scotia rule which permits intervenor status [paragraph 12 of *Cameron*] which does not exist here.

32 Based on the Reasons as discussed in the two *Skyepharma* [*Skyepharma*, *Skyepharma*] decisions and *Royal Bank v. Fracmaster Ltd.*, I conclude that:-

> (a) wide latitude is afforded to the Receiver;
>
> (b) disappointed bidders generally have no standing; and
>
> (c) the Court does not wish to sanction a process that will result in chaos and confusion at the approval motion.

33 The Receiver/Manager set out a bid process in this matter, and its discretion should not be lightly interfered with without strong evidence. Here the allegations by Ritchie Bros. are disputed, and some of the allegations do not appear to be that serious in any event.

34 If there was strong evidence of serious problems in the bid process the Court would exercise its inherent jurisdiction and discretion. I would be been prepared to allow Ritchie Bros. to put forward another proposal for the potential benefit of the creditors. The Court's supervisory jurisdiction requires this in the appropriate clear-cut case otherwise it would just be a rubber stamp for the Receiver/Manager.

35 The Court also must ensure generally that the Receiver/Manager acts in accordance with its enabling Order, and carries out these functions properly under the provision of S. 66(1) of the *PPSA* which reads:-

> 66(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged **in good faith and in a commercially reasonable manner**.

[Emphasis added]

36 In the result however, I conclude that Ritchie Bros. has not brought forward anything that would vitiate or interfere with the wide powers that were granted by this Court to the Receiver/Manager on September 7, 2000 which include:-

At paragraph 1

The Receiver is given authority to "manage and operate the businesses and undertakings";

At paragraph 2

It is hereby acknowledged and declared that the Receiver is an officer of this Honourable Court and is assisting in the preservation and, as appropriate, the orderly sale and realization of the property, undertaking and assets of the Defendant for the benefit of all creditors and claimants, including the Plaintiff, as a secured creditor.

At paragraph 7

The Receiver shall be at liberty to employ such assistants, agents, employees, auditors, advisers and counsel, including legal counsel as it may consider necessary for the purpose ... of realizing the undertaking, property and assets of the Defendants...

At paragraph 8

The Receiver be and is hereby granted leave to take such steps as in its judgement are necessary or desirable for the preservation, protection and realization of the business...

At paragraph 9

The Receiver is authorized to sell, on credit or otherwise, the undertaking, assets and property of each of the Defendants ... or any part or parts thereof out of the ordinary course of business, at public auction, by public tender or by private sale on such terms and conditions as it deems appropriate, provided any such sales over $100,000.00 shall be subject to approval of this Court.

37 While Ritchie Bros. submits that the Receiver/Manager made some errors in its process and procedures, I conclude that it has acted "in good faith and in a commercially reasonable manner."

38 In the initial Order appointing the Receiver/Manager, Lefsrud J. gave Meyers Norris & Penny Limited wide latitude to dispose of the assets of the Defendants, on behalf of the creditors of the Defendants. That latitude provides the Receiver/Manager with a variety of options, including that the Receiver/Manager may choose to sell some or all of the assets by public auction. The Receiver/Manager may choose to sell none by auction, and proceed with other methods of realization.

39 In this case, Cobrico holds General Security Agreements over the Defendants, who are both insolvent. The Defendants will be unable to fully pay the indebtedness owed to the Plaintiff. It is therefore clear that there will be no recovery for unsecured creditors.

40 Certain secured parties hold purchase money security interests ("PMSI") which afford them with priority security over certain of the chattels of the Defendants. Of those chattels, some have an equity sufficient to fully redeem the PMSI secured indebtedness, while other chattels will have insufficient value to fully repay the indebtedness owed to the PMSI holder. In the latter case, it is the desire of the Receiver/Manager to recognize that the decision to be made as to how best to realize on that particular chattel should be left to the PMSI holder, and the Receiver/Manager has no-wish to engage in the sale of that chattel, unless specifically instructed to do so by the holder of the PMSI.

41 The Receiver/Manager knows that certain of the chattels have sufficient equity to fully pay out the secured party who holds a PMSI with respect to each such chattel. The Receiver/Manager, however, is not qualified to assess the value of the chattels, or to determine if they have such equity. For that reason the Receiver/Manager submitted the same list of equipment

to three auction houses and asked them to appraise each item so that a determination could then be made of the value of that equipment, and if that value exceeded the indebtedness owed to the respective PMSI holder for each such chattel.

42 Three auction houses were requested to submit proposals and valuations. All Peace Auctions and Century Sales Inc. did so. Ritchie Bros. did not submit valuations on each individual piece.

43 With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy, who will act as receivers, receiver/managers, monitors, trustees or as privately appointed receivers, are often affiliated with chartered accountancy practices which engage in accounting, audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are regulated professionals who in the course of the realization on assets may be employing the services of experts, or who may be selling assets to persons, any of whom may have affiliation with the receiver.

44 However, generally that does not constitute a conflict of interest, nor generally does the marketplace of potential advisers or of potential purchasers have any legal standing to interfere with the performance of the receiver. That standing is generally reserved by law to those persons whose indebtedness is being protected by the receivership.

45 In the case at bar, those persons are the secured parties, being the PMSI holders and the Plaintiff. Indeed it is the Plaintiff whose interest is most immediately affected by the realization process. Any act which increases the value of the assets (at least those assets whose value is sufficient to satisfy the PMSI indebtedness) will be to the benefit of the Plaintiff. Any act which decreases the value of the assets will be at the Plaintiff's cost.

46 In this case the Plaintiff and the PMSI holders have been given notice of the list of assets which the Receiver/Manager proposes to sell by public auction. They support that auction and the recommendation of the Receiver/Manager to sell the chattels at the November 15, 2000 All Peace auction because of its strategic advantages of size and timing. They support it because All Peace complied with the request to provide an appraisal of each asset, and has guaranteed that it will pay to the Receiver/Manager an amount sufficient to pay off the PMSI indebtedness on each asset which eliminates risk and uncertainty. They support the decision to not select Century Sales Inc. which complied with the Receiver/Manager's stated requirements, and they support the decision to not select Ritchie Bros. which did not comply with the Receiver/Manager's stated requirements.

47 Ritchie Bros. now complains that it has not received the same "Final List" of assets from the Receiver/Manager as did the other auction houses. The "Final List" of assets never existed in the form contemplated by Ritchie Bros.. The Receiver/Manager gave the three auction houses the same inventory list of assets which was compiled by the Receiver/Manager, which exceeds 100 pages, and asked them to provide an appraisal for each of the assets, and a bid amount for the assets which each auction house *in their own discretion and judgement* considered to have an equity sufficient to pay off the PMSI indebtedness. The same statement of pay out amounts (the "Master List") was given to each auction house, and that has not changed. It listed the items secured by PMSI. It was up to the auction houses to each assess how successful they could be at recovering equity on each item. Any items which increase the total bid submitted by All Peace over the total bid submitted by Ritchie Bros. are not significant because they increase the total bid. Rather, they are significant because All Peace has guaranteed the Receiver that it will recover at least an amount sufficient to pay out the PMSI indebtedness secured by that chattel, whereas Ritchie Bros. have been unable or unwilling to do so.

48 The auction houses were each given access to the equipment to inspect the same. The Receiver/Manager's decision to proceed in this fashion is commercially reasonable and prudent (unlike the sale in *Salima*) and is supported by the creditors.

49 Further Ritchie Bros. have given no notice to the secured creditors, most particularly the Plaintiff, and are not supported by any of the secured creditors. They engage in a move to effectively enjoin the sale at the APA auction by the Receiver/Manager, but have not complied with any of the tripartite test for an injunction, nor have they posted an undertaking in damages.

50 The motion by the Receiver/Manager is to permit it to dispose of the assets listed in the proposed Order by public auction. Even by granting Ritchie Bros. status and standing, there is no serious reason to upset the Receiver/Manager's discretion, which is supported by the various secured creditors whose interests are of greater importance.

51 Further, there are certain procedural requirements imposed upon a person wishing to take action against the companies or by extension, the Receiver/Manager which Ritchie Bros. has not complied with Paragraph 6 of the initial Order states:-

> That no legal actions, administrative proceedings, self-help remedies or other acts or proceedings shall be taken or continued against the Receiver of either of the Defendants' assets without leave of this Court first had and obtained upon 2 days prior notice to the Receiver....

52 The Receiver/Manager may therefore exercise its authority in any way it considers to be commercially reasonable, subject only to the requirement imposed by paragraph 9 to obtain Court approval for sales over $100,000.00.

53 Ritchie Brothers are not creditors of either Tucker Industries Inc. or Tucker Enterprises Corp.. While the Receiver/Manager has extended contractually the time in which Ritchie Brothers was entitled to make its bid for auction rights, Ritchie Brothers has no standing to object to the exercise of discretion by the Receiver/Manager. Ritchie Bros. has also not established conclusively that anyone, other than themselves would benefit from the Court's intervention in this case.

54 The Receiver/Manager is authorized to dispose of the assets by public auction conducted by All Peace. Notice of Intention to dispose of the assets as required by the *PPSA* is dispensed with upon the debtor since there will be no remaining assets left for its benefit in any event.

Application granted.

End of Document

TAB 6

2014 ABQB 350
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Elaborate Homes Ltd.

2014 CarswellAlta 921, 2014 ABQB 350, [2014] A.W.L.D. 3322, [2014] A.W.L.D. 3353, 14 C.B.R. (6th) 199, 243 A.C.W.S. (3d) 80, 590 A.R. 156

In the Matter of the Insolvency of Elaborate Homes Ltd. and Elaborate Developments Inc.

Alberta Treasury Branches, Plaintiff and Elaborate Homes Ltd., Elaborate Developments Inc., Manjit (John) Nagra, Jaswinder Nagra, Defendants

K.G. Nielsen J.

Heard: May 14, 2014
Judgment: June 11, 2014 *
Docket: Edmonton 1103-02937

Counsel: Robert M. Curtis, Q.C. for Alco Industrial Inc.
Michael J. McCabe, Q.C. for PriceWaterhouseCoopers Inc.

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

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave

Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Debtors and creditors --- Receivers — Conduct and liability of receiver — Duties — General principles

Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

MOTION by corporation for leave to file action against receiver, in bankruptcy matter.

***K.G. Nielsen J.*:**

I. Introduction

1 PriceWaterhouseCoopers Inc. (PWC) was appointed as receiver of all current and future assets and property of Elaborate Homes Ltd. and Elaborate Developments Inc. (collectively referred to as Elaborate).

2 Alco Industrial Inc. (Alco) seeks leave to commence proceedings against PWC in relation to matters arising in the receivership.

II. Background

3 Alco held a second mortgage (the Mortgage) in the amount of $1,075,000 on, *inter alia*, property (the Condo) owned by Elaborate Homes Ltd., legally described as:

> Condominium Plan 0520263 Unit 4 and 905 undivided 1/10,000 shares in the common property Excepting thereout all mines and minerals.

4 Alberta Treasury Branches was a secured creditor of Elaborate. It held, *inter alia*, a first mortgage on the Condo.

5 PWC was appointed as the receiver of Elaborate Homes Ltd. pursuant to a Consent Receivership Order dated February 22, 2011 (the Receivership Order). Pursuant to a separate Receivership Order, also dated February 22, 2011, PWC was named as receiver of Elaborate Developments Inc., a company related to Elaborate Homes Ltd.

6 On March 3, 2011, PWC sent notice to Alco, pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) of the receivership of Elaborate. This was sent by regular mail to the address indicated on the registration of the Mortgage on the Certificate of Title to the Condo. In the Brief filed in this application on behalf of Alco, it is acknowledged that Alco was served with a copy of the Receivership Order.

7 On or about April 5, 2011, an assistant with legal counsel for PWC (not the counsel for PWC on this application) obtained certain contact information with respect to Alco. While the assistant could not recall with whom she spoke at Alco or the exact conversation, she deposed that she believed she followed her typical practice when speaking to creditors which was as follows:

> (a) she identified herself to the creditor and advised that she was calling from counsel for the receiver with respect to the receivership of the debtor company;
>
> (b) she advised the creditor that the receiver required certain information from the creditor with respect to the receivership; and
>
> (c) she requested contact information for the individual within the creditor's organization who would be best suited to receive correspondence with respect to the receivership.

8 In the discussions that ensued with the individual at Alco following this typical practice, she was advised that the owner of Alco was Bob Taubner and she was given his email address. This information is confirmed in a handwritten note made by the assistant. At all material times, Mr. Taubner was the President of Alco.

9 PWC took steps to market Elaborate's assets and property pursuant to the provisions of the Receivership Order. As a result of the marketing efforts, a number of offers were received for individual assets of Elaborate. PWC also received a number of "*en bloc* offers" to purchase all of Elaborate's assets. One of those *en bloc* offers was received from 1601812 Alberta Ltd. (the 160 Offer).

10 In accordance with its obligations, PWC reported to the Court with respect to the offers received in its Second Report, filed May 26, 2011. The Second Report contained a Bid Summary of all of the offers. PWC wished to keep the information in the Bid Summary confidential, and to release it to the public only after the Court had approved a sale. However, parties could obtain a copy of the Bid Summary on signing and sending to PWC a Confidentiality Letter, which provided that anyone signing it would be provided with the Bid Summary, but would be barred from acting as a purchaser in any way in respect of Elaborate's assets.

11 As outlined in the Second Report, PWC was of the opinion that the 160 Offer would lead to the highest net recovery for the creditors of Elaborate, as opposed to accepting other offers for specified or individual assets. PWC formed this view based on the combined value of the cash and assumption of liabilities components of the 160 Offer.

12 PWC accepted the 160 Offer subject to Court approval. PWC recommended to the Court that the 160 Offer be approved on the basis that it was higher than other offers and was preferable from the perspective of all of the creditors of Elaborate as a whole. Compared to all of the other *en bloc* offers, the 160 Offer would produce the highest net recovery on the Condo. Based on its analysis of the 160 Offer, PWC concluded that accepting the 160 Offer would allow for recovery of all of the indebtedness of Elaborate to Alberta Treasury Branches, but would not allow for the full recovery of the indebtedness of Elaborate to another secured creditor, Servus Credit Union. Following discussions with PWC, Servus Credit Union agreed with PWC's recommendation to accept the 160 Offer. PWC had no discussions with Alco with respect to the offers received.

13 The 160 Offer required Court approval by June 3, 2011. By an email dated May 26, 2011, counsel for PWC forwarded to Elaborate's creditors, including Alco, copies of the following:

(a) the Application for an Order Approving Sale and Vesting Order returnable June 3, 2011 (the Application);

(b) the Second Report;

(c) a copy of a letter directed to the Court; and

(d) a copy of the Confidentiality Letter.

14 On June 3, 2011, Belzil J. heard the application for approval of the sale of Elaborate's assets and property pursuant to the 160 Offer. Belzil J. granted a Sale Approval and Vesting Order approving the acceptance of the 160 Offer by PWC (the Sale Order). Belzil J. also granted a Sealing Order which sealed the Bid Summary until such time as the sale transaction had closed and a letter had been filed with the Clerk of the Court confirming that fact (the Sealing Order).

15 On June 3, 2011, counsel for PWC served the Sale Order and the Sealing Order by email on the listed creditors, including Alco.

16 Mr. Taubner, the President of Alco, has deposed that while he received the email of May 26, 2011 enclosing the Application, and 19 other emails with respect to this receivership, he did not use the email address which had been given to counsel for PWC or any other email address at the material time. He deposed that he was unfamiliar with computers and he did not anticipate that he might receive communications from PWC in such a fashion.

17 On cross-examination on his Affidavit, Mr. Taubner testified that he would occasionally request email communications, some of his employees would communicate with him by email, he would read such emails, and the group accountant for Alco had access to his emails. There is no evidence that any of the emails forwarded to Alco with respect to the Elaborate receivership at the address given, were rejected or returned as undeliverable.

18 The sale of Elaborate's assets and property proceeded pursuant to the 160 Offer, and Alco ultimately received the sum of $90,553.09 net of costs in relation to the security which it held on the Condo. This recovery was insufficient to pay out the Mortgage.

19 PWC reported in its First Report, filed April 20, 2011, that an appraisal of the Condo had been conducted in August 2010, reflecting a market value of $785,000. The Bid Summary indicated that the appraised value of the Condo on a forced liquidation was $505,750. The value assigned to the Condo pursuant to the 160 Offer was $432,000. This was the highest value assigned to the Condo in any of the *en bloc* offers. An offer had been received on the Condo only. This offer was in the amount of $529,444.

20 The value assigned to the Condo in the 160 Offer represented 85% of the forced liquidation valuation. Only two other assets had higher returns compared to their valuations. The lowest allocation to an asset in the offers received was 24% of that asset's valuation.

21 Andrew Burnett, Vice President of PWC, was involved in this receivership. He filed an Affidavit in response to Alco's Application and was examined on it. With respect to the 160 Offer, Mr. Burnett deposed as follows:

> Page 30, lines 17 to 22:
>
> > Q Was there ever any conversation with the offeror about modifying its offer in respect of the office condo [the Condo] because of the position of Alco?
> >
> > A No, there was never discussion with them about changing their position on any of the other pieces of property other than the Althen One [unrelated to the Condo].
>
> Page 33, lines 25 to 27 and Page 34, lines 1 to 11:
>
> > Q One of the bids that PWC did receive for the office condo alone was over $500,000, correct?
> >
> > A Correct.
> >
> > Q When that bid came in, do I take it that the sole consideration was that it was a standalone bid whereas you wanted to have *en bloc* bids?
> >
> > A No.
> >
> > Q What consideration was given to possibly accepting that bid?
> >
> > A We went back to all the purchasers that had more than one item on there and asked them whether we could carve out pieces, saying okay, you're the highest on this, but you're lower on this, can we just take that?
>
> Page 36, lines 15 to 20:
>
> > Q What did Studio Homes [formerly 1601812 Alberta Ltd.] specifically advise with respect to their position on the office condo at the time, not in January of 2014, but at the time?
> >
> > A At the time, and I won't say it's just on the office condo, we asked whether they would pull any of their other parcels out and they advised no.

III. Terms of the Orders

A. Receivership Order

22 The following provisions of the Receivership Order are relevant to this application:

> ...2. Pursuant to sections 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-03 (the "*BIA*"), 13(2) of the *Judicature Act*, RSA 2000, c. J-2, 99(a) of the *Business Corporations Act*, RSA 2000, c. B-9 and 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, PriceWaterhouseCoopers Inc. is hereby appointed Receiver (the "Receiver"),

without security, of all of the Debtor current and future assets, undertakings and properties real and personal of every nature and kind whatsoever, and wherever situate, including all proceeds thereof ("the Property").

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

...(k) 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.

(l) To sell, convey, transfer, lease or assign the Property (the "Disposition") or any part or parts thereof: ...

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

. . .

16. The Receiver shall incur no liability or obligation as a result of its appointment or carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the WEPPA. Nothing in this order shall derogate from the protection afforded to the Receiver by s. 14.06 of the BIA or any other applicable legislation.

B. Sale Order

23 The following provisions of the Sale Order are relevant to this application:

1. Service of the notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service is abridged to that actually given.

2. The Receiver's acceptance of the Purchaser's offer to purchase the Lands and Personal Property dated May 6th, 2011 as clarified and extended by the letter from the Receiver dated May 13, 2011, the e-mail from the Purchaser's legal counsel to the Receiver's legal counsel dated May 19, 2011, the letter from legal counsel for the Receiver to legal counsel for the Purchaser dated May 20, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 24, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 25, 2011, and the letter from the Receiver to the Purchaser dated May 26, 2011 (the "Offer"), which Offer is summarized at paragraphs 20 to 32 of the Receiver's Second Report, and [sic] is hereby approved and ratified.

. . .

15. Service of this Order may be effected upon those persons (directly or through legal counsel) on the Service List by facsimile or electronic mail, and such service shall constitute good and sufficient service. Service on any person other than as specified in the Service List is hereby dispensed with.

C. Sealing Order

24 The following provision of the Sealing Order is relevant to this application:

1. ... the Clerk of the Court is hereby directed to seal the Bid Summary (the "Confidential Documents") on the Court file until the sale of the Lands and Personal Property to 1601812 Alberta Ltd. has been closed in accordance with the Offer Terms and the filing of a letter with the Clerk of the Court from PriceWaterhouseCoopers Inc. confirming the sale of the Lands and Personal Property has been closed. ...

IV. Positions of the Parties

25 Alco argues that leave should be granted to file the Statement of Claim appended to its Application. Alco submits that it has a claim against PWC for gross negligence or wilful misconduct in serving the Application by email on May 26, 2011, and selling the Condo for less than its appraised value, thereby preferring the interests of other creditors to those of Alco.

26 PWC argues that there is no basis for a claim against it, as all documents were properly served on Alco by email, and all steps taken by it were in accordance with its obligations to act in the best interests of the creditors of Elaborate as a whole. Therefore, it was neither grossly negligent, nor did it wilfully misconduct itself.

V. Issue

27 The sole issue before the Court is whether Alco should be granted leave to file the Statement of Claim against PWC.

VI. Applicable Rules

A. Alberta Rules of Court, Alta Reg 124/2010

28 The following Rules of the *Alberta Rules of Court* are relevant to this application:

> **9.15(1)** On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made
>
> (a) without notice to one or more affected persons, or
>
> (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.
>
> **(2)** Unless the Court otherwise orders, the application must be made within 20 days after the earlier of
>
> (a) the service of the judgment or order on the applicant, and
>
> (b) the date the judgment or order first came to the applicant's attention.
>
> . . .
>
> **11.21(1)** A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and
>
> (a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and
>
> (b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.
>
> **(2)** Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.
>
> **(3)** In this rule, "electronic" and "electronic agent" have the same meanings as they have in the *Electronic Transactions Act*.

B. Bankruptcy and Insolvency General Rules, CRC, c 368

29 The following *BIA* Rules are relevant to this application:

> **3.** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> . . .
>
> **6.(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.

VII. Law

A. Threshold Test for Leave

30 The Supreme Court of Canada in *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123 (S.C.C.) confirmed that the threshold is low on an application for leave to commence an action against a receiver or trustee:

> 55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact...
>
> . . .
>
> 57 In the leading case of ***Mancini***, the Court of Appeal summarized the accepted principles as being the following:
>
> > 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
> >
> > 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
> >
> > 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

31 Conrad J. (as she then was) considered this issue in her decision in *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of)* (1988), 90 A.R. 173 (Alta. Q.B.), at 177 -78, [1988] 6 W.W.R. 156 (Alta. Q.B.):

> ...In ***Royal Bank of Canada v. Vista Homes Ltd. et al*** (1985) 63 B.C.L.R. 366 (B.C.S.C.), Mr. Justice MacDonald stated at p. 374:
>
> > ...the obtaining of an order to sue should not be a perfunctory process... The court should examine with some care the foundation of the alleged claim with a bias against exposing its appointed officer to unnecessary or unwarranted litigation. On the other hand, there is not an onus on the applicant to prove its case against the receiver-manager at this stage.
>
> . . .
>
> I am satisfied the test to be applied by this court is to determine whether it is perfectly clear that there is no foundation for the claim or whether the action is frivolous or vexatious. It is not for this court to deal with the merits of either party's position or to gauge the probability of success should the action proceed to trial. Leave should be granted if the evidence presented discloses that there is some foundation for the claim and that the claim is not merely frivolous nor vexatious.

> Indeed, while the Court may by its order want to protect its appointed officer from unnecessary and unwarranted litigation, I do not take that to mean they are entitled to protection against proper actions simply because they are court appointed.

32 Therefore, the proposed plaintiff must have supplied "facts to support the claim sought to be asserted", or "some foundation for the claim". Both of these cases make it clear that there must be some factual basis for the claim, a court should not grant leave for frivolous, vexatious or unmeritorious claims, and it is not appropriate at the leave stage for the court to make a final assessment of the merits of the claim or possible defences to the claim.

33 While the threshold for granting leave is low, the process of reviewing the proposed claim is not to be perfunctory. Therefore, I will analyze in some detail the basis for the claims alleged by Alco against PWC.

B. Gross Negligence and Willful Misconduct

34 Clause 16 of the Receivership Order provides that PWC will incur liability only in circumstances of "gross negligence or wilful misconduct on its part". The starting point, therefore, is to consider what constitutes gross negligence or willful misconduct.

35 *Black's Law Dictionary*, 9th ed (St Paul, MN: West, 2009) defines gross negligence as, *inter alia*:

> A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.
>
> ...As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous...have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof...But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind...

36 The *Dictionary of Canadian Law*, 4th ed (Scarborough, Ont: Thomson Carswell, 2011) provides the following definition:

> Conduct in which if there is not conscious wrongdoing, there is a very marked departure from the standard by which responsible and competent people...habitually govern themselves...a high or serious degree of negligence...

37 The Supreme Court of Canada has considered these terms in the context of tort litigation. In *McCulloch v. Murray*, [1942] S.C.R. 141 (S.C.C.), at 145, [1942] S.C.J. No. 7 (S.C.C.), Duff C.J. observed:

> ... All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. ...

38 In *Société Telus Communications v. Peracomo Inc.*, 2014 SCC 29, [2014] S.C.J. No. 29 (S.C.C.), Cromwell J. for the majority commented on "wilful misconduct":

> 57 In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference"; "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": ***R. v. Boulanger***, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing ***Attorney General's Reference (No. 3 of 2003)***, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an insightful article, Peter Cane states that "[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take": "*Mens Rea* in Tort Law" (2000), 20 *Oxford J. Legal Stud*. 533, at p. 535.

> 58 These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know...

39 Therefore, in order for Alco to establish PWC's liability arising from the receivership at an eventual trial, it must show that PWC demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

40 Against this backdrop, I will consider Alco's complaints regarding PWC's conduct.

VIII. Analysis

A. Email Service

41 Alco argues that service of the Application was not effective, as Alco had not specifically provided an address to which information or data in respect of the receivership action might be transmitted to it.

42 Nothing in the material before the Court supports this allegation. Clearly, the assistant for counsel at PWC contacted a representative of Alco who provided an email address for the president of Alco. It is reasonable to infer that whoever provided the email address to the assistant for counsel at PWC was not aware that Mr. Taubner would not access his email account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

43 PWC derived its authority from the Receivership Order which specifically references the *BIA*. Rule 6(1) of the *BIA Rules* requires that every notice or other document pursuant to the *BIA* or the *BIA Rules* be "served, delivered personally or sent by mail, courier, facsimile or electronic transmission". Both the Application and the Sale Order were sent by electronic transmission to an email address provided by Alco. There is nothing in the material before the Court to suggest that service was not effected in compliance with Rule 6(1) of the *BIA Rules*.

44 In contrast, *BIA* Rule 124 provides that a notice pursuant to s. 244(1) of the *BIA* by a secured creditor who intends to enforce a security on all or substantially all property of an insolvent may be "sent, *if agreed to by the parties*, by electronic transmission". Neither s. 245 regarding the initial notice of the receiver, nor general Rule 6(1) imposes a similar requirement.

45 The *Alberta Rules of Court* supplement the *BIA Rules* to the extent that they are not inconsistent with the *BIA* or the *BIA Rules*. Rule 11.21 requires that the recipient has specifically provided an address. Arguably, this is more onerous than Rule 6(1), and therefore inconsistent with it. However, even if Rule 11.21 of the *Alberta Rules of Court* applies, there is nothing in the material before the Court to suggest that the requirements of Rule 11.21 were not met in this case.

46 I also note that if Alco wished to pursue the position that the Sale Order had been obtained without notice to it, it could have availed itself of Rule 9.15 of the *Alberta Rules of Court* which provides a mechanism to seek to vary or discharge a judgment or order on that basis. Such an application must be made within 20 days after the earlier of service of the order on the applicant, or the date the order first came to the applicant's attention.

47 The Sale Order was, of course, also served by email on Alco. Therefore, Alco would argue that the Sale Order was not properly served upon it. However, on the record before me it is clear that Alco was aware of the Sale Order by January 11, 2012 at the latest, when it resisted the apportionment of receivership costs as against the proceeds from the sale of the Condo. Alco took no timely steps to set aside the Sale Order for lack of service upon becoming aware of it.

48 Further, the Sale Order makes it clear that service of the Application was declared to be good and sufficient and that service of the Sale Order could be effected upon all affected persons by way of facsimile or electronic mail, and such service was constituted to be good and sufficient. Therefore, it appears that Belzil J. considered the matter of both service of the Application

and the Sale Order. Again, Alco could have either appealed the Sale Order, or sought to set it aside on the basis of a lack of notice. It took neither of these steps.

49 I would add that in today's world, electronic service is a reflection of practical realities. The *Alberta Rules of Court* and the *BIA Rules* recognize this reality. Perhaps there is no area of practice where electronic service of documents is more appropriate than the bankruptcy and insolvency area. I say this because of the volume of documents that are often produced in such matters, and the need for receivers, trustees, monitors and counsel to act expeditiously and often in the face of very short deadlines. Given the commercial and legal realities of bankruptcy and insolvency matters, there is an obvious need to exchange documents electronically. In my view, a party involved in such matters cannot ignore these realities by refusing to move effectively into the electronic age.

50 In summary, I find nothing in the material before the Court to suggest that PWC through its counsel did not properly effect service of both the Application and the Sale Order on Alco by emailing those documents to Mr. Taubner at Alco. There is no factual basis to suggest that PWC was either grossly negligent, or that it wilfully misconducted itself, in effecting service of the documents by email.

B. Sale Transaction

51 Alco also alleges that PWC breached its duties to Alco in the manner in which it conducted the sale of Elaborate's assets. Specifically, Alco alleges that PWC concealed the Bid Summary, and sold the Condo for an amount which was below its appraised value.

52 The Second Report indicated that PWC preferred that the Bid Summary remain confidential until such time as the sale transaction had closed. Upon signing the Confidentiality Letter, the Bid Summary would be disclosed to the signatory on the basis that the information disclosed in the Bid Summary would not later be used by the signatory as a potential purchaser of Elaborate assets.

53 Alco argues that PWC should not have required it to give up any right to make an offer on the Condo. Alco submits that its rights "ought not to have been extorted away under threat that otherwise the information necessary for it to respond to a court application would be kept hidden from view".

54 It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952, [2009] O.J. No. 5440 (Ont. S.C.J. [Commercial List]), Newbould J. explained the reasons for such confidentiality:

> 17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In ***8857574 Ontario Inc. v. Pizza Pizza Ltd***, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

55 Alco alleges that PWC and its counsel ignored Alco, hid the Bid Summary and cloaked their activities in the receivership with secrecy. However, there is nothing in the material before the Court to suggest that PWC's preference to keep the Bid Summary confidential until the sale transaction had been approved and closed was for any purpose other than to ensure the integrity of the marketing process, and to avoid misuse of the information in the Bid Summary by a subsequent bidder to obtain

an unfair advantage in the event it was necessary to remarket Elaborate's assets. Further, there is nothing to suggest that Belzil J. granted the Sealing Order for any other reason.

56 Alco may have been in a unique position given that it held a second mortgage on the Condo. Given that unique position, it may very well have been entitled to receive information with respect to the offers received in relation to the Condo and, therefore, could have suggested revised terms to any required confidentiality agreement. However, Alco's position does not render PWC's actions inappropriate. There is nothing to suggest that PWC's actions in this regard were not in accordance with common, prudent and reasonable practice in receiverships, or that they reflect or resulted from gross negligence or wilful misconduct on the part of PWC.

57 With respect to the manner in which the sale of the Condo was conducted, Alco submits that PWC breached a "fundamental duty of Receivers" in that it failed to act with an even hand towards classes of creditors and in accordance with recognised lawful priorities. Again, the law and the material before the Court do not support this contention.

58 The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at paras 27-29, Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

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

59 Galligan J.A. recognized that in considering a sale by a receiver, a court must place a great deal of confidence in the actions taken and in the opinions formed by the receiver, and should assume that the receiver is acting properly unless the contrary is clearly shown. He summarized the duties of the court when deciding whether a receiver who has sold property acted properly as follows (at para 17):

> 1. It should consider whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
>
> 2. It should consider the interests of all parties;
>
> 3. It should consider the efficacy and integrity of the process by which offers are obtained;
>
> 4. It should consider whether there has been unfairness in the working out of the process.

60 In *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, [1999] O.J. No. 4300 (Ont. S.C.J. [Commercial List]) at para 4, Farley J. cited *Soundair* with approval, holding that a receiver's conduct is to be reviewed in light of the objective information the receiver had and not with the benefit of hindsight. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver acted improvidently in accepting it.

61 In *Scanwood Canada Ltd., Re*, 2011 NSSC 189, 305 N.S.R. (2d) 34 (N.S. S.C.), the receiver was of the view that the best realization of the assets in question would come from a sale *en bloc*. Hood J. held that the receiver's duty to act in the interests of

the general body of creditors does not necessarily mean that the majority rules. Rather, the receiver must consider the interests of all creditors and then act for the benefit of the general body.

62 PWC accepted the 160 Offer and recommended that the acceptance be approved by the Court on the basis that it was higher than other *en bloc* offers and was preferable from the overall perspective of Elaborate's creditors. The 160 Offer provided for the highest net recovery on the Condo of all of the *en bloc* offers and represented a recovery of 85% of the forced liquidation valuation of the Condo. Only one other offer in the marketing process undertaken by PWC assigned a purchase price for the Condo which was higher than the price assigned in the 160 Offer. This was an offer with respect to the Condo only.

63 The law is clear to the effect that the receiver must not consider the interests of only one creditor, but must act for the benefit of the general body of creditors. PWC was under a duty to act in the interests of the general body of creditors and to conduct a fair and efficient marketing process.

64 The excerpts from the cross-examination of Mr. Burnett on his Affidavit indicate that PWC did attempt to maximize the recovery on all of Elaborate's assets as it conducted negotiations with the various bidders in this regard.

65 There is nothing before the Court to suggest that PWC did not make sufficient efforts to obtain the best price for the assets, nor that it acted improvidently. Alco has not put forward any factual foundation to support an inference that PWC did not act for the benefit of the general body of creditors.

66 Alco submits that had it attended the hearing on June 3, 2011 before Belzil J., it would have been successful in arguing that Alco was deprived of a statutory right to recover its secured debt against the Condo. However, the contents of the Second Report undermine the argument that PWC's acceptance of the 160 Offer would not have been approved in the circumstances as known when the matter proceeded before Belzil J. Further, given my findings on the email service issue, PWC cannot be blamed for Alco's non-attendance at the hearing on June 3, 2011.

67 Therefore, I conclude that Alco has not established a factual basis for the claim that PWC was either grossly negligent or wilfully misconducted itself in the manner that it marketed Elaborate's assets or in its reporting to the Court.

IX. Conclusion

68 The threshold test for leave in this case is low. However, PWC would only be liable if it acted with gross negligence or wilful misconduct. I have found no factual basis to suggest that PWC was either grossly negligent or wilfully misconducted itself as alleged by Alco.

69 PWC is not entitled to protection against proper actions simply because it was court appointed. However, I am mindful of the bias against exposing a court appointed officer to unnecessary or unwarranted litigation. In my view, granting leave to Alco to proceed with the claim against PWC would expose it to a manifestly unmeritorious action.

70 Therefore, Alco's application for leave to file the Statement of Claim against PWC is dismissed.

X. Costs

71 If the parties cannot otherwise agree on costs, they may appear before me within 60 days of the filing of these Reasons for Judgment.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on June 23, 2014 has been incorporated herein.

End of Document

TAB 7

2015 ONSC 6562
Ontario Superior Court of Justice

Mustang GP Ltd., Re

2015 CarswellOnt 16398, 2015 ONSC 6562, 259 A.C.W.S. (3d) 623, 31 C.B.R. (6th) 130

In the Matter of the Notice of Intention to Make a Proposal of Mustang GP Ltd.

In the Matter of the Notice of Intention to Make a Proposal of Harvest Ontario Partners Limited Partnership

In the Matter of the Notice of Intention to Make a Proposal of Harvest Power Mustang Generation Ltd.

H.A. Rady J.

Heard: October 19, 2015
Judgment: October 28, 2015
Docket: 35-2041153, 35-2041155, 35-2041157

Counsel: Harvey Chaiton, for Mustang GP Ltd., Harvest Ontario Partners Limited Partnership and Harvest Power Mustang Generation Ltd.
Joseph Latham, for Harvest Power Inc.
Jeremy Forrest, for Proposal Trustee, Deloitte Restructuring Inc.
Robert Choi, for Badger Daylighting Limited Partnership
Curtis Cleaver, for StormFisher Ltd.

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

Headnote

Bankruptcy and insolvency --- Proposal — Approval by court — General principles

In September 2015, debtors filed intention to make proposal — Debtors were indirect subsidiaries of HP Inc. — SE Ltd. was competitor of HP Inc., and it expressed interest in purchasing debtors' business as going concern — SE Ltd. offered to make DIP loan of up to $1 million to fund projected shortfall in cash flow — Debtors brought motion for orders consolidating their proposal proceeding, authorizing debtors to enter into an interim financing term sheet with SE Ltd. as DIP lender, approving DIP term sheet and granting SE Ltd. super priority charge to secure all of debtors' obligations to SE Ltd. under DIP term sheet, granting charge not to exceed $150,000 in favour of debtors' legal counsel to secure payment of their reasonable fees and disbursements, granting charge up to $2,000,000 in favour of debtors' directors and officers, approving process for sale and marketing of debtors' business and assets, approving agreement of purchase and sale between SE Ltd. and debtors and granting debtors extension of time to make proposal to their creditors — Motion granted — Consolidation of debtors' notice of intention proceedings was appropriate — It avoided multiplicity of proceedings, associated costs and need to file three sets of motion materials — Three debtors were closely aligned and shared accounting, administration, human resources and financial functions — Debtors' assets were to be marketed together and form single purchase and sale transaction — DIP term sheet was approved and super priority granted — Administration charge was granted — Involvement of professional advisors was critical to successful restructuring — Process was reasonably complex and their assistance was self evidently necessary to navigate to completion — Debtors had limited means to obtain that professional assistance — Directors' of officers' charge was warranted — It was only required in event that sale was not concluded and wind down of facility was required — Directors and officers whose participation in process was critical might not continue their involvement if relief was not granted — Sale process and stalking horse agreement were approved — It permitted sale of debtors' business as going concern — Stalking horse bid established floor price for debtors' assets — Process seemed fair and transparent and there was no viable alternative — Proposal trustee supported process and agreement — Time to file proposal was extended so sale process could be carried out.

MOTION by debtors for approval of proposal.

***H.A. Rady J.*:**

Introduction

1 This matter came before me as a time sensitive motion for the following relief:

(a) abridging the time for service of the debtors' motion record so that the motion was properly returnable on October 19, 2015;

(b) administratively consolidating the debtors' proposal proceeding;

(c) authorizing the debtors to enter into an interim financing term sheet (the DIP term sheet) with StormFisher Environmental Ltd. (in this capacity, the DIP lender), approving the DIP term sheet and granting the DIP lender a super priority charge to secure all of the debtors' obligations to the DIP lender under the DIP term sheet;

(d) granting a charge in an amount not to exceed $150,000 in favour of the debtors' legal counsel, the proposal trustee and its legal counsel to secure payment of their reasonable fees and disbursements;

(e) granting a charge in an amount not to exceed $2,000,000 in favour of the debtors' directors and officers;

(f) approving the process described herein for the sale and marketing of the debtors' business and assets;

(g) approving the agreement of purchase and sale between StormFisher Environmental Ltd. and the debtors; and

(h) granting the debtors an extension of time to make a proposal to their creditors.

Preliminary Matter

2 As a preliminary matter, Mr. Choi, who acts for a creditor of the debtors, Badger Daylighting Limited Partnership, requested an adjournment to permit him an opportunity to review and consider the material, which was late served on October 15, 2015. He sought only a brief adjournment and I was initially inclined to grant one. However, having heard counsel's submissions and considered the material, I was concerned that even a brief adjournment had the potential to cause mischief as the debtors attempt to come to terms with their debt. Any delay might ultimately cause prejudice to the debtors and their stakeholders. Both Mr. Chaiton and Mr. Latham expressed concern about adverse environmental consequences if the case were delayed. No other stakeholders appeared to voice any objection. As a result, the request was denied and the motion proceeded.

3 Following submissions, I reserved my decision. On October 20, 2015, I released an endorsement granting the relief with reasons to follow.

Background

4 The evidence is contained in the affidavit of Wayne Davis, the chief executive officer of Harvest Mustang GP Ltd. dated October 13, 2015. He sets out in considerable detail the background to the motion and what has led the debtors to seek the above described relief. The following is a summary of his evidence.

5 On September 29, 2015, the moving parties, which are referred to collectively as the debtors, each filed a Notice of Intention to Make a Proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 as amended. Deloitte Restructuring Inc. was named proposal trustee.

6 The debtors are indirect subsidiaries of Harvest Power Inc., a privately owned Delaware corporation that develops, builds, owns and operates facilities that generate renewable energy, as well as soil and mulch products from waste organic materials.

7 Harvest Power Mustang Generation Ltd. was established in July 2010 in order to acquire assets related to a development opportunity in London. In October 2010, it purchased a property located at 1087 Green Valley Road from London Biogas Generation Inc., a subsidiary of StormFisher Ltd. The intent was to design, build, own and operate a biogas electricity production facility.

8 In November 2011, a limited partnership was formed between Harvest Power Canada Ltd., Harvest Power Mustang GP Ltd. and Waste Management of Canada Corporation, referred to as Harvest Ontario Partners Limited Partnership or Harvest Ontario Partners. It was formed to permit the plant to accept organic waste to be used to generate renewable electricity. After the partnership was formed, Harvest Power Mustang Generation Ltd. became a 100 percent owned subsidiary of the partnership. In June 2012, its personal property was transferred to the partnership. It remains the registered owner of 1087 Green Valley Road.

9 The plant employs twelve part and full time employees.

10 The debtors began operating the biogas electrical facility in London in April 2013. Unfortunately, the plant has never met its production expectations, had negative EBITDA from the outset and could not reach profitability without new investment. The debtors had experienced significant "launch challenges" due to construction delays, lower than expected feedstock acquisition, higher than anticipated labour costs, and delays in securing a necessary approval from the Canadian Food Inspection Agency for the marketing and sale of fertilizer produced at the facility.

11 Its difficulties were compounded by litigation with its general contractor, arising from the earlier construction of the facility. The lawsuit was ultimately resolved with the debtors paying $1 million from a holdback held by Harvest Ontario Partners as well as a 24 percent limited partnership interest in the partnership. The litigation was costly and "caused a substantial drain on the debtors' working capital resources".

12 The debtors' working capital and operating losses had been funded by its parent company, Harvest Power Inc. However, in early 2015 Harvest Power Inc. advised the debtors that it would not continue to do so. By the year ended September 2015, the debtors had an operating loss of approximately $4.8 million.

13 In January 2015, the debtors defaulted on their obligations to Farm Credit Canada, its senior secured creditor, which had extended a demand credit facility to secure up to $11 million in construction financing for the plant. The credit facility was converted to a twelve year term loan, secured by a mortgage, a first security interest and various guarantees. In February 2015, FCC began a process to locate a party to acquire its debt and security, with the cooperation of the debtors. FCC also advised the debtors that it would not fund any restructuring process or provide further financing. The marketing process failed to garner any offers from third parties that FCC found acceptable.

14 On July 9, 2015, FCC demanded payment of its term loan from Harvest Ontario Partners and served a Notice of Intention to Enforce Security pursuant to s. 244(1) of the *BIA*. In August 2015, an indirect subsidiary of Harvest Power Inc. — 2478223 Ontario Limited — purchased and took an assignment of FCC's debt and security at a substantial discount.

15 Shortly thereafter, StormFisher Ltd., which is a competitor of Harvest Power Inc., advised 2478223 that it was interested in purchasing the FCC debt and security in the hopes of acquiring the debtors' business. It was prepared to participate in the sale process as a stalking horse bidder and a DIP lender.

16 On September 25, 2015, 2478223 assigned the debt and security to StormFisher Environmental Ltd., a subsidiary of StormFisher Ltd., incorporated for the purpose of purchasing the debtors' assets. The debt and security were purchased at a substantial discount from what 2478223 had paid and included cash, a promissory note and a minority equity interest. StormFisher Ltd. is described as having remained close to the Harvest Power group of companies in the time following its subsidiary's sale of the property to Harvest Power Generation Ltd. Some of its employees worked under contract for Harvest Power Inc. It was aware of the debtors' financial difficulties and had participated in FCC's earlier attempted sale process.

17 On September 29, 2015, the debtors commenced these proceedings under the *BIA*, in order to carry out the sale of the debtors' business as a going concern to StormFisher Environmental Ltd. as a stalking horse bidder or another purchaser. Given the lack of success in the sale process earlier initiated by FCC, and concerns respecting the difficulties facing the renewable energy industry in general and for the debtors specifically, the debtors believe that a stalking horse process is appropriate and necessary.

18 In consultation with the proposal trustee, the debtors developed a process for the marketing and sale of their business and assets. The following summary of the process is described by Mr. Davis in his affidavit:

> i. the sale process will be commenced immediately following the date of the order approving it;
>
> ii. starting immediately after the sale process approval date, the debtors and the proposal trustee will contact prospective purchasers and will provide a teaser summary of the debtors' business in order to solicit interest. The proposal trustee will obtain a non-disclosure agreement from interested parties who wish to receive a confidential information memorandum and undertake due diligence. Following the execution of a non-disclosure agreement, the proposal trustee will provide access to an electronic data room to prospective purchasers;
>
> iii. at the request of interested parties, the proposal trustee will facilitate plant tours and management meetings;
>
> iv. shortly following the sale process approval date, the proposal trustee will advertise the opportunity in the national edition of the Globe and Mail;
>
> v. the bid deadline for prospective purchasers will be 35 days following the sale process approval date. Any qualified bid must be accompanied by a cash deposit of 10% of the purchase price;
>
> vi. the debtors and the proposal trustee will review all superior bids received to determine which bid it considers to be the most favourable and will then notify the successful party that its bid has been selected as the winning bid. Upon the selection of the winning bidder, there shall be a binding agreement of purchase and sale between the winning bidder and the debtors;
>
> vii. if one or more superior bids is received, the debtors shall bring a motion to the Court within seven business days following the selection of the winning bidder for an order approving the agreement of purchase and sale between the winning bidder and the debtors and to vest the assets in the winning bidder;
>
> viii. the closing of the sale transaction will take place within one business day from the sale approval date;
>
> ix. in the event that a superior bid is not received by the bid deadline, the debtors will bring a motion as soon as possible following the bid deadline for an order approving the stalking horse agreement of purchase and sale.

19 StormFisher Environmental Ltd. is prepared to purchase the business and assets of the debtors on a going-concern basis on the following terms:

> A partial credit bid for a purchase price equal to: (i) $250,000 of the debtors' total secured obligations to StormFisher Environmental Ltd. (plus the DIP loan described below); (ii) any amounts ranking in priority to StormFisher Environmental Ltd.'s security, including the amounts secured by: (a) the administration charge; (b) the D&O charge (both described below); and (c) the amount estimated by the proposal trustee to be the aggregate fees, disbursements and expenses for the period from and after closing of the transaction for the sale the debtors' business to the completion of the *BIA* proceedings and the discharge of Deloitte Restructuring Inc. as trustee in bankruptcy of estate of the debtors.

20 The debtors and the proposal trustee prepared a cash flow forecast for September 25, 2015 to December 25, 2015. It shows that the debtors will require additional funds in order to see them through this process, while still carrying on business.

21 StormFisher Environmental Ltd. has offered to make a DIP loan of up to $1 million to fund the projected shortfall in cash flow. In return, the DIP lender requires a charge that ranks in priority to all other claims and encumbrances, except the administration and D&O charges. The administration charge protects the reasonable fees and expenses of the debtors' professional advisors. The D&O charge is to indemnify the debtors for possible liabilities such as wages, vacation pay, source deductions and environmental remedy issues. The latter may arise in the event of a wind-down or shut down of the plant and for which existing insurance policies may be inadequate. According to Mr. Davis, the risk if such a charge is not granted is that the debtors' directors and officers might resign, thereby jeopardizing the proceedings.

22 The debtors have other creditors. Harvest Power Partners had arranged for an irrevocable standby letter of credit, issued by the Bank of Montreal to fund the payment that might be required to the Ministry of Environment arising from any environment clean up that might become necessary.

23 Searches of the *PPSA* registry disclosed the following registrations:

(a) *Harvest Ontario Partners:*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts.

(b) *Harvest Power Mustang Generation Ltd.*

(i) FCC in respect of all collateral classifications other than consumer goods. On August 12, 2015, change statement filed to reflect the assignment of FCC's Debt and Security to 2478223;

(ii) BMO in respect of accounts; and

(iii) Roynat Inc. in respect of certain equipment.

24 There are two registrations on title to 1087 Green Valley Road. The first is for $11 million in favour of FCC dated February 28, 2012 and transferred to 2478223 on October 8, 2015. The second is a construction lien registered by Badger Daylighting Limited Partnership on July 2, 2015 for $239,191. The validity and priority of the lien claim is disputed by the debtors and 2478223.

Analysis

a) the administrative consolidation

25 The administration order, consolidating the debtors' notice of intention proceedings is appropriate for a variety of reasons. First, it avoids a multiplicity of proceedings, the associated costs and the need to file three sets of motion materials. There is no substantive merger of the bankruptcy estates but rather it provides a mechanism to achieve the just, most expeditious and least expensive determination mandated by the *BIA General Rules*. The three debtors are closely aligned and share accounting, administration, human resources and financial functions. The sale process contemplates that the debtors' assets will be marketed together and form a single purchase and sale transaction. Harvest Ontario Partners and Harvest Power Mustang Generation Ltd. have substantially the same secured creditors and obligations. Finally, no prejudice is apparent. A similar order was granted in *Electro Sonic Inc., Re*, 2014 ONSC 942 (Ont. S.C.J. [Commercial List]).

b) the DIP agreement and charge

26 S. 50.6 of the *BIA* gives the court jurisdiction to grant a DIP financing charge and to grant it a super priority. It provides as follows:

50.6(1) ***Interim Financing:*** On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(b)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

50.6(3) ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

27 S. 50.6(5) enumerates a list of factors to guide the court's decision whether to grant DIP financing:

50.6(5) ***Factors to be considered:*** In deciding whether to make an order, the court is to consider, among other things,

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

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

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

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

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

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

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

28 This case bears some similarity to *P.J. Wallbank Manufacturing Co., Re*, 2011 ONSC 7641 (Ont. S.C.J.). The court granted the DIP charge and approved the agreement where, as here, the evidence was that the debtors would cease operations if the relief were not granted. And, as here, the DIP facility is supported by the proposal trustee. The evidence is that the DIP lender will not participate otherwise.

29 The Court in *Wallbank* also considered any prejudice to existing creditors. While it is true that the DIP loan and charge may affect creditors to a degree, it seems to me that any prejudice is outweighed by the benefit to all stakeholders in a sale of the business as a going concern. I would have thought that the potential for creditor recovery would be enhanced rather than diminshed.

30 In *Comstock Canada Ltd., Re*, 2013 ONSC 4756 (Ont. S.C.J.), Justice Morawetz was asked to grant a super priority DIP charge in the context of a *Companies' Creditors Arrangement Act* proceeding. He referred to the moving party's factum, which quoted from *Indalex Ltd., Re*, 2013 SCC 6 (S.C.C.) as follows:

> [I]t is important to remember that the purpose of CCAA proceedings is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders when a company has become insolvent. As my colleague, Deschamps J. observed in *Century Services*, at para. 15:
>
> > ...the purpose of the *CCAA*... is to permit the debtor to continue to carry on business and, where possible, avoid the social and economic costs of liquidating its assets.
>
> In the same decision, at para. 59, Deschamps J. also quoted with approval the following passage from the reasons of Doherty J.A. in *Elan Corp. v. Comiskey* (1990), 41 O.A.C. 282, at para. 57 (dissenting):

> The legislation is remedial in the purest sense in that it provides a means whereby the devastating social and economic effects of bankruptcy or creditor initiated termination of ongoing business operations can be avoided while a court-supervised attempt to reorganize the financial affairs of the debtor company is made.
>
> . . .
>
> Given that there was no alternative for a going-concern solution, it is difficult to accept the Court of Appeal's sweeping intimation that the DIP lenders would have accepted that their claim ranked below claims resulting from the deemed trust. There is no evidence in the record that gives credence to this suggestion. Not only is it contradicted by the CCAA judge's findings of fact, but case after case has shown that "the priming of the DIP facility is a key aspect of the debtor's ability to attempt a workout" (J. P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 97). The harsh reality is that lending is governed by the commercial imperatives of the lenders, not by the interests of the plan members or the policy considerations that lead provincial governments to legislate in favour of pension fund beneficiaries. The reasons given by Morawetz J. in response to the first attempt of the Executive Plan's members to reserve their rights on June 12, 2009 are instructive. He indicated that any uncertainty as to whether the lenders would withhold advances or whether they would have priority if advances were made did "not represent a positive development". He found that, in the absence of any alternative, the relief sought was "necessary and appropriate".
>
> [Emphasis in original]

31 I recognize that in the *Comstock* decision, the court was dealing with a *CCAA* proceeding. However, the comments quoted above seem quite apposite to this case. After all, the *CCAA* is an analogous restructuring statute to the proposal provisions of the *BIA*.

c) administration charge

32 The authority to grant this relief is found in s. 64.2 of the *BIA*.

> **64.2 (1)** ***Court may order security or charge to cover certain costs:*** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
>
> (a) the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
>
> (b) any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **64.2 (2)** ***Priority:*** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person.

33 In this case, notice was given although it may have been short. There can be no question that the involvement of professional advisors is critical to a successful restructuring. This process is reasonably complex and their assistance is self evidently necessary to navigate to completion. The debtors have limited means to obtain this professional assistance. See also *Colossus Minerals Inc., Re*, 2014 ONSC 514 (Ont. S.C.J.) and the discussion in it.

d) the D & O charge

34 The *BIA* confers the jurisdiction to grant such a charge at s. 64.1, which provides as follows:

64.1 (1) On application by a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the property of the person is subject to a security or charge — in an amount that the court considers appropriate in favour of any director or officer of the person to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer after the filing of the notice of intention or the proposal, as the case may be.

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

(3) The court may not make the order if in its opinion the person could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional default.

35 I am satisfied that such an order is warranted in this case for the following reasons:

• the D & O charge is available only to the extent that the directors and officers do not have coverage under existing policies or to the extent that those policies are insufficient;

• it is required only in the event that a sale is not concluded and a wind down of the facility is required;

• there is a possibility that the directors and officers whose participation in the process is critical, may not continue their involvement if the relief were not granted;

• the proposal trustee and the proposed DIP lender are supportive;

e) the sale process and the stalking horse agreement of purchaser sale

36 The court's power to approve a sale of assets in the context of a proposal is set out in s. 65.13 of the *BIA*. However, the section does not speak to the approval of a sale process.

37 In *Brainhunter Inc., Re* (2009), 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), Justice Morawetz considered the criteria to be applied on a motion to approve a stalking horse sale process in a restructuring application under the *CCAA* and in particular s. 36, which parallels s. 65.13 of the *BIA*. He observed:

13. The use of a stalking horse bid process has become quite popular in recent CCAA filings. In *Nortel Networks Corp., Re*, [2009] O.J. No. 3169(Ont. S.C.J. [Commercial List]), I approved a stalking horse sale process and set out four factors (the "Nortel Criteria") the court should consider in the exercise of its general statutory discretion to determine whether to authorize a sale process:

(a) Is a sale transaction warranted at this time?

(b) Will the sale benefit the whole "economic community"?

(c) Do any of the debtors' creditors have a *bona fide* reason to object to a sale of the business?

(d) Is there a better viable alternative?

14. The Nortel decision predates the recent amendments to the CCAA. This application was filed December 2, 2009 which post-dates the amendments.

15. Section 36 of the CCAA expressly permits the sale of substantially all of the debtors' assets in the absence of a plan. It also sets out certain factors to be considered on such a sale. However, the amendments do not directly assess the factors a court should consider when deciding to approve a sale process.

16. Counsel to the Applicants submitted that a distinction should be drawn between the approval of a sales process and the approval of an actual sale in that the Nortel Criteria is engaged when considering whether to approve a sales process, while s. 36 of the CCAA is engaged when determining whether to approve a sale. Counsel also submitted that s. 36 should also be considered indirectly when applying the Nortel Criteria.

17. I agree with these submissions. There is a distinction between the approval of the sales process and the approval of a sale. Issues can arise after approval of a sales process and prior to the approval of a sale that requires a review in the context of s. 36 of the CCAA. For example, it is only on a sale approval motion that the court can consider whether there has been any unfairness in the working out of the sales process.

38 It occurs to me that the Nortel Criteria are of assistance in circumstances such as this — namely on a motion to approve a sale process in proposal proceedings under the *BIA*.

39 In *Meta Energy Inc. v. Algatec Solarwerke Brandenberg GmbH*, 2012 ONSC 175 (Ont. S.C.J.) the Court was asked to approve a sales process and bidding procedures, which included the use of a stalking horse credit bid. The court reasoned as follows:

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

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

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

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

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

40 I am satisfied that the sale process and stalking horse agreement should be approved. It permits the sale of the debtors' business as a going concern, with obvious benefit to them and it also maintains jobs, contracts and business relationships. The stalking horse bid establishes a floor price for the debtors' assets. It does not contain any compensation to StormFisher Environmental Ltd. in the event a superior bid is received, and as a result, a superior bid necessarily benefits the debtors' stakeholders rather than the stalking horse bidder. The process seems fair and transparent and there seems no viable alternative, particularly in light of FCC's earlier lack of success. Finally, the proposal trustee supports the process and agreement.

f) Extension of time to file a proposal

41 It is desirable that an extension be granted under s. 50.4 (9) of the *BIA*. It appears the debtors are acting in good faith and with due diligence. Such an extension is necessary so the sale process can be carried out. Otherwise, the debtors would be unable to formulate a proposal to their creditors and bankruptcy would follow.

42 For these reasons, the relief sought is granted.

Motion granted.

End of Document

TAB 8

2014 ONSC 514
Ontario Superior Court of Justice

Colossus Minerals Inc., Re

2014 CarswellOnt 1517, 2014 ONSC 514, 14 C.B.R. (6th) 261, 237 A.C.W.S. (3d) 584

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, As Amended

In the Matter of the Notice of Intention of Colossus Minerals Inc., of the City of Toronto in the Province of Ontario

H.J. Wilton-Siegel J.

Heard: January 16, 2014
Judgment: February 7, 2014
Docket: CV-14-10401-00CL

Counsel: S. Brotman, D. Chochla for Applicant, Colossus Minerals Inc.
L. Rogers, A. Shalviri for DIP Agent, Sandstorm Gold Inc.
H. Chaiton for Proposal Trustee
S. Zweig for Ad Hoc Group of Noteholders and Certain Lenders

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Miscellaneous

Applicant filed notice of intention to make proposal under s. 50.4(1) of Bankruptcy and Insolvency Act (Can.) (BIA) on January 13, 2014 — Main asset of applicant was 75 percent interest in gold and platinum project in Brazil, which was held by subsidiary — Project was nearly complete — However, there was serious water control issue that urgently required additional de-watering facilities to preserve applicant's interest in project — As none of applicant's mining interests, including project, were producing, it had no revenue and had been accumulating losses — Applicant sought orders granting various relief under BIA — Application granted — Court granted approval of debtor-in-possession loan (DIP Loan) and DIP charge dated January 13, 2014 with S Inc. and certain holders of applicant's outstanding gold-linked notes in amount up to $4 million, subject to first-ranking charge on applicant`s property, being DIP charge — Court also approved first-priority administration charge in maximum amount of $300,000 to secure fees and disbursements of proposal trustee and counsel — Proposed services were essential both to successful proceeding under BIA as well as for conduct of sale and investor solicitation process — Court approved indemnity and priority charge to indemnify applicant`s directors and officers for obligations and liabilities they may incur in such capacities from and after filing of notice of intention to make proposal — Remaining directors and officers would not continue without indemnification — Court also approved sale and investor solicitation process and engagement letter with D Ltd. for purpose of identifying financing and/or merger and acquisition opportunities available to applicant — Time to file proposal under BIA was extended.

APPLICATION by debtor for various orders under *Bankruptcy and insolvency.*

***H.J. Wilton-Siegel J.*:**

1 The applicant, Colossus Minerals Inc. (the "applicant" or "Colossus"), seeks an order granting various relief under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"). The principal secured creditors of Colossus were served and no objections were received regarding the relief sought. In view of the liquidity position of Colossus, the applicant was heard on an urgent basis and an order was issued on January 16, 2014 granting the relief sought. This endorsement sets out the Court's reasons for granting the order.

Background

2 The applicant filed a notice of intention to make a proposal under s. 50.4(1) of the BIA on January 13, 2014. Duff & Phelps Canada Restructuring Inc. (the "Proposal Trustee") has been named the Proposal Trustee in these proceedings. The Proposal Trustee has filed its first report dated January 14, 2014 addressing this application, among other things. The main asset of Colossus is a 75% interest in a gold and platinum project in Brazil (the "Project"), which is held by a subsidiary. The Project is nearly complete. However, there is a serious water control issue that urgently requires additional de-watering facilities to preserve the applicant's interest in the Project. As none of the applicant's mining interests, including the Project, are producing, it has no revenue and has been accumulating losses. To date, the applicant has been unable to obtain the financing necessary to fund its cash flow requirements through to the commencement of production and it has exhausted its liquidity.

DIP Loan and DIP Charge

3 The applicant seeks approval of a Debtor-in-Possession Loan (the "DIP Loan") and DIP Charge dated January 13, 2014 with Sandstorm Gold Inc. ("Sandstorm") and certain holders of the applicant's outstanding gold-linked notes (the "Notes") in an amount up to $4 million, subject to a first-ranking charge on the property of Colossus, being the DIP Charge. The Court has the authority under section 50.6(1) of the BIA to authorize the DIP Loan and DIP Charge, subject to a consideration of the factors under section 50.6(5). In this regard, the following matters are relevant.

4 First, the DIP Loan is to last during the currency of the sale and investor solicitation process ("SISP") discussed below and the applicant has sought an extension of the stay of proceedings under the BIA until March 7, 2014. The applicant's cash flow statements show that the DIP Loan is necessary and sufficient to fund the applicant's cash requirements until that time.

5 Second, current management will continue to operate Colossus during the stay period to assist in the SISP. Because Sandstorm has significant rights under a product purchase agreement pertaining to the Project and the Notes represent the applicant's largest debt obligation, the DIP Loan reflects the confidence of significant creditors in the applicant and its management.

6 Third, the terms of the DIP Loan are consistent with the terms of DIP financing facilities in similar proceedings.

7 Fourth, Colossus is facing an imminent liquidity crisis. It will need to cease operations if it does not receive funding. In such circumstances, there will be little likelihood of a viable proposal.

8 Fifth, the DIP Loan is required to permit the SISP to proceed, which is necessary for any assessment of the options of a sale and a proposal under the BIA. It will also fund the care and maintenance of the Project without which the asset will deteriorate thereby seriously jeopardizing the applicant's ability to make a proposal. This latter consideration also justifies the necessary adverse effect on creditors' positions. The DIP Charge will, however, be subordinate to the secured interests of Dell Financial Services Canada Limited Partnership ("Dell") and GE VFS Canada Limited Partnership ("GE") who have received notice of this application and have not objected.

9 Lastly, the Proposal Trustee has recommended that the Court approve the relief sought and supports the DIP Loan and DIP Charge.

10 For the foregoing reasons, I am satisfied that the Court should authorize the DIP Loan and the DIP Charge pursuant to s. 50.6(1) of the BIA.

Administration Charge

11 Colossus seeks approval of a first-priority administration charge in the maximum amount of $300,000 to secure the fees and disbursements of the Proposal Trustee, the counsel to the Proposal Trustee, and the counsel to the applicant in respect of these BIA proceedings.

12 Section 64.2 of the BIA provides jurisdiction to grant a super-priority for such purposes. The Court is satisfied that such a charge is appropriate for the following reasons.

13 First, the proposed services are essential both to a successful proceeding under the BIA as well as for the conduct of the SISP.

14 Second, the quantum of the proposed charge is appropriate given the complexity of the applicant's business and of the SISP, both of which will require the supervision of the Proposal Trustee.

15 Third, the proposed charge will be subordinate to the secured interests of GE and Dell.

Directors' and Officers' Charge

16 Colossus seeks approval of an indemnity and priority charge to indemnify its directors and officers for obligations and liabilities they may incur in such capacities from and after the filing of the Notice of Intention (the "D&O Charge"). It is proposed that the D&O Charge be in the amount of $200,000 and rank after the Administration Charge and prior to the DIP Charge.

17 The Court has authority to grant such a charge under s. 64.1 of the BIA. I am satisfied that it is appropriate to grant such relief in the present circumstances for the following reasons.

18 First, the Court has been advised that the existing directors' and officers' insurance policies contain certain limits and exclusions that create uncertainty as to coverage of all potential claims. The order sought provides that the benefit of the D&O Charge will be available only to the extent that the directors and officers do not have coverage under such insurance or such coverage is insufficient to pay the amounts indemnified.

19 Second, the applicant's remaining directors and officers have advised that they are unwilling to continue their services and involvement with the applicant without the protection of the D&O Charge.

20 Third, the continued involvement of the remaining directors and officers is critical to a successful SISP or any proposal under the BIA.

21 Fourth, the Proposal Trustee has stated that the D&O Charge is reasonable and supports the D&O Charge.

The SISP

22 The Court has the authority to approve any proposed sale under s. 65.13(1) of the BIA subject to consideration of the factors in s. 65.13(4). At this time, Colossus seeks approval of its proposed sales process, being the SISP. In this regard, the following considerations are relevant.

23 First, the SISP is necessary to permit the applicant to determine whether a sale transaction is available that would be more advantageous to the applicant and its stakeholders than a proposal under the BIA. It is also a condition of the DIP Loan. In these circumstances, a sales process is not only reasonable but also necessary.

24 Second, it is not possible at this time to assess whether a sale under the SISP would be more beneficial to the creditors than a sale under a bankruptcy. However, the conduct of the SISP will allow that assessment without any obligation on the part of the applicant to accept any offer under the SISP.

25 Third, the Court retains the authority to approve any sale under s. 65.13 of the BIA.

26 Lastly, the Proposal Trustee supports the proposed SISP.

27 Accordingly, I am satisfied that the SISP should be approved at this time.

Engagement Letter with the Financial Advisor

28 The applicant seeks approval of an engagement letter dated November 27, 2013 with Dundee Securities Limited ("Dundee") (the "Engagement Letter"). Dundee was engaged at that time by the special committee of the board of directors of the applicant as its financial advisor for the purpose of identifying financing and/or merger and acquisition opportunities available to the applicant. It is proposed that Dundee will continue to be engaged pursuant to the Engagement Letter to run the SISP together with the applicant under the supervision of the Proposal Trustee.

29 Under the Engagement Letter, Dundee will receive certain compensation including a success fee. The Engagement Letter also provides that amounts payable thereunder are claims that cannot be compromised in any proposal under the BIA or any plan of arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").

30 Courts have approved success fees in the context of restructurings under the CCAA. The reasoning in such cases is equally applicable in respect of restructurings conducted by means of proposal proceedings under the BIA. As the applicant notes, a success fee is both appropriate and necessary where the debtor lacks the financial resources to pay advisory fees on any other basis.

31 For the following reasons, I am satisfied that the Engagement Letter, including the success fee arrangement, should be approved by the Court and that the applicant should be authorized to continue to engage Dundee as its financial advisor in respect of the SISP.

32 Dundee has considerable industry experience as well as familiarity with Colossus, based on its involvement with the company prior to the filing of the Notice of Intention.

33 As mentioned, the SISP is necessary to permit an assessment of the best option for stakeholders.

34 In addition, the success fee is necessary to incentivize Dundee but is reasonable in the circumstances and consistent with success fees in similar circumstances.

35 Importantly, the success fee is only payable in the event of a successful outcome of the SISP.

36 Lastly, the Proposal Trustee supports the Engagement Letter, including the success fee arrangement.

Extension of the Stay

37 The applicant seeks an extension for the time to file a proposal under the BIA from the thirty-day period provided for in s. 50.4(8). The applicant seeks an extension to March 7, 2014 to permit it to pursue the SISP and assess whether a sale or a proposal under the BIA would be most beneficial to the applicant's stakeholders.

38 The Court has authority to grant such relief under section 50.4(9) of the BIA. I am satisfied that such relief is appropriate in the present circumstances for the following reasons.

39 First, the applicant is acting in good faith and with due diligence, with a view to maximizing value for the stakeholders, in seeking authorization for the SISP.

40 Second, the applicant requires additional time to determine whether it could make a viable proposal to stakeholders. The extension of the stay will increase the likelihood of a feasible sale transaction or a proposal.

41 Third, there is no material prejudice likely to result to creditors from the extension of the stay itself. Any adverse effect flowing from the DIP Loan and DIP Charge has been addressed above.

42 Fourth, the applicant's cash flows indicate that it will be able to meet its financial obligations, including care and maintenance of the Project, during the extended period with the inclusion of the proceeds of the DIP Loan.

43 Lastly, the Proposal Trustee supports the requested relief.

Application granted.

End of Document

TAB 9

ALBERTA

RULES OF COURT

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

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

(2) If the right of a party to a specific fund is in question, the Court may order that the fund be paid into Court or that security be given for it to the Court or to a person named by the Court in a form and manner and in an amount satisfactory to the Court.

Information note

See also the *Civil Enforcement Act*.

Inspection or examination of property

6.26 On application, the Court may make one or more of the following orders:

(a) an order to inspect property, including an inspection by a judge or jury, or both, at trial, if the inspection is advisable to decide a question in dispute in an action, application or proceeding;

(b) an order to take samples, make observations or undertake experiments for the purpose of obtaining information or evidence, or both;

(c) an order to enter land or premises for the purpose of carrying out an order under this rule.

Notice before disposing of anything held by the Court

6.27(1) On application, the Court may direct that money or other personal property held by the Court not be paid out or disposed of without notice being served on the applicant.

(2) The applicant must be a person who

(a) is interested in the money or other personal property held by the Court, or

(b) is seeking to have the money or personal property applied to satisfy a judgment or order or a writ of enforcement against the person on whose behalf the money or personal property is held.

(3) The applicant

(a) must file an affidavit verifying the facts relied on in the application, and

(b) may make the application without serving notice of the application on any other person.

Information note

An application may be made before or after judgment (see rule 6.3(1) *[Applications generally]*). For applications after judgment, see rule 9.14 *[Further or other order after judgment or order entered]*.

Division 4
Restriction on Media Reporting and Public Access to Court Proceedings

Application of this Division

6.28 Unless an enactment otherwise provides or the Court otherwise orders, this Division applies to an application for an order

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Restricted court access applications and orders

6.29 An application under this Division is to be known as a restricted court access application and an order made under this Division is to be known as a restricted court access order.

When restricted court access application may be filed

6.30 A person may file a restricted court access application only if the Court has authority to make a restricted court access order under an enactment or at common law.

AR 124/2010 s6.30;194/2020

Timing of application and service

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

(a) file the application in Form 32, and

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

Notice to media

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

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

(b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or master assigned to application

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

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

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

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

AR 124/2010 s6.33;194/2020

Application to seal or unseal court files

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

(2) The application must be made to

(a) the Chief Justice, or

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

(3) The Court may direct

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

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

(c) any other matter that the circumstances require.

Persons having standing at application

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

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

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

No publication pending application

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

AR 124/2010 s6.36;143/2011

TAB 10

Most Negative Treatment: Distinguished
Most Recent Distinguished: T.Z. v. P.V.R. | 2022 SKQB 129, 2022 CarswellSask 256 | (Sask. Q.B., May 17, 2022)

2021 SCC 25, 2021 CSC 25
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, Kasirer JJ.

Heard: October 6, 2020
Judgment: June 11, 2021
Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

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

Headnote

Judges and courts --- Jurisdiction — Jurisdiction of court over own process — Sealing files

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully

appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

Held: The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public

interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées

et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.

Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

Arrêt: Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt

public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpliquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée. Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

APPEAL by estate trustees from judgment reported at *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), allowing appeal from judgment imposing sealing orders.

POURVOI formé par les fiduciaires d'une succession à l'encontre d'un jugement publié à *Donovan v. Sherman Estate* (2019), 2019 ONCA 376, 2019 CarswellOnt 6867, 47 E.T.R. (4th) 1, 56 C.P.C. (8th) 82 (Ont. C.A.), ayant accueilli l'appel interjeté à l'encontre d'un jugement imposant une ordonnance de mise sous scellés.

Kasirer J. **(Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):**

I. Overview

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system

brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees") [1] sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star"). [2] The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

III. Proceedings Below

A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club* . He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

C. Subsequent Proceedings

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

IV. Submissions

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club* . The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club* .

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp. v. New Brunswick (Attorney General), [1996] 3 S.C.R. 480, at para. 23; Vancouver Sun (Re), 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; Dagg v. Canada (Minister of Finance), [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., R. v. Henry, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra*

Club analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club* . Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club* . Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club* . Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

37 Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; A.B. v. Bragg Communications Inc., 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

38 The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without

altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (Toronto Star Newspapers Ltd. v. Ontario, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (New Brunswick, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "'one of the hallmarks of a democratic society'" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the Charter is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also Mentuck, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An

order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 Ottawa L. Rev. 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify

non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity branch of the test" (para. 25). Respectfully stated, the emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement in this case and in *Williams* is, I think, mistaken. Personal concerns that relate to aspects of the privacy of an individual who is before the courts can coincide with a public interest in confidentiality.

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club* . But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within the meaning of *Sierra Club* . To invoke the expression of Binnie J. in F.N. (Re), 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club* . It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club* .

50 In the context of s. 8 of the Charter and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in Dagg, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in Lavigne, at para. 25.

51 Further, in Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401 2013 SCC 62, [2013] 3 S.C.R. 733 (“UFCW”), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., Lavigne, at para. 24; *Bragg*, at para. 18, per Abella J., citing TorontoStar Newspaper Ltd. v. Ontario, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; Douez v. Facebook, Inc., 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., Privacy Act, R.S.C. 1985, c. P-21; Personal Information Protection and Electronic Documents Act, S.C. 2000, c. 5 (“PIPEDA”); Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31; Charter of Human

Rights and Freedoms, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41). [3] Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 U.B.C. L. Rev. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev*. 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev*. 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, Law of Publication Bans, Private Hearings and Sealing Orders (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., R. v. Paterson(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see S. v. Lamontagne, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., Himel v. Greenberg, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., A.B. v. Canada (Citizenship and Immigration), 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., R. v. Pickton, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson

J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 Deakin L. Rev. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310* Canada inc. v. Chamberland2004 CanLII 4122(Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (R. v. Spencer, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness,

as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; Coltsfoot Publishing Ltd. v. Foster-Jacques, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club* . As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing Toronto Star Newspaper Ltd., at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the Code of Civil Procedure, CQLR, c. C-25.01 ("C.C.P."), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile*, *chapitre C-25.01* (2015), art. 12). Under art. 12 *C.C.P.*, a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the courts as fundamental to a given society (see Goulet v. Transamerica Life Insurance Co. of Canada, 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to *Sierra Club* prior to the enactment of art. 12 *C.C.P.*, the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see *3834310 Canada inc.*, at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 *C.C.P.* alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 *C.C.P.* — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" (*Godbout*, at p. 2569, per Baudouin J.A.; see also A. v. B.1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 *C.C.P.* It is the exemplar of the *Sierra Club* important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif*: *Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of *Sierra Club* 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen

in public. This was even alluded to by La Forest J., dissenting but not on this point, in *Dagg*, where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in *Dyment* that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on s. 8 of the Charter as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; R. v. Tessling, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., Work Safe

Twerk Safe v. Her Majesty the Queen in Right of Ontario, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., Fedeli v. Brown, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on s. 8 of the Charter above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the s. 8 jurisprudence focuses on the degree to which information is private (see, e.g., *R. v.* Marakah, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, “Privacy and Court Records: Online Access and the Loss of Practical Obscurity”(2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v.* Quesnelle, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places” (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (R. v. Mabior, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).

85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

(1) The Risk to Privacy Alleged in this Case Is Not Serious

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the

knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club* .

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

(2) The Risk to Physical Safety Alleged in this Case is Not Serious

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v.* Chanmany, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the Toronto Star, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

VI. Conclusion

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the

appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.

2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.

3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.

TAB 11

2022 YKSC 2
Yukon Territory Supreme Court

Yukon (Government of) v. Yukon Zinc Corporation

2022 CarswellYukon 3, 2022 YKSC 2, 343 A.C.W.S. (3d) 8, 96 C.B.R. (6th) 255

GOVERNMENT OF YUKON as represented by the Minister of the Department of Energy, Mines and Resources (PETITIONER) AND YUKON ZINC CORPORATION (RESPONDENT)

S.M. Duncan C.J.S.C.

Judgment: January 21, 2022
Docket: Whitehorse S.C. 19-A0067

Counsel: John T. Porter, Kimberly Sova, for Petitioner
No one for Yukon Zinc Corporation
H. Lance Williams, Forrest Finn, for Welichem Research General Partnership
Tevia Jeffries, Emma Newbery, for PricewaterhouseCoopers Inc.

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

Headnote

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

Receiver of mining company was responsible for care and maintenance of mine — Receiver developed sale and investment solicitation plan (SISP) that proposed evaluation of bids for assets and property of company — Although several bids were made, some bidders withdrew — Receiver concluded that no bid could result in viable sale — After consultation with Yukon government, receiver agreed to terminate sale process — Receiver subsequently received binding bid from another company (M) for small portion of assets — Receiver believed M bid could be viable sale of small portion of assets — Receiver brought applications for approval of purchase agreement with M and termination of sale and investment solicitation plan, and for order sealing its confidential report — Applications granted — There was no evidence of any improvident actions by receiver — M was experienced mining company and only bidder specifically for small portion of assets — Even though sale to M represented small fraction of assets, their sale would generate some funds for estate which was in interests of all parties — Yukon government supported sale — M's offer was obtained through SISP process, which was approved by court as fair, transparent and commercially efficacious — Purchase agreement with M was approved.

Bankruptcy and insolvency --- Proposal — Approval by court — General principles

Receiver of mining company was responsible for care and maintenance of mine — Receiver developed sale and investment solicitation plan (SISP) that proposed evaluation of bids for assets and property of company — Although several bids were made, some bidders withdrew — Receiver concluded that no bid could result in viable sale — After consultation with Yukon government, receiver agreed to terminate sale process — Receiver subsequently received binding bid from another company (M) for small portion of assets — Receiver believed M bid could be viable sale of small portion of assets — Receiver brought applications for approval of purchase agreement with M and termination of sale and investment solicitation plan, and for order sealing its confidential report — Applications granted — In reviewing sales process court was to defer to business expertise of receiver, and was not to intervene in receiver's recommendations and conclusions — Receiver undertook thorough process in attempting to attract and identify acceptable bidders in consultation with Yukon government — Receiver appeared to have implemented SISP fairly and in good faith — Yukon government agreed with termination of SISP — Court approved termination of SISP.

Business associations --- Legal proceedings involving business associations — Practice and procedure in proceedings involving corporations — Confidentiality or sealing orders

Receiver of mining company was responsible for care and maintenance of mine — Receiver developed sale and investment solicitation plan (SISP) that proposed evaluation of bids for assets and property of company — Although several bids were

made, some bidders withdrew — Receiver concluded that no bid could result in viable sale — After consultation with Yukon government, receiver agreed to terminate sale process — Receiver subsequently received binding bid from another company (M) for small portion of assets — Receiver believed M bid could be viable sale of small portion of assets — Receiver brought applications for approval of purchase agreement with M and termination of sale and investment solicitation plan, and for order sealing its confidential report — Applications granted — It was standard practice to keep all aspects of bidding or sales process confidential — Sealing that information ensured integrity of sales and marketing process and avoided misuse of information by bidders in subsequent process to obtain unfair advantage — Requirement for confidentiality no longer existed when sale process was completed — Court acknowledged importance of sealing receiver's confidential report, which contained results of SISP and details of process — Commercial interests of bidders, creditors, stakeholders and maintaining integrity of sales process outweighed negative effects of sealing order — Redaction of documents was not reasonable alternative as virtually all information in report was confidential — Court ordered redacted material relating to M's purchase to be unsealed once sale was complete — As future of sales process for whole assets was uncertain, court ordered report to be sealed for three years or until further order.

APPLICATIONS by receiver for orders approving sale of certain mineral claims and termination of sale and investment solicitation plan, and for order sealing its confidential report on purchase process.

***S.M. Duncan C.J.S.C.*:**

Introduction

1 The court-appointed Receiver, PricewaterhouseCoopers Inc., brings two applications: one for Orders approving the sale of certain mineral claims and related assets of Yukon Zinc Corporation ("Yukon Zinc") to Almaden Minerals Ltd. ("Almaden") and for the termination of the sale and investment solicitation plan (the "SISP"), and the second for an Order sealing the Receiver's Confidential Supplemental Eighth Report to the Court, with appendices, currently unfiled.

2 The Government of Yukon supports these applications. The applications are unopposed or subject to no position taken by Welichem Research General Partnership ("Welichem") a secured creditor of Yukon Zinc and lessor of items comprising substantially all of the infrastructure, tools, vehicles and equipment at the Wolverine Mine (the "Mine"). No other interested party appeared on the application or made submissions.

3 For the following reasons, I will grant the Orders requested, subject to certain conditions as set out below.

Background

4 These applications arise in the context of the ongoing receivership of all the assets, undertakings and property of Yukon Zinc. Its principal asset is the Mine, a zinc-silver-lead mine located 282 km northeast of Whitehorse, Yukon. It holds 2,945 quartz mineral claims, a quartz mining license issued under the Quartz Mining Act, SY 2003, c.14, and a water licence issued under the Waters Act, SY 2003, c.19. Yukon Zinc carried out exploration and development activities between 2008 and 2011. The Mine began production in March 2012. In January 2015, the Mine ceased operating because of financial difficulties and was put into care and maintenance. Despite a successful restructuring in October 2015, Yukon Zinc was unable to obtain additional funds to operate the Mine and it continued in care and maintenance. In 2017, the underground portion of the Mine flooded and contaminated water was diverted to the tailings storage facility, creating an increased risk of the release of untreated water into the environment. In May 2018, the Yukon government requested from Yukon Zinc an increase in reclamation security from $10,588,966 to $35,548,650 to enable it to address the deteriorating condition of the Mine. Yukon Zinc never provided this increased amount. In September 2019, the Yukon government's petition for the appointment of the Receiver of Yukon Zinc's property and assets was granted by this Court. By October 2019, Yukon Zinc had not filed a proposal in the bankruptcy matter, commenced in British Columbia, and Yukon Zinc was deemed to have made an assignment into bankruptcy. PricewaterhouseCoopers Inc. was appointed the trustee in bankruptcy.

5 Pursuant to s. 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 as amended (the "*BIA*"), the Receiver became responsible for the care and maintenance of the Mine. It developed the SISP that proposed the evaluation of bids for

the assets and property of Yukon Zinc on various factors. The SISP was approved by the Court on May 26, 2020 but was stayed pending the outcome of an appeal by Welichem. The Court's approval was confirmed on appeal.

6 The sale process began in April 2021. The Receiver contacted 559 potential bidders, advertised the SISP on-line and through media in British Columbia and Yukon and encouraged other stakeholders such as Yukon government and the Kaska Nation to provide additional contacts. Eighteen potential bidders signed non-disclosure agreements and were given access to the data room. By June 2021 several entities submitted non-binding expressions of interest. Throughout the summer of 2021, the Receiver held multiple calls with each of these potential bidders to discuss their plans and ensure the Receiver understood them, to explain and clarify the SISP evaluation criteria, and to support the bidders' due diligence work, including providing explanations of the regulatory requirements. The Receiver also discussed the progress of the SISP regularly with Yukon government and the Kaska Nation. The binding bid deadline was extended and by July the Receiver had received several binding bids. The Receiver began to evaluate these bids. By September 2021, however, some bidders withdrew from the process for various reasons. These withdrawals were confirmed in writing by the Receiver (the "Removal Letters").

7 On completion of the evaluation of the remaining bids, the Receiver concluded that no bid could result in a viable sale of substantially all of Yukon Zinc's assets. The Receiver advised the relevant stakeholders by letter, after consultation with Yukon government, that the sale process would be terminated (the "Termination Letters"). The Receiver also determined at that time that the preferred approach was to transfer the care and maintenance to the Yukon government.

8 In June 2021, the Receiver received a non-binding expression of interest and subsequently a binding bid from Almaden for a small portion of the assets of Yukon Zinc, the Logan interests. Almaden had entered into a joint venture agreement with Yukon Zinc (then called Expatriate Resources Ltd.) in 2005. This agreement led to the forming of a contractual joint venture to explore and develop the Logan interests. No such activity was ever commenced. The Logan interests consist of 156 mineral claims located approximately 100 km south of the Mine. Under the joint venture, Yukon Zinc had an interest of 60% and Almaden 40%. Almaden offered to purchase the Yukon Zinc 60% interest.

9 The Receiver believes the Almaden bid could be a viable sale of the Logan interests and has entered into a purchase and sale agreement with Almaden for this purpose, subject to court approval.

10 The Receiver has submitted copies of the non-binding expressions of interest, binding bids, Removal letters, Termination letters, the Almaden bid, and the Almaden purchase agreement as attachments to the Receiver's Confidential Supplemental Eighth Report. All of these documents along with the report are considered to contain sensitive commercial information and the Receiver seeks a sealing order over them.

Approval of Sale to Almaden

11 Subsections 3(k) and (l) of the Receiver's powers set out in the Order dated September 13, 2019 provide the Receiver with express power and authority to market any or all of the Yukon Zinc assets, undertakings or property, including advertising and soliciting offers for all or part of the property, negotiating appropriate terms and conditions, as well as authority to sell, convey, transfer, lease or assign the property with approval of this Court if the transaction exceeds $150,000.

12 The SISP sets out at s. 22 the evaluation criteria for qualified purchase bids. They are:

> (a) Price;
>
> (b) Structural complexity of the proposed transaction;
>
> (c) Nature and sufficiency of funding for the proposed transaction;
>
> (d) Probability of closing the proposed transaction and any relevant risks thereto, including nature of any remaining conditions and due diligence requirements;
>
> (e) Whether the proposed transaction leaves any of the YZC [Yukon Zinc Corporation] Assets within the receivership;

(f) Impact on former employees of YZC;

(g) Bidder's financial strength, technical and environmental expertise and relevant experience to carry out work required to maintain regulatory compliance at the Wolverine Mine after closing of the proposed transaction;

(h) Bidder's historical environmental safety record, operational experience with undertakings of similar nature and/or scale and record of successful restart of mines out of care and maintenance;

(i) Strength of a bidder's proposal for posted required Reclamation Security as required by the DEMR [Department of Energy, Mines and Resources] and any other security required by any other applicable regulator;

(j) Qualified Bidder's willingness and demonstrated ability to obtain and maintain any necessary regulatory approval in connection with ownership and operation or case and maintenance of the Wolverine Mine, including from but not limited to the Water Board and the DEMR;

(k) Benefits that may accrue to Yukon residents and businesses and the affected Kaska Nations of Ross River Dena Council, Liard First Nation, Kwadacha Nation and Dease River First Nation.

13 The SISP also requires the Receiver to report to the Court on the outcome of the solicitation process, including whether it intends to proceed with any one or more of the qualified purchase bids. The applicable statutory obligations on the Receiver are set out in s. 247(a) and (b) of the BIA: to act honestly and in good faith, and to deal with the property of the debtor in a commercially reasonable manner.

14 The principles to be applied by a court in determining whether to approve a proposed sale by a receiver are set out in the leading case of Royal Bank v Soundair Corp(1991), 4 OR (3d) 1 (CA) at para. 16:

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.

15 Here, the Receiver made extensive efforts through direct and indirect contacts of potential bidders and advertising to obtain the best price for the assets. There is no evidence of any improvident actions by the Receiver. The Receiver spent time with each interested potential bidder to assist with their due diligence activities and other aspects of the bidding process.

16 As the Receiver reported, a review of the submitted bids shows that Almaden was the only bidder specifically for the Logan interests. While other bidders referred to the Logan interests, and included them in their bids, their overall bids were withdrawn or unacceptable to the Receiver. Almaden provided the best price for the Logan interests. Almaden is an experienced mining exploration company based in Vancouver.

17 The Receiver noted that although the Logan interests represent a small fraction of the Yukon Zinc assets and property, their sale will generate some funds for the estate which is in the interests of all parties. Yukon government supports this sale and Welichem does not oppose it.

18 The Almaden offer was obtained through the SISP process. This process was approved by the Court as fair, transparent and commercially efficacious.

19 Finally, the evidence shows the SISP process was conducted by the Receiver honestly and in good faith. There is no suggestion or evidence of unfairness in the way the process was carried out.

20 The finalizing of this sale process will be simple: the 60% interest in the Logan assets under the joint venture agreement will be transferred to Almaden. The other 40% are already in the name of Almaden. The commercial joint venture agreement will become defunct on closing. The Receiver advised the splitting off of these interests from the remainder of the assets and property would not be detrimental to any future sale process as they represent a small portion and there was no other bidder interested in solely the Logan interests. The cost to the Receiver of this transaction is reasonable given Almaden's existing agreement and interests.

21 The Almaden Purchase Agreement, a redacted copy of which is included in the filed materials, is approved.

Termination of the SISP

22 As noted above, the Receiver concluded that the SISP process did not lead to a viable sale. None of the bids was acceptable, either because the bidder withdrew from the process, or the bids contained conditions for closing or available consideration that were unacceptably uncertain. The specifics of each bid were not disclosed in the publicly filed eighth report of the Receiver, for reasons of confidentiality. This issue is addressed below.

23 In general, the reasons why certain bidders withdrew from the process included:

(a) the realization during the SISP process of the need for the purchaser to obtain a new water licence instead of assuming the current water licence, a process which could take two years or more;

(b) the possibility of ongoing litigation over the Welichem assets which remain at the site (the Court has been advised that the matter is in the process of settling, although the settlement agreement is not yet finalized);

(c) the unknown extent and costs of reconstruction to make the Mine operational, given the flooded state of the underground part of the Mine and its questionable structural integrity;

(d) the inability to determine potential value of the mineral claims because of an absence of updated exploration results; and

(e) the uncertainty of reclamation or remediation costs and how they will be shared with the Yukon government.

24 The Receiver explained that there was not one issue that presented a bar to the bidders who withdrew or were rejected; the concerns were different for each bidder.

25 The Order approving the SISP or the SISP do not contain a provision for termination of the SISP process. However, s. 30(a) of the SISP states that the Receiver, in consultation with Yukon government, may reject at any time any bid that is:

(i) inadequate or insufficient;

(ii) not in conformity with the requirements of the BIA, this SISP or any orders of the Court applicable to YZC or the Receiver; or

(iii) contrary to the interests of YZC's estate and stakeholders as determined by the Receiver;

26 Further, s. 23(f) of the SISP contemplates the possibility that the Receiver may report to the Court that it will not proceed with any one or more of the bids.

27 The jurisprudence offers little guidance on the role of the court in a situation of termination of a sales process in the event of no acceptable bidders. The Receiver noted one decision in which the Supreme Court of British Columbia observed it saw no reason why the Receiver could not recommend against completion of a sale, and that it had a duty to advise the court of any reason why the court might conclude the sale should not be approved (*Bank of Montreal v On-Stream Natural Gas Ltd Partnership* (1992), 29 CBR (3) 203 (BC SC) at para. 24).

28 The case law is clear that in reviewing a sales process the court is to defer to the business expertise of the Receiver, and is not to intervene or "second guess" the Receiver's recommendations and conclusions (*Royal Bank of Canada v* Keller & Sons Farming Ltd, 2016 MBCA 46 at para. 11). The court is to ensure the integrity of the process is maintained through the exercise of procedural fairness in any negotiations and bidding.

> ... 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. ... [*Crown Trust Co v Rosenberg* (1986), 60 OR (2d) 87 (H Ct J) at para. 65]

29 Here, the Receiver undertook a thorough process in attempting to attract and identify an acceptable bidder and ultimate purchaser, in consultation with Yukon government and the Kaska Nation. By its own account, it provided substantial assistance to potential bidders throughout the summer of 2021, including extending deadlines, participating in multiple calls to clarify and understand their proposals, and providing them with necessary information and connections to enable them to complete their due diligence. The SISP has already been approved as fair and reasonable by this Court and as noted above, the Receiver's appears to have implemented the SISP fairly and in good faith.

30 Yukon government agreed with the termination of the SISP, indicating that the Receiver's good faith efforts were the best that could be achieved at this time. Welichem did not oppose the termination of the SISP.

31 While the confidential documents set out the more detailed reasons why the Receiver has concluded there are no appropriate bidders, scrutiny or assessment of these reasons is not the Court's role.

32 I note that the SISP process may have some value for future in that entities with interest in the project were identified and educated about the process, and a large amount of information was gathered and learned about the Mine both by the interested parties and the Receiver in consultation with Yukon government and the Kaska Nation. This may have some value for future bidding or sales processes.

33 For these reasons, the termination of the SISP is approved. The draft Approval and Vesting Order filed by the Receiver on this application is approved, with appropriate adjustments to reflect appearances of counsel.

Sealing Order

34 The Receiver seeks an order sealing its Confidential Supplemental Eighth Report to the Court containing the results of the SISP and attached documents. The report sets out details of the process including:

> (a) the names of the bidders, and the kind of work the Receiver engaged in over the summer of 2021 to advance the bids according to the evaluation criteria;
>
> (b) the details of each bid, including price and conditions;
>
> (c) the challenges of each bid;
>
> (d) the Receiver's review and application of the evaluation criteria; and
>
> (e) the reasons why certain bidders withdrew or were eliminated from the process.

35 The documents attached to the report include unredacted:

> (a) expressions of interest;
>
> (b) binding bids;
>
> (c) Removal Letters;

(d) Termination Letters;

(e) Almaden's bid; and

(f) Almaden's Purchase Agreement.

36 The Receiver argues that the information in this report disclosing its application of the evaluation criteria and the challenges and problems with the bids, as well as the documents themselves, contain sensitive commercial information that would cause harm to any future efforts to market the Mine. Information about the identity of bidders, the proposed purchase prices, the proposed terms and conditions, the reasons for the bidders' withdrawal or rejection would affect the possibility of free and open negotiation in any future sale process.

37 The two-part test for a sealing order was set out in Sierra Club of Canada v Canada (Minister of Finance) 2002 SCC 41 ("Sierra Club") at 543-44:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the [sealing] order including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

38 The recent Supreme Court of Canada decision of Sherman Estate v Donovan 2021 SCC 25 ("Sherman Estate") confirmed the test set out in *Sierra Club* continues to be an appropriate guide for judicial discretion (at para.43), and added the following three core prerequisites to be met before the imposition of a sealing order at para. 38:

> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

39 In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

40 This requirement for confidentiality no longer exists when the sale process is completed and as a result any sealing order is generally lifted at that time. As noted by the court in the insolvency proceeding of GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc, 2014 ONSC 1173 at paras. 33-34:

> The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.
>
> **To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential**

> **bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place.** [emphasis added].

41 *Look Communications Inc v Look Mobile Corp*, (2009), 183 ACWS (3d) 736 (Ont Sup Ct) ("*Look*") was decided not in the insolvency context but in the context of a court-approved sales process requiring the appointment of a monitor, and a plan of arrangement under the Business Corporations Act, R.S.C. 1985, c. C.44. The facts were like those of the case at bar in that only two of the five assets were sold through the initial sales process. The court ordered the monitor file an unredacted version of its report after the sale was completed and the monitor's certificate filed with the court. However, the company requested a further sealing of the report and documents for six months because it was continuing its efforts to sell the remaining assets and was in discussion with some of the same parties who submitted bids under the initial completed sales process. The court applied the principles in *Sierra Club*, noting that the "important commercial interest" must be more than the specific interest of the party requesting the confidentiality order, such as loss of business or profits. There must be a general principle at stake, such as a breach of a confidentiality agreement through the disclosure of the information.

42 The court in *Look* noted at para. 17:

> It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd.* (1994) 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

43 The court in *Look* granted the company's request for a sealing order for a further six months, finding that even though the remaining sales would not occur under the original sale process, the commercial interest in ensuring the assets were sold for the benefit of all stakeholders was the same.

44 Here, I acknowledge the importance of sealing the Receiver's Confidential Supplemental Eighth Report to the Court and attached documents during the sale process and until any ongoing sale process is complete. The important interest is the commercial interests of the bidders, the creditors, the stakeholders and maintaining the integrity of the sales process. The Receiver's counsel advised they represented to the bidders that the process would be confidential until completion. The bidders all signed non-disclosure agreements before they received access to the data. These interests outweigh the negative effects of a sealing order. Redaction of the documents or reports is not a reasonable alternative as virtually all of the information contained in the report and documents (other than the parts that are already public) is confidential for the reasons noted.

45 The issue of a future sales process of some kind however, is far less certain than it was in *Look*, where the new sales process was underway at the time of the court application. All parties in this case agree that the current Receiver-led SISP process is exhausted, and the unopposed or supported request for court approval of its termination confirms this. The Receiver has no intention of starting a new sales process.

46 Counsel for Yukon government indicated that they would be open to discussing the sale of some or all of the Yukon Zinc assets in future if approached by a potential purchaser. Yukon government confirmed it had no intention of commencing a similar sales process to the SISP in the near future, as their priority will be care and maintenance of the Mine when this responsibility is transitioned from the Receiver to them, likely in the fall of 2022.

47 The Receiver noted in its public reports several of the ongoing issues affecting a potential sale. These include the regulatory complexities of obtaining a new water licence, the uncertainty of the responsibilities and costs of restoring the Mine to an operable state, the uncertain value of the mineral claims, and the possibility of ongoing litigation over the Welichem assets if a settlement is not achieved. Unless one or more of these factors changes, the possibility of a future sale is unlikely, in the Receiver's view. This is different from *Look*, where the new sales process had commenced at the time the sealing order was requested.

48 The Supreme Court of Canada has emphasized the importance of the fundamental principle of open and accessible court proceedings. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (Canadian Broadcasting Corp v New Brunswick (Attorney General), [1996] 3 SCR 480 at para. 23 ("New Brunswick"); Vancouver Sun (Re), 2004 SCC 43 at paras. 23-26). Public and media access to the courts is the way in which the judicial process is scrutinized and criticized. "The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner" (*New Brunswick* at para. 22). There is a strong presumption in favour of court openness. Judicial discretion in determining confidentiality or sealing orders must be exercised against this backdrop.

49 Given these unique factual circumstances, and applying the legal principles described above, I conclude the following in relation to sealing the materials.

50 Once the Almaden sale is complete, and the Receiver's certificate has been filed with the Court, the redacted material related to Almaden's purchase of the Logan Interests will be unsealed. The Receiver has disclosed most of the information related to this purchase and sale but some information such as the purchase price remains redacted. As the sale of this portion of the assets will be over once this transaction is completed, there is no reason to continue to seal the Almaden documents contained in the Confidential Supplemental Eighth Report to Court that have not already been disclosed.

51 The remoteness of a future sale of the remaining assets evident from the Receiver's materials and submissions means that the length of a sealing order could be indefinite. As noted in *Sierra Club*, at 545, a court is to restrict the sealing order as much as is reasonably possible while preserving the important interest in question. While it is still in the public interest to maintain the sealing order where a future sale is a possibility, at some point that possibility may no longer be realistic. Or, so much time will have passed that the information in the original bids may have little relationship to the actual situation so the importance of the interest to be protected is diminished.

52 The Receiver in this case advised that some of the current circumstances that prevented the success of the sales process would have to change before a sale is likely. Yukon government confirmed that their focus in the near term will be on care and maintenance issues and not on the longer term issues related to remediation, reconstruction, or water licence. It is possible, however, over the next few years, that some of these circumstances may change. For example, the litigation between Welichem and the Receiver over its assets will either be settled or judicially determined, more clarity on the responsibilities for remediation or even further steps taken towards remediation and reconstruction may occur, or more work may be done to value the mineral claims. Some or all of these changes could lead to a successful sale.

53 I will grant the sealing order over the Receiver's Confidential Supplemental Eighth Report to the Court, and attached documents, except for the documents related to the Almaden purchase once the Receiver's certificate is filed with the Court, for a period of three years, or until further order of this Court. The report shall be filed as of the date of these Reasons.

54 The draft sealing order filed by the Receiver on this application should be modified to reflect the terms set out in these reasons and to reflect the presence of all counsel.

Applications granted.

End of Document

TAB 12

2014 ONSC 1173
Ontario Superior Court of Justice [Commercial List]

GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.

2014 CarswellOnt 2113, 2014 ONSC 1173, [2014] O.J. No. 835, 238 A.C.W.S. (3d) 101

GE Canada Real Estate Financing Business Property Company, Applicant and 1262354 Ontario Inc., Respondent

D.M. Brown J.

Heard: February 18, 2014
Judgment: February 24, 2014
Docket: CV-12-9856-00CL

Counsel: L. Pillon, Y. Katirai, for Receiver
L. Rogers, for Applicant, GECanada Real Estate Financing Business Property Company
C. Reed, for Respondent and Keith Munt, principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer
A. Grossi, for Proposed purchaser, 5230 Harvester Holdings Corp.

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

Headnote

Debtors and creditors --- Executions — Sale under execution — General principles

Prior to receivership, debtor had offered primary asset, two manufacturing facilities on some 13 acres of property, for sale for $10.9 million — Following appointment in November 2012, receiver listed property for sale for $9.95 million — In January 2013, receiver reduced listing price to $8.2 million — After five months of marketing, receiver received only one offer which was for far below asking price — In June 2013, noting appraised value less than January listing price, receiver reduced listing price further to $6.8 million — Prospective purchaser made offer and receiver entered agreement for purchase and sale — Purchaser unable to waive conditions and agreement came to end — After rejecting several other offers due to either price or conditions, receiver accepted offer from new purchaser and executed agreement in December 2013 — Receiver brought motion for court approval of sale, fees and distribution of net proceeds to priority claims and secured creditor — Motion granted — Commercially sensitive information kept confidential in order to protect integrity and fairness of sale process by ensuring that competitors or potential bidders did not obtain unfair advantage — Receiver acted reasonably in refusing to disclose such information without execution of confidentiality agreement — On evidence, no question receiver had exposed property to market in reasonable fashion and for reasonable period of time — Accepted offer below appraised value but superior to others received in last quarter of 2013 — Appraised value, therefore, clearly over-estimated market value of property.

MOTION by receiver for court approval of sale, fees and distribution of net proceeds to priority claims and secured creditor.

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

I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property

1 PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

2 The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

3 After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

II. Facts

4 The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for $10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of $9.95 million. In January, 2013, the listing price was reduced to $8.2 million.

5 In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

6 Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

7 Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to $6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

8 One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to $6.8 million.

9 On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

10 As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional

on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

11 The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at $6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

12 In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

13 By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately $593,000 of the $600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

14 The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

15 In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

16 The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

17 The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, "clean" - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations — and provided for a reasonably quick closing date of February 25, 2014.

III. The adjournment request

18 The only personswho opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver's materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

19 At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

IV. Receiver's request for approval of the sale: the disclosure issue

A. The dispute over the disclosure of the purchase price

20 The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the "Receiver's Confidentiality Agreement"). A dispute thereupon arose between the Receiver and Debtor about the terms of that proposed agreement.

21 By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

> As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

22 On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

23 On January 23 Debtor's counsel wrote to the Receiver:

> My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

24 The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

25 The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

26 Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

27 On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

28 At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver - i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

29 The Receiver's Confidentiality Agreement contained a recital which read:

> The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

> 1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
>
> 2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person toeffect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
>
> 3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
>
> 4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

30 Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

> The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

31 By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

B. Analysis

32 In *Sierra Club of Canada v. Canada (Minister of Finance)* [1] the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects. [2] As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer - receiver, monitor or trustee - filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

33 The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids. [3]

34 To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of

bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

35 From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

36 Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

> (i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank v. Soundair Corp.*,[4] specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;
>
> (ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership — a proper request. The Debtor was prepared to agree to that term;
>
> (iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

37 In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

V. Receiver's request for approval of the sale: The Soundair analysis

38 The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

39 The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the

Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

40 Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

(i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;

(ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;

(iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.

41 Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

VI. Request to approve Receiver's activities and fees

42 As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

43 As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,[5] motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

44 First, one had to take into account the economic reality of this receivership - i.e. thatgiven the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

45 Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to $356,301.40, and its counsel had incurred fees approximating $188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

46 Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

47 Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

48 Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigationgiven the nature and complexity of the litigation. [6] In this receivership the Receiver had served this motion over a week in advance of the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file evidence in response to the sales approval part of the motion.

49 Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

50 Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of areceivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

51 For those reasons, I refused the Debtor's second adjournment request.

52 Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

VII. Partial distribution

53 Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

VIII. Summary

54 For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

Motion granted.

Footnotes

1 2002 SCC 41 (S.C.C.)

2 *Ibid.*, para. 53.

3 *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]).

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

5 2011 ONSC 346 (Ont. S.C.J. [Commercial List]), para. 7.

6 *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), para. 31.