File No. CI 23-01-39421

THE KING'S BENCH

WINNIPEG CENTRE

IN THE MATTER OF:	THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF KING'S BENCH ACT*, C.C.S.M. c. C280

BETWEEN:

FIRST NATIONAL FINANCIAL GP CORPORATION,

Applicant,

- and -

5684961 MANITOBA LTD., 6315402 MANITOBA LTD. and K & P PROPERTIES INC.,

Respondents.

MOTION BRIEF OF THE RECEIVER
HEARING DATE: TUESDAY, FEBRUARY 13th at 10:00 a.m.
BEFORE THE HONOURABLE MR. JUSTICE MARTIN

PITBLADO LLP
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(File No. 61972/3)

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1. Notice of Motion, to be filed;

2. Receivership Order, pronounced March 17, 2023 ;

3. Affidavits of Sonia Pacheco sworn February 13, 2023 and March 8, 2023;

4. The Receiver's First Report, dated April 25, 2023;

5. Confidential Supplement to the Receiver's First Report, dated April 25, 2023;

6. Order of the Honourable Mr. Justice Martin pronounced April 28, 2023;

7. The Receiver's Second Report, dated June 9, 2023 and Supplement thereto dated June 29, 2023;

8. Confidential Supplement to the Receiver's Second Report, dated June 9, 2023 and Supplement thereto dated June 29, 2023;

9. Order of the Honourable Mr. Justice Martin pronounced July 7, 2023;

10 The Receiver's Third Report, to be filed;

11 Confidential Supplement to the Receiver's Third Report, to be filed.

PART II

AUTHORITIES TO BE RELIED UPON

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2. *Royal Bank of Canada v Soundair* Corporation, 1991 CarswellOnt 205 (Ontario Superior Court)
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5. *Court of Kings Bench Act*, C.C.S.M. c. C280, Sections 37 and 77
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12. *Bank of Montreal v Trent Rubber Corp,* 2005 CarswellOnt 3126 (Ontario Superior Court of Justice)
13. *Rose-Isli Corp v Frame-Tech Structures Ltd.*, 2023 ONSC 832

14. *Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161

15. *Target Canada Co., Re*, 2015 ONSC 7574

16. *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400

PART III

STATEMENT OF FACTS

1. This is a motion brought by MNP Ltd., the Court-appointed receiver (the "**Receiver**") of the Respondent, 5684961 Manitoba Ltd. (the "**Debtor**"). The relevant information to be considered and the Receiver's position can be found in the Reports of the Receiver (the "**Reports**"), and the Confidential Supplements to the Reports (the "**Confidential Supplements**").

PART IV

ISSUES

A. Should service of the within motion and supporting materials be abridged and validated?

B. Should this Honourable Court approve the asset purchase agreement (the "**Sale Agreement**") between the Receiver and 4589093 Manitoba Ltd. (the "**Purchaser**"), as recommended by the Receiver in its Third Report?

C. Should this Honourable Court vest in the Purchaser all of the Debtor's right, title and interest in and to the Purchased Assets as described in the Sale Agreement?

D. Should the Confidential Supplement of the Third Report be sealed?

E. Should the Third Report, the Confidential Supplement to the Third Report, the activities of the Receiver described therein, the Receiver's Statement of Receipts and Disbursements and the Receiver's Sale Process be approved?

F. Should the fees, estimated fees, and disbursements of the Receiver and its legal counsel be approved?

PART V

ARGUMENT

A. Service of the within motion and supporting materials should be abridged and validated.

1. Notwithstanding the ordinary requirements for service pursuant to the *King's Bench Rules*, this Court has authority to abridge time requirements, validate defective service, and to dispense with service where necessary in the interests of justice.

***Court of King's Bench Rules*, ManReg 553/88**
Rules 2.03, 3.02., 16.04(1), 16.08(1), and 37, as amended [TAB 1]

2. Paragraph 24 of the receivership Order in this proceeding, granted by Justice Martin on March 17, 2023 (the "Receivership Order") contemplates that creditors and interested parties may be served by prepaid ordinary mail, courier, personal delivery, facsimile or electronic transmission. Paragraphs 25 and 26 of the Receivership Order provide that any court materials may be served by facsimile or e-mail upon the Service List maintained by counsel for the Receiver.

3. As such, the Receiver submits that, to the extent it may be necessary, service of the Notice of Motion and supporting materials ought to be abridged and/or validated.

B. This Court should approve the Sale Agreement recommended by the Receiver.

4. The four factors to be considered by the Court on an application to approve a proposed sale by a receiver were set out by the Ontario Court of Appeal in *Royal Bank of Canada 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.

***Royal Bank of Canada v Soundair* Corporation, 1991 CarswellOnt 205 (Ontario Court of Appeal) ("*Soundair*") at para 16 [TAB 2]**

***Royal Bank of Canada v Keller & Sons Farming Ltd.*, 2016 MBCA 46 at para 14 [TAB 3]**

5. In *Soundair*, the Ontario Court of Appeal stated that when it appoints a receiver, the court intends to rely upon the receiver's expertise and not upon its own. Specifically, the Ontario Court of Appeal stated:

> 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. (emphasis added)

***Soundair, supra*, at para 14 [TAB 2]**

6. The above-listed *Soundair* principles were adopted by the Manitoba Court of Queen's Bench, as it then was, in *Shape Foods Inc. (Re)*, 2009 MBQB 171. In that case, a Receiver-manager of two corporations applied for a Vesting Order to complete the sale of corporate assets. Justice Menzies granted the Receiver-manager's application, noting that "[t]he court should accept the recommendation of the Receiver except in circumstances where the necessity of rejection of the Receiver-manager's recommendation is clear".

***Shape Foods Inc. (Re)*, 2009 MBQB 171 at para 49 [TAB 4]**

7. The Receiver submits that the Sale Agreement was the result of a fair, transparent process and will maximize the chances of obtaining the best possible price for the Purchased Assets, and further that the process satisfies the *Soundair* criteria as outlined above.

8. The Receiver has made efforts to get the best price for the Purchased Assets and has not acted improvidently. The Receiver has considered the interests of all parties and maintained the efficacy and integrity of the process by which the Sale Agreement was obtained.

9. Further, the consideration being offered by the Purchaser is reasonable and fair. In the circumstances, there is no reasonable basis to conclude that further marketing and sales efforts would produce offers superior to the Sale Agreement.

C. The Purchaser should be vested with all right, title and interest in and to the Purchased Assets, as described in the Sale Agreement

10. Pursuant to section 37 of *The Court of King's Bench Act*, this Honourable Court has the power to make a Vesting Order:

> **Vesting orders**
> **37(1)** The court may by order vest in a person an interest in real or personal property that the court has authority to order to be disposed of, encumbered or conveyed.

***The Court of King's Bench Act*, C.C.S.M. c. C280, s. 37(1) [TAB 5]**

11. Section 176(1) of *The Real Property Act* provides as follows:

> **Orders by judge**
> **176(1)** In a proceeding respecting land, or in respect of a transaction or contract relating thereto, or in respect of an instrument, caveat, memorial, or other entry affecting land, the court may, by order, direct the district registrar to cancel, correct, substitute, or issue, a certificate of title, or make an endorsement or entry on any instrument, or to do or refrain from doing any act, or make or refrain from making any entry necessary to give effect to the judgment, or order of the court.

***The Real Property Act*, C.C.S.M. c. R30, s. 176(1) [TAB 6]**

12. On October 20, 2004, a directive was issued by the Registrar General and Chief Operating Officer of the Property Registry of Manitoba.

Directive of the Property Registry of Manitoba dated October 20, 2004 [TAB 7]

13. Pursuant to the October 20, 2004 direct, the Property Registry of Manitoba will no longer accept a Vesting Order if the 30-day appeal period has not expired, unless:

(a) All parties have consented;

(b) An undertaking has been given by those having a right to appeal that no appeal will be commenced;

(c) A Certificate from the Court that issued the Vesting Order has been issued that no appeal has been made and the time for filing the appeal has expired;

(d) A Certificate from the solicitor, indicating that all appeals have finally been disposed of or discontinued, has been received; or

(e) The Court has ordered that the Vesting Order can be immediately filed, thereby causing an immediate cancellation of the existing title and the immediate issuance of a new title.

14. The Vesting Order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. The Ontario Court of Appeal in *Chippewas of Sarnia Band v Canada (Attorney General)*, noted:

> Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly
>
> ***Chippewas of Sarnia Band v Canada (Attorney General)*, 2000 CarswellOnt 4836 (ONCA) at para 281 [TAB 8]**

15. In *Regal Constellation Hotel Ltd., Re*, the Ontario Court of Appeal indicated that in Ontario there was no restriction upon the filing of the Vesting Order. As such, once the Court made a Vesting Order, the Land Titles Office accepted and filed the Vesting Order. Unless the affected

party obtained a stay of proceeding, then the Land Titles Office would, pursuant to the Vesting Order, cancel the existing Certificate of Title and issue a new Certificate of Title. Once the old title had been cancelled and the new title had been issued, there was no point in appealing the Vesting Order, because the title had already been cancelled and reissued. Justice Blair of the Ontario Court of Appeal made the following comments:

> Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.
>
> ...
>
> Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

***Regal Constellation Hotel Ltd., Re*, 2004 CarswellOnt 2653 (ONCA) at paras 39 and 43 [TAB 9]**

16. In this case the Sale Agreement expressly recognizes certain existing non-monetary interests in the Real Property, which would be preserved by the form of Sale Approval and Vesting Order that has been submitted before this Court, namely caveats respecting by-law compliance orders from the City of Winnipeg.

17. Applying the foregoing principles to the issue at hand, it is respectfully submitted that this Honourable Court ought to order the immediate vesting of title to the Real Property into the name of the Purchaser, because:

(a) No party to these proceedings will be adversely affected if this Honourable Court should order an immediate vesting of title;

(b) It is not in anyone's interest that title remain in the name of the Debtor;

(c) It is expected that all parties will either be consenting to or not objecting to the immediate vesting of title;

(d) There will be costs incurred in waiting until the appeal period expires, including the interest accruing on FNF's mortgage against the Real Property; and

(e) This Honourable Court has the authority to issue a Vesting Order which has an immediate effect.

D. The Confidential Supplement to the Third Report should be sealed.

18. The Receiver requests a sealing order with respect to the Confidential Supplement to the Third Report, until such time as a sale is closed or upon further order of the Court.

19. Section 77(1) of the *Court of King's Bench Act* provides as follows:

> **Sealing confidential documents**
> **77(1)** The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.
>
> ***The Court of King's Bench Act,* C.C.S.M. c. C280, s. 77(1) [TAB 5]**

20. The test to obtain a sealing order was set out by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)* and revised by the Supreme Court in *Sherman Estate v Donovan*:

> 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.

***Sherman Estate v Donovan*, 2021 SCC 25 at para 38 [TAB 10]**

***Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [TAB 11]**

21. In *Bank of Montreal v Trent Rubber Corp*, a sealing order was granted with respect to a Confidential Exhibit of the Receiver's Report, which contained information regarding the value of some of the debtor's assets. The Court found that it would be potentially prejudicial to disclose the values attributed to those assets before they were disposed of in an open market.

***Bank of Montreal v Trent Rubber Corp*, 2005 CarswellOnt 3126 (Ontario Superior Court of Justice) at para 16 [TAB 12]**

22. Sealing orders are also appropriate in the context of a proposed sale of assets by a Receiver, where the sealing order is limited in either scope or time. As the Ontario Superior Court stated in *Rose-Isli Corp v Frame-Tech Structures Ltd.*:

> The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.
>
> The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and

> commercially-sensitive information prior to the completion of the now approved Ora Transaction.
>
> These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in Sherman Estate v. Donovan, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

***Rose-Isli Corp v Frame-Tech Structures Ltd.*, 2023 ONSC 832 at paras 138-140 [TAB 13]**

23. In this case, the Confidential Supplement to the Third Report contains sensitive financial information and analysis as to the value of the Purchased Assets. There is a serious risk that disclosure of the information contained in the Confidential Supplement to prospective purchasers would compromise the Sale Agreement and the sales process, and may impact upon the ability of the Receiver to maximize the recovery and obtain the best price for the Purchased Assets. The Receiver submits that the sealing order is appropriate, pending the closing of a sale, that alternative measures will not prevent the risk of disclosure, and the benefits to the stakeholders in granting the sealing order outweigh the potential harmful effects.

24. The Receiver therefore submits that the salutary effects of a sealing order outweigh any negative effects.

E. The Third Report, the Confidential Supplement to the Third Report, the activities of the Receiver, the Receiver's Statement of Receipts and Disbursements and the Receiver's Sales Process should be approved.

25. The Receiver seeks approval of its Third Report, the Confidential Supplement to the Third Report, its activities, its Statement of Receipts and Disbursements and its Sales Process.

26. Paragraph 3 of the Receivership Order empowers the Receiver to, among other things: execute, assign, issue and endorse documents of whatever nature in respect of any of the Debtor's Property; market the Debtor's any or all of the Debtor's Property; and to sell, convey, transfer, lease or assign the Property out of the ordinary course of business.

27. The factors to be considered by the court when determining whether it should approve a receivers' report and activities are the same as those the court considers when determining whether it should approve the activities of a monitor pursuant to the *Companies' Creditors Arrangement Act*.

***Hanfeng Evergreen Inc., (Re)*, 2017 ONSC 7161 at para 15 [TAB 14]**

28. In *Target Canada Co., Re*, the Ontario Superior Court recognized that there are good and practical policy reasons for the Court to approve a Court Officer's activities - in that case, a Monitor's activities - including, *inter alia*, that such approval:

(a) Allows the Court Officer to move forward with the next steps in the proceedings;

(b) Brings the Court Officer's activities before the Court;

(c) Allows an opportunity for the concerns of stakeholders to be addressed, and any problems rectified; and

(d) Enables the Court to satisfy itself that the Court Officer's activities have been conducted in a prudent and diligent manner.

***Target Canada Co., Re*, 2015 ONSC 7574 at paras 12 and 21-23 [TAB 15]**

29. The Receiver submits that it has conducted itself in a prudent and diligent manner, including by engaging in the Sales Process as set out in the Third Report, and has acted in accordance with the terms of the Receivership Order. The Receiver therefore submits that approval of its Reports and activities ought to be granted by this Court in accordance with the *Target Canada* principles as outlined above.

F. The fees, estimated fees, and disbursements of the Receiver and its legal counsel should be approved.

30. Paragraph 21 of the Receivership Order provides that the Receiver and its counsel shall be paid their reasonable fees and disbursements with respect to the receivership proceedings.

31. A non-exhaustive list of factors to be considered by the Court when determining whether to approve the fees of a receiver and its counsel was recently set out by the Ontario Superior Court in *Triple-I Capital Partners Limited v 12411300 Canada Inc.*, as follows:

> The factors to be considered have been sent out by the Court of Appeal for Ontario: Bank of Nova Scotia v. Diemer, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:
>
> a. the nature, extent and value of the assets;
> b. the complications and difficulties encountered;
> c. the degree of assistance provided by the debtor;
> d. the time spent;
> e. the receiver's knowledge, experience and skill;
> f. the diligence and thoroughness displayed;
> g. the responsibilities assumed;
> h. the results of the receiver's efforts; and
> i. the cost of comparable services when performed in a prudent and economical manner.
>
> The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive ...

***Triple-I Capital Partners Limited v 12411300 Canada Inc.*, 2023 ONSC 3400 ("*Triple-I*") at paras 23-24 [TAB 16]**

32. The Court in *Triple-I* held that emphasis should be placed on the value of the receiver's and its counsel's services, and that the question to be answered is whether the fees sought are "fair and reasonable":

> While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership.

***Triple-I, supra*, at para 26 [TAB 16]**

33. The Receiver submits that the fees outlined in the Third Report are fair and reasonable in the circumstances and are an accurate reflection of the efforts undertaken by the Receiver and its counsel with respect to administering the receivership proceedings, which includes the conclusion of the Sales Process and Sale Agreement.

34. FNF supports the approval of the fees and estimated fees and disbursements of the Receiver and its counsel, without the requirement for a formal accounting thereof.

CONCLUSION

35. In light of the above, the Receiver respectfully submits that the relief sought in the Sale Approval and Vesting Order before this Honourable Court ought to be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of February, 2024.

PITBLADO LLP

Per: _____

Catherine E. Howden
Counsel for the Receiver

TAB 1

Court of King's Bench Rules, M.R. 553/88

COURT MAY DISPENSE WITH COMPLIANCE

2.03 The court may, only where and as necessary in the interest of justice, dispense with compliance with any rule at any time.

...

EXTENSION OR ABRIDGMENT

General powers of court

3.02(1) The court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

Expiration of time

3.02(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

Consent in writing

3.02(3) A time prescribed by these rules for serving or filing a document may be extended or abridged by consent in writing.

...

SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

Where order may be made

16.04(1) Where it appears to the court that it is impractical for any reason to effect prompt service of an originating process or any other document required to be served personally or by an alternative to personal service the court may make an order for substituted service or, where necessary in the interest of justice, may dispense with service.

...

VALIDATING SERVICE

16.08(1) Where a document has been served in an unauthorized or irregular manner, the court may make an order validating the service where the court is satisfied that,

(a) the document came to the notice of the person to be served; or

(b) the document was served in such a manner that it would have come to the notice of the person to be served, except for the person's own attempts to evade service.

...

SERVICE OF NOTICE

Required as general rule
37.06(1) The notice of motion shall be served on any person or party who will be affected by the order sought, unless these rules provide otherwise.

Notice not required
37.06(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice.

Consent order without notice of motion
37.06(2.1) The court may make an order on consent without a notice of motion being filed.

Interim order without notice
37.06(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice.

Service of order
37.06(4) Where an order is made without notice to a person or party affected by the order, the order, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion, shall be served forthwith on the person or party unless the court orders or these rules provide otherwise.

Where notice ought to have been served
37.06(5) Where it appears to the court that the notice of motion ought to be served on a person who has not been served, the court may,

(a) dismiss the motion or dismiss it only against the person who was not served;

(b) adjourn the motion and direct that the notice of motion be served on the person; or

(c) direct that any order made on the motion be served on the person.

Time for service
37.06(6) Where a motion is made on notice, the notice of motion shall be served at least four days before the date on which the motion is to be heard.

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.

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

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

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

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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Table of Authorities

Cases considered:

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

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

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

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

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

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

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

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

2 It is necessary at the outset to give some background to the dispute. Soundair Corporation ("Soundair") is a corporation engaged in the air transport business. It has three divisions. One of them is Air Toronto. Air Toronto operates a scheduled airline from Toronto to a number of mid-sized cities in the United States of America. Its routes serve as feeders to several of Air

Canada's routes. Pursuant to a connector agreement, Air Canada provides some services to Air Toronto and benefits from the feeder traffic provided by it. The operational relationship between Air Canada and Air Toronto is a close one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

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

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

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

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

18 Having regard to the fact that it was highly unlikely that a commercially viable sale could be made to anyone but the two national airlines, or to someone supported by either of them, it is my view that the receiver acted wisely and reasonably when it

negotiated only with Air Canada and Canadian Airlines International. Furthermore, when Air Canada said that it would submit no further offers and gave the impression that it would not participate further in the receiver's efforts to sell, the only course reasonably open to the receiver was to negotiate with Canadian Airlines International. Realistically, there was nowhere else to go but to Canadian Airlines International. In do ing so, it is my opinion that the receiver made sufficient efforts to sell the airline.

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not*

> *be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I

am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered bona fide into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a

similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of OEL being given the same right during its negotiations with the receiver. I see no unfairness on the part of the receiver when it honoured its letter of intent with OEL by not releasing the offering memorandum during the negotiations with OEL.

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

McKinlay J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the

amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

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

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

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

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

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

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

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

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

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

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership

proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal dismissed.

TAB 3

2016 MBCA 46
Manitoba Court of Appeal

Royal Bank of Canada v. Keller & Sons Farming Ltd.

2016 CarswellMan 147, 2016 MBCA 46, 265 A.C.W.S. (3d) 664, 330
Man. R. (2d) 12, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) 219, 675 W.A.C. 12

Royal Bank of Canada, (Plaintiff) Respondent and Keller & Sons Farming Ltd. and Keller Holdings Ltd., (Defendants)

Shilo Farms Ltd. and Marcus Keller, Appellants and Ernst & Young Inc., in its capacity as Receiver of the undertaking, property and assets of the Debtors, and not in its personal capacity, (Applicant) Respondent

Freda M. Steel, Diana M. Cameron, Janice L. leMaistre JJ.A.

Heard: May 2, 2016
Judgment: May 2, 2016
Docket: AI 16-30-08585

Counsel: R.W. Schwartz, for Appellant, Shilo Farms
F.J. Trippier, A.K. Anjoubault, for Appellant, M. Keller
J.M.J. Dow, for Respondent, Royal Bank of Canada
A.J. Stacey, R.A. McFadyen, for Respondent, Ernst & Young
D.E. Swayze, for Prospective Purchasers, Spud Plains Farms Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency; Property

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.b Rights

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

Receiver accepted offer from A group over offer of S Ltd. respecting sale of debtor companies' lands, buildings and related irrigation infrastructure — Motion judge approved sale to A group — S Ltd. appealed — Appeal dismissed — Offer by S Ltd. to pay unsecured creditors over time and out of future profits was unrealistic when best possible offer would still result in shortfall to secured creditors — Secured creditors were only parties with material and direct commercial interest in proceeds of sale and it was reasonable for receiver not to take into account portion of offer by S Ltd. that dealt with unsecured creditors — Receiver had authority to deal with all assets and receivables of debtors — Receiver had authority to sell property, and it was entitled to take steps it considered necessary to carry out sale process — It was within receiver's discretion to consider pending litigation with appellant company, along with sale price of land, and conclude that it was better to take higher amount for land offered by A group and pursue outstanding claims against appellant company than to accept proposed settlement offered by appellant company — Motion judge reasonably concluded that receiver canvassed market for land in open, fair and transparent manner.

Table of Authorities

Cases considered by *Freda M. Steel J.A.*:

Business Development Bank of Canada v. Paletta & Co. Hotels Ltd. (2012), 2012 MBCA 115, 2012 CarswellMan 727, 288 Man. R. (2d) 129, 564 W.A.C. 129, 5 C.B.R. (6th) 334 (Man. C.A.) — referred to

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to
Shape Foods Inc. (Receiver of), Re (2009), 2009 MBQB 171, 2009 CarswellMan 312, 54 C.B.R. (5th) 224, 241 Man. R. (2d) 235 (Man. Q.B.) — referred to
Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to
Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 2009 MBCA 81, 2009 CarswellMan 375, [2010] 1 W.W.R. 246, 245 Man. R. (2d) 70, 466 W.A.C. 70 (Man. C.A.) — referred to

APPEAL from *Royal Bank of Canada v. Keller & Sons Farming Ltd.* (2016), 2016 MBQB 77, 2016 CarswellMan 346 (Man. Q.B.), by unsecured creditor of approval of sale of debtor companies' lands, buildings and related irrigation infrastructure.

***Freda M. Steel J.A.*:**

1 This is an appeal from the decision of the motion judge approving the request of Ernst & Young Inc. (the Receiver) for the sale of Keller lands, buildings and related irrigation infrastructure equipment (the Keller Lands) to Spud Plains Farms Ltd., A&A Farms Ltd., TA Farms Ltd. and A&M Potato Growers Ltd. (collectively referred to as the Adriaansen Group).

2 Shilo Farms Ltd. (Shilo), an unsecured creditor and unsuccessful bidder, and Marcus Keller, the sole shareholder of the defendant debtor companies, an unsecured creditor, and also the general manager of Shilo, appeal from that decision.

3 Fundamentally, the appellants argue that the sale process was not fair or equitable. They argue that the integrity of the process of bidding was tainted. It is submitted that the Receiver "muddied the waters" by asking Shilo to make an offer that included a settlement offer for outstanding disputed claims.

4 At a later stage in the modified sale and investor solicitation process, the Receiver asked the Adriaansen Group and Shilo to resubmit improved offers. Specifically, the Receiver asked Shilo to make an offer that included an amount related to certain disputed claims between the Receiver and Shilo. The Adriaansen Group made an offer for the land and, as well, advised the Receiver that, if successful, it would be reselling a parcel of the Keller Lands known as Parcel 4. Depending on the amount obtained on the resale, it was possible for the Receiver to obtain further proceeds from that resale.

5 Shilo made an improved offer that included an amount of $700,000 as a settlement of the disputed claims. Shilo also indicated it would make arrangements to repay amounts owing to the defendants' unsecured creditors over time out of future profits. It is this additional amount, submitted by Shilo for settlement of the claims, that was the subject of much of Shilo's submissions opposing the sale in the Court below and in this Court.

6 While the offers were relatively close, the Receiver accepted the offer from the Adriaansen Group, explaining that the amount offered by the Adriaansen Group was higher than the offer of Shilo when the settlement amount was removed from the Shilo offer. The Adriaansen Group offer for the land alone was $300,000 higher than the Shilo offer. The Receiver decided that, upon acceptance of the Adriaansen Group offer, it could then still realize on the claims against Shilo, the claims estimated at $1,100,00 by the Receiver, even though the realization of those claims might very well include litigation and the necessity to incur additional legal fees. The Receiver also noted a potential to further increase the proceeds depending on the subsequent reselling of Parcel 4 of the Keller Lands.

7 Shilo submits that the Receiver's request to Shilo that it include an amount for settlement of the outstanding disputes created an unfair process. In other words, it was a mistake on the Receiver's part to say to Shilo that its bid would be more favourably received by the Receiver if it included an amount to settle outstanding claims by the Receiver against Shilo. As well, it is argued that the Receiver was acting outside of its authority. The Receiver only had the authority to deal with the land itself, not extraneous claims.

8 Keller argues that the Receiver did not consider the interests of all the parties, particularly those of the unsecured creditors, and the offer to pay the unsecured creditors 20 cents on the dollar over time out of future profits.

9 The appeal of Shilo and Keller must, out of necessity, also consider the question as to whether they have standing to appeal. Standing is a pre-requisite to opposing a sale approval motion. See *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 130 O.A.C. 273 (Ont. C.A.); and *Shape Foods Inc. (Receiver of), Re*, 2009 MBQB 171, 241 Man. R. (2d) 235 (Man. Q.B.). At the motion, because of the exigencies of time, the Court heard from both parties on the merits of their motion and decided the matter on those merits, despite the Court's final decision that neither party had standing.

10 In this Court, the appellants argue that they have standing to challenge the decision of the Receiver and, hence the decision of the motion judge. Shilo argues that it has standing as a result of its status as an unsuccessful bidder for the property, and also as an unsecured creditor. Keller argues that he has standing as an unsecured creditor, as well as a shareholder of the defendant debtor companies.

Standard of Review

11 The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case. See *Royal Bank v. Soundair Corp.* (1991), 46 O.A.C. 321 (Ont. C.A.); and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pp 109, 111.

12 The decision of the motion judge was an exercise in judicial discretion and is entitled to deference in this Court. We will intervene only if the motion judge exercising his discretion, erred in law, misapprehended the evidence in a material way or was clearly wrong. See *Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.*, 2012 MBCA 115 (Man. C.A.) at para 8, (2012), 288 Man. R. (2d) 129 (Man. C.A.); and *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at para 25, (2009), 245 Man. R. (2d) 70 (Man. C.A.).

Decision

13 We have some sympathy for the appellants' argument as to standing. That is, if unsecured creditors are unable to challenge the process, who will speak on their behalf? While a party must have a material interest that has been affected in order to establish standing, the question of what constitutes a material interest will vary depending on the facts of the case. It may be, as was argued, that the unfairness of the process itself prevented the party from obtaining a material interest in the sale process. In any event, this is not the case to pursue that argument because, even if we disagreed with the motion judge and felt that either or both parties should have standing, we do not see a ground for appellate intervention in the final decision.

14 When reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured creditors. There is no question that it is the responsibility of the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. See *Soundair Corp.*

15 However, the offer to pay unsecured creditors over time out of future profits is not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. Given the outstanding amounts owing to the secured creditors, and the amounts that would be generated from the sale of assets, there will inevitably be a significant shortfall in this case. As a result, the secured creditors are the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the Receiver not to take into account the portion of the offer dealing with unsecured creditors.

16 There is some dispute as to whether Shilo knew that there would be a shortfall to the secured creditors. Whether or not the company knew this, it also stated in its affidavit that it would not have changed the offer. We do not see how that affected the integrity of the process.

17 Second, with respect to the fairness of the sale process, the motion judge held that since the Receiver was dealing with a prospective purchaser, Shilo, with which it had outstanding claims, this was an efficient way to proceed in wrapping up other aspects of the receivership, and possibly obtaining an increased overall bid. Moreover, the amount that Shilo did offer for the Keller Lands was not as high as the offer put forward by the Adriaansen Group, if the amount proposed for settlement was taken out. The motion judge held that the Receiver was entitled to conclude that taking more money for the land, and taking the risk of suing for the entire amount owing in the disputed claims with Shilo, was a better option than taking less for the land and settling the disputed claims.

18 In addition, the Receiver had the authority to deal with all assets and receivables of Keller & Sons Farming. The Receiver was granted authority to sell property in the order granted by Schulman J on October 8, 2015. That order gave the Receiver the right to sell by negotiating such terms and conditions as it saw fit and to consider, evaluate and, if it deemed appropriate, settle claims relating to the defendants.

> THIS COURT ORDERS that 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:
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> . . .
>
> (g) to settle, extend or compromise any indebtedness owing to or by the Defendants;
>
> . . .
>
> (j) 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.

19 We believe that Shilo's argument interprets the power of the Receiver too narrowly. The second order (February 8, 2016) allowed the Receiver to take such steps as it considered necessary in carrying out the sale process.

> THIS COURT ORDERS AND DECLARES that the Receiver is authorized and directed to continue to implement the Sales Process, subject to further order of the Court, and to take such steps as it considers necessary or desirable in carrying out the Sales Process, including entering into an auction agreement with Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie") with respect to the equipment of Keller & Sons Farming Ltd.

20 Consequently, it was within the Receiver's discretion to consider pending litigation, along with a sale price of the land, and to ultimately conclude that it was better to take a higher amount for the land and pursue the outstanding claims against Shilo, than to accept the proposed settlement. Whether someone else would have decided differently is irrelevant. It is clearly not an improvident bargain.

21 The motion judge specifically addressed each of the relevant criteria and found on the facts that the Receiver had fully canvassed the market for the Keller Lands in an "open, fair and transparent manner to all potential interested purchasers" (at para 28). That decision was reasonable, given the evidence before him. We see no error in such a conclusion, certainly no error that is clearly wrong.

22 The appeal is dismissed with costs.

Appeal dismissed.

End of Document

TAB 4

2009 MBQB 171
Manitoba Court of Queen's Bench

Shape Foods Inc. (Receiver of), Re

2009 CarswellMan 312, 2009 MBQB 171, [2009] M.J. No. 240,
178 A.C.W.S. (3d) 570, 241 Man. R. (2d) 235, 54 C.B.R. (5th) 224

In the Matter of The Receivership of Shape Foods Inc.

And In the Matter of The Receivership of 0767623 B.C. Ltd.

Deloitte & Touche Inc. in its capacity as receiver and manager of Shape Foods Inc. and 0767623 B.C. Ltd.

Menzies J.

Judgment: June 22, 2009
Docket: Brandon Centre CI 09-02-02233

Counsel: D. Swayze for Deloitte & Touche
B. Filyk for Vanguard Credit Union
W. Leslie for 884498 Alberta Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks, Richard Brugger
J. Hirsch for 5842264 Manitoba Ltd. (watching brief)
R. Paterson for City of Brandon (watching brief)

Subject: Corporate and Commercial; Insolvency; Property; Intellectual Property
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Debtors and creditors
XIV Miscellaneous
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Receiver manager made reasonable efforts to achieve best deal and its recommendation should not be rejected — Fact that one potential bidder did not meet requirements or deadline did not mean sale was improvident — Process of sale was fair and receiver manager was able to obtain higher price than tender — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.
Debtors and creditors --- Miscellaneous issues
Standing to oppose sale by receiver manager — Debtor defaulted on loan secured by assets of two corporations and receiver manager was appointed — Receiver obtained offer to purchase business interests — Receiver brought application for vesting order approving sale — Application granted — Unsuccessful purchasers did not have standing to oppose application — Prospective purchasers did not have rights in property — Minority shareholders did not have standing to oppose sale — Sale to another entity would not effect shareholder's capacity as unsecured creditors — Receiver manager made considered effort to obtain best price and sale was in best interest of interested parties.
Table of Authorities
Cases considered by *Menzies J.*:

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

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

Selkirk, Re (1987), 1987 CarswellOnt 177, 64 C.B.R. (N.S.) 140 (Ont. S.C.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (2000), 47 O.R. (3d) 234, 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — followed

Statutes considered:

Corporations Act, R.S.M. 1987, c. C225

s. 94 — referred to

APPLICATION by receiver manager for approval of sale of property.

***Menzies J.*:**

1 Shape Foods Inc. ('Shape') operated a food processing business in the City of Brandon. 0767623 B.C. Ltd. ('B.C.') was a related corporation which held ownership to the intellectual property (patents and trademarks) associated with Shape's food processing business. Both corporations executed a security agreement in favor of Vanguard Credit Union ('Vanguard') as security for a loan. The security agreement provided that in the event of default on the loan, Vanguard had the right to appoint a receiver-manager to realize on its security.

2 On October 23, 2008, Vanguard appointed Deloitte & Touche ('the Receiver') as receiver-manager of Shape Foods Inc.

3 Subsequently on December 10, 2008, Vanguard, appointed Deloitte & Touche receiver-manager of 0767623 B.C. Ltd.

4 On April 14, 2009, the Receiver accepted an offer to purchase the assets of Shape and B.C. in the amount of $5.1 million from 5842664 Manitoba Ltd. ('the purchaser'). A formal agreement was executed on May 6, 2009 which required the Receiver to provide a vesting order of the property in the name of the purchaser on or before June 5, 2009.

5 The Receiver-manager brought an application is for a vesting order to complete the transaction with the purchaser and for a declaration that the sale of the corporate assets is not reviewable by the remaining creditors of Shape or B.C. or by any subsequent trustee in bankruptcy.

The Standing of Parties on the Application

6 The application by the Receiver-manager is opposed by 884498 Manitoba Ltd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks and Richard Brugger. The Receiver-manager argues these parties do not enjoy standing before the court as they are not interested parties in the outcome of the application.

7 Before deciding the issue of standing, I allowed Todd Hicks on behalf of 884498 Manitoba Ltd. and Nick Mashin on behalf of Canrex Biofuels Ltd. to file affidavits as to their attempts to purchase the assets of Shape and B.C. My decision was based on the premise the evidence was relevant to the issue of the integrity of the Receiver-manager's actions taken to sell the security.

8 The Receiver-manager brought the application for the vesting order shortly before the closing date of June 5, 2009. A decision as to whether or not the vesting order would issue was required in a timely fashion or the sale agreement would be in jeopardy. With some misgivings, I reserved my decision on the issue of standing and heard the arguments of the opposing parties to allow the ultimate application to proceed. While this is not the best procedure in which to consider an application, the process did allow me to render a decision on the issue of the vesting order within the time constraints of the purchase agreement.

Interested Parties

9 884498 Manitoba Ltd. and Canrex Biofuels Ltd. attempted unsuccessfully to purchase the assets of Shape and B.C. from the Receiver-manager. Barry Comis, Ben Comis, Todd Hicks and Richard Brugger are shareholders of 884498 Manitoba Ltd.

10 I have concluded an unsuccessful purchaser does not have standing to challenge a proposed sale. In coming to this conclusion I rely upon the reasons of O'Connor J. A. of the Ontario Court of Appeal in *Skyepharma PLC v. Hyal Pharmaceutical Corp.*, [2000] O.J. No. 467, 47 O.R. (3d) 234 (Ont. C.A.) beginning at para 25:

> There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold...The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of sale. 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: *Crown Trust v. Rosenberg* (1986), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H. C. J.).
>
> Moreover, 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 sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.
>
> In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of the process: *Crown Trust v. Rosenberg*, supra; Royal *Bank of Canada v. Soundair Corp.* (1991), 4 O. R. (3d) 1, 83 D. L. R. (4 th) 76 (C. A.). The examination of the sale process will in normal circumstances be focused on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.
>
> [para. 29] In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest in not sufficient.

11 As prospective purchasers, none of the opposing parties have a legal right or interest in the assets arising out of the circumstances of the sale process. Although I have considered their evidence in assessing the integrity of the sale process, they are not interested parties merely due to their status of unsuccessful purchasers.

12 Barry Comis and Ben Comis claim standing as interested parties by virtue of being shareholders of Shape. Richard Brugger and Todd Hicks claim standing as shareholders of Falcon Creek Holdings Inc., a corporation which is a shareholder in Shape. The extent of their holdings in Shape were not disclosed except to the extent of an admission by their counsel that they are minority shareholders in Shape. They were not appearing on behalf of Shape, but simply in their capacity as minority shareholders.

13 Ben Comis also claims status as an interested party by virtue of being a creditor of Shape in the amount of $6,300.00.

14 I am not satisfied that the status of shareholder, in and of itself, or the status of creditor gives one the status of an interested party. In my opinion, more is required. In this case the assets of Shape and B. C. are secured by three secured creditors. Vanguard is the first secured creditor. As of May 19, 2009, Vanguard was owed $4,711,865.50 with daily interest accruing at the rate of $822.26. The Manitoba Development Corporation ('MDC') is the second secured creditor. The debt owed to MDC as of May 1, 2009 was $4,145,541.82 with interest accruing at the daily rate of $868.14. In addition, MDC had guaranteed repayment of Vanguard's debt. The third debtor is RAB Special Situation (Master) Fund Ltd. with a debt in the approximate amount of $2,000,000.00.

15 The completion of the agreement between the Receiver and the successful purchaser will result in Vanguard being paid in full and MDC receiving only partial payment. In addition, MDC will be relieved of any obligation under its guarantee of the Vanguard debt.

16 The two prospective offers not accepted by the Receiver will result in Vanguard being paid in full, and MDC receiving an increased partial payment on its debt. The acceptance or the rejection of the Receiver-manager's recommended sale in favor of one of the unsuccessful purchasers will not affect the position of Ben Comis, Barry Comis, Todd Hicks or Richard Brugger in their capacity as minority shareholders or Ben Comis in his capacity as an unsecured creditor.

17 As receiverships often affect numerous parties, I am of the opinion that a party requesting to appear to oppose a proposed sale by a receiver-manager must minimally show an interest to the extent that any alleged failure of the receiver-manager to act in a commercially reasonable manner may affect their interests in a material fashion.

18 I am not satisfied that 884498 Manitoba Lyd., Canrex Biofuels Ltd., Barry Comis, Ben Comis, Todd Hicks or Richard Brugger have proven they are interested parties to this application.

The Duty of the Receiver

19 S. 94 of *The Corporations Act* (Manitoba) provides that a receiver or receiver-manager of a corporation appointed under an instrument shall act honestly and in good faith; and deal with any property of the corporation in his possession or control in a commercially reasonable manner.

20 On considering a proposed sale of a debtor's property by a receiver-manager, there are four criteria for the court to consider. (See: *Crown Trust Co. v. Rosenberg*, supra; Bennett on Receiverships, (2nd Ed.) (1999) Carswell at p. 251 et seq.)

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

21 In *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), the Ontario Court of Appeal outlined two principles for a court to consider in reviewing a sale of property. The first principle is that a court should place a great deal of confidence in the actions taken and the opinions formed by the receiver-manager. Unless the contrary is clearly shown, the court should assume that the receiver-manager is acting properly. The second principle is a court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager. I will now consider the relevant criteria in this transaction.

Did the Receiver Make a Sufficient Effort to Get the Best Price and Did It Act Providently?

22 In this instance the Receiver-manager was appointed to take control of the assets of Shape in October 2008. The Receiver-manager advertised the sale of the assets of Shape and B. C, by way of tender with the advertisements being published in the Brandon Sun, the Winnipeg Free Press and the Globe and Mail on November 26, 2008. Tenders closed on December 17, 2008 with the highest bid being in the amount of $750,000.00.

23 Following the attempt to sell by tender, a sales and information package was distributed to potential purchasers and interested parties on April 16, 2009. By March 31, 2009, the Receiver-manager had received five additional proposals with the highest being $4.5 million.

24 The Receiver-manager advised the interested parties to reconsider their bids and that no bid under $5 million would be considered. The Receiver-manager maintains that all parties were advised that bids would require either a deposit or a letter from a financial institution confirming financing.

25 Two bids were received which complied with the conditions as set out by the Receiver-manager. The highest bid was received from the purchaser and was accepted.

26 The evidence establishes the Receiver-manager put considerable effort into obtaining the best price for the assets of Shape and B. C.

27 The real issue to be determined is whether the Receiver-manager acted improvidently. I am guided by the comments of Anderson J. in the decision of *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 on the motion for approval.

28 I repeat that a court should be reluctant to reject the recommendation of the Receiver-manager based upon information which comes to light after the decision was made. Evidence as to the value of competing bids was placed before me on this application. This evidence is relevant only to the extent it allows me to evaluate the reasonableness of the price obtained by the Receiver-manager. (See: *Crown Trust Co. v. Rosenberg*, supra)

29 Evidence of the value of competing bids was considered by McRae J. in *Selkirk, Re* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at 142:

> 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.

30 The evidence alleging improvident behavior on behalf of the Receiver-manager comes from two sources. One such source is the affidavit of Nick Mashin, the President of Canrex Biofuels Ltd, who submitted a proposal of $6.25 million for the assets of Shape and B.C. In brief, the evidence of Mashin was that although he forwarded the proposal to the Receiver-manager on March 13, 2009, he was not prepared to provide either a deposit or a letter of commitment for financing by the date on which the Receiver-manager accepted the purchaser's offer. These allegations do not amount to evidence of improvident behavior by the Receiver-manager.

31 The other source is the affidavit of Todd Hicks. According to Hicks, 884498 Alberta Ltd. submitted a proposal in the amount of $6.51 million on April 9, 2009. On April 14, 2009, Hicks was advised that a 7% deposit *and* a letter of commitment for financing would need to be provided to the Receiver-manager by 1:00 p.m. that day. Hicks forwarded the letter confirming financing to their Manitoba lawyer but instructed him not to forward it on to the Receiver-manager until he received further instructions.

32 At 3:04 p.m. on April 14, 2009, the lawyer for 884498Alberta Ltd. emailed the Receiver advising that his client was aware the confirmation of financing letter must be provided and that the 7% deposit was being raised. This was two hours after the deadline as advised by the Receiver. On April 15, 2009, the Receiver advised 884498 Alberta Ltd. that another offer had been accepted.

33 Hicks provides much evidence as to conversations he had with respect to the purchase of the property. However, Hicks knew of the April 14, 2009 at 1:00 p.m. deadline and did not meet it. There is no evidence of a request for an extension of time to raise the deposit. The letter of commitment for financing was available but not forwarded until after the deadline.

34 Business negotiations take many interesting and varied approaches. 884498 Alberta Ltd. decided not to forward the available letter of commitment for financing which is their right to do. However, as of April 14, 2009 at 1:00 p.m., the Receiver did not have a deposit or a letter of commitment of financing to back up the offer of $6.5 million. The Receiver-manager, with the information it had, made his decision. He accepted the purchaser's proposal. I am not persuaded the Receiver-manager acted improvidently.

The Interests of the Parties

35 No one appeared on behalf of Shape and B. C. on this application.

36 There are three major creditors holding security against the assets the Receiver-manager proposes to sell. The first secured creditor in priority is Vanguard who as of May 19, 2009 was owed $4,711,865.50 with interest continuing to accrue at the per diem rate of $882.26.

37 The second secured creditor in priority is MDC. As of May 1, 2009, MDC was owed $4,145,541.82 with interest accruing at the rate of $868.14 daily. In addition to its own loan to Sharpe and B.C., MDC has guaranteed the loan held by Vanguard.

38 The third secured creditor in priority is RAB Special Situations (Master) Fund Ltd. whose loan is in the approximate amount of $2,000,000.00. This creditor took no part in these proceedings.

39 Vanguard supports the Receiver-manager's proposal in favor of the purchaser. Vanguard will be paid in full by the Receiver-manager's proposal.

40 MDC also supports the Receiver-manager's proposal. With the closing of the transaction with the purchaser, Vanguard will be paid off and MDC will be released of any liability under their guarantee. It is anticipated that there will also be some monies available to reduce the amount of indebtedness on the MDC loan. RAB will get nothing.

41 MDC does not support the position of 884498 Manitoba Ltd. Although 884498 Manitoba Ltd.'s bid exceeds the purchaser's offer by $1.5 million, the bid is subject to the completion of a due diligence review. It is not a guaranteed transaction. MDC supports the Receiver-manager's proposal as it is to close imminently.

42 Neither scenario will result in MDC being paid in full. RAB will not receive any payment on account of their debt no matter which proposal is accepted.

43 It is in the interests of the interested parties that approval to the Receiver-manager's proposal be given.

Consideration of the Efficacy and Integrity of the Process

44 It is important that the potential purchasers in a receivership situation have confidence that if they act in good faith, undertake bona fide negotiations with a receiver-manager and enter into an agreement for purchase of the assets that a court will not lightly interfere with the negotiated agreement. Potential purchasers must have some degree of confidence in the efficacy and integrity of the process. The comments of Saunders J. in *Re: Selkirk*, supra, at p. 246 [C. B. R.] are of assistance:

> In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important consideration is that the process under which the sale agreement is arrived at should be consistent with commercial efficacy and integrity.
>
> In that connection I adopt the principles stated by Macdonald J. A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of 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.

45 Hicks and Mashin attack the process used by the Receiver-manager in their affidavits. They claim they were unable to obtain information in a timely manner and their bids were made subject to conditions that the ultimate purchaser did not have to comply with, notably the provision of a deposit. I do know that the purchaser did ultimately provide a deposit but I do not know when and under what circumstances. Although their allegations raise some concern, I am unable to adjudicate if the procedures required of Mashin or Hicks were substantially different than the procedure for the purchaser based solely on the affidavit evidence before the court.

46 It is true that there were strict timelines under which parties were expected to comply with conditions of the receiver's process, but that does not affect the integrity of the process.

47 As far as efficacy of the process, the Receiver-manager began with a tendering process which resulted in an offer of $750,000.00 and was able to negotiate a proposal from the purchaser in the amount of $5,100,000.00. The efforts of the receiver-manager obtained positive results for the debtor and creditors. As was stated earlier in the *Skyepharma* decision, supra, the integrity of the process should be analyzed from the perspective of those for whose benefit it has been conducted. In that regard, the proposal accepted by the Receiver-manager was considerably higher that the initial tenders at the beginning of the process.

Consideration of Unfairness in the Process

48 The Receiver-manager undertook to sell the assets with a tendering process which was unsuccessful. The Receiver moved on to a second bidding process which once again was unsuccessful. Finally the Receiver followed up with who he considered to be serious buyers and accepted a proposal from the purchaser. All parties were provided with notice of what constituted an acceptable tender by the Receiver and all potential bidders were aware of the time guidelines. The only unfairness alleged is that the conditions of a tender were not the same for all parties. As I have already said I am unable on the evidence before me to conclude whether this allegation has been made out or not. However, other that that one allegation, the process undertaken was a fair process to all concerned.

Decision

49 The court should accept the recommendation of the Receiver except in circumstances where the necessity of rejection of the Receiver-manager's recommendation is clear (See *Crown Trust and Rosenberg*, supra.).

50 Receiver-manager has made a considered effort to obtain the best price and has not acted improvidently. In light of the position of MDC, I have no hesitation in finding that the approval of the proposed sale to the purchaser would be in the best interests of the interested parties.

51 I am unsure if there has been any unfairness in the working of the process with respect to the conditions imposed on the final purchase bids on the property. The evidence is somewhat contradictory and I am unable to resolve the credibility issues on the basis of affidavits alone. However, a decision was required as of the date of the hearing or the sale agreement with the purchaser would have been breached.

52 Due consideration must be given to preserving the efficacy and integrity of the sale process undertaken by the Receiver-manager.

53 After consideration of all the criteria set out in the case law, I have concluded the proposed sale should be approved as requested by the Receiver-manager. To not do so would put any potential sale of the assets at jeopardy and place the parties back into a situation of uncertainty.

54 The vesting orders as requested by the Receiver will be granted.

55 Because I was unable to resolve the issue of unfairness with any degree of certainty, I am not prepared to grant the declaratory relief as requested by the Receiver and that portion of the application is dismissed.

Order accordingly.

TAB 5

The Court of King's Bench Act, C.C.S.M. c. C280

Vesting orders

37(1) The court may by order vest in a person an interest in real or personal property that the court has authority to order to be disposed of, encumbered or conveyed.

...

Sealing confidential documents

77(1) The court may order that a document filed in a civil proceeding is confidential, is to be sealed and is not a part of the public record of the proceeding.

TAB 6

The Real Property Act, C.C.S.M. c. R30

IN ACTIONS GENERALLY

Orders by judge

176(1) In a proceeding respecting land, or in respect of a transaction or contract relating thereto, or in respect of an instrument, caveat, memorial, or other entry affecting land, the court may, by order, direct the district registrar to cancel, correct, substitute, or issue, a certificate of title, or make an endorsement or entry on any instrument, or to do or refrain from doing any act, or make or refrain from making any entry necessary to give effect to the judgment, or order of the court.

TAB 7

The Property Registry
A Special Operating Agency of the Province of Manitoba

Office d'enregistrement des titres et des instruments
Un organisme de service spécial de la Province du Manitoba

October 20, 2004

To: All Clients of the Manitoba Land Titles System

Re: Registration of Court Orders - Appeal Periods

On June 28, 2004 the Ontario Court of Appeal, in the case of Regal Constellation Hotel Ltd., ruled that no appeal is available after a vesting order has been registered in the province's land titles system. The Court of Appeal ruled that once the vesting order had been registered on title it's attributes as a conveyance prevailed, the change of title had been affected and any appeal was therefore moot. It further noted that appeal rights could be protected by obtaining a stay which precludes registration of the vesting order on title pending the disposition of the appeal. As well, the Court of Appeal commented that as there was no requirement as existed in other jurisdictions to show that no appeal is pending and that all appeal rights have been terminated, the registration was permissible in Ontario. The Court noted that once the registration was affected, that the order was embodied in the register and it became a creature of the land titles system and subject to the dictates of that regime. As a result the vesting order merged into the instrument of conveyance on registration and there is no longer a means to impeach the vesting order by way of appeal. The Court of Appeal cited with approval, the Alberta Land Titles Act which requires the Registrar to obtain certain evidence prior to the registration of an order.

Le 20 octobre 2004

Destinataires : Clients du Système d'enregistrement des titres fonciers du Manitoba

Objet : Enregistrement des ordonnances judiciaires- délais d'appel

Le 28 juin, la Cour d'appel de l'Ontario, dans l'affaire *Regal Constellation Hotel Ltd.*, a statué qu'il ne pouvait être interjeté appel après qu'une ordonnance de dévolution a été enregistrée dans le Système d'enregistrement des titres fonciers de la province. La Cour d'appel a statué que, dès que l'ordonnance de dévolution a été enregistrée au titre de propriété et que les attributs en tant que transfert ont eu préséance, le changement de propriété a été visé, tout appel devenant sans objet pour cette raison. Elle a également indiqué que les droits d'appel pouvaient être protégés par l'obtention d'une suspension interdisant l'enregistrement de l'ordonnance de dévolution au titre de propriété jusqu'à la décision sur le pourvoi. La Cour d'appel a également fait remarquer que, vu l'absence d'exigence comme dans il en existe dans d'autres ressorts, de démontrer qu'aucun appel n'est en instance et que tous les droits d'appel ont été épuisés, l'enregistrement était autorisé en Ontario. La Cour a fait remarquer que, dès que l'enregistrement a été visé, l'ordonnance était versée au registre et devenait un élément du Système d'enregistrement des titres fonciers et, à ce titre, soumise aux impératifs de ce régime. En conséquence, l'ordonnance de dévolution se fond avec l'instrument de transfert au moment de l'enregistrement, et il n'existe plus aucun moyen d'attaquer l'ordonnance de dévolution en appel. La Cour d'appel a cité avec approbation, la *Alberta Land Titles Act* qui oblige le registraire à obtenir certaines preuves avant d'enregistrer une ordonnance.

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To safeguard all parties' rights of appeal and to ensure the integrity of the registration, the Manitoba Land Titles Office will adopt Alberta's procedure on the registration of orders as suggested by the Ontario Court of Appeal.

Effective immediately, on the registration of an order that operates to cancel a title, terminate an interest in land, or discharge an instrument, the Registrar will require either:

a) consents by all parties or their solicitors;

b) an undertaken by those having a right to appeal that no appeal will be commenced;

c) a certificate from the Court that issued the order that no appeal has been made and that the time for appeal has expired; or

d) a certificate from the solicitor that all appeals have finally disposed of or discontinued.

Where an appeal of the order has been made, a copy of the final judgment, together with the certificate from the solicitor as indicated above, would be required.

Where the order expressly states that the above is not required or was made ex parte and stated that it did not have to be served, a Registrar could register the order without further evidence.

Afin de protéger les droits d'appel de toutes les parties et pour assurer l'intégrité de l'enregistrement, le Bureau des titres fonciers du Manitoba adoptera la procédure de l'Alberta pour l'enregistrement des ordonnances, comme la Cour d'appel de l'Ontario l'a suggéré.

Avec entrée en vigueur immédiatement, au moment de l'enregistrement d'une ordonnance ayant pour effet d'annuler le titre, de mettre fin à un intérêt foncier ou d'opérer mainlevée à l'égard d'un acte, le registraire exigera ce qui suit :

a) que toutes les parties ou leurs procureurs donnent leur consentement; ou

b) que les personnes qui ont un droit d'appel s'engagent à ce qu'aucun appel ne soit interjeté; ou

c) qu'un certificat soit donné par le tribunal qui a rendu l'ordonnance confirmant qu'aucun appel n'a été interjeté et que le délai d'appel est expiré; ou

d) qu'un certificat du procureur confirme qu'il a été statué sur tous les appels ou qu'il y a eu désistement.

Lorsqu'un appel de l'ordonnance a été interjeté, une copie du jugement définitif, accompagnée du certificat du procureur, comme il est mentionné plus haut, serait exigée.

Lorsqu'une ordonnance énonce expressément que ce qui précède n'est pas exigé ou a été rendu *ex parte* ou qu'il n'existe pas d'obligation de la signifier, un registraire peut enregistrer l'ordonnance sans obtenir d'autre preuve.

Le registraire général et
Chef de l'exploitation,

Richard M. Wilson
Registrar General and
Chief Operating Officer

TAB 8

2000 CarswellOnt 4836
Ontario Court of Appeal

Chippewas of Sarnia Band v. Canada (Attorney General)

2000 CarswellOnt 4836, [2000] O.J. No. 4804, [2001] 1 C.N.L.R. 56, 101 A.C.W.S. (3d) 859, 139 O.A.C. 201, 195 D.L.R. (4th) 135, 41 R.P.R. (3d) 1, 51 O.R. (3d) 641

The Chippewas of Sarnia Band (Plaintiff / Appellant / Respondent) and Attorney General of Canada, Her Majesty the Queen In Right of Ontario and Canadian National Railway Company, Dow Chemical Canada Inc., the Corporation of the City of Sarnia, Amoco Canada Resources Ltd., Amoco Canada Petroleum Company Ltd., Ontario Hydro Networks Company Inc., Union Gas Limited, Interprovincial Pipe Line Inc., the Bank of Montreal, the Toronto-Dominion Bank and Canada Trustco Mortgage Company individually and as class representatives (Defendants / Respondents / Appellants / Cross-Appellants)

Osborne A.C.J.O., Finlayson, Doherty, Charron, Sharpe JJ.A.

Heard: June 19-29, 2000
Judgment: December 21, 2000
Docket: CA C32170, C32188, C32202

Proceedings: reversing in part (April 30, 1999), Doc. 95-CU-92484 (Ont. S.C.J.)

Counsel: *Earl A. Cherniak*, *Q.C.*, *Elizabeth K.P. Grace*, *H. Sandra Bang*, for Appellant
Charlotte Bell, *Q.C.*, *Gary Penner*, *Scott Warwick*, for Attorney General of Canada
J.T.S. McCabe, *Q.C.*, *E. Ria Tzimas*, for Her Majesty the Queen In Right of Ontario
Kenneth R. Peel, for Canadian National Railway Company
M. Philip Tunley, *Jane A. Langford*, for Dow Chemical Canada Inc. and Union Gas Limited
Gerard T. Tillmann, *Norman W. Feaver*, for Corporation of the City of Sarnia, Bank of Montreal, Toronto-Dominion Bank and Canada Trustco Mortgage Company
Jeff G. Cowan, for Amoco Canada Resources Ltd. and Amoco Canada Petroleum Company Ltd.
Joseph Agostino, for Ontario Hydro Networks Company Inc.
Brian A. Crane, *Q.C.*, for Interprovincial Pipe Line Inc.
M. Celeste McKay, *Alan Pratt*, for Intervener, Chief Lisa Eshkakogan Ozawanimke on behalf of the Algonquin Nation in Ontario
Paul Williams, for Intervener, Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames et al.

Subject: Public; Property; Civil Practice and Procedure
Related Abridgment Classifications
Aboriginal and Indigenous law
II Land
II.5 Transfer or disposition
Aboriginal and Indigenous law
XI Practice and procedure
XI.8 Miscellaneous
Civil practice and procedure

XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.h Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.G Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.10 Costs of particular proceedings
XXIV.10.i Motion for judgment
Civil practice and procedure
XXIV Costs
XXIV.13 Costs of appeals
XXIV.13.a General principles

Headnote

Native law --- Reserves and real property — Transfer or disposition — General

Action was commenced by Indian band for return of land or for damages from Crown — Land had been transferred by band to individual in 1839 — Crown and current owners of property brought motion for summary judgment for declaration that patent transferring land was valid and for order dismissing band's claim — Band brought cross-motion for summary judgment for declaration that patent transferring lands was void and for declaration that band had exclusive right to possess and occupy lands — Motion by owners was granted in part and motion by band was granted in part — Motions judge held that no triable issue existed with respect to formal or informal surrender of land by band — Motions judge held that given lack of surrender, 1839 transfer was void and illegal ab initio, and that patent transferring land was also void ab initio — Motions judge held that owners were purchasers in good faith without notice — Motions judge held that damage action against Crown was legally adequate alternative remedy to claim against owners — Motions judge held that it would have been unconscionable, and would have brought administration of justice into disrepute, to let band proceed in action against owners — Motions judge found 60-year equitable limitation period appropriate in circumstances — Motions judge that found band's aboriginal rights in lands extinguished in 1921, at which point rights crystallized into damage claim against Crown — Owner's motion to dismiss band's claim for return of land granted — Appeal by Crown allowed in part, appeal by band dismissed and cross-appeal by owners allowed in part — Agreement negotiated for purchase of reserve lands did not amount to surrender of lands — Notwithstanding absence of surrender, band accepted sale of land — Claim by band was not barred by any statutory limitation period — Patent transferring land was valid on its face and continued to have legal effect until set aside by discretion of court — Principles governing availability of relevant public and private law remedies militated against court exercising its discretion in present case — Band members' acceptance of land transaction was to be considered in exercise of discretion to grant or withhold public law remedy — Band provided no adequate explanation for delay in bringing claim — Exceptional circumstances existed to justify withholding of public law remedy — Claim for return of land was claim for equitable remedy and was subject to equitable principles — Equitable doctrines of laches and acquiescence applied, as did defence of good faith purchaser for value without notice — Imposition of 60-day limitation period was not supportable in law — Band had no entitlement to remedies they sought for return of disputed lands.

Native law --- Practice and procedure — Miscellaneous issues

Action was commenced by Indian band for return of land or for damages from Crown — Land had been transferred by band to individual in 1839 — Crown and current owners of property brought motion for summary judgment for declaration that patent transferring land was valid and for order dismissing band's claim — Band brought cross-motion for summary judgment for declaration that patent transferring lands was void and for declaration that band had exclusive right to possess and occupy lands — Motion by owners was granted in part and motion by band was granted in part — Motions judge held that no limitation period barred band's claim against Crown for breach of fiduciary duty — Motions judge held that limitation periods in provincial

statutes did not apply directly or indirectly through incorporation in federal statute — Motions judge held that pre-Confederation statutes were equivalent to federal laws but did not evidence specific intent necessary to extinguish Indian title to disputed lands — Motions judge held that owners could not depend on defence of laches and acquiescence as factual foundation of defences was entirely lacking — Motions judge held that 60-year equitable limitation period was appropriate in circumstances — Motions judge found that band's aboriginal rights in lands extinguished in 1921, at which point rights crystallized into damage claim against Crown — Owner's motion to dismiss band's claim for return of land was granted and Crown's motion to dismiss claim for damages was dismissed — Appeal by Crown allowed in part, appeal by band dismissed and appeal by owners allowed in part — Claim by band was not barred by any statutory limitation period — Band members' acceptance of land transaction was to be considered in exercise of discretion to grant or withhold public law remedy — Band provided no adequate explanation for delay in bringing claim — Exceptional circumstances existed to justify withholding of public law remedy — Claim for return of land was claim for equitable remedy and was subject to equitable principles — Equitable doctrines of laches and acquiescence applied, as did defence of good faith purchaser for value without notice — Imposition of 60-day limitation period was not supportable in law — Band had no entitlement to remedies they sought for return of disputed lands.

An action was commenced by an Indian band for the return of land situated in the city of Sarnia and its outskirts. The land was owned by over 2,000 families, homeowners, businesses, churches and individuals who purchased their land in good faith. The band claimed that they held the land under Indian title, recognized at common law and guaranteed by Treaty 29. The band denied that they had ever surrendered the land and claimed that the orders in council approving the alleged sale of the land in 1839 and the corresponding patent were of no force and effect. The band sought a declaration that their treaty protected common law and aboriginal title in the disputed lands was never extinguished and that they alone had exclusive right to occupy, enjoy, possess and use the lands. The band also sought damages for trespass and damages against the Crown for breach of fiduciary duty.

The Crown and the property owners moved for summary judgment to dismiss the band's claim for possession and trespass. The owners claimed that the Crown had the power to extinguish Indian title in the lands unilaterally and that it did so in the patent. The owners also relied on the intervening 145 years as providing the defences of statutory limitations and equitable delay. The band brought a cross-motion for summary judgment seeking a declaration that the patent was void and that their claim should succeed. The motions by the owners were granted in part and the cross-motion by the band was granted in part. The motions judge held that there was no triable issue with respect to the formal or informal surrender of land by the band. The motions judge held that the lack of surrender made the 1839 transfer void and illegal ab initio, and that the patent transferring the land was also void ab initio. The motions judge found that the owners were purchasers in good faith without notice, and that a damage action against the Crown was a legally adequate alternative remedy to a claim against the owners. The motions judge found that there had been no substantial recent connection between the band and the lands, and that the band had received substantial payment for lands in trust at a price considered to be fair. The motions judge held that it would be unconscionable, and would bring the administration of justice into disrepute, to let the band proceed in its action against the owners. The motions judge found that a 60-year equitable limitation period was appropriate in the circumstances, and that the band's aboriginal rights in the lands were extinguished in 1921, at which point the rights crystallized into a damage claim against the Crown. The owners' motion to dismiss the band's claim for the return of the land was granted, and the motions judge declared that the owners held title free and clear of any aboriginal title or treaty right. The Crown and the band brought appeals. The owners brought a cross-appeal in the band's appeal.

Held: The appeal by the Crown was allowed in part, the appeal by the band was dismissed, and the cross-appeal by the owners was allowed in part.

The Crown and the band entered into Treaty 29 in 1929. The Treaty complied with all the formalities attached to a surrender of Indian land to the Crown. Under the Treaty, the band surrendered all its rights, title and interest in the land except for its rights and title in four reserves, one of which included the disputed lands. The reserves were therefore not only protected by the band's pre-existing land rights as acknowledged by the Crown, but also by the promise contained in the written Treaty. In 1839, the head chief of the band advised Crown officials that the band was prepared to sell a portion of the back of the upper reserve. Negotiations were conducted by a private citizen for the purchase of the relevant lands, and an agreement was reached for a reasonable price. The agreement was approved by the Lieutenant Governor, and orders-in-council were issued. The orders-in-council neither referred to a surrender or recommended that a surrender of the lands be accepted. The agreement for the purchase of the lands did not amount to a surrender. The agreement failed to follow the established procedure for the surrender of Indian lands. Although the agreement was negotiated by a private citizen, the motions judge erred in describing the transaction as a

"private sale". The negotiations were conducted with the knowledge and under the authority of Crown officials and the terms of the transaction were reviewed and approved by the Crown. Although the orders-in-council did not refer to a surrender of the lands, they did refer to the transaction as the "proposed" sale, suggesting that the transaction would close some time in the future and allowing for a surrender before closing. The motions judge was correct in concluding that the language of the orders-in-council was consistent with the Crown's intention to obtain a surrender at some point in the future. As the lands were not in fact transferred until 14 years after the orders-in-council were issued, the Crown had ample opportunity to obtain a surrender, but failed to do so. In 1851, Crown officials mistakenly believed that a surrender had been made and that a surrender document existed. The letters patent issued in 1853 were consistent with a surrender having been obtained. The patent was valid on its face and continued to have legal effect until a court exercised its discretion to set it aside. The availability of public and private law remedies militated against the exercise of such discretion in this case.

The motions judge found that no evidence existed that the band made any complaint about the land transaction or the head chief's authority to negotiate the agreement. In 1843, the band members made detailed complaints against the head chief's abuse of his position at a public inquiry, and made no reference at that time to the land transaction. The absence of any reference to the transaction was significant. The motions judge erred in characterizing it as a failure to complain about a lack of surrender, as what was significant was the failure to complain about the head chief's agreement to sell one quarter of the reserve. This failure to complain constituted evidence from which it could be reasonably inferred that the head chief acted with the authority of the band or that they had accepted his actions after the fact. The land transaction was communally accepted and seen by the band as providing a source of funds with which they could develop sugar-making resources. Further support for the finding that the band was aware of and in agreement with the land transaction was the band's recognition of the Crown's right to survey the disputed lands in 1842 and their refusal to allow the Crown to survey the remainder of the reserve. The band's knowledge and acceptance of the land transaction was also demonstrated in the subsequent correspondence between the band and the Crown concerning payment of the purchase price under the agreement, and disputes over road allowances across the reserve from the disputed lands to the river. Finally, questions posed by the chiefs of the band at the General Council in 1855 was strong evidence that the band accepted the land transaction, no longer viewed the disputed lands as theirs, and were prepared to abide by the terms of the agreement.

The question of the effect of the passage of the *Quebec Act, 1774* on the formal legal status of the *Royal Proclamation* was of little importance, given that the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the band's consent to surrender. As aboriginal title could only be lost by a voluntary communal surrender of land to the Crown, the determination of the legal status of the *Royal Proclamation* was unnecessary.

The motions judge held that no statutory limitation period barred the band's action against the owners. The motions judge concluded that none of the relevant Ontario statutes was incorporated in federal law by reference. The owner's appeal related to the applicability of the *Crown Liability and Proceedings Act*, and the question of whether pre-Confederation statutes extinguished aboriginal treaty rights. Section 32 of the *Crown Liability and Proceedings Act* incorporates by reference the Ontario limitations laws with respect to proceedings by or against the federal Crown. The owners took the position that the band's claim for recovery of the land was a "proceeding by the Crown" within the meaning of s. 32. The motions judge correctly rejected this argument. The band's claim was not a proceeding by the Crown. As a result, the *Nullum Tempus Act* also had no application to the proceedings brought by the band. The 1859 pre-Confederation statute provided for a 20-year limitation period with respect to actions for the recovery of land. The statute did not extinguish aboriginal treaty rights, as it did not meet the "clear and plain" language test. The motions judge was correct in finding that the statute did not evidence any intent to affect or to extinguish the aboriginal or treaty rights of the band in the disputed lands. No statutory limitations acted to bar the band's claim.

Public law remedies are derived from common law and equitable sources, and are discretionary in nature. Delay in asserting a claim to a public law remedy, and reliance by an innocent third party on the impugned act or decision, is a well-established basis for refusing a remedy. A Crown patent apparently granting the fee simple in land is the type of act which will be relied on by innocent third parties. Although aboriginal rights are fundamental, constitutionally protected rights, the rights are not absolute. The principle of legality and the rule of law require that a priori consideration be given to the party whose rights have been taken, but the right asserted by the complaining party must be considered in relation to the rights of others. Aboriginal claims will not be defeated on grounds of delay alone. The reason for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples. The band members' acceptance of the land transaction must be considered

in the exercise of the discretion to grant or withhold a public law remedy. The patent was not granted in a situation where there was "a total absence of jurisdiction". The transaction was approved by the Crown to ensure that the band's interests were protected. The failure to obtain a proper surrender was not the result of any fraud or advantage taken of the band, or from any attempt to deny the band's rights, but was rather an inadvertent error. The discretion existed to refuse a public law remedy with respect to the inadvertent error of a dysfunctional bureaucracy that was relied on for 150 years by the innocent owners. The band provided no adequate explanation for the delay in bringing its claim. The band made no complaint whatsoever for 150 years, and gave no indication of any dissatisfaction with the possession by others of lands formerly within their reserve. Exceptional circumstances existed to justify the withholding of a public law remedy. The interests of the innocent owners were to prevail. The band's claim for the return of the lands was a claim for an equitable remedy, and was subject to equitable principles. A claim to aboriginal title is not strictly legal in nature, and is not immune from the principles of equity. The discretionary factors associated with equitable remedies were required to be considered in the circumstances. The discretionary factors bearing upon the availability of public law remedies is closely paralleled by equitable considerations applicable as between private parties in respect of proprietary claims. Delay in asserting a right gives rise to the equitable doctrines of laches and acquiescence. The relevant facts in this case bring it squarely within the principles governing laches. The band accepted the transfer of its lands and acquiesced in the transaction. The owners altered their position by investing in and improving the lands in reasonable reliance on the band's acquiescence. The equitable defences of laches and acquiescence applied, and it would be unjust to disturb the situation. The defence of a good faith purchaser for value without notice was also applicable in the circumstances. The motions judge found that all of the owners were good faith purchasers for value. The motions judge imposed a strict 60-year "equitable limitation period" extending the time within which the band could assert their claim to the lands unaffected by the operation of the good faith purchaser for value defence. The imposition of such a limitation period was not supportable in law. No reason existed why the good faith purchaser for value defence should not be applied to preclude the band from asserting their claim against the owners.

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Quebec Act, 1774 (U.K.), 14 Geo. 3, c. 83, reprinted R.S.C. 1985, App. II, No. 2

Generally — considered

Real Property, and to Render the proceedings for recovering possession thereof in certain cases, less difficult and expensive, Act to amend the Law respecting, S.U.C. 1834, c. 1

Generally — referred to

Royal Proclamation, 1763 (U.K.), reprinted R.S.C. 1985, App. II, No. 1

Generally — referred to

Union Act, 1840 (3 & 4 Vict.), c. 35, reprinted R.S.C. 1985, App. II, No. 4

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 20 — considered

R. 20.04 — considered
Treaties considered:
Robinson-Huron Treaty, 1850
Generally — referred to
Treaty No. 27 1/2, 1825
Generally — referred to
Treaty No. 29, 1827
Generally — referred to

APPEALS by band and Crown from judgment reported at 1999 CarswellOnt 1244, 40 R.P.R. (3d) 49 (Ont. S.C.J.), granting in part property owners' motion for summary judgment dismissing band's claim for possession of land, and granting in part band's cross-motion for summary judgment declaring patent transferring reserve lands was void; CROSS-APPEAL by owner in band's appeal.

***Per curiam*:**

I. Overview of the Proceedings

A. The Chippewas' Claim

1 The Chippewas of Sarnia Band ("the Chippewas") claim ownership of a parcel of land located in and around the City of Sarnia ("the disputed lands"). Prior to 1827, the disputed lands were part of a vast tract of land over which the Chippewa Nation [1] had dominion. By 1827, the Chippewas had surrendered almost all of that territory to the Crown. They had, however, retained four reserves, including one referred to as the Upper Reserve located on the St. Clair River near present-day Sarnia. The ancestors of the Chippewas of Sarnia lived on the Upper Reserve. The Upper Reserve originally occupied 10,280 acres. The disputed lands are the 2,540 acres located at the rear or back of the reserve furthest from the St. Clair River, and are presently occupied by over 2,000 different individuals, organizations, and businesses.

2 In November 1839, Malcolm Cameron, a politician and land speculator, purported to purchase the disputed lands from the Chippewas. The lands were eventually conveyed to him by Crown patent in 1853 ("the Cameron patent"). The present occupants of the disputed lands trace their title to the Cameron patent. The Chippewas claim that their ancestors never surrendered the disputed lands and that their interest in the land is the same now as it was in 1827.

3 The Chippewas started this action in 1995. In essence, they seek declaratory relief recognizing their right to the disputed lands and damages for trespass and breach of fiduciary duty. If the Chippewas obtain the declaratory relief claimed, they would be entitled to possession of the land, although they have made it clear that they are ready and willing to negotiate with the federal and provincial governments and do not seek the wholesale eviction of the present occupiers of the property.

4 The individual defendants, other than the Attorney General of Canada ("Canada") and Her Majesty the Queen in Right of Ontario ("Ontario"), occupy parts of the disputed land. They also represent the defendant class certified by Adams J. in 1996 under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6. In this decision we refer to them collectively as the landowners.

B. The Motions for Summary Judgment

5 Canada brought a motion for summary judgment asking that the parts of the Chippewas' claim seeking declaratory relief be dismissed. The landowners also brought a motion for summary judgment seeking the dismissal of the action against them on the grounds advanced by Canada in its motion and on other grounds applicable only to the individual defendants.

6 Ontario supported both motions.

7 The Chippewas responded with a cross-motion seeking summary judgment against all defendants on the parts of the claim seeking a declaration as to the Chippewas' rights to the disputed lands.

8 None of the motions for summary judgment touched the parts of the claim seeking damages against Canada and Ontario. The trial of those claims awaits the result of these proceedings.

9 The motions judge, Campbell J.:

- dismissed Canada's motion for summary judgment;
- allowed in part the landowners' motion for summary judgment, dismissed the action against them and declared that they held title free and clear of any aboriginal title or treaty right; and
- allowed the Chippewas' motion to the extent that it sought a declaration of invalidity with respect to the letters patent issued to Malcolm Cameron in 1853, but dismissed the Chippewas' motion for a declaration that they continued to enjoy "aboriginal, treaty and constitutional rights" in the disputed lands.

10 The motions judge's main findings were:

- There was no evidence that the Chippewas ever surrendered the disputed lands.
- The sale of the disputed lands by three chiefs of the Chippewas to Malcolm Cameron in 1839 was a private sale without formal surrender and as such was prohibited by common law and by the *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 ("*Royal Proclamation*").
- There was no evidence that the Chippewas ever expressed a free, voluntary and fully informed collective intention to release their interest in the lands or to consent to the sale to Cameron.
- The Governor General, Lord Elgin, had no authority to issue a patent for the disputed lands in 1853. Therefore, the patent issued to Cameron was void *ab initio* and of no force and effect.
- The Chippewas' interest in the lands continued to this day, unless extinguished by some constitutionally applicable statute, rule of law, or principle of equity.
- None of the limitations statutes relied upon by the parties operated to extinguish the Chippewas' interests in the lands or to bar the Chippewas' action for recovery of the lands.
- The doctrines of laches, acquiescence and estoppel by election did not bar the Chippewas' action.
- The defence of good faith purchaser for value without notice was a fundamental aspect of the applicable real property regime. This defence could, in appropriate cases, bar an aboriginal claim against an innocent third party purchaser.
- Against ordinary property, the good faith purchaser for value without notice defence operated immediately upon purchase. Such an abrupt application, if applied to land subject to aboriginal title, would ignore the legal priority to be accorded to aboriginal rights and would result in the extinguishment of the Chippewas' title immediately in 1861.
- The competing interests of the Chippewas and the innocent purchasers without notice would best be balanced by allowing the good faith purchaser without notice defence to operate only after sixty years. A sixty-year equitable limitation period would protect aboriginal property interests against immediate extinguishment on sale to a good faith purchaser for value without notice.
- The sixty-year equitable limitation to the claim against the good faith purchaser began on August 26, 1861 and ended on August 26, 1921. As of August 26, 1921, no action had been commenced against any good faith purchaser. Therefore, the defence of good faith purchaser for value without notice operated to extinguish the Chippewas' aboriginal title and treaty rights in the lands on August 26, 1921.

• The aboriginal rights which were extinguished as of August 26, 1921 have crystallized into a damage claim against the Crown.

11 Based on his findings, the motions judge directed that the following order should issue:

(a) Canada's motion to dismiss the Chippewas' claim on the basis that the Cameron patent was valid was dismissed.

(b) The landowners' motion in respect of the validity of the 1853 Cameron patent was also dismissed.

(c) The Chippewas' motion in respect of the invalidity of the Cameron patent was allowed. A declaration was issued to the effect that the patent issued to Malcolm Cameron on August 13, 1853 was void *ab initio* and of no force and effect because there was no lawful surrender. Neither the orders-in-council of March 19, 1840 and June 18, 1840 which approved the sale to Cameron, nor the subsequent letters patent extinguished the Chippewas' unceded, unsurrendered, common law, and aboriginal interests in the lands.

(d) The Chippewas' motion for a declaration that they enjoyed continuing and unextinguished common law, aboriginal, treaty and constitutional rights in the lands was dismissed.

(e) The Chippewas' action for damages against the Crown was permitted to continue.

(f) The motion by the landowners was allowed. The Chippewas' claim against the landowners was dismissed on the basis that the defence of good faith purchaser for value without notice protected the landowners' title and that the application of an equitable limitation period of sixty years worked to extinguish all right, title and interest of the Chippewas in the disputed lands as of August 26, 1921. A declaration was issued to the effect that the present landowners held their title free and clear from any aboriginal title claims.

C. The Appeals and Cross-Appeals

12 The motions judge's decision gave rise to six appeals and cross-appeals, all of which were argued during the last two weeks of June 2000. In particular:

• Canada appealed from the dismissal of its motion for summary judgment, the order dismissing in part the landowners' motion for summary judgment, and the order allowing the Chippewas' motion. Canada sought an order dismissing that part of the Chippewas' claim in which the Chippewas asserted that the Crown had no authority, right or jurisdiction to issue the patent to Malcolm Cameron and a further order dismissing that part of the claim which alleged that the patent was void *ab initio* and unenforceable at law.

• The Chippewas appealed from the orders allowing the landowners' motion for summary judgment and from the dismissal of the Chippewas' cross-motion for summary judgment. They sought an order declaring that they enjoyed continuing and unextinguished common law, statutory, aboriginal, treaty and constitutional rights in the disputed lands. Canada, Ontario and the landowners are respondents on the Chippewas' appeal.

• The landowners cross-appealed in the Chippewas' appeal, seeking:

(a) an order declaring that the letters patent issued to Cameron were valid and created a valid interest in the lands in question;

(b) a declaration that the effect of the patent was to extinguish any aboriginal title or treaty rights in the lands; and

(c) a declaration that any right of action that the Chippewas may have had for recovery or enforcement of any interest in the land was barred by the operation of limitations statutes or by various equitable doctrines.

13 Ontario cross-appealed in the Chippewas' appeal and sought an order granting the landowners' motion for summary judgment and an order dismissing the Chippewas' cross-motion. Ontario contended that the Cameron patent was valid and conveyed the lands to Cameron free of any interest of the Chippewas. Ontario also claimed that the doctrine of good faith purchaser for value without notice extinguished any claim that the Chippewas had from the time of the purchase rather than sixty years after the purchase.

14 On January 27, 2000, the Chippewas moved to quash Ontario's appeal from the dismissal of Canada's motion for summary judgment and Canada's cross-appeal in the Chippewas' appeal. These motions were dismissed. [2]

15 The following representatives of First Nations appeared as interveners on the appeals: Chief Richard K. Miskokomon on behalf of the Chippewas of the Thames, Chief Mary Jane Wardell on behalf of the Ojibways of Thessalon, Martin Bayer on behalf of the United Chiefs and Councils of Manitoulin and Chief Lisa Eshkakogan Ozawanimke on behalf of the Algonquin Nation in Ontario.

16 The appellate proceedings were case-managed by Goudge J.A. who, among other things, determined the order of, and time allocations for, oral argument after consulting with all counsel. It was agreed by all parties that, given the nature of the judgment appealed from, none of the appeals and cross-appeals related to interlocutory orders and that, consequently, the proceedings were properly before this court. We are grateful to Goudge J.A. for his assistance. We are also grateful to counsel, not only for the quality of their oral arguments, but also for their cooperation in adhering to the times allocated for hearing the appeals.

D. Our Decision in a Nutshell

17 In our view, these appeals and cross-appeals give rise to two main issues. First, was there a surrender of the disputed lands by the Chippewas to the Crown? Second, if there was no surrender, what remedies, if any, are the Chippewas entitled to?

18 Although the first issue gave rise to questions that were essentially factual, much of the argument was focussed on whether the surrender provisions in the *Royal Proclamation* had the force of law at the relevant time, and if so, what effect would any failure to comply with these provisions have on the Cameron transaction. The motions judge held that the surrender procedures in the *Royal Proclamation* had the force of law at the relevant time, that these procedures were not followed and that the Chippewas never consented to or affirmed the Cameron transaction. Consequently, the following points were argued before us:

> 1. Did the surrender procedures set out in the *Royal Proclamation* have the force of law at the time of the sale to Cameron in 1839 and the subsequent letters patent in 1853?
>
> 2. Did the Chippewas surrender the disputed lands to the Crown?
>
> 3. If the lands were not surrendered, did the Chippewas nonetheless consent to or affirm the sale to Cameron?

19 The first question has been authoritatively determined by this court in *Ontario (Attorney General) v. Bear Island Foundation* (1989), 68 O.R. (2d) 394 (Ont. C.A.), aff'd [1991] 2 S.C.R. 570 (S.C.C.). This court held that the surrender provisions of the *Royal Proclamation* were revoked by the *Quebec Act, 1774*, R.S.C. 1985, App. II, No. 2. The motions judge was bound by this decision and, consequently, he erred in departing from its authority when he determined otherwise. However, we are of the view that, in this case, little turns on whether the surrender provisions of the *Royal Proclamation* had the force of law at the relevant time. Instead, we adopt the view that surrender was necessary as a result of the established protocol between the Crown and First Nations peoples that aboriginal title could be lost only by surrender to the Crown. The precise legal status of the *Royal Proclamation* at the time of the Cameron transaction is therefore of no consequence to our decision.

20 On the second point, we accept the proposition that a surrender required a voluntary, informed, communal decision to give up the land and we agree with the motions judge that the Chippewas never surrendered the disputed lands to the Crown. However, we disagree with a number of the motions judge's findings relating to the Chippewas' participation in the Cameron transaction. This brings us to the third point.

21 In our view, the evidence leads to the inescapable conclusion that, notwithstanding the absence of a surrender, the Chippewas accepted the sale to Cameron. This finding becomes important in our determination of the appropriate remedies.

22 The following points were argued with respect to the remedies sought by the Chippewas:

> 4. Is the Chippewas' claim barred by any statutory limitation periods?
>
> 5. In the absence of a surrender, is the Cameron patent void *ab initio* or is the remedy subject to the exercise of the court's discretion?—
>
> 6. Do the equitable defences of laches and acquiescence apply to bar the Chippewas' claim to the disputed lands?
>
> 7. Does the equitable defence of good faith purchaser for value apply to defeat the Chippewas' claim? If so, was the motions judge correct in finding that the defence of good faith purchaser for value was subject to an equitable sixty-year limitation period before it can operate to extinguish the Chippewas' claim to the land?
>
> 8. If the Chippewas enjoy continuing and unextinguished rights in the disputed lands, should this court order that the Crown has a duty to negotiate in good faith with the Chippewas?

23 The motions judge held that the Chippewas' claim was not barred by any statutory limitation period. He held further that in the absence of surrender, the Cameron patent was void *ab initio* and that the defences of laches and acquiescence could not be relied upon. The motions judge concluded, however, that the present occupiers of the land could rely on the doctrine of good faith purchaser without notice subject to a sixty-year "equitable limitation period" which in effect postponed the application of the doctrine.

24 We agree with the motions judge that the Chippewas' claim is not barred by any statutory limitation period. However, we do not agree that the Cameron patent was void *ab initio*. In our view, the patent was valid on its face and continues to have legal effect unless and until a court decides to exercise its discretion to set it aside. We are of the view that the principles governing the availability of the relevant public and private law remedies militate against a court exercising its discretion in this case. Finally, we are of the view that the imposition of a sixty-year "equitable limitation period" is not supportable in law. In the result, we are of the view that the Chippewas have no entitlement to the remedies they seek for the return of the disputed lands and that they are left with their claim in damages against Canada and Ontario.

II. Preliminary Issues

25 Two preliminary issues were raised by the parties. First, the Chippewas sought to introduce fresh evidence on their appeal. Second, Ontario challenged the motions judge's authority to decide the case on motions for summary judgment.

A. Chippewas' Motion to Introduce Fresh Evidence

26 The Chippewas sought to introduce fresh evidence which generally fell into two categories:

> (a) new evidence relating to sales of property within the disputed lands that occurred after the decision below; and
>
> (b) further evidence of the circumstances surrounding the sale of Indian lands which was already addressed in the existing record.

27 It was agreed that we would deal with the fresh evidence issue on the basis of counsel's written material. No oral submissions were made.

28 The test for the admission of fresh evidence on appeal is that set out by the Supreme Court of Canada in *Public School Boards' Assn. (Alberta) v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44 (S.C.C.). See also *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.). The requirements for the admission of fresh evidence are as follows:

1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial.

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the proceeding.

3. The evidence must be credible in the sense that it is reasonably capable of belief.

4. The evidence must be such that if believed, it could reasonably, when taken with the other evidence adduced, be expected to have affected the result.

29 In our view, the proposed fresh evidence does not meet these requirements. In particular, it is not evidence that if believed could reasonably, when taken with the other evidence, affect the result.

30 The motion to admit fresh evidence is therefore dismissed.

B. The Summary Judgment Issue

31 Ontario submits that the motions judge "significantly overstepped" the narrow role of a motions judge when he dealt with the motions that were brought before him. Ontario asserts that in his 241-page reasons for judgment, the motions judge assessed credibility, weighed evidence, made findings of fact on disputed evidence and generally dealt with the summary judgment motions in such a way as to conduct what was essentially a paper trial.

32 Ontario accepts that, pursuant to Rule 20.04 of the Rules of Civil Procedure, the motions judge was entitled to determine questions of law and to " . . . grant judgment accordingly". In particular, Ontario accepts that the motions judge could grant judgment on discrete issues of law such as the application of the doctrine of good faith purchaser for value without notice. However, Ontario submits that where the resolution of discrete issues of law required the motions judge to make findings of fact on evidence that was in conflict, the motions judge exceeded the jurisdiction given to him by Rule 20.

33 We are prepared to accept that in some instances, the motions judge made findings of fact and drew inferences from evidence which was to some degree conflicting. We are, nonetheless, not disposed to give effect to Ontario's submissions on the summary judgment issue for the following reasons.

34 Ontario participated fully in the summary judgment proceedings. None of the parties, including Ontario, took the position that, having regard to the voluminous evidence placed before the motions judge and the issues of law raised by the material, it was not appropriate to deal with the matter under Rule 20. To the extent that the parties, including Ontario, participated in what Ontario asserts was a paper trial, they got precisely what they agreed to: a resolution of clearly identified issues of fact and law on the basis of a paper record. In addition, Ontario filed no material on the motion that would in any way suggest that this was not an appropriate matter to be decided under Rule 20.

35 Apart from the expert witnesses, there are no living witnesses who could give relevant evidence. Thus, if the action were to proceed to trial, the trial judge would be in no better position to deal with the issues than the motions judge, unless one were to accept Ontario's late submission that the trial judge would have an advantage from seeing and hearing the expert witnesses testify. In our opinion, absolutely nothing would be gained by sending this matter to trial.

36 We are authorized by s. 134(1)(c) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to make a decision on appeal that " . . . is considered just". It would not, in our view, be " just" to accede to Ontario's position on the summary judgment issue, particularly where Ontario did not see fit to raise the issue below: see *National Trust Co. v. Bouckhuyt* (1987), 61 O.R. (2d) 640 (Ont. C.A.); *Scarboro (Scarborough) Golf & Country Club Ltd. v. Scarborough (City)* (1988), 66 O.R. (2d) 257 (Ont. C.A.), leave to appeal to S.C.C. refused [1989] 2 S.C.R. vi (S.C.C.); *Shaver Hospital for Chest Diseases v. Slesar* (1979), 27 O.R. (2d) 383 (Ont. C.A.), leave to appeal to S.C.C. refused (1980), [1981] 1 S.C.R. xiii (S.C.C.).

37 We would not give effect to this ground of appeal.

III. The Facts

A. Introduction

38 The summary judgment motions raised complex legal issues, turning in part on the interpretation of old statutes and documents, the nature and scope of arcane remedies, and traditional property law concepts, some of which seem to have more relevance to 17th century England than to present-day Ontario. Despite the many difficult legal issues raised, however, this case is first and foremost a factual one. The determination of the Chippewas' claim is necessarily site-specific and primarily fact-driven. As the motions judge noted:

> This decision affects these lands only. As noted below in response to the argument *in terrorem*, this decision turns on the unique story that unfolded around these four square miles and the specific terms of the instruments affecting it; above all, the site-specific provisions of Treaty 29.

39 The events giving rise to these proceedings spread over more than 200 years and are found in the thousands of historical documents filed by the parties and analyzed in the affidavits and cross-examinations of various experts. There was no *viva voce* evidence presented on the motions. The motions judge undertook an exhaustive review of the massive record. He told the story underlying this dispute with extraordinary clarity and vitality. We have borrowed liberally from his reasons (which unfortunately are not reported) in setting out the relevant facts.

40 The motions judge made numerous findings of fact. Many were primary findings of fact based directly on information contained in the historical documents or found in the uncontested parts of the evidence of the various experts. Others findings were in the nature of inferences drawn from one or more of the primary findings of fact. The primary facts as found by the motions judge are not challenged. Some of the inferences he drew from those facts are, however, very much in dispute. In the unusual circumstances of these summary judgment proceedings, justice dictates that we approach the motions judge's findings of fact as though they were made at trial. We defer to the inferences he drew except where we conclude that they are based on a misapprehension of the evidence, a failure to consider material evidence, or where in the light of the totality of the undisputed primary facts, we conclude that the inferences the motions judge drew were unreasonable. As will become evident, we do not accept some of the inferences drawn by the motions judge.

B. The Occupants of the Disputed Lands: Then and Now

41 At the turn of the 18th century, the disputed lands were in Chippewa territory. The Chippewas were established over a vast expanse of land, including present-day southwestern Ontario. The Chippewa Nation consisted of three distinct groups who occupied different territories, but shared a common language and similar customs and traditions. The Mississauga Chippewas occupied southwestern Ontario. By 1760 they had established several seasonal villages in southwestern Ontario, including one on the St. Clair River near present-day Sarnia.

42 The Chippewas lived in relatively small groups spread out over their vast territory. They survived by hunting, fishing, gathering, growing corn, and harvesting maple sugar. To do so they moved from place to place within their lands on a seasonal basis. Groups of families, referred to as bands, shared a territory which supplied them with the necessary food, shelter and clothing. Within these regional bands, there were a number of smaller traditional bands consisting of thirty to sixty people. In the late 1820s after the Chippewas had given up most of their land and began to settle on reserves, traditional distinctions between various bands became somewhat blurred and those who lived on particular reserves were seen as having a communal interest in that reserve. The evidence indicates that as of 1839 there were approximately six regional bands of Chippewas in southwestern Ontario, each of which had 250 to 350 members. The St. Clair regional band, the ancestors of the Chippewas of Sarnia, included approximately eight to ten traditional bands.

43 Each traditional band had a chief. The chief was usually the eldest son of the former chief, however, the band could choose someone else if it decided that the eldest son was not up to the task. The chief acted with the concurrence of the band

as expressed at meetings of the principal men in the band, and had little authority to act on his own. The actual power of any particular chief depended in large measure on his own leadership abilities. The regional Chippewa bands came to recognize one chief as the Head Chief. The Head Chief was the primary spokesman in dealings with the Crown but within the Chippewa community had no more power than the other chiefs.

44 The traditional bands managed their own local affairs at Local Councils attended by the principal men of the band. Matters of general importance to the region were resolved at General Councils attended by the chiefs and principal men of the traditional bands within the region. Traditional bands within a region would come together on occasion at a principal village within the region, like the one near present-day Sarnia, to engage in various social activities and decide matters of regional importance.

45 Today, the Chippewas live on what is left of the Upper Reserve. Their reserve occupies some 3,000 acres adjacent to the disputed lands. The disputed lands themselves have been divided into 2,276 properties. The properties are zoned for various uses ranging from agricultural to industrial. There are over 2,000 residences, five schools, five churches and a number of commercial and industrial properties located on the disputed lands. The Canadian National Railway Company's main line between Ontario and western Canada runs through the disputed lands.

46 The individual defendants and the defendant class are the present occupants of the disputed lands. Until this action was commenced in 1995, they had no way of knowing or discovering the existence of the claim made by the Chippewas of Sarnia. They and their predecessors in title since 1861 are innocent of any illegality or prohibited act. They acquired the land in good faith for good value with no knowledge of and no reason to believe the Chippewas of Sarnia had any claim to the land. The individual defendants and their predecessors in title have developed the property at considerable expense. The motions judge described their investment in the property as being in the "hundreds of millions of dollars". He also observed that those who now live and work on the disputed lands have a "deep connection" with those lands.

C. The Time Line

47 Before examining the relevant events in some detail, it is helpful to set out a chronology of the central events:

Date—	**Event**
1756-1763	Southwestern Ontario, including the disputed lands, was under the dominion of the Chippewa Nation. Both the French and English, who were at war, claimed the area as part of their North American empires. The white men in the area were primarily involved in military operations or fur trading.
1763	The Treaty of Paris ended the seven-year war between France and England. The French Crown ceded New France to England and also relinquished any other claim to present-day Ontario. Southwestern Ontario, including the disputed lands, became part of British North America and fell under the control of the English Crown.
October 7, 1763	George III, by order-in-council, issued a Royal Proclamation. The Proclamation created four new colonies, including Quebec, from the land ceded to the English Crown by France in the Treaty of Paris, established governments for those colonies, and addressed the status of Indian lands throughout British North America. Southwestern Ontario was not part of any of the established colonies and was instead part of what was referred to in the Proclamation as the "interior" Indian territory.
1764	William Johnson, the Superintendent of Indian Affairs for the northern district, convened a large meeting with the First Nations chiefs at Niagara. Many Chippewa chiefs were present. The English Crown and the chiefs entered

	into the Treaty of Niagara. William Johnson read the 1763 Proclamation as it related to Indian lands and the regulation of trade. The chiefs promised to keep the peace and deliver up any prisoners taken during the previous hostilities.
1774	The British Parliament passed the *Quebec Act*. The *Act* expanded the boundaries of the colony of Quebec to include southwestern Ontario, introduced French civil law into that colony, guaranteed religious freedom and altered the form of colonial government. The effect, if any, of the *Quebec Act* on the provisions relating to Indian lands in the Royal Proclamation is the subject of dispute in this litigation.
1791	By the *Constitutional Act, 1791*, R.S.C. 1985, App. II, No. 3, the British Parliament divided Quebec into the provinces of Upper and Lower Canada. Southwestern Ontario was part of Upper Canada.
1818 to 1825	The Chippewas and the Crown conducted a series of negotiations aimed at the surrender of a large part of the Chippewas' territory to the Crown for settlement purposes.
April 1825	The Chippewas and the Crown entered into Provisional Treaty 27 1/2 whereby the Chippewas gave up their rights to some 2.2 million acres of land referred to as the Huron tract. The Chippewas, however, maintained their rights to four specific areas (reserves) one of which, the Upper Reserve, included the disputed lands.—
July 10, 1827	The land surrendered by the Chippewas to the British Crown in provisional Treaty 27 1/2 and the four reserves were surveyed and the Chippewas and the British Crown entered into Treaty 29, which finalized the agreement reflected in the provisional Treaty.
August 12, 1839	Malcolm Cameron, a businessman, land speculator and politician, wrote to Lieutenant Governor Arthur proposing that part of Upper Reserve be purchased and opened for settlement.
October 1839	Cameron received permission from Samuel Jarvis, Chief Superintendent of Indian Affairs, to enter into negotiations with the Chippewas for a sale of part of a reserve "subject to the approval of the Lieutenant Governor and the Council".
November 9, 1839	Cameron met with Joshua Wawanash, the Head Chief of the St. Clair Regional Chippewas, and two other chiefs. They reached an agreement whereby Cameron would purchase 2,540 acres at the rear of the Sarnia reserve [the Cameron transaction]. These are the disputed lands.
November 9, 1839	Cameron wrote to Lieutenant Governor Arthur and Jarvis, reporting that he had reached an agreement with "the Indians". He sought approval of the transaction.
November 9, 1839	William Jones, the resident Superintendent of Indian Affairs at Sarnia, wrote to his superior Samuel Jarvis, telling him that the three chiefs had advised Jones of the agreement with Cameron and had asked that he "propose to the government the sale" of the part of the reserve referred to in the Cameron transaction.
November 16-18, 1839	In correspondence, Jarvis took issue with the terms of payment proposed by Cameron and observed that where similar transactions had been approved, the Crown first took a surrender of the land from the Indians and then made a grant of the land to a stated party.
March 19 and June 18, 1840	Two orders-in-council were passed, approving the Cameron transaction on terms as modified by the proposal of Jarvis.

	Neither order-in-council referred to a surrender to the Crown by the Chippewas.
1840	By the *Union Act, 1840*, R.S.C. 1985, App. II, No. 4, the British Parliament unified Upper and Lower Canada to form the province of Canada. The Indian Department was reorganized to reflect the Union.
February 27, 1841	Cameron made the first payment against the purchase price to the Crown.—
June 1841 to June 1842	Discussions were ongoing concerning the survey of the land referred to in the Cameron transaction. Jarvis favoured a survey of the entire reserve, however, the Chippewas refused to agree to a survey of any land other than the land encompassed in the Cameron transaction.
June 1842	John O'Mara surveyed the lands referred to in the Cameron transaction. He was on site for about fifteen days.
December 1846	Cameron wrote to Resident Superintendent Clench stating that he had "just put sixteen settlers on 1600 acres."
January 1851 to May 1851	A dispute arose as to whether the Cameron transaction included certain road allowances. Eventually, the dispute was resolved in favour of the Chippewas and they surrendered a single road allowance through the reserve.
January-November 1851	Cameron sold off large parts of the disputed lands.
August 11, 1853	Cameron paid the rest of the purchase price. He had not made any payments since the first payment in 1841. [3]
August 13, 1853	Letters patent for the disputed lands were granted by the Crown to Cameron. The letters patent were in the form used when the land referred to in the patent was surrendered land. The validity of this Cameron patent is in dispute.
September 1853 to 1861	Cameron continued to sell parts of the disputed lands.
August 26, 1861	Cameron sold off all of the disputed lands and was no longer on title.
August 1979	William Plan, an amateur historian and researcher for the Chippewas, wrote to an official in the Indian Affairs Department in connection with an ongoing dispute over a road allowance claim. Mr. Plan contended that the disputed lands were never surrendered to the Crown by the Chippewas and that the Chippewas maintained their original interest in those lands. This was the first indication that the Chippewas asserted a continuing interest in the disputed lands.
October 18, 1995	The Chippewas commenced this action.

D. Crown-First Nations Relations

48 In the first half of the 18th century the English Crown showed little interest in the First Nations of North America. Unlike its Catholic counterparts in France and Spain, the English Crown did not pursue active efforts to "civilize" the First Nations peoples and convert them to Christianity. Relationships between the First Nations and English colonies in North America were left primarily to the individual colonies and developed on an *ad hoc* basis. By the 1750s, however, French imperialist ambitions, aided and abetted by First Nations allies, threatened the security of English interests in North America. Those who shaped imperial policy came to see the military need to develop better relations with First Nations peoples in North America.

49 An Indian Department under the control of English ministers of the Crown was established in the 1750s. Sir William Johnson was appointed Superintendent of the Northern District. His district encompassed present-day southwestern Ontario. Johnson and members of his family played a key role in the administration of English-First Nations relations in the latter part

of the 18th and the early part of the 19th century. All were familiar with First Nation customs and appear to have been well regarded by the First Nations.

50 At first, the Crown's policy was aimed at gaining the military support, or at least the neutrality of First Nations in England's ongoing war with the French. When that war ended with an English victory in 1763, English control over the territories it had won from France depended in part on maintaining good relations with the First Nations. The English Crown continued its wartime Indian policy in the hope of forging new military alliances with First Nations who had supported the French (*e.g.* the Mississauga Chippewas) and avoiding further uprisings like that led by Chief Pontiac of the Odawa in 1763.

51 The Indian Department underwent many changes between 1750 and 1860. The lines of responsibility and the titles of various officials changed repeatedly. As the bureaucracy grew, responsibility for different aspects of the policy fell to various Crown agencies. Despite these many bureaucratic changes, two fundamental tenets of the Crown's policy towards First Nations remained constant until 1860.[4] First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative. Like all imperial policies, Indian policy was formulated in England and those responsible for the implementation of it in North America reported to Crown officials. Indian affairs were no concern of the colonial legislatures.

52 Second, the English Crown, primarily for military reasons, actively pursued the support of the First Nations. In doing so, it sought to address First Nations' grievances. Those grievances had arisen out of incursions by white settlers onto Indian lands and the dishonest actions of some of those who traded with the First Nations. In an effort to gain First Nations support, the Crown sought to assure the First Nations that they would not be deprived of their lands or cheated in their (trade) dealings with the white man. The Crown pursued these goals by recognizing First Nations' land rights, taking steps to protect those rights against white settlers, and regulating trade between the white man and First Nations.

53 The *Royal Proclamation* was an important, albeit not the first, manifestation of Crown imperial policy as it applied to Indian lands. The *Royal Proclamation*:

- recognized that First Nations had rights in their lands;
- established imperial control over settlement on Indian lands whether those lands were within or beyond the boundaries of the established British colonies in North America;
- prohibited private purchase of Indian lands and required that alienation of Indian rights in their lands be by way of surrender to the Crown; and
- established a process by which surrenders of Indian land would be made to the Crown. The surrender process accepted that Indian rights in their lands were collective and not individual.

54 After setting out its policy in the *Royal Proclamation*, the Crown took extraordinary steps to make the First Nations aware of that policy and to gain their support on the basis that the policy as set down in the *Royal Proclamation* would govern Crown-First Nations relations. In the summer of 1764, at the request of the Crown, more than 2,000 First Nations chiefs representing some twenty-two First Nations, including chiefs from the Chippewa Nation, attended a Grand Council at Niagara. Sir William Johnson, the Crown representative, who was well known to many of the chiefs present, read the provisions of the *Royal Proclamation* respecting Indian lands and committed the Crown to the enforcement of those provisions. The chiefs, in turn, promised to keep the peace and deliver up prisoners taken in recent hostilities. The singular significance of the *Royal Proclamation* to the First Nations can be traced to this extraordinary assembly and the treaty it produced.[5]

55 The First Nations chiefs prepared an elaborate wampum belt to reflect their understanding of the Treaty of Niagara. That belt described the relationship between the Crown and the First Nations as being based on peace, friendship and mutual

respect. The belt symbolized the Crown's promise to all of the First Nations who were parties to the Treaty that they would not be molested or disturbed in the possession of their lands unless they first agreed to surrender those lands to the Crown.

56 The meeting at Niagara and the Treaty of Niagara were watershed events in Crown-First Nations relations. The Treaty established friendly relations with many First Nations who had supported the French in the previous war. It also gave treaty recognition to the nation-to-nation relationship between the First Nations and the British Crown, Indian rights in their lands and the process to be followed when Indian lands were surrendered.

57 Between 1764 and 1774, the commanders of the British forces in North America who were responsible for Indian relations emphasized the applicability and the importance, not only of the specific terms of the *Royal Proclamation*, but also of the policies underlying it.

58 In 1774, the English Parliament passed the *Quebec Act*. That *Act* radically changed the government of the province of Quebec and extended the boundaries of that province to include what is now southwestern Quebec. The effect of that *Act* on the terms of the *Royal Proclamation* relating to Indian lands will be addressed later in these reasons. It is safe to say, however, that those responsible for First Nations relations after 1776 continued to follow the central policies underlying the *Royal Proclamation*. The historical record is replete with references to the *Royal Proclamation* and its policies. For example, in August 1791, Lord Dorchester, the Governor General of Canada, advised a delegation of First Nation chiefs, including Chippewa chiefs, that the King had no right to their lands save where it had been:

> fairly ceded by yourself with your consent by public convention and sale . . .

and that further:

> . . . bargains with private individuals were forbidden and considered as void.

59 Lord Dorchester's comments make it clear that the Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

60 The Crown policy towards the First Nations was reflected not only in official documents like the *Royal Proclamation*, but also in the day-to-day conduct of those relations. People like Sir William Johnson had long-standing connections with First Nations peoples and long-standing associations with them. They were aware of and respected the manner in which First Nations peoples conducted business. Formal meetings between Crown officials and First Nations were held at public Council meetings attended by the chiefs and other members of the First Nations. Certain formalities became an accepted part of these meetings and served to emphasize the nation-to-nation nature of the dealings. Many of those formalities reflected aboriginal customs and usages. The First Nations peoples attached considerable importance to compliance with these formalities and the Crown representatives were aware of the importance of these formalities to the First Nations.

61 By the turn of the 19th century, the procedures associated with the surrender of land by First Nations to the Crown were well established. Those procedures blended aboriginal and British customs and usages and came to be reflected in various orders issued by responsible Crown officials (*e.g.*, the Dorchester Regulations of 1794). The surrender of First Nations land to the Crown involved the following:

- All surrenders were made "in public council with great solemnity and ceremony, according to the ancient usages and customs of the Indians".

- The Crown representatives at the meeting included the Governor or his designate, representatives from the Indian Department, and military officers.

- An interpreter was present and explained the "nature and extent of the bargain" to the Indians in their language. The consideration for the sale was clearly stated.

• If a surrender was agreed upon, a deed of conveyance surrendering the land to the Crown was prepared in triplicate and executed at the Council meeting by the Indian chiefs who would place their totems on the deed and by the Superintendent of the Indian Department or his designate.

• A descriptive plan of the land to be surrendered was attached to the deed and signed and witnessed in the same manner as the deed.

• The Head Chief received one of the copies of the deed.

62 These formalities recognized the importance of the surrender of lands by First Nations and the collective nature of the First Nations' interest in the land. The procedures also reflected the common law concern that certainty attach to the transfer of land. Certainty was achieved by requiring that the conveyance of land be fully documented, that the documents be placed in the appropriate records and that they be preserved for future reference.

63 Surrender was the first step toward making Indian land available for settlement. After the surrender deed was executed, it was submitted to the Governor in Council for approval. If approved, an order-in-council would issue and the surrender deed could be registered in the appropriate colonial land registry record. At this stage, the surrendered land could be granted by the Crown to third parties by way of letters patent. Over time, the patents were standardized and made reference to the fact that the land had been acquired from a First Nations people. Where the First Nations were to be paid from the proceeds of the grant to the third party, the Crown held those proceeds for the benefit of the First Nations.

64 Although a surrender could only be authorized by a General Council meeting of the First Nations people, Crown Indian policy also depended on the development of strong working relationships between Crown officials and influential chiefs of regional bands. Indian Department officials worked at obtaining the confidence and support of key chiefs. The relationship with these chiefs became even more important as the Indians surrendered much of their lands and took up residence on reserves.

65 Indian Department officials would meet with key chiefs prior to Council meetings in an effort to gain their support on the matters that were to be considered at the Council meeting. If the Crown official and those chiefs could reach an agreement, the chiefs would become the spokesmen for the proposed agreement at the subsequent Council meeting.

E. The Surrender of Chippewa Lands Before the Sale to Cameron

66 By 1815, the military importance to the English Crown of alliances with First Nations, including the Chippewas, had diminished significantly. The war of 1812 had ended and there was no real risk of continued hostilities in the British North American colonies with either the United States or any European power. Soldiers returning from the war of 1812 were looking for land and the pressure to open Indian land to settlement increased dramatically.

67 As the military significance of alliances decreased and demands for settlement increased, the Crown became more receptive to those who petitioned for the opening of Indian land for settlement purposes. Imperial Indian policy also began to reflect objectives other than military ones. The "civilization" of those First Nations whose land stood in the path of white settlement became a priority. The Crown's "civilization" policy encouraged First Nations to live, farm and worship like the white man, in and around permanent sites located on lands reserved for the First Nations.

68 Despite the change in focus of the Crown's Indian policy, the Crown continued to control access by settlers to Indian lands by insisting that Indian land could not be sold directly to settlers but had to be surrendered to the Crown first. This policy reflected both the Crown's desire to control settlement and to protect aboriginal people as the harmful effects of contact with the white man became more obvious. [6]

69 The Crown's continued recognition of Indian rights to their lands, the prohibition against alienation of land to anyone except the Crown by way of surrender and the requirement that the surrender be accompanied by a public manifestation of the First Nations' agreement to surrender are all evident in the extensive land dealings between the Chippewas and the Crown

between 1818 and 1827. Those dealings resulted in the surrender of some 2.2 million acres of Chippewa land and the retention by the Chippewas of four reserves within that tract of land.

70 The possibility of acquiring a large part of the Chippewas' land in southwestern Ontario for settlement purposes was first raised by the Surveyor General of Upper Canada in 1815. In October 1818, an official of the Indian Department met with numerous Chippewa chiefs at Amherstburg to discuss the possibility of a surrender of Chippewa land. The Chippewas advised that they were not opposed to the surrender in return for an annuity but were anxious to retain enough land to permit them to continue to enjoy their traditional lifestyle and maintain their viability as a people. The Chippewas were concerned that they not suffer the fate of their American brothers who had failed to retain sufficient reserves when surrendering their land. In the initial discussion, the Chippewas referred to five possible reserves, including one on the St. Clair River which came to be known as the Upper Reserve on which the disputed lands are located.

71 Discussions between the Crown and the Chippewas went on for several years. Progress was slow. The Chippewas' lifestyle was still quite transitory and it was sometimes difficult to arrange for the attendance of the necessary chiefs at Council meetings to discuss the proposed surrender. Various provisional agreements were made and in July 1822, the Crown and the Chippewas concluded their first confirmatory treaty whereby the Chippewas surrendered some 500,000 acres of land along and near the Thames River.

72 This surrender did not satisfy the ever-increasing needs of the white settlers. In 1824 the Canada Company was formed and received a million acre grant of land in Upper Canada for settlement purposes. Part of that land was to come from the Chippewas' land. In March 1825, an official of the Indian Department was directed to assemble the chiefs of the Chippewas in Council " with the least possible delay" to finalize the surrender of over 2,000,000 acres of Chippewa land. This land came to be known as the Huron Tract.

73 A General Council of the Chippewas was held at which the Chippewas and the Indian officials observed the usual formalities. The Crown requested a surrender and the chiefs, "after consultation among themselves", said that they were prepared to make the surrender on behalf of the Chippewas. Provisional Treaty 27 $^{1}/_{2}$ was signed by James Givens, Superintendent of Indian Affairs, representing the Crown and twenty named " chiefs and principal men" of the Chippewas. These chiefs represented the various bands who lived on the affected lands.

74 Under the terms of Provisional Treaty 27 $^{1}/_{2}$, the Chippewas agreed to "freely, fully and voluntarily . . . surrender and convey" to the Crown some 2.2 million acres of land in consideration for a perpetual annuity of 1,100£. The treaty identified 440 Chippewas who were affected by this surrender and provided for a reduction in the annuity if the population decreased.

75 Under the terms of the Provisional Treaty, the Chippewas did not surrender all of their lands. They retained four reserves, including the Upper Reserve, for themselves and future Chippewa generations. The Provisional Treaty provided that the reserves were retained by the Chippewas for their "exclusive use and enjoyment".

76 Upon receipt of the agreement the Lieutenant Governor forwarded it to the Colonial Secretary in London who in turn advised that the Crown accepted the terms.

77 The Crown and the Chippewas could not conclude a final agreement in 1825 because there was no descriptive plan of the surrendered lands available. Under established procedures, a surrender could not be made unless a descriptive plan was attached to a deed of surrender. In 1829, after the land had been surveyed, the Crown and Chippewas entered into Treaty 29 which confirmed the terms of the 1825 agreement.

78 Treaty 29 complied with all the formalities attached to a surrender of Indian land to the Crown. A written document acknowledging the Chippewas' rights in the land and describing the surrender was signed by Superintendent of Indian Affairs George Ironside, for the Crown, and by eighteen named chiefs and principal men of the part of the Chippewas inhabiting and claiming the lands affected by the surrender. Those chiefs, on behalf of the bands they represented, surrendered to the King all

their rights, title and interest in the land save their rights and title in the four reserves. Their rights in those four reserves were held by them for their exclusive use and enjoyment for all time.

79 The Chippewas do not question the validity of the surrender made by Treaty 29. As the motions judge observed, it bore all the indicia associated with a valid cession of First Nations land to the Crown. It was the product of direct negotiations between the Crown and the chiefs of the Chippewas. The terms of the surrender, including the annuity to be paid, were put to the Chippewas at a General Council meeting at Amherstburg in July 1827 and approved at that Council. The surrender was formalized in a written document executed by the appropriate officials on both sides. The document recognized pre-existing Chippewa rights in the land and acknowledged that the Chippewas were surrendering those rights to the Crown. The consideration for the surrender was set out in the deed and a descriptive plan attached to it.

80 By July 1827, the face of the map of what is now southwestern Ontario had changed dramatically. The Chippewas had surrendered 2.2 million acres of land to the Crown. They had retained four reserves, including the Upper Reserve. Those four reserves were protected not only by the Chippewas' pre-existing land rights as acknowledged by the Crown, but also by the solemn promise of the Crown in Treaty 29. The land on the reserves, including the disputed lands, belonged to the Chippewas.

81 It would appear that Crown officials initially regarded the four reserves set out in Treaty 29 as held in common by all the various bands who were signatories to Treaty 29. By the late 1830s, however, the St. Clair Regional Band, which included the ancestors of the present Chippewas of Sarnia Band, were regarded as the owners of three of the reserves, including the Upper Reserve. The Walpole Indian Regional Band was seen as the owner of the fourth reserve. Best estimates suggest that by 1839 there were as many as eight to ten chiefs of the St. Clair Regional Band.

82 One of the chiefs for St. Clair Regional Band was Joshua Wawanosh. Wawanosh had a remarkable and checkered career as a leader of the St. Clair Chippewas. He became a chief shortly after the war of 1812 in part because of his military service on behalf of the Crown in the war of 1812. By the mid-1820s, Crown officials and other Chippewa chiefs recognized Wawanosh as the Head Chief. He was the first to sign Provisional Treaty 27 $^{1}/_{2}$ on behalf of the Chippewas, received a copy of the deed and was described by Joseph Clench, a superintendent in the Indian Department, as the "principal chief".

83 By the 1830s, there was opposition to Wawanosh's leadership on the four reserves. That opposition grew during the 1830s reaching its zenith in 1844 when Wawanosh was removed as Head Chief after a public inquiry by Indian Department officials. He remained a chief. Within four years, however, Wawanosh had regained the confidence of the other chiefs on the reserves and recovered from the ignominy of his removal. At the suggestion of the man who had replaced him as Head Chief, Wawanosh was restored to the position of Head Chief.

84 Throughout his long tenure, Wawanosh, who had converted to Christianity, favoured the "civilization" policy. He believed that the Chippewas should establish a permanent farming community on the Upper Reserve and learn the white man's ways. He also had a keen eye for opportunities and sought to increase his influence and personal wealth whenever the opportunity arose.

85 Wawanosh's position as the spokesman for the Chippewas on the Upper Reserve is evident in discussions between himself and William Jones, the resident Indian Superintendent, in 1830. At the request of the Lieutenant Governor, Jones broached with Wawanosh the possibility of the Chippewas surrendering their land along the river and moving inland to establish permanent farming communities. Wawanosh advised Jones that the Chippewas were firmly against moving from their " present residence on the Upper River", but that they were "pleased with the idea of having their children educated and learning to live like white people . . . ".

86 The Indian Department accepted Wawanosh's position and did not seek a surrender of any part of the reserve, but did step up efforts to establish a permanent village and farming base on the reserve for the Chippewas.

87 Wawanosh spoke for the bands on the Upper Reserve again in 1834 when Jones was directed to approach the Chippewas for permission to allow the private cutting of timber on part of the Upper Reserve. Jones sought out Wawanosh's view on the matter and reported back to Jarvis.

88 Wawanosh's discussions with Jones typified the kind of preliminary discussions that Indian Department officials would have with influential chiefs when important matters arose. There is no suggestion that Wawanosh did not speak for the Band on the Upper Reserve in 1830 or 1834, or that he did not accurately convey the collective position of the Chippewas to Jones.

F. The Cameron Transaction

89 By 1839, responsibility for Indian matters was divided among various Crown departments. Those departments were under the control of the Lieutenant Governor of Upper Canada. The department was headed by a chief superintendent who had a number of deputy superintendents. Various resident superintendents lived at or near reserves and were responsible for overseeing relations with the First Nations people on those reserves. As the bureaucracy grew, those at the top ceased to have any kind of direct, long-standing relationship with First Nations chiefs. Subsequent inquiries (*e.g.* the Bagot Inquiry in 1844) also demonstrated that the Department was in many respects dysfunctional by 1839.

90 The Indian Department was responsible for mediating disputes between white men and aboriginals, keeping the Crown advised of the views and attitudes of the Indians, ensuring that white settlers did not intrude onto Indian lands, supervising the surrender of Indian lands, administering payments due to First Nations under the terms of surrenders, and promoting the "civilization" policy. These responsibilities often brought Indian Department officials into conflict with white settlers. As often as not, those officials found themselves aligned with positions taken by First Nations people and opposed to positions advanced by white settlers.

91 Samuel P. Jarvis was appointed Acting Chief Superintendent of Indian Affairs in Upper Canada in 1837 and remained in that post until his dismissal in 1845 following the revelations of the Bagot Commission. Jarvis, a Tory and member of the Family Compact, appears to have been an honest and well intentioned person who had virtually no hands-on experience with the First Nations prior to 1837. He was an abject failure as an administrator.

92 William Jones was the Resident Superintendent at Port Sarnia from March 1830 until June 1845 when, like Jarvis, he was dismissed as a result of the findings of the Bagot Commission. Jones' relationship with the principals of the Cameron transaction (Cameron and Wawanosh) was far from friendly as of November 1839.

93 Resident Superintendent Jones had many dealings with Chief Wawanosh. He recognized Wawanosh's influence and the need to maintain Wawanosh's support. He also came to regard Wawanosh as dishonest, greedy and intent upon advancing his own interests over those of the Chippewas on the Upper Reserve. Jones's mistrust of Wawanosh increased during the rebellion of 1837 when Wawanosh, unlike many Chippewa chiefs, refused to support the Crown but insisted on a position of neutrality. By November 1839, Jones had no reason to favour Wawanosh or to assist him in promoting his personal interests.

94 The mistrust of Wawanosh did not stop with Jones. Chief Superintendent Jarvis and even the Lieutenant Governor had reason to doubt Wawanosh's honesty and the reliability of statements he purported to make on behalf of the Band.

95 Malcolm Cameron, a businessman, politician and land speculator from eastern Canada, took up residence in Port Sarnia in the early 1830s. As an accomplished businessman with political connections, he quickly became one of the town's most influential citizens. Cameron was a reformer, a Methodist, and a strong proponent of the "civilization" policy. He took the forefront in attempts to secure parts of the Upper Reserve for white settlement, taking the position that the Chippewas could use the proceeds from the sale of parts of their land to finance the development of the rest.

96 Wawanosh, like Cameron, was a Methodist and shared Cameron's entrepreneurial spirit. The two developed a close working relationship. Cameron lent money to Wawanosh from time to time. On various occasions, to the consternation of officials in the Indian Department, Cameron assisted Wawanosh in making direct representations to the Lieutenant Governor or, after 1840, the Governor General.

97 Although Cameron had strong political support in 1839, including that of the reform-minded Lieutenant Governor Arthur, Cameron did not enjoy good working relations with the officials of the Indian Department. As a Methodist reformer, he had

nothing in common with High Anglican Tories like Superintendent Jarvis. His support of Wawanosh also brought him into conflict with Jones.

98 The residents of Port Sarnia had from time to time after 1827 petitioned the government to obtain the surrender of parts of the Upper Reserve. They felt that the reserve was blocking key trade and communication channels along the St. Clair River and inhibiting the development of their town. In the late summer of 1839, Wawanosh, speaking for the Chippewas on the Upper Reserve as he had in 1830 and 1834, made it clear that the Chippewas were not prepared to sell any part of the front part of the Upper Reserve running along the St. Clair River. This was the part of the reserve coveted by the white settlers at Port Sarnia. As in 1830 and 1834, Wawanosh spoke for, and accurately expressed the position of the Chippewas on the Upper Reserve.

99 At almost the same time that Wawanosh told Jones that the Chippewas were not prepared to give up any land along the front of the St. Clair River, Wawanosh advised Jarvis that the Chippewas were inclined to sell part of the rear of the Upper Reserve. A document found in the papers of Jarvis and purporting to be a translation and transcription of an address given by Wawanosh in September 1839 reads in part:

> You recommended to us last year to cultivate the soil and proposed that, workmen should be hired to put our fields in proper condition for sowing crops. We have thought of this & think the advice good, but are unwilling that the expense should be defrayed from our annuity. We wish your advice on a plan which we think would please us all. We propose to sell a mile in depth off the rear of our Reserve, and with the money produced by this sale to cultivate the front. What is your opinion?

100 The exact circumstances in which Wawanosh made this purported address have been lost in time. It cannot be said whether he made the address at a Council of the Chippewas, or at some public gathering of the St. Clair Regional band. It is, however, clear that his proposal was consistent with the ongoing development of a permanent agricultural settlement on the Upper Reserve. Most of the land at the back of the reserve which Wawanosh indicated the Chippewas were prepared to give up was not as well suited for farming as the front of the reserve. Nor, contrary to the finding of the motions judge, was there any inherent contradiction between the Chippewas' refusal to sell off any part of the front of the reserve and Wawanosh's indication that they were prepared to sell off parts of the back of the Upper Reserve. The Chippewas sold off pieces of the Upper Reserve from time to time after 1827.

101 Cameron advanced his proposal that the Upper Reserve be opened for settlement in a letter to Lieutenant Governor Arthur in August 1839. Cameron argued that the lands within the reserve exceeded those needed by the Chippewas to establish a permanent farming settlement. He suggested that the proceeds of the sale of a considerable part of the reserve could be used to improve the remaining land so that it could be effectively farmed by the Chippewas. Cameron suggested that the money could be realized either by a purchase by the government or a purchase by private individuals with government approval.

102 In the fall of 1839 Cameron met with Lieutenant Governor Arthur and subsequently with Chief Superintendent Jarvis to promote the acquisition of a large part of the Upper Reserve. Jarvis told Cameron that he, Cameron, could negotiate with the Chippewas and, if possible, strike a bargain, subject to the approval of the Governor in Council. Cameron travelled to the Upper Reserve, met first with Jones, and later with Wawanosh and two other chiefs.

103 Cameron advised both Lieutenant Governor Arthur and Jarvis in letters dated November 9, 1839 that he had met with Wawanosh and "other chiefs". He explained that the chiefs were reluctant to give up any part of the reserve because they feared that their agreement to give up part of the reserve would be seen by land-hungry settlers as an invitation to take more land than the Chippewas had agreed to sell. According to Cameron, he had the "confidence" of the chiefs and was able to convince them that he would adhere to any bargain they made. Cameron advised that he had concluded a bargain for the purchase of four square miles at the rear of the reserve furthest from the St. Clair River. According to Cameron, the Chippewas also agreed to provide four roads running from that block of land through the reserve to the river. Cameron said that he had agreed to pay the Chippewas 10 shillings per acre with an initial payment of 250£. The rest of the purchase price (1,020£) was to be paid in nine annual instalments. Cameron observed that the price was two shillings higher than the "government price", but that he had agreed to the higher price in lieu of paying any interest on the unpaid part of the purchase price. Cameron attached a rough map of the land which he said the Chippewas had agreed to give up. The map showed four roads running through the reserve to the river.

104 In his letter to Lieutenant Governor Arthur, Cameron stressed the "public good" of the transaction and urged Arthur to approve it if he thought it to be a "fair and advantageous bargain for the Indians".

105 Resident Superintendent Jones also wrote to Jarvis on November 9, 1839. He advised that Cameron had met with the only three chiefs who were on the Upper Reserve (Wawanosh, Chibigun and Corning). [7] Those chiefs had later called on Jones and asked that he propose to the government on their behalf "the sale of one mile in depth by the whole length of the reserve off the rear of the Upper St. Clair Reserve". Jones reported the terms of the agreement as told to him by the chiefs. He also indicated that, under the bargain, a road was to run from each concession line through the reserve to the river. Jones said that the Chippewas expected to be paid for the land used for these roads.

106 The correspondence outlined above demonstrates that all concerned appreciated that the transaction could not be completed without the approval of the Crown. Cameron and the chiefs both notified the Crown of the bargain and sought Crown approval. Neither believed that they could deal with the disputed lands without the intervention of the Crown.

107 Chief Superintendent Jarvis was asked by the Lieutenant Governor's office to comment on the proposed sale. In correspondence delivered in late November 1839, Jarvis opined that the purchase price appeared to be "fair and reasonable", but went on to observe that Cameron should be required to pay interest on the unpaid balance of the purchase price. [8] Jarvis also noted that there was some suggestion that the purchase price would be paid directly to the Chippewas. He pointed out that this was not Crown policy and that the money should be paid to the Crown to be invested for the benefit of the Chippewas. Jarvis' recommendations were accepted by the Lieutenant Governor and incorporated into two orders-in-council approving the sale.

108 The first order-in-council, dated March 19, 1840, began with the following:

> The Executive Council are respectfully of the opinion that it would be a great public advantage as well as a benefit to the Indians were the tract of land above mentioned disposed of to white settlers at an adequate price.

It also set out the price, required the payment of interest on the instalments, and provided for an allotment of land for clergy reserves.

109 Cameron objected to both the payment of interest and the allotment of lands for clergy reserves. Eventually he agreed to pay interest but persisted in his objection to the clergy reserves. In June 1840 a second order-in-council was passed in the same terms as the March order-in-council save that the requirement for clergy reserves was deleted.

110 Both orders-in-council referred to the proposed purchase by Cameron of the land and neither referred to a surrender or recommended that a surrender of the lands be accepted. In contrast, orders-in-council issued at or about the same time as the Cameron order-in-council and referring to the sale of other parts of the Chippewa reserves made reference to the surrender of the land to the Crown.

111 It is helpful at this stage to summarize the substance of the Cameron transaction.

- Cameron had approached Crown officials for permission to negotiate the purchase with the Chippewa chiefs.
- Negotiations were conducted with the authorization of the senior Crown official responsible for Indian Affairs in Upper Canada.
- Cameron negotiated through an interpreter with three of the chiefs on the Upper Reserve, including Head Chief Wawanosh. The record is clear that no other chiefs were present but is unclear as to who, if anyone else, was privy to the negotiations.
- The bargain arrived at by Cameron and the three chiefs was made known to Crown officials by Cameron and the chiefs separately. Both sought government approval for the transaction.

• The negotiated purchase price was a reasonable one.

• The appropriate official in the Indian Department considered the proposed bargain, altered two of the terms to add further protection of the Chippewa interests, and recommended the approval of the transaction.

• The Lieutenant Governor, the representative of the Crown in Upper Canada, approved the transaction as altered by the Indian Department.

• The land which was the subject of the transaction was not on the part of the Upper Reserve the Chippewas had refused to part with in earlier discussions with the Crown in 1839. Much of it was not ideal for farming. If the proceeds of the sale could be used to improve the rest of the reserve, or to acquire more arable land, the Cameron transaction could be seen as a logical step in furtherance of the civilization policy. That policy had its supporters among the Chippewas on the Upper Reserve and had proceeded with some success by November 1839. [9]

112 It is equally important to bear in mind, as did the motions judge, what did *not* occur as part of the Cameron transaction prior to the issuing of the order-in-council.

• Crown officials were never directly involved in the negotiations with the Chippewas.

• The transaction was never explained, discussed, or approved at a General Council of the regional bands of the Chippewas affected by the transaction.

• Although three chiefs approved the transaction, the approval of the other chiefs (possibly five to seven) was neither sought nor obtained.

• The bargain struck between Cameron and the chiefs was never reduced to writing in a deed, contract, or treaty signed by the necessary chiefs and the Crown representative. Consequently, there was no formal document in which the Crown acknowledged the Chippewas' rights in the land and the Chippewas agreed to surrender those rights.

• There was no descriptive plan of the lands signed by the appropriate Crown officials and chiefs of the Chippewas.

113 We agree with the motions judge that the exchange of correspondence in November 1839 combined with the meetings involving the Chippewa chiefs, Jones and Cameron did not amount to a surrender. As the reasons of the motions judge demonstrate, there was in this transaction a failure to follow virtually every established procedure attendant upon the surrender of Indian land. As the motions judge observed, the failure to follow these procedures makes the Cameron transaction unique among the many land dealings between the Chippewas and the Crown in the 19th century.

114 Although we accept the motions judge's conclusion that there was no surrender in November 1839, we do not agree with his description of the Cameron transaction as a "private sale" between Cameron and three chiefs. The negotiations were conducted with the knowledge of and under the authority of Crown officials in the Indian Department. The terms of the transaction were reviewed and changed by Superintendent Jarvis and only then approved by the Crown. The ultimate terms were dictated by the Crown for the protection of the Chippewas.

115 The motions judge also repeatedly referred to the meeting between Cameron and the three chiefs as a "private meeting". We can accept this characterization if it means only that the meeting between Cameron and the chiefs was not a General Council meeting as that phrase would be understood in the context of the surrender of Indian lands. We do not, however, accept the characterization if it is meant to suggest that the three chiefs were the only Chippewas who were aware of the negotiations or the bargain reached. Although only three chiefs met with Cameron, nothing in the record suggests that they were the only Chippewas who were privy to the meetings, or that the negotiations or the bargain reached were in any way secret from Chippewas who were on the Upper Reserve. Subsequent events lend no support to either of those suggestions.

116 It is not surprising, in the context of Indian land negotiations, that there was no actual surrender as of the end of November 1839. As indicated above, discussions between Indian Department officials and individual chiefs in which agreements were worked out subject to approval at a General Council were quite common. It would have been entirely consistent with established practice had the terms of the Cameron transaction, as agreed upon by Cameron and the three chiefs and as modified by Jarvis, been put to a General Council of the Chippewas for approval at some point after November 1839 and before the land was actually granted to Cameron.

117 There is, however, no evidence that a surrender occurred between November 1839 and the issuing of the orders-in-council in March and June of 1840. The only reference to a surrender in the correspondence preceding the orders-in-council appears in Jarvis' letter to the Lieutenant Governor's office in November 1839. He wrote:

> Should the government think proper to permit the Indians to dispose of a part of their reserve the course heretofore pursued in similar transactions has been to require as a first step a surrender of the land to the Crown after which the Crown will grant the same, on such terms as may be agreed upon, and will take care that the purchase money is safely invested.

118 No one in the Department followed up on Jarvis' statement. The failure of the Department to obtain a surrender and follow the well established practices relating to surrenders is not explained by any conspiracy to deprive the Chippewas of their land, or even by a desire within the Indian Department to assist Cameron and allow him to circumvent established procedures and accelerate settlement of the land. Jarvis carried no brief for Cameron and had in no way supported or associated himself with the success of Cameron's negotiations with Wawanosh and the other two chiefs.

119 Resident Superintendent Jones also had no reason to help Wawanosh or Cameron. By November 1839, Jones and Wawanosh were engaged in a heated vilification of each other involving a series of charges and counter-charges. It is unlikely that Jones would facilitate a fraudulent transaction involving Wawanosh or knowingly turn a blind eye to any legal requirements of that transaction. It is also unlikely that Jones, given his view of Wawanosh, would accept without question whatever Wawanosh told him about the Chippewas' wishes with respect to the sale of their land.

120 Although neither Jarvis nor Jones acted to secure the appropriate surrender, there is no evidence that they or anyone else in the Indian Department had any reason to believe that a surrender would not be forthcoming if requested.

121 True, the two orders-in-council do not refer to a surrender of the land. The language of these orders-in-council stands in stark contrast to others pertaining to land transactions involving Chippewa land, including one issued on the same day as the second Cameron order-in-council (June 18, 1840). All other orders-in-council referable to Chippewa land make reference to a surrender. However, the Cameron orders-in-council refer instead to a "proposed" sale suggesting that the transaction would close at some time in the future thereby allowing for a surrender before closing. We agree with the motions judge's conclusion that the language of the order-in-council was consistent with the Crown's intention to obtain a surrender at some point in the future.

122 The Crown had ample opportunity to obtain a surrender. The disputed lands were not granted to Cameron in fee simple by way of letters patent until some fourteen years later in August 1853. There were several reasons for the delay, some of which will be examined below. Despite the passage of fourteen years, however, the Indian Department did not arrange for surrender of the land. There was no General Council of the Chippewa bands affected by the transaction at which the details of the transaction were explained and approval of the surrender given. [10] There was also no formal surrender document prepared and executed by the appropriate Crown official and the Chippewa chiefs. In short, none of the established procedures were followed.

123 There were few references to a surrender in the documents touching on the Cameron transaction between 1840 and 1853. By 1851, officials in the Indian Department, none of whom had been involved in the Cameron transaction in 1839 and 1840, had come to believe that a surrender had in fact been made and that a surrender document existed. Although the existence of the document was questioned on one occasion, no one bothered to check the actual records. The form of the letters patent issued in 1853 was consistent with a surrender having been obtained.

124 The failure to take the steps necessary to obtain a proper surrender prior to the issuing of the letters patent was explained by the motions judge in terms which we adopt:

> There is no evidence that Jarvis' recommendations of November 18, 1839 that there should be as a first step a surrender to the Crown of the disputed land, was deliberately rejected. But it was uncontradicted that it was neglected. While there is no evidence that any particular official was asleep at the switch, it is uncontradicted that Jarvis' surrender recommendation simply fell between the cracks in the general chaos and lack of accountability that prevailed in the five separate bureaucracies that then dealt with Indian land. No one was in charge and no one was accountable.

125 Cameron did nothing to encourage the Indian Department to obtain the appropriate surrender. The record suggests that he never concerned himself with obtaining a proper surrender. His attention between 1839 and 1853 was directed to several other problems, including difficulties he encountered in raising the funds to pay the purchase price. He made the initial downpayment in February 1841, but did not make the annual payments as he had promised. It was not until August 11, 1853 that he paid the outstanding amount owing on the purchase price. [11]

126 Cameron's disregard for the legalities associated with the transaction is evident from the fact that he sold large parts of the land and placed settlers on it years before he received the patent and the fee simple. He was a businessman in a hurry.

127 There is no direct evidence of the Chippewas' reaction to the Cameron transaction, and, in particular, the Chippewas' reaction to the failure of the Indian Department to obtain the necessary surrender. The Chippewas' tradition is an oral one and direct evidence of their response to the Cameron transaction has been lost over the 160 years since the transaction.

128 The Chippewas' position may, however, be inferred from events which occurred between November 1839 and 1855. After reviewing some of those events, the motions judge concluded that by 1840, the Chippewas were aware that there was an agreement to sell part of their reserve to Cameron. He further concluded, however, that the Chippewas were never made aware of the details of the sale and may well have expected that before the transaction was consummated the Crown would seek a surrender in accord with the established practice.

129 The motions judge also found that there was no evidence that the Chippewas made any complaint that Wawanosh and the other chiefs had acted without authority in their dealings with Cameron, or that any representative of the Chippewas ever repudiated the transaction. We accept those findings. The motions judge went on, however, to hold that the absence of any complaint, combined with the Chippewas' knowledge of the transaction, did not constitute any evidence that the Chippewas as a community agreed to surrender their lands.

130 The evidentiary significance of the absence of any complaint about the transaction or any repudiation of it must be assessed in the context of the entire record. There is overwhelming evidence that the Chippewas were an intelligent people who as of 1839 were keenly aware of their land rights and were most diligent in preserving those rights. By 1839, the Chippewas were well accustomed to addressing grievances to the Crown by way of petitions. Those petitions were prepared at General Council meetings and addressed many issues, including complaints with respect to land transactions. On various occasions, the Chippewas' petitions specifically repudiated earlier transactions to which they had allegedly agreed. For example, the strong objection by the Chippewas to the proposed Saugeen surrender in 1836 demonstrates that even where a proposed land transaction was initiated by the Lieutenant Governor himself, the Chippewas could and would voice strong opposition to it if it did not accord with their wishes.

131 There can also be no doubt but that many chiefs of the St. Clair regional bands, both on and off the Upper Reserve, were not reluctant to complain to the Indian Department and the Lieutenant Governor or Governor General about the conduct of Chief Wawanosh. Complaints about Wawanosh began in the early 1830s, grew more vigorous as time went on and reached a crescendo in early 1844 when Wawanosh was removed as Head Chief following a public inquiry into his conduct. The many complaints against Wawanosh included allegations that he abused his authority as chief, misappropriated band assets, and showed gross favouritism towards friends and allies. There were also allegations that Wawanosh sold, or at least tried to sell, Chippewa land

without authority. For example, in October 1836, a number of Chippewas petitioned the government complaining among other things that Wawanosh was "disposing of land reserved for us, our wives and children without our consent". A similar allegation was made in 1841 when various chiefs complained that Wawanosh was trying to sell land without authority.

132 In August 1843, a petition signed by about 200 Chippewas was directed to the Governor General. It contended that Wawanosh was not the hereditary chief, took more than his proper share of the annuity, and favoured his friends and relatives leaving the rest of the band in poverty. The petition concluded with these strong words:

> We are not neither children or foolish. We know perfectly well who either wrongs us or does us good, and we can complain of the former and thank the latter, we therefore beg your Excellency will attend to what comes from ourselves only, and not to the unsolicited and obnoxious interference of white men with whom we neither have nor wish to have any concern; . . . [Emphasis added.]

133 The Chippewas requested a General Council at Port Sarnia at which their complaints against Wawanosh could be aired. The Governor General decided to hold a formal public inquiry into the charges against Wawanosh. That inquiry was held in late 1843. Witnesses for and against Wawanosh testified and Wawanosh replied in detail to the allegations made against him. Summaries of the testimony have survived and provide a detailed account of the accusations against Wawanosh, and insight into the level of animosity that many of the Chippewa chiefs had developed toward Wawanosh.

134 Superintendent Clench presided over the inquiry and prepared a report for Jarvis summarizing his findings. According to Clench, the charges against Wawanosh related to mismanagement of his office as chief, the appropriation of more than his share of the annuities due to the Chippewas, gross favouritism, and making a false claim to being an hereditary chief. Clench reported that over 75 percent of the Chippewas on the four reserves were against Wawanosh.

135 It was determined that Wawanosh should be removed as Head Chief but should remain as a chief. Despite the efforts of Wawanosh and Cameron to prevent the removal of Wawanosh, he was in fact removed as Head Chief and not restored until 1848.

136 The complaints made against Wawanosh between 1830 and 1844 are set out in considerable detail in various affidavits filed by the parties. None of the complaints refer to the Cameron transaction, although it occurred and was known to other Chippewas at the very height of their displeasure with Wawanosh (1839-1843). In our view, it is significant that despite the many general and specific complaints directed at Wawanosh's conduct, there was never any suggestion by the other Chippewa chiefs that Wawanosh had acted beyond his authority in reaching a bargain with Cameron, or that the purported sale was contrary to the wishes of the Chippewas.

137 In assessing the significance of the absence of any reference to the Cameron transaction in the onslaught of complaints made against Wawanosh at the inquiry, we bear in mind that by the fall of 1843, the Chippewas knew the full extent of the lands involved in the Cameron transaction. Those lands had been surveyed into lots in the summer of 1842. The Chippewas knew by the fall of 1843 that the Cameron transaction involved about one quarter of the land on the Upper Reserve.

138 The absence of any reference to the Cameron transaction among the litany of complaints made against Wawanosh defies explanation if the other Chippewa chiefs looked on the Cameron transaction as a "private" deal whereby Wawanosh disposed of one quarter of the Upper Reserve against the wishes of the Chippewas affected by that transaction. The explanation advanced by one witness for the Chippewas that the Chippewas' culture was such that complaints against Wawanosh would be indirect (a contention neither accepted nor rejected by the motions judge), does not hold up. By the fall of 1843, there was a concerted attack underway on Wawanosh's leadership in the years before and following 1839. That attack included specific allegations against him by other Chippewa chiefs. Furthermore, the formal inquiry of 1843 was a trial-like inquiry conducted by Superintendent Clench. The inquiry was directed into any and all allegations that witnesses wished to advance against Wawanosh. Surely, had there been any reason to suspect that Wawanosh had acted improperly in connection with a transaction involving one quarter of the Upper Reserve, some reference to that transaction would have been made in the many complaints brought forward against Wawanosh.

139 The motions judge found, however, that the absence of any complaint about the Cameron transaction had no evidentiary value because in his words:

> . . . The first question is when, and exactly of what, the Chippewas should be expected to have complained. Lack of complaint about lack of surrender cannot be expected until lack of surrender becomes apparent. The legal status of the Cameron lands, between November 1839 and August 13, 1853 was unclear. . . . If the Crown officials could not know the status of the disputed lands one would hardly expect the Chippewas to know enough detail to be in a position to complain specifically. . . . Lack of complaint of lack of surrender has no evidentiary significance when future surrender is reasonably to be expected. [Emphasis added.]

140 The motions judge missed the evidentiary significance of the absence of any complaint about the Cameron transaction by characterizing it as a failure to complain about the lack of a surrender. It is not the Chippewas' failure to complain about the lack of a surrender which is significant. What is significant is that even though the other chiefs were aware that Wawanosh had agreed to sell one quarter of the Upper Reserve, they made no complaint about that transaction in an inquiry, the purpose of which was to air any and all complaints about Wawanosh's conduct as Head Chief. The failure to complain about Wawanosh's actions in connection with the Cameron transaction, or to repudiate that transaction, constitutes evidence from which it can be reasonably inferred that Wawanosh acted with the authority of the Chippewa bands affected by the transaction, or at least that they accepted his actions, once they became known.

G. Post-Cameron Transaction Events

141 The inference of approval or at least acceptance of the Cameron transaction by the Chippewas flowing from the absence of any complaint about it in the avalanche of complaints made against Wawanosh is strengthened by the evidence of several events which occurred between 1840 and 1855. These events shed further light on the Chippewas' attitude towards the Cameron transaction.

142 In reviewing these events, we heed the admonition of the motions judge that direct evidence from the Chippewas is not available. The events are described in documents that were not authored by or even known to the Chippewas, the vast majority of whom did not speak or write English. [12] In assessing this evidence, however, we also bear in mind that, although the authors of the documents shared a common ancestry and cultural background, they did not share the same perspective of the Cameron transaction or the same broad goals or interests. Officials in the Indian Department, and in particular Jarvis and Jones, were hardly in the camp of Cameron and Wawanosh. They had nothing to gain by facilitating the transaction, misrepresenting the Chippewas' position, or ignoring any concerns the Chippewas may have brought to their attention. If anything, circumstances would suggest a bias, especially by Jones, in favour of those who may have voiced any opposition to Wawanosh's actions.

143 The first reference in the Indian Department correspondence to the Cameron transaction after November 1839 was a letter from Jones to Jarvis in early May 1840. Jones advised Jarvis that the Chippewas wanted approval for the purchase of 300 acres of land in Enniskillen. The Chippewas, including those on the Upper Reserve, had been interested in acquiring Enniskillen land for many years. There were maple groves at Enniskillen which were ideal for sugar-making, a traditional Chippewa activity which had taken on commercial importance as the number of white settlers increased.

144 Jones advised Jarvis that the Chippewas proposed that the purchase price " be paid out of the money which they are to receive from the tract to be sold to Mr. Cameron and co., or, in the event of much delay, the first instalment to be paid out of their annuity".

145 The proposal made by the Chippewas through Jones in May 1840 was the latest of several proposals the Chippewas had made concerning the acquisition of Enniskillen land. Some involved the exchange of reserve land (not land on the Upper Reserve) for Enniskillen property, and others involved the outright purchase of Enniskillen property. These proposals were advanced by the chiefs after Council meetings and reflected the consensus of the Chippewa bands. There is no reason to doubt but that the proposal put forward through Jones in May 1840 also represented the community consensus. Jones refers only

to "the Indians" in his letter, however, given his relationship with Wawanosh, we think that had the plan been advanced by Wawanosh, Jones would have said so.

146 The motions judge concluded that the letter from Jones in May 1840 was evidence that the Chippewas on the Upper Reserve had a general awareness of the Cameron transaction as of May 1840 and knew that the land was to be sold to Cameron. We think the letter shows more than that. It indicates a communal awareness of the Cameron transaction as early as May 1840 and a communal acceptance of the transaction. The Chippewas saw the Cameron transaction as providing a source of funds with which they could develop the sugar-making resources on the Enniskillen property. In doing so, they would be pursuing a traditional practice, while at the same time improving their economic base by developing a commercial relationship between themselves and the white settlers. Far from repudiating the Cameron transaction in May 1840, the Chippewas embraced it as a means of acquiring the Enniskillen property, a long held and actively pursued community goal.

147 The Enniskillen lands were eventually purchased by the Chippewas, but not from the proceeds of the Cameron transaction. Those proceeds were not available. The fact that the Cameron transaction did not fund the purchase has no effect on the inference to be drawn from the Chippewas' position as set out in Jones' letter of May 1840.

148 The events leading up to the survey of the disputed lands in the summer of 1842 also shed light on the Chippewas' attitude towards the Cameron transaction. In June 1841, Cameron complained that he could not commence a settlement of the land until it was surveyed and set out in lots. In October 1841, the Surveyor General suggested that it would be more economical to survey the entire Upper Reserve rather than just the lands affected by the Cameron transaction. Jarvis agreed with his suggestion but observed:

> I entirely concur in your view of the matter but as the Chief of the tribe of Indian who live on the Reserve is not on very good terms with his people I should recommend a reference being first made to them, to ascertain whether they have any objection to the land being laid out into lots.

149 Jarvis understood that the Chippewas might well be opposed to having the entire Upper Reserve surveyed. From the Chippewas' perspective, a survey setting out lots was a precursor to settlement by the white man. Before taking that provocative step, Jarvis wanted to be sure that the Chippewa community would not oppose it. Given the relationship between Wawanosh and many of the Chippewas on the Upper Reserve by the fall of 1841, Jarvis was not prepared to act on Wawanosh's word alone. [13]

150 The motions judge contrasted Jarvis' careful approach to obtaining a Chippewa consensus in relation to the survey with the absence of any concern about the existence of a Chippewa consensus in connection with the Cameron transaction. With respect, the two situations were not analogous. In so far as the survey was concerned, Jarvis had no reason to think that the Chippewas were agreeable to a survey and given the significance of a survey to the Chippewas, very good reason to think that they would be opposed to the survey. With respect to the Cameron transaction, it was brought to the Indian Department representative, Jones, as a concluded bargain by three chiefs of the Chippewas.

151 In October 1842, Jones was told of the proposal to survey the entire reserve and was asked to determine the views of the "chiefs of the tribes generally". Two weeks later, Jones wrote back to Jarvis indicating that he had had some difficulties getting the chiefs together and that it had taken them some time to determine whether they were agreeable to a survey of the entire reserve. Jones indicated that the chiefs did not wish to have the entire reserve surveyed.

152 As the motions judge observed, the Chippewas' consideration of whether to permit a survey of the entire reserve would have necessarily entailed knowledge of the fact of the Cameron transaction and the extent of the land involved in that transaction. The Chippewas' response to the survey request leads to two other conclusions. First, the Chippewas were perfectly capable of resisting attempts to intrude on their land. Second, there was no suggestion that the Crown was not entitled to survey the disputed lands and set out lots on that land. Acceptance of the Crown's right to survey implied recognition of imminent settlement by the white man. Such settlement was inconsistent with any claim by the Chippewas that the Cameron transaction was unauthorized by them, or at least unacceptable to them as of 1842. We infer from the Chippewas' response to the request for a survey of the entire reserve that by the fall of 1842, the Chippewas on the Upper Reserve distinguished between the disputed

lands and the rest of the reserve, saw it as their right to prohibit surveys of the latter but not the former, and knew that white settlement of the disputed lands was imminent.

153 Jarvis was inclined to press for a survey of the entire reserve despite the position of the Chippewas, but in January 1842 it was concluded that the benefits of surveying the entire reserve were not worth the harm that the survey would cause to the relations with the Chippewas on the Upper Reserve. The entire reserve was not surveyed until 1855 when the chiefs consented to the survey.

154 Even after the proposal to survey the entire reserve was abandoned, there was a further delay in surveying the lands which were subject to the Cameron transaction. The delay was due in part at least to some confusion over road allowances. That confusion resulted from the absence of proper documentation of the transaction.

155 In May 1842, John O'Mara, a surveyor, went to the Upper Reserve and spent some two weeks doing a detailed survey of the disputed lands. He divided the lands into three blocks, set out a road between blocks A and B, a road between blocks B and C and two roads running from the western limit of the disputed lands through the reserve to the St. Clair River. In referring to the actual making of the survey, the motions judge said:

> This is an important piece of evidence because the band was sensitive to the implications of any survey. The open and notorious presence of surveyors on the disputed land and the visible survey monumentation in the form of stakes and blazed trees would bring home to the band very vividly the fact that their land was being prepared for settlement.

156 We agree with the conclusion of the motions judge. In our view, there were two reasonable inferences to be drawn from the Chippewas' inaction in the face of the survey. Either Wawanosh and the other chiefs acted with the approval of the Chippewas affected by the sale when they made the bargain with Cameron; or even if they did not have their approval, the Chippewas accepted the bargain when it came to their attention, did not seek to repudiate it or otherwise assert any right to the disputed lands.

157 The failed attempt by residents of Port Sarnia to acquire part of the Upper Reserve in February 1843 was the next event discussed in some detail by the motions judge. He accurately observed that the officials in the Indian Department regarded a surrender of the land as a condition precedent to any acquisition of it by the residents of Port Sarnia. He also suggested that the aborted transaction demonstrated:

> the ease with which enthusiastic purchasers can convince government officials, wrongly, that the Chippewas had agreed to sell part of the reserve.

158 With respect, the evidence does not support this conclusion. The government officials were not convinced of anything by the residents of Port Sarnia. Rather, Jones was instructed to convene a meeting of the principal men and determine whether a surrender could be agreed upon. Within a month, the Chippewas indicated they were not prepared to surrender the land at that time, and that ended the matter as far as Jarvis was concerned.

159 The reference to the aborted transaction involving the residents of Port Sarnia provides little insight into the Cameron transaction. Unlike that transaction, there was no bargain presented to the Indian Department in 1843 by chiefs of the Chippewas, but rather a petition to that Department by the land-hungry residents of Port Sarnia asking the Department to obtain a surrender.

160 The attempts by the residents of Port Sarnia to acquire part of the Upper Reserve in 1843 do, however, provide yet another example where Chief Wawanosh, speaking through his son, conveyed the position of the Chippewas on the Upper Reserve to the Indian Department. As with the earlier occasions set out above, there is no suggestion that Wawanosh inaccurately conveyed the community consensus to the Indian Department.

161 The incident in 1843 also demonstrates that the Chippewas' objections to intrusions onto their lands were acknowledged and accepted by the Indian Department even over the opposition of settlers.

162 The Bagot Commission Report in 1844 also deserves brief reference. That Commission examined in detail the affairs of the Indian Department, and was highly critical of the operation of that department. The Commission heard many complaints about unjust land transactions in the 1830s, but recorded no complaints or disputes with respect to the Cameron transaction. The Commission was well aware of the transaction and examined its monetary details at some length. The Commission concluded that Jarvis had placed the initial payment made by Cameron in the wrong bank account and the Commission was highly critical of Jarvis' record-keeping. Nowhere, however, is there any suggestion that the transaction did not have the approval of the Crown and the Chippewas, or that it was regarded by anyone as a "private deal" between Cameron and Wawanosh.

163 The next reference by the Chippewas to the Cameron transaction appeared in correspondence from Peter McGlashan, the clerk of the Magistrate's Court at Port Sarnia to resident Superintendent Clench in August 1847. McGlashan, who was involved in yet another attempt by the residents of Port Sarnia to acquire land on the Upper Reserve, wrote to Clench to tell him that the Chippewas were not prepared to give up any of their land. He said:

> . . . To all these arguments the Indians have but one answer *viz*, that they were induced some eight years ago to consent to the sale of a large part of the reserve to Mr. Cameron of this place, for which he agreed to pay them within five years, in annual instalments but that to this time they have not received any part of the purchase money, and that they will not dispose of any more of their land for fear that they should be served in the same manner in receiving payment for it.

164 The motions judge found that the letter was further evidence of the Chippewas' knowledge of the transaction albeit that they were mistaken as to the number of annual instalments to be paid. He went on, however, to conclude that McGlashan could not be relied on to accurately convey the Chippewas' attitude towards the transaction, and that it "has little evidentiary weight in determining whether Wawanosh on November 8, 1839 acted with the consent and authority of the band".

165 While it is not unreasonable to conclude that the letter could not be relied on to show that Wawanosh had the consent of the affected bands when he agreed to the transaction, we see no reason to discount the value of the letter as evidence of the Chippewas' attitude towards the transaction in 1847. Their comments to McGlashan do not suggest a repudiation of the agreement. Quite the contrary, they signal a willingness to comply with the agreement and a complaint that the purchaser was not complying with it. The attitude of the Chippewas, as expressed to McGlashan, is inconsistent with the claim that the Chippewas viewed the disputed lands as having been unilaterally taken from them by Cameron. It is equally inconsistent with the claim that, as of 1847, the Chippewas did not accept that the disputed lands were no longer theirs.

166 The Chippewas maintained this same position in subsequent communications with the Indian Department. For example, in 1850, a local Indian Department official reported that the chiefs were concerned that Cameron was issuing deeds for parts of the disputed land when they had not yet been fully paid. As in 1847, the Chippewas' complaint was with Cameron's failure to comply with the bargain, not with the bargain itself.

167 The lengthy dispute over road allowances across the Upper Reserve, between the residents of Port Sarnia and the Chippewas on the Upper Reserve, provides further evidence of the Chippewas' attitude towards the Cameron transaction. In 1849, the residents of Port Sarnia petitioned the government to open a road through the reserve. Some settlers wanted a road through the middle of the reserve, to the river. In August 1849, the provincial land surveyor recommended that a road be built through the reserve. In September 1849, the Chippewas, through their interpreter Henry Chase, responded to the proposed road as follows:

> The chiefs had granted a road should be opened for the use of their white neighbours direct from Sarnia Village, cutting diagonally the northeast corner of the Indian reserve of three quarters of a mile, as the Honourable Malcolm Cameron had proposed to be opened, to his lot of land on the rear of the reserve.

168 Mr. Chase also reported that the chiefs would not agree to a second road being opened through the reserve. In early 1850, the residents of Port Sarnia filed a further petition with the government complaining that the Chippewas' opposition was due to "a child-like ignorance of what is really for their benefit".

169 In July 1850, the residents of Port Sarnia changed tactics. They now contended that three roads had been granted to Cameron as part of the 1839 transaction. They petitioned the town Council of Port Sarnia to create a road along those allowances and indicated that the Indian Department should "order the agreement with the Honourable Malcolm Cameron to be fulfilled".

170 An exchange of correspondence ensued dealing with the road allowances, if any, that had been granted in the Cameron transaction. The lack of proper documentation respecting the transaction fuelled the controversy. It was in the course of this correspondence that an Indian Department official asked whether a surrender of the land had been made at the time of the sale to Cameron. That question went unanswered.

171 After making inquiries, the Indian Department advised the Port Sarnia municipal Council that:

> On the authority of an existing order of the Governor General in Council that as the land through which you wish the road to pass is an Indian reserve which has never been surrendered to the Crown, no part of it can be considered under the jurisdiction of the municipal Council as a public highway.

172 The municipal Council was not prepared to accept this position and indicated, relying on the letter of Jones to Jarvis of November 9, 1839, that the municipality would press ahead and "abide the consequences if they overstep their authority".

173 Clench responded with equal vigour, advising the municipality that if the road concessions were not provided for in the surrender, the letter of Jones would have no value. Clench assumed that a surrender existed. In fact, there was none.

174 Eventually, the municipality resiled from its threats to proceed with the roads despite the position of the Indian Department. An agreement was reached with the Chippewas whereby the Chippewas agreed to permit a road running diagonally across the corner of the reserve. This was the offer the Chippewas had made in 1849 when they first indicated they were willing to allow their " white neighbours" to run a road through the Upper Reserve from the disputed lands to the river.

175 The Chippewas' attitude throughout the road dispute was one of acceptance of the fact of the Cameron transaction. The back of the reserve was described as Cameron's lands. The Chippewas were also willing to co-operate with their white neighbours in road construction, but insisted that the co-operation be on their terms if the road was to run over their land. Their position was supported throughout by officials at the Indian Department.

176 The road allowance dispute is a good example of the tripartite nature of disputes involving Indian lands in southwestern Ontario in the middle of the 19th century. The settlers stood on one side of the dispute and the Chippewas on the other with the Indian Department in the middle. That Department did not see itself as a promoter of the interests of white settlers. Where, as in the case of the road allowance dispute, the Department concluded that the Chippewas were correct, they fully supported the Chippewas' position.

177 The willingness of the Indian Department to support the Chippewas' position even against the persistent claims of the white settlers in Port Sarnia was not unique and would not have been lost on the Chippewa leadership. Their failure to take issue with the Cameron transaction cannot be explained on the basis that they assumed that such complaints would not receive a fair hearing at the Indian Department. As the road allowance dispute demonstrates, officials in that department were prepared to support the Chippewas in contentious matters involving lands on the Upper Reserve.

178 The final event which must be examined in considering the Chippewas' attitude towards the Cameron transaction is the General Council meeting of the Chippewa chiefs in March 1855. The chiefs addressed a number of questions to Superintendent Talfourd, Clench's successor. Talfourd's notes indicate that the questions were directed to several transactions involving reserve lands. Talfourd's cryptic notes of the questions put by the Chippewa chiefs included the following reference to the Cameron transaction:

> To what amt. the principal the sale of the parcel of land brought by Mr. Cameron and the amt. of land to have the exclusive use of the money?

179 Talfourd's report on the General Council meeting included the following:

> . . . I attended a Council . . . of the Chippewas of Sarnia when it was decided that I should communicate to Your Lordship their wants and wishes on the following subjects . . .
>
> (Firstly) the sum that will be realized by the late surrender of land at Sarnia Village, the block sold to Honourable M. Cameron in the rear of the reserve, and one lot in Bosanquet sold to Mr. Kennedy, and at what time they may expect the interest on the payments already made.

180 After referring to these documents, the motions judge held:

> . . . The documents show that the band knew of the sale to Cameron, did not know the amount of the sale price, did not know the amount of land sold, knew there was some interest owing, and did not know when it would be paid.

181 We cannot accept some of these conclusions. In our view, it is not reasonable to infer from these notes that the Chippewas were unaware of the purchase price. In his report, Talfourd refers to "the sum that will be realized". This is a very different matter than the purchase price since an interest calculation was involved. Nor is it reasonable to assume that the Chippewas did not know the amount of land that had been sold. As indicated above, a detailed survey of the land had been carried out in 1842. A further more detailed survey was made before 1850. While the Chippewas might not have known how many white man's acres were involved in the transaction, they knew exactly what part of the Upper Reserve had been given up in the Cameron transaction. Lastly, the Chippewas' question concerning when they would pay the accumulated interest does not reflect any ignorance of the terms of the bargain made with Cameron. Actual payment to the Chippewas depended on the Crown who held the money for the benefit of the Chippewas and not on the terms of any bargain struck between Cameron and the three chiefs.

182 We take the queries posed by the chiefs at the General Council in 1855 as strong evidence that the Chippewas accepted the transaction, no longer regarded the disputed land as theirs, were prepared to abide by the terms, but were also determined to get what was due to them under the terms of the transaction. As with the previous events outlined above, the Chippewas did not seek to repudiate the agreement, but rather sought compliance with the terms of the agreement by the purchaser.

183 By 1861, some twenty-two years had passed since the Cameron transaction. Cameron was no longer on title and those who had purchased the land had no involvement in the transaction. They could look to an apparently valid Crown patent issued some eight years earlier for the root of their title.

H. Summary of Findings

184 We summarize our relevant findings with respect to the Cameron transaction and the events in the ensuing twenty-two years as follows:

- Crown officials responsible for First Nations relations continued throughout the relevant time to follow the central policies underlying the *Royal Proclamation*. The Crown continued to recognize Indian rights in their lands, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and capable of surrender only by a public manifestation of the First Nations' consent to the surrender.

- Cameron, with the approval of the Crown, negotiated the transaction with three chiefs of the Chippewas, including Head Chief Wawanosh. The chiefs and Cameron reached a bargain, the terms of which were modified by Jarvis and then approved by the Crown. The bargain was consistent with the goals of the "civilization" policy of the Crown.

- By 1851, the Crown believed that a surrender of the disputed lands had been made and issued a patent on that basis in 1853.

- There was in fact never a surrender of the disputed lands to the Crown.

• The Chippewas were never asked by the Indian Department to surrender the disputed lands to the Crown. Consequently, there is no evidence of the existence of a communal intention to surrender the disputed lands to the Crown at any time.

• The failure to request and obtain the necessary surrender is explained by the dysfunctional state of the Indian Department and the neglect of those charged with the responsibility of obtaining the surrender.

• It cannot be said whether Head Chief Wawanosh and the two other chiefs negotiated the bargain with Cameron with the authority of those Chippewa bands affected by the transaction. It is, however, clear that those bands knew of the transaction shortly after it was made. They chose not to repudiate the agreement, but rather accepted the transaction, sought to obtain the proceeds from it, and sought to apply those proceeds to other well established communal interests.

• In the twenty years following the transaction, those Chippewas affected by it both acknowledged and accepted it. They regarded the disputed lands as no longer part of their Upper Reserve, and insisted that they obtain what was due to them under the terms of the transaction.

• The Chippewas' repudiation of the Cameron transaction and their claim that they retain their interests and rights in the disputed lands first occurred some 140 years after the Cameron transaction when it was discovered that there was no documentation evincing the surrender of the lands by the Chippewas to the Crown.

IV. No Surrender of the Disputed Lands

185 It follows from our review of the evidence that we agree with the motions judge's finding that the Chippewas never surrendered the disputed lands to the Crown. As stated earlier, this issue, which is central to this case, is first and foremost a factual one. However, since the arguments of all parties on this issue were essentially focussed on the surrender provisions of the *Royal Proclamation* and the effect of the *Quebec Act* on those provisions, we will examine the question of surrender in that light.

A. The Royal Proclamation of 1763

186 The *Royal Proclamation of 1763* was an expression of the royal prerogative. It was used as a mode of imposing the imperial power on conquered colonies in North America including New France. In accordance with its stated intention to "Establish New Governments in America" it created four new colonies including the province of Quebec on which it imposed the laws of England until the pre-conquest French Law was restored in Quebec by the *Quebec Act*, *1774*: see P. W. Hogg, *Constitutional Law of Canada*, 4th ed., looseleaf (Scarborough: Carswell, 1997) at 2-7 to 2-8.

187 Stripped to its essentials, the *Royal Proclamation* states that the King has acquired territories in America secured by the Treaty of Paris and has seen fit, with the "Advice of Our Privy Council" to grant letters patent under the Great Seal of Great Britain to create within the territories four distinct and separate governments (i.e., Quebec, East Florida, West Florida and Grenada). The territorial boundaries are then set out; they do not include within Quebec the contested Chippewa lands. The letters patent issued pursuant to the *Royal Proclamation* provide that the Governors of the colonies shall call General Assemblies and that the Governors, with the consent of the assembly, are given the power to make laws for the public welfare and to constitute courts of law. The Governors and councils were also given authority and power to settle and agree with the inhabitants of the New Colonies for such lands, tenements and hereditaments as shall be in "Our Power" to dispose of and to grant certain lands to officers and men of the army and navy who have disbanded in America.

188 The Indian provisions of the *Royal Proclamation* begin with the following declaration:

> And whereas it is just and reasonable, and essential to our Interest and Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them or any of them, as their Hunting Grounds. . . .

189 The Indian provisions of the *Royal Proclamation* are found in the next five paragraphs of the proclamation and are contained in what the motions judge calls "Part IV" (Reasons of the motions judge, paras. 250-257). Paragraph 1 creates an interior Indian territory beyond the colonies and the western settlement barrier. It prohibits government land grants of any kind in this territory and prohibits government land grants in the colonies of unceded Indian land. Paragraph 2 reserves the interior Indian territory including (until 1774) what is now the disputed land "for the use of the said Indians" and prohibits any settlement or land purchase " without Our especial Leave and Licence for that Purpose first obtained". The leave and licence provisions are of little application and have no significance to this case. Paragraph 3 is a removal provision that required any persons settled in the interior Indian territory or on unceded Indian lands within the colonies to remove themselves immediately.

190 Paragraph 4 deals with two distinct provisions; the first, part 4a, prohibits private purchases and sets requirements for the surrender to the Crown of Indian lands within colonies open to settlement. The second, part 4b, regulates the fur trade.

191 The private purchase prohibition and the surrender procedures are introduced with a preamble noting the "great Frauds and Abuses" that have been committed in private purchases from the Indians and the need to prevent such private purchases in order to convince the Indians of the justice of the Crown and to remove sources of discontent. Paragraph 4a provides that, in areas with colonies open to settlement, Indian lands can be acquired only if they are first surrendered to the Crown by the Indians at a public meeting of the nation or tribe held for that specific purpose:

> We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; . . .

192 These are the surrender provisions of the *Royal Proclamation*. The Chippewas submit that these provisions survived the *Quebec Act* and had the force of law until replaced in 1860 by the Legislature of the Province of Canada: see *An Act Respecting the Management of the Indian Lands and Property*, S. Prov. C. 1860, 23 Vict., c. 151, s. 6. They submit that the Crown could only acquire legal title to Indian lands by following the letter of the surrender provisions in the *Royal Proclamation*. Otherwise, they say, the transaction was a private sale and void *ab initio* leaving the present landowners without title.

193 The motions judge accepted the Chippewas' position. He found that: (1) there was no formal surrender of the disputed lands; (2) the sale to Cameron was a private sale; (3) the private sale of unsurrendered aboriginal land was prohibited by the *Royal Proclamation* and by common law; and (4) the letters patent to Cameron were illegal and void *ab initio*.

194 The motions judge's reasons, in summary form, for deciding the surrender issue were as follows: the surrender procedures in the *Royal Proclamation* had the force of law in 1839 and accordingly any sale of Indian lands had to comply with these procedures; the disputed lands had never been surrendered by the Chippewas because the mandatory surrender procedures set out in the *Royal Proclamation* had not been complied with; absent a formal surrender, the Chippewas did not and could not have consented to or affirmed the sale of the disputed lands. The motions judge therefore decided the surrender issue in the Chippewas' favour and characterized their interest in the disputed lands in the nature of an "unceded unsurrendered common law aboriginal interest and title guaranteed by Treaty 29".

195 The motions judge held that the *Royal Proclamation* had the force of law in 1839 and that its full surrender requirements were directly in force in the disputed lands at the material time. He also noted that "[t]he surrender procedures incorporated into the *Proclamation*, quite apart from the *Proclamation* itself, reflect fundamental aspects of Indian title at common law" and accordingly that the surrender requirements themselves were "in force in 1774 and thereafter in the area of the disputed lands as fundamental conditions precedent for the valid alienation of Indian land" (para. 286). He concluded that any surrender of Indian lands in 1839 had to comply with the *Royal Proclamation* and common law surrender requirements.

196 The motions judge rejected the various defendants' arguments that the surrender provisions of the *Royal Proclamation* had been repealed by the *Quebec Act* and thus rendered inoperative. He concluded, as a matter of statutory interpretation, that

the *Quebec Act* was not intended to, and in fact did not, repeal or abrogate the surrender procedures of the *Royal Proclamation*. He further noted that the *Quebec Act*, which made no reference to Indians at all, did not evidence the "clear legislative intent" required to derogate from Indian title or treaty rights. Following a chronological review of the relevant case law, he distinguished the *Bear Island Foundation* case, in which this court held that " the *Quebec Act* repealed the surrender procedures of the *Royal Proclamation*" and that there was no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown (para. 333). He supported his decision to not follow the *Bear Island* "repeal dictum" on the basis that the case was "fact-driven", that it was overruled by subsequent Court of Appeal authorities, and that although the Supreme Court of Canada upheld this Court's decision, the Supreme Court expressly stated that it did not necessarily agree with all the legal findings of this Court.

197 In the submission of the Chippewas, these findings of the motions judge support the legal conclusion that the Crown had acquired no title to the disputed land and could grant no title to Cameron. The Chippewas further submit that because they have a constitutionally entrenched right to the occupation of these lands that continues to this day, the court is not in a position to grant any relief to the present landowners.

198 In the light of our findings on the evidence before us that whatever the formal legal status of the *Royal Proclamation* subsequent to the passage of the *Quebec Act*, the Crown continued to recognize Indian rights in their land, continued to require that those rights be surrendered only to the Crown on consent, and continued to regard those rights as communal and surrenderable by a public manifestation of the First Nations consent to surrender (see paras. 57-65 above), little turns in this case on whether the surrender provisions per se of the *Royal Proclamation* had the force of law in 1839. We have found that those responsible for the First Nations relations after 1776 continued to follow the central policies underlying the *Royal Proclamation* and developed protocols for the conduct of meetings to which formalities the First Nations and the Crown representative attached considerable importance. We have also found that at the relevant time such surrender procedures were in place, that it was understood by all parties that they were a first step towards making the lands in question available for settlement, that the procedures should have been followed and they were not followed.

199 As we accept the proposition that aboriginal title could be lost only by surrender to the Crown, and that a surrender required a voluntary, informed, communal decision to give up the land, it is not necessary to our analysis that we determine the precise legal status of the *Royal Proclamation* at the time of the Cameron transaction.

200 On the one hand, the record contains evidence that, historically, the *Royal Proclamation* was intended to be a provisional arrangement which, in so far as Quebec was concerned, was replaced by the *Quebec Act* and that the temporal limitations of the *Royal Proclamation* also applied to the Indian provisions. For example, we refer to certain statements to this effect made by the Lords of Trade, [14] the drafting of legislation for Parliament in 1764 entitled "Plan for Future Management of Indian Affairs", and the provisions of the *Quebec Act* itself. Further, one Crown expert, Dr. Paul Gerald McHugh, posits that the government of the day did not regard the *Royal Proclamation* as being operative even before the passage of the *Quebec Act.* According to his evidence, it would appear that instructions as to the treatment of Indians, including the formalities for the surrender of Indian lands, were treated as an ongoing exercise of the royal prerogative. He further asserted that while the spirit of the *Royal Proclamation* was respected in that all surrender procedures were to be of a public nature, the specific procedure in each case was a matter to be determined on a case-by-case basis by the Governor in Council.

201 On the other hand, the evidence shows that while the *Royal Proclamation* was a unilateral declaration of the imperial Crown, historically, it had become a formal part of the treaty relationship with the Indian nations. In reviewing the evidence, we have already alluded to the fact that the Crown took extraordinary steps to make the First Nations aware that the policy set out in the *Royal Proclamation* would govern Crown-First Nations relations and the importance attached to the *Royal Proclamation* by First Nations as their *Charter*. There can be little doubt that from the aboriginal perspective, the *Royal Proclamation* was perceived as an authoritative and enduring statement of the principles governing their relationship with the Crown. We also note in the record evidence that government officials considered that the Indian land provisions in the *Royal Proclamation* were still in effect even after the passage of the *Quebec Act*. Moreover, the *Royal Proclamation* is expressly referred to in the *Canadian Charter of Rights and Freedoms*, s. 25, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.),

1982, c. 11 [15] and it has been consistently cited in the case law from the earliest times as the defining source of the principles governing the Crown in its dealings with the aboriginal people of Canada.

202 As stated earlier, in view of our findings of fact, we do not find it necessary to make any final determination on the precise legal status of the *Royal Proclamation*. We note as well that the importance of the *Royal Proclamation* as the source of aboriginal title has been much diminished by recent decisions of the Supreme Court of Canada. That Court has made clear that, contrary to the suggestion of earlier case law, aboriginal rights, including aboriginal title, are pre-existing rights. As was stated by Dickson J. in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), at 379:

> Their [the Indians'] interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s. 18(1) of the *Indian Act*, or any other executive order or legislative provision.

203 In *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.), at 1082, Lamer C.J.C. stated:

> Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling* [*St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46]. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples.

And at 1091-1092:

> Aboriginal title at common law is protected by s. 35(1) [of the *Constitution Act, 1982*]. This conclusion flows from the express language of s. 35(1) itself, which states in full: "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed" [emphasis added by Lamer C.J.C.]. On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were "existing" in 1982. The provision, at the very least, constitutionalized those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before 1982 (*e.g. Calder* [*Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313]), s. 35(1) has constitutionalized it in its full form. [Emphasis in original.]

204 Lamer C.J.C. also stated that "the same legal principles governed the aboriginal interest in its reserve lands and lands held pursuant to aboriginal title" (at 1085). He quoted with approval from 379 of the reasons of Dickson J. in *Guerin* (at 379):

> It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases . . . [Emphasis in original.]

205 This last statement is important to this case where the Chippewas and the motions judge made much of the language of Treaty 29, consummated at Amherstburg on July 10, 1827, expressly reserving to the Indians from the lands surrendered a reservation covering the disputed lands.

B. The Quebec Act, 1774

206 In light of these recent pronouncements by the Supreme Court, it would appear that the *Quebec Act, 1774* could not and did not effect any change in the nature and extent of aboriginal title to the extent that it did revoke the *Royal Proclamation*. In any event, we are not concerned so much with the nature and extent of aboriginal rights, as with the question of their surrender. On that subject, we are bound by our own decision that the surrender provisions of the *Royal Proclamation* were revoked by the *Quebec Act*: see *Ontario (Attorney General) v. Bear Island Foundation*, *supra*, at 410.

207 In *Bear Island Foundation*, it was argued that the members of the Temagami Band were not bound by the Robinson-Huron Treaty of 1850 because the surrender procedures followed by the Crown were contrary to the *Royal Proclamation.* As to this argument, this court said at 410:

> It is at least questionable whether these provisions affected the Temagami lands since they may not have been "within those parts of Our Colonies where We have thought proper to allow Settlement". It is, however, not necessary to resolve this question since the relevant procedural aspects of the Proclamation were repealed by the *Quebec Act*,1774 (U.K.), c. 83 [R.S.C. 1970, App. ll, No.2]. Section 3 of the *Quebec Act, 1774* makes it clear that it does not make void, vary or alter any right, title or possession. Therefore, whatever right, title or possession the Temagami Band may have had pursuant to the Royal Proclamation was not affected by the *Quebec Act, 1774.* We think it clear, however, that the procedural requirements for purchase "at some public Meeting or Assembly . . ." was repealed. *Thus, at the relevant times there was in existence no positive law prescribing the manner in which aboriginal rights could be ceded to the Crown.* [Emphasis added.]

208 It is argued that these remarks were *obiter dictum*. They were not. The entire thrust of the judgment was that it was not necessary to determine whether that Band had acquired aboriginal rights because any rights they had were extinguished either by being parties to the Robinson-Huron Treaty or because the Band's subsequent conduct amounted to adhesion to the Treaty.

209 The Supreme Court of Canada dismissed the appeal of the Temagami Band: [1991] 2 S.C.R. 570 (S.C.C.). The Supreme Court recognized that the case was largely fact-driven and that there were concurrent findings of fact in the two lower courts with which it would not take issue. It then said at 575:

> It does not necessarily follow, however, that we agree with all the legal findings based on those facts. In particular, we find that on the facts found by the trial judge the Indians exercised sufficient occupation of the lands in question throughout the relevant period to establish an aboriginal right; see in this context *Simon v. The Queen*, [1985] 2 S.C.R. 387; *R. v. Sparrow*, [1990] 1 S.C.R. 1075. In our view, the trial judge was misled by the considerations which appear in the passage from his reasons quoted earlier.

210 This court did not accept this legal conclusion either, and proceeded on the assumption that the Band had established aboriginal rights over the disputed lands. In effectively taking the same approach, the Supreme Court said at 575:

> It is unnecessary, however, to examine the specific nature of the aboriginal right because, in our view, whatever may have been the situation upon the signing of the Robinson-Huron Treaty, that right was in any event surrendered by arrangements subsequent to that treaty by which the Indians adhered to the treaty in exchange for treaty annuities and a reserve.

211 In our view, these passages cast no doubt on the legal conclusions reached by this court. In particular, the Supreme Court's acceptance of the proposition that "arrangements subsequent to the treaty" amounted to a surrender indicate that it was no longer necessary to follow the letter of the procedure prescribed by the *Royal Proclamation*.

212 Nor do we accept the contention that this court "impliedly" reversed *Bear Island Foundation* in *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (Ont. C.A.), leave to appeal to S.C.C. refused [1994] 2 S.C.R. v (S.C.C.), and *Chippewas of Kettle & Stony Point v. Canada (Attorney General)* (1996), 31 O.R. (3d) 97 (Ont. C.A.), aff'd [1998] 1 S.C.R. 756 (S.C.C.). Neither case mentions *Bear Island Foundation* nor the Quebec Act. The only references to the *Royal Proclamation* were made in an historical context. There was no suggestion that it was still in force as the operative surrender procedure.

213 In *Hopton*, the Shawanaga Indian Band was the respondent to an action for a declaration that a road, which ran through its unsurrendered Indian lands, was a public road. The public had used the road from 1850 to 1978 when the Band took the position that it was a private road. The trial judge declared the road to be a public highway by reason of the common law doctrine of dedication and in addition, or in the alternative, by virtue of s. 257 of the *Municipal Act*, R.S.O. 1980, c. 302 [now R.S.O. 1990, c. M.45, s. 261] which provides that "all roads passing through Indian lands . . . are common and public highways". The Band appealed and the trial judgment was set aside.

214 This court held that the doctrine of dedication is inapplicable to unsurrendered Indian lands because the *sui generis* nature of Indian title renders impossible an inference of intention to dedicate. This court also held that s. 257 of the *Municipal Act* cannot mean that lands passing through Indian lands become public highways by the simple operation of that section because that would be legislation within the exclusive legislative jurisdiction of the Parliament of Canada and, as such, would be *ultra*

vires the province. The section can do no more than declare public, for provincial purposes, those highways that have become public highways pursuant to the provisions of the *Indian Act*, R.S.C. 1985, c. I-5, which provides for the surrender to the Crown and transfer of administration and control of the lands to the provinces.

215 The only reference to the *Royal Proclamation* is in the holding by the court that the doctrine of dedication is inapplicable to unsurrendered Indian land. Putting the matter in historical perspective, the court stated at 399:

> The *Royal Proclamation,* the Robinson-Huron Treaty and the successive *Indian Acts* all prohibit the disposition of any part of unsurrendered land except through formal surrender to the Crown.

216 As we understand this passage, it says no more than that the aboriginal rights of the Band have been recognised by the Crown over time starting with the *Royal Proclamation* and continuing with regard to this Band with the Robinson-Huron Treaty and with the *Indian Act* thereafter. While the court followed with quotes from both the *Royal Proclamation* and the Robinson-Huron Treaty, in its disposition of this issue, it confined its authorities to those applicable from 1850 to 1978 and relied solely on its interpretation of "treaties and the statutes relating to Indians".

217 In *Chippewas of Kettle & Stony Point v. Canada (Attorney General)*, *supra*, the Band surrendered reserve land to the Crown in 1927. The Band complained in 1992 that the voluntary surrender provisions of the *Indian Act*, R.S.C. 1906, c. 81 had not been complied with. Laskin J.A., in delivering the judgment of the court, reviewed the history of surrender provisions relating to Indian lands, starting with the *Royal Proclamation.* He stated that the "underlying rationale" for the Royal Proclamation and the Indian Act was to prevent aboriginal peoples from being exploited. He then held that the mere presence of one of the subsequent purchasers from the Crown at the surrender meetings conducted pursuant to the *Indian Act* did not violate the language of the *Indian Act* or the "rationale" of the *Royal Proclamation.* It has never been suggested that the surrender procedures in the *Royal Proclamation* survived once they were codified in the *Indian Act* or its predecessor statutes and that it was necessary for the Crown to comply with both the *Indian Act* and the *Royal Proclamation*. As stated, the issue in the case was whether the surrender provisions of the 1906 *Indian Act* had been complied with.

218 A further appeal to the Supreme Court of Canada was dismissed: [1998] 1 S.C.R. 756 (S.C.C.). Cory J. who, as a matter of interest, had been a member of the panel of this court that decided *Bear Island Foundation*, delivered the Court's brief reasons. He said at 757:

> On this appeal we are not concerned with the issue of the Crown's fiduciary duty. The sole question before us is the validity of the surrender and on this issue we are in agreement with the reasons of Laskin J.A.

219 We are not persuaded that this court or the Supreme Court of Canada has overruled Bear Island, implicitly or otherwise. However, we do not regard the fact that *Bear Island Foundation* remains a binding authority as dispositive of the issues raised in this appeal. Simply put, this is not a case where the validity of the surrender turns on whether the appropriate procedures, whatever their source, were followed. Here, there was no surrender at all. Since we accept the proposition that aboriginal title can be lost only by surrender to the Crown, the issues that remain are whether, in the absence of a surrender, the Chippewas have a right to the relief they seek, and whether their claims are barred by the application of any statutory limitation periods or equitable doctrines.

V. Statutory Limitation Periods

220 Canada and Ontario concede that no limitation period bars the Chippewas' claim against the Crown for breach of fiduciary duty, a cause of action for which there is no statutory limitation period in Ontario. The landowners, however, moved for summary judgment to dismiss the action on the basis, *inter alia*, that the claims asserted against them by the Chippewas were barred by the provisions of eighteen different statutes, as listed at paragraph 445 of the motions judge's reasons. The motions judge held that none of the statutes in question applied to bar the action, and the landowners and Ontario appeal from this aspect of the decision. For reasons that follow, however, we would not interfere with the motions judge's conclusions on this issue.

A. Issues on Appeal

221 The motions judge first determined that, for the purpose of any limitation period, the time started to run, subject to any question of capacity and discoverability, from the date of the issuance of the Cameron patent on August 13, 1853. No appeal is taken from this finding.

222 The motions judge then considered the scope and effect of a multitude of Ontario statutes and concluded that Ontario legislation, because of constitutional restrictions on provincial power, could not of its own force extinguish Indian title. Again, no appeal is taken from this finding.

223 The motions judge next considered the alternative argument that, if the Ontario statutes did not apply directly of their own force, they applied because they were incorporated in federal law by reference through various provisions. In the first instance, the landowners relied on s. 88 of the *Indian Act*, R.S.C. 1985, c. I-5; s. 39(1) of the *Federal Court Act*, R.S.C. 1985, c. F-7; and s. 22 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 (as am. by S.C. 1990, c. 8). The motions judge considered each statutory provision and concluded, for various reasons, that none of them applied. The landowners take issue with this finding but restrict their appeal to the applicability of the *Crown Liability and Proceedings Act*.

224 Finally, the motions judge considered the effect of a number of pre-Confederation statutes: the English *"Nullum Tempus Act"* of 1769 [16] which applied to the disputed lands by virtue of the statutory reception of English law in 1792; the 1834 Upper Canada limitations statute; and the 1859 Province of Canada (Canada West) limitations statute. Although the motions judge did not deal specifically with the *Nullum Tempus Act* in his analysis, his reasoning with respect to the other two pre-Confederation statutes would necessarily apply to this statute as well.

225 The motions judge held that the 1834 and 1859 pre-Confederation statutes were continued as if they were laws of the Parliament of Canada in respect of matters within the constitutional authority of Parliament by virtue of s. 129 of the *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. The question then became whether these statutes effectively extinguished the Chippewas' Indian title to the lands.

226 The motions judge recognized that Parliament had the power before 1982 to extinguish aboriginal title unilaterally by specific legislation plainly evidencing a clear specific intent to do so, but held that this power did not extend to the extinguishment of treaty rights. Even if Parliament had the power to extinguish both aboriginal and treaty rights unilaterally, the motions judge concluded that the 1834 and the 1859 pre-Confederation statutes did not evidence any specific intent to do so and hence that they were of no effect. He further held that, in any event, the colonial legislatures that enacted these statutes had no power to affect or extinguish either aboriginal or treaty rights as these were matters exclusively within the Imperial authority and beyond the colonial legislative power at the time.

227 The landowners and Ontario both appeal from the motions judge's finding with respect to pre-Confederation statutes. Canada does not rely on any statutory limitation defence and took no part in the argument of this issue.

228 The following questions are raised with respect to statutory limitation periods:

1. Does s. 22 of the *Crown Liability and Proceedings Act* incorporate any Ontario limitations statute in federal law?

2. Does the *Nullum Tempus Act* of 1769 have any application to this litigation?

3. Were the 1834 and 1859 pre-Confederation statutes continued under s. 129 of the *Constitution Act, 1867* as if they were statutes of the Parliament of Canada or as if they were provincial statutes?

4. Did Parliament before 1982 have the power to extinguish treaty rights unilaterally by statute?

5. Do the 1834 and 1859 pre-Confederation statutes evidence the required intention to extinguish the Chippewas' aboriginal or treaty rights?

> 6. Did the colonial legislatures that enacted the 1834 and 1859 statutes have the power to extinguish aboriginal or treaty rights?

229 It is only necessary to answer questions 1, 2 and 5 to dispose of the question of statutory limitation periods in this case. Our view, stated succinctly, is as follows. The applicability of the *Crown Liability and Proceedings Act* and the *Nullum Tempus Act* is dependent upon the argument that the Chippewas' claim against the landowners for the recovery of land is in effect a "proceeding by the Crown" within the meaning of either of these statutes. The simple answer is that it is not. In so far as the 1834 and 1859 limitation statutes are concerned, it is our view, regardless of the answers to the other questions, that the motions judge was correct in his conclusion that neither statute evidences the clear and plain intent necessary to extinguish aboriginal or treaty rights and that, consequently, the statutes do not affect the disputed lands.

B. The Crown Liability and Proceedings Act

230 Section 32 of the *Crown Liability and Proceedings Act*, first enacted in the *Crown Liability Act*, S.C. 1952-53, c. 30 in a slightly different form, incorporates by reference the Ontario limitations laws with respect to proceedings by or against the federal Crown. It reads as follows:

> 32. Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any *proceedings by or against the Crown* in respect of any cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose. [Emphasis added.]

231 Since this statute only extends to the federal Crown, Ontario does not rely on this provision and, as stated earlier, Canada does not raise any limitations defence. It is therefore not necessary to consider the application of this provision to the Chippewas' action "against the Crown". The landowners, however, argue that the Chippewas' action is, in effect, a claim made on behalf of the federal Crown and hence "a proceeding by the Crown" within the meaning of s. 32. In support of this argument, the landowners rely on the Chippewas' pleadings wherein, amongst other relief, they claim vesting orders in the Crown in trust for the Band.

232 The motions judge rejected this argument and, in our view, rightly so. The Chippewas' claim for recovery of the land is not "a proceeding by the Crown" regardless of the form of relief sought. Even if the fact that the Crown itself would be barred from claiming the same remedy from the landowners could arguably be relevant to the court's decision whether or not to grant the relief sought by the Chippewas, it does not turn the Chippewas' action into a " proceeding by" or on behalf of the Crown so as to trigger the application of s. 32.

C. The Nullum Tempus Act

233 The *Nullum Tempus Act* of 1769 is lengthy and is drafted in the cumbersome legislative language of the time. However, it is not necessary for the purpose of these reasons to reproduce its terms nor to consider any of its precise language because there is no dispute as to what its effect would be if it were applicable. The *Nullum Tempus Act* barred actions and other proceedings *by the Crown* with respect to any land claim commenced more than sixty years after the cause of action accrued. If applicable, it would therefore bar any action by the Crown for the recovery of land commenced after 1913, sixty years after the issuance of the Cameron patent.

234 Ontario and the landowners contend that the *Nullum Tempus Act* was in force in Upper Canada and Canada West from 1792 to the date of confederation and that it was continued thereafter by s. 129 of the *Constitution Act, 1867*. They argue that the Chippewas' action for recovery of land on behalf of the Crown is therefore barred, having been commenced after 1913. The Chippewas do not dispute that the *Nullum Tempus Act* provides for a sixty-year limitation period but they argue that the *Act* was not in force and that, in any event, it does not apply to their action.

235 We do not find it necessary to determine whether the *Nullum Tempus Act* was in force during any part of the relevant period because, in our view, it has no application to the proceeding brought by the Chippewas. As stated earlier, this action is not a proceeding brought by or on behalf of the Crown. It is therefore not affected by the *Act*'s provisions.

D. The 1834 and 1859 pre-Confederation limitation statutes

236 The 1859 statute re-enacted the earlier 1834 statute and the relevant provisions are identical. It is therefore only necessary to consider the language of the later statute. The relevant sections are 1 and 16, the first barring the remedy and the second extinguishing the right and title of ownership. They read as follows:

> s. 1 *And be it further enacted by the authority aforesaid*, That after the first day of July, one thousand eight hundred and thirty four, no person shall make an entry or distress, or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action shall have first accrued to the person making or bringing the same.
>
> s. 16 *And be it further enacted by the authority aforesaid*, That at the determination of the period limited by this Act to any person for making an entry or distress, or bringing an action or suit, the right and title of such person to the Land or Rent, for the recovery whereof such entry, distress, action or suit, respectively, might have been made or brought within such period, shall be extinguished.

237 Hence, these provisions provide for a twenty-year limitation period with respect to actions for the recovery of land. The equivalent sections are found in sections 4 and 15 of the current Ontario *Limitations Act*, R.S.O. 1990, c. L.15, except that the period is now ten years.

238 It is common ground that, prior to 1982, Parliament could unilaterally extinguish aboriginal title by statute. It is also agreed that Parliament could only do so, however, by the use of clear and plain language. While it would appear from recent decisions of the Supreme Court of Canada that, contrary to the motions judge's finding, Parliament's power in this regard extended to the extinguishment of treaty rights as well (see *Marshall v. Canada*, [1999] 3 S.C.R. 456 (S.C.C.), at 496), it is not necessary to decide the matter because there is no dispute that, if Parliament had the power to unilaterally extinguish treaty rights, the legislation would also have to meet the "clear and plain" language test. In our view, it does not.

239 The jurisprudence has evolved considerably in recent years in the direction of narrowing the concept of extinguishment of aboriginal rights. In *Delgamuukw*, *supra*, Lamer C.J.C., in considering whether provincial laws of general application could extinguish aboriginal rights, referred to the "clear and plain" test in these words (at 1120):

> . . . a law of general application cannot, by definition, meet the standard which has been set by this Court for the extinguishment of aboriginal rights without being *ultra vires* the province. That standard was laid down in *Sparrow, supra*, at p. 1099, as one of" clear and plain" intent. In that decision, the Court drew a distinction between laws which extinguished aboriginal rights, and those which merely regulated them. Although the latter types of laws may have been" necessarily inconsistent" with the continued exercise of aboriginal rights, they could not extinguish those rights. While the requirement of clear and plain intent does not, perhaps, require that the Crown" use language which refers expressly to its extinguishment of aboriginal rights" (*Gladstone*, [[1996] 2 S.C.R. 723] at para. 34), the standard is still quite high. My concern is that the only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.

240 If the pre-Confederation statutes are considered to be continued as if they were laws of Parliament, of course no issue arises as to the constitutional division of powers. Nonetheless, these comments suggest that a mere inconsistency between a statute and an aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right. McLachlin

J.'s comments in *R. v. Vanderpeet*, [1996] 2 S.C.R. 507 (S.C.C.), at 652 (dissenting, but not on this point) are also helpful to understand what is required to meet the "clear and plain" test:

> For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow, supra* at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "[w]hat is essential [to satisfy the " clear and plain" test'] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty" or right.

241 While in an appropriate case a general limitations statute can bar a claim for damages arising from the loss of aboriginal or treaty rights (see *e.g.*, *Apsassin v. Canada (Department of Indian Affairs & Northern Development)*, [1995] 4 S.C.R. 344 (S.C.C.)), different considerations apply where it is contended that the statute itself extinguished the aboriginal or treaty right. In this case, we agree with the motions judge's conclusion (at paras. 595-96) that the 1834 and 1859 pre-Confederation limitations statutes did not evidence any intent to affect or to extinguish the aboriginal title or treaty rights of the Chippewas in the disputed land. Consequently, we would not interfere with the motions judges' conclusions.

242 To summarize, we agree with the motions judge that there are no statutory limitations to bar the Chippewas' claims in this case.

VI. Remedies and Equitable Defences

A. Introduction

243 As we have concluded that there was no proper surrender and that the Chippewas' actions are not barred by any statutory limitation periods, the issue becomes whether, on the facts of this case, the Chippewas are entitled to the remedies they seek, namely, a declaration that the Cameron patent is void and a declaration that they are entitled to possession of the disputed lands. In particular, the issue is whether it is appropriate, in deciding whether or not to accord the Chippewas a remedy, for the court to consider that no claim was asserted for 150 years, and that innocent third parties may have relied on the apparent validity of the Cameron patent.

244 The issue of remedies and equitable defences, like the other issues in this case, has both public and private law dimensions. The aboriginal right asserted by the Chippewas has been described as *sui generis* in nature. The *sui generis* nature of aboriginal title reflects the interaction between traditional aboriginal values and those of European settlers and consequently, aboriginal title is not readily classified in the conventional categories of the English common law tradition. In some respects, aboriginal title draws upon the concepts of public law. The rights it embraces are communal in nature and can only be understood in the context of the unique relationship between the Crown and the aboriginal community asserting the right. At the same time, aboriginal title has been held on the highest authority to be a right of property and it cannot be described or understood except in relation to the concepts of traditional common law private property rights.

245 The remedies claimed by the Chippewas reflect the dual public and private law dimensions of aboriginal title. As against the Crown, the Chippewas impugn the validity of the exercise of the Crown prerogative, invoking the principles of public law and the remedies available to challenge the legality of governmental action. At the same time, the Chippewas assert a claim to a property right against the private citizens who are the present occupiers of the property, invoking the legal principles governing the reconciliation of competing claims to private property. It follows that defences bearing upon the availability of remedies in both the public and private law settings must be considered.

246 As we have already noted, the issue of the Chippewas' right to damages against the Crown for breach of its aboriginal rights is not before us. The damages claim was not the subject of the motions for summary judgment and it was common ground that it would proceed to trial. Accordingly, we confine our attention to the Chippewas' claim for a remedy related to the return of the lands themselves and we do so on the basis that the Chippewas have a right of action against the Crown for damages.

B. Public Law Remedies

247 The Cameron patent was in the usual form and, on its face, was apparently valid. As is apparent from the record before us, it required extensive archival research to determine that there was any reason to suspect that there had not been a proper surrender of the lands covered by the patent. For well over 100 years, no one could have had any reason to doubt its validity.

248 The patent was issued as an exercise of Crown prerogative. The issuance of Crown patents to land was a routine governmental act. A Crown patent has been accepted from the earliest days of European settlement until the present as the foundation for title to land. For almost 150 years, successive purchasers have bought lands that were included in the Cameron patent without having any reason to suspect that the patent, and consequently their root of title, was in any way defective.

249 Public law remedies are derived from both common law and equitable sources. The common law remedies were the prerogative writs. While the prerogative writs have now been replaced by the statutory application for judicial review, the principles governing their availability continue to apply by analogy. Since the early years of the 20th century, the equitable remedy of the declaratory judgment has been an accepted public law remedy. Whatever their origin, public law remedies are discretionary in nature. As will be explained in greater detail below, delay in asserting a claim to a public law remedy, combined with reliance by innocent third parties on the impugned act or decision, is a well-established basis for refusing a remedy.

1. The Prerogative Writ of Scire Facias

250 The common law prerogative writ to challenge the validity of a Crown patent, grant, charter or franchise was the prerogative writ of *scire facias*: See Evans, *de Smith's Judicial Review of Administrative Action* 4th ed. (London: Stevens, 1980) at 585; Wade and Forsyth, *Administrative Law* 7th ed. (Oxford: Clarenden Press, 1994) at 615; 1(1) *Hals*. (4th) at para. 279. While today in Canada, the writ of *scire facias* is an unfamiliar relic of the common law's past, it was an accepted and recognized remedy in the 19th century. It was described in the following terms by the Judicial Committee of the Privy Council in *R. v. Hughes* (1865), L.R. 1 P.C. 81 (England P.C.), at 87-88 per Lord Chelmsford:

> The writ of *Scire facias* to repeal or revoke grants or charters of the Crown is a prerogative judicial writ which, according to all the authorities, must be founded upon a Record . . . .All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *Scire facias*. And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy. For as was said by Chief Justice Jervis, in the case of *The Eastern Archipelago Company v. The Queen* [2 E. & B. 94] "To every Crown grant there is annexed by the common law an implied condition that it may be repealed by *Scire facias* by the Crown, or by a subject grieved using the prerogative of the Crown upon the fiat of the Attorney-General.

251 The writ of *scire facias* has fallen into disuse, but it is mentioned in *de Smith* and Wade, *supra*, as falling in the same category as the more familiar prerogative writs of *certiorari*, *mandamus*, prohibition and *habeas corpus*.

252 In modern times, in the domain of administrative law, the prerogative writs have been replaced by statutory remedies for judicial review, yet the principles they embrace continue to apply. A party may no longer seek a prerogative writ to challenge the validity of official or governmental acts, but the availability of the modern remedy of judicial review will be determined by reference to the foundational principles developed under the earlier regime of the prerogative writs.

253 One of those foundational principles is the discretionary nature of the inherent power of the superior courts to grant the prerogative writs. The fact that the writ of *scire facias*, like the other prerogative writs, were said to issue "as of right" did not detract from the court's discretion to grant relief to the party invoking its jurisdiction. There is a distinction between the right of every person to have his or her claim considered by the court and the discretion of the court to grant or withhold relief upon full consideration of the case. A person aggrieved is entitled " as of right" to invoke the writ to bring the matter before the court. It remains for the court to decide how to dispose of the complaint, and in deciding the matter, the court does have a discretion to exercise. This point is explained by Wade, *supra* at 718: "the fact that a person aggrieved is entitled to *certiorari ex*

debito justitiae does not alter the fact that the court has power to exercise its discretion against him, as it may in the case of any discretionary remedy." Similarly, Beetz J. observed in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.), at 575-6:

> The use of the expression *ex debito justitiae* in conjunction with the discretionary remedies of *certiorari* and *mandamus* is unfortunate. It is based on a contradiction and imports a great deal of confusion into the law.
>
> *Ex debito justitiae* literally means "as of right", by opposition to "as of grace" (P.G. Osborne, *A Concise Law Dictionary*, 5th ed.; *Black's Law Dictionary*, 4th ed.); a writ cannot at once be a writ of grace and a writ of right. To say in a case that the writ should issue *ex debito justitiae* simply means that the circumstances militate strongly in favour of the issuance of the writ rather than for refusal. But the expression, albeit Latin, has no magic virtue and cannot change a writ of grace into a writ of right nor destroy the discretion even in cases involving lack of jurisdiction.

254 The statement in *Hughes*, *supra*, that the writ of *scire facias* issues "as of right" must be read together with the statement that the purpose of the remedy of *scire facias* is that grants of letters patent "*may* be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons." If the patent *may* be repealed on *scire facias*, it must equally be the case that it *may not* be repealed or revoked even " when contrary to law".

2. The Discretionary Nature of Public Law Remedies

255 From the discretionary nature of the prerogative remedies, there has developed and ripened a general principle of Canadian public and administrative law. That principle received clear expression in *Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.). The case involved an action in nullity under the *Code of Civil Procedure*, R.S.Q., c. C-25, art. 33, to quash municipal by-laws that had adopted a loan scheme that also imposed a tax on property owners. The by-laws were attacked on the ground that the municipality had failed to give affected landowners the notice required by statute. It was argued that since the statutory procedure had not been followed, and the landowners had been denied the fundamental right to be heard, the by-laws had not been properly enacted and that they should be declared a nullity. The action was brought five years after the by-laws were enacted, after the municipal bonds had been issued and the improvements had been made. Writing for a unanimous Court, Gonthier J. accepted the submission that the municipality's failure to give the required notice violated the *audi alteram partem* rule, and thereby rendered the by-laws vulnerable to review, but he held that the court had a residual discretion to refuse the remedy of a declaration of nullity. While the case involved detailed considerations of the principles developed under the Quebec *Code of Civil Procedure*, Gonthier J. made it clear that the direct action in nullity derived from the same inherent power exercised by the superior courts to supervise the legality of the acts of all public authorities. At page 360, he described this inherent power of judicial review as "the cornerstone of the Canadian and Quebec system of administrative law" and as a "necessary consequence of the rule of law". At the same time, Gonthier J. emphasized that the power of judicial review was "essentially discretionary" in nature.

256 As Gonthier J. noted, the same point had been made in earlier decisions of the Supreme Court of Canada. In *Harelkin v. University of Regina*, *supra*, the Court upheld the discretion of the superior courts to refuse *certiorari* on grounds of delay. See also *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), at 1034-35. In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 (S.C.C.), at 77, La Forest J. put it as follows:

> There is no question that unreasonable delay may bar an applicant from obtaining a discretionary remedy, particularly where that delay would result in prejudice to other parties who have relied on the challenged decision to their detriment, and the question of unreasonableness will turn on the facts of each case . . .

257 The underlying rationale for the discretionary nature of public and administrative law remedies in general, and the consideration of delay and its consequences for third parties in particular, reflects the polycentric nature of the rights and interests implicated. There is more at stake than the rights of the individual or group asserting the claim and the applicable legal principles must reflect that element. As explained by Brown and Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 1998) para. 3:1100:

> the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals. The public interest in good government, including the principle that it should be conducted according to law, has always been an equally important factor in the development of the law of judicial review.

258 Apparently valid acts of public officials are relied upon by the members of the public at large in planning their affairs. Official documents are taken at face value. The purported exercise of a statutory or prerogative power creates legitimate expectations that the law will protect. The administration of government is a human act and errors are inevitable. The rights of a party aggrieved by the error must be reconciled with the interests of third parties and the interests of orderly administration. Accordingly, as explained by the *Immeubles Port Louis Ltée* case and by the leading texts, (see Brown and Evans, *supra* at para. 3:5100; de Smith, *supra*, at 579; Jones and de Villars, *Principles of Administrative Law* 3 rd ed. (Scarborough, Ont.: Carswell, 1999) at 583), a remedy may be refused where delay by the aggrieved party in asserting the claim would result in hardship or prejudice to the public interest or to third parties who have acted in good faith upon the impugned act or decision.

259 A Crown patent, apparently granting the fee simple in land, provides a classic example of an official act that will be relied on by innocent third parties. A Crown patent is accepted by all as the basis for rights to real property and no purchaser would consider it necessary to go behind the patent to determine whether or not it had been validly granted. It is for this reason that the courts have for long hesitated to invalidate patents that have created third party reliance. See, for example, *Bailey v. Du Cailland* (1905), 6 O.W.R. 506 (Ont. Div. Ct.), at 508 per Falconbridge J.:

> It was held in *McIntyre v. Attorney-General*, 14 Gr. 86, that where a bill is filed by a private individual to repeal letters patent on the ground of error, the onus of proof is on the plaintiff, although it may to some extent involve proof of a negative. 'Patents are not to be lightly disturbed. They lie at the foundation of every man's title to his property.'

260 To a similar effect is the following statement from *Fitzpatrick v. R.* (1926), 59 O.L.R. 331 (Ont. C.A.), at 342 quoting from *Boulton v. Jeffrey* (1845), 1 E. & A. 111 (U.C. Q.B.):

> It is difficult indeed to conceive a more prolific source of litigation than would be opened in this Province, if the patentees of the Crown were exposed to be attacked upon supposed equities acquired by other parties, while the estate was vested in the Crown, when no fraud, misrepresentation, or concealment is imputed to the patentee, and when the Crown, at the time of making the grant, has exercised its discretion on a view of all the circumstances. Just such a patent as this lies at the root of every man's title.

261 The motions judge analyzed this aspect of the case in terms of whether the Cameron patent was "void". He held that the Cameron patent was " void". A "void" patent is said to be one that has no legal effect whatsoever, while a "voidable" patent is one that does have effect unless and until it is set aside. Whatever its merits for other purposes, the language of "void" and "voidable" seems to us to be not a particularly apt or helpful analytic tool in the present context. From a remedial perspective, the inherent discretion of the court is always in play. As Wade has explained, *supra* at 343-4, the term" void" is "meaningless in any absolute sense. Its meaning is relative, depending upon the court's willingness to grant relief in any particular situation." Wade adds, at 718, in relation to the discretionary nature of judicial review, " a void act is in effect a valid act if the court will not grant relief against it." See also Jones and de Villars, *supra* at 404. Accordingly, for practical purposes, a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside. In our view, the issue is more clearly put and understood in terms of the discretion to grant or withhold a remedy and the factors that must be considered in relation to the exercise of that discretion. In fairness to the motions judge, it should be mentioned here that the arguments regarding the discretionary nature of public law remedies do not appear to have been presented to him with the same force and clarity as they were in this Court.

3. Discretion and Aboriginal Rights

262 The Chippewas submit that there is no place for the exercise of discretion in the present case. Aboriginal property rights are fundamental constitutionally protected rights. We fully accept that courts do not have an open-ended discretion to enforce or deny aboriginal property rights as seems to suit the convenience of the case. In particular, it would plainly be wrong to deny a remedy to vindicate a valid claim to aboriginal title purely on the grounds that recognition of the claim would be troublesome to others: see *Marshall v. Canada*, [1999] 3 S.C.R. 533 (S.C.C.), at 565.

263 On the other hand, aboriginal rights are an integral aspect of the Canadian legal landscape. Their shape, definition and enforcement do not and cannot exist in a vacuum. In the Canadian legal tradition, no right is absolute, not even constitutionally protected aboriginal rights: see *R. v. Nikal*, [1996] 1 S.C.R. 1013 (S.C.C.), at 1057-1058; *R. v. Agawa* (1988), 65 O.R. (2d) 505 (Ont. C.A.), at 524. As the Supreme Court of Canada has made clear, aboriginal rights " must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown" (*R. v. Vanderpeet*, *supra*, at 539) and "with the rest of Canadian society" (*R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.), at 775). See also *Delgamuukw*, *supra*, at 1065-1066, 1096, 1100, and 1107-1108. The same need for reconciliation between the aboriginal rights, and the rights of the Crown and third parties is applicable in the case of treaty rights: *Sioui v. Quebec (Attorney General)*, [1990] 1 S.C.R. 1025 (S.C.C.), at 1070-1072. In aboriginal title cases, the rules of the common law tradition must be adapted and applied by analogy. Accordingly, as explained by Lamer C.J.C. in *Vanderpeet*, *supra*, at 550-1, "a court must take into account the perspective of the aboriginal people claiming the right . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each". The accommodation is to be done in a manner that does not strain "the Canadian legal and constitutional structure".

264 Is it possible to reconcile the fundamental nature of aboriginal rights, and the overarching importance of according due recognition to those rights, on the one hand, with the discretionary nature of public law remedies, on the other? The answer lies in the nature of the discretion that is involved. Simply put, the discretion is narrowly circumscribed, only to be exercised on the basis of established legal principles. As explained by Wade, *supra*, the " discretionary power may make inroads upon the rule of law, and must therefore be exercised with the greatest care." The discretion to grant or withhold a public law remedy does not mean that the court is free to do as it pleases with the case, without regard to the governing legal principles. The principle of legality and the rule of law require that *a priori* consideration be given to the party whose rights have been taken, especially where the rights at issue are as fundamental in nature as the right of aboriginal title. However, it is a basic principle of our legal system that the right asserted by the complaining party must be considered in relation to the rights of others. The complaining party cannot claim entitlement to the mechanical grant of an automatic remedy without regard to the consequences to the rights of others that might flow by reason of the complaining party's own conduct, including any delay in asserting the claim. It is for this reason that the established principles governing the availability of public law remedies require that, before a remedy is granted, consideration be accorded to the rights and interests of others who may have had every reason to rely upon the apparent validity of the impugned act.

265 In *Immeubles Port Louis Ltée*, *supra* at 370, Gonthier J. provided the following helpful analysis of this point:

> I would point out that discretion and arbitrary action should not be confused. While arbitrary action means power exercised at will, just as the person likes, discretion, though it removes the strict duty to act, is subject to certain rules. A judge hearing a direct action in nullity does not decide to do what he feels like doing, but must exercise his power of review in a judicial manner, direct himself correctly in law and observe the applicable principles.

266 Gonthier J. went on, at 372, to explain the manner in which the discretion should be exercised:

> First, the judge must take into account the nature of the disputed act, the nature of the illegality committed and its consequences, and second, the causes of the delay between the disputed act and the bringing of the action. The nature of the right relied on is a factor relevant to the exercise of the discretion, but is not the only one. The court must also consider the plaintiff's behaviour.

267 In the case of a claim to aboriginal title, a court must approach the issue of delay with extreme caution and with due regard to the nature of the right at issue. Aboriginal claims often arise from historical grievances. These claims reflect the disadvantages long suffered by aboriginal communities and the failure of our society and our legal system to provide adequate responses. There is a significant risk that denial of claims on grounds of delay will only add insult to injury. It is plainly not the law that aboriginal claims will be defeated on grounds of delay alone. The reason and any explanation for the delay must be carefully considered with due regard to the historically vulnerable position of aboriginal peoples.

4. Application of Discretionary Factors

268 The first factor to consider is "the nature of the disputed act, the nature of the illegality committed and its consequences". See *Immeubles Port Louis Ltée*, *supra* at 372. As our review of the facts demonstrates, the circumstances both before and after the grant of the Cameron patent plainly demonstrate acceptance and acquiescence on the part of the Chippewas. The facts are flatly inconsistent with any suggestion that the lands were taken, either by Cameron or by the Crown, without the acquiescence of the Band members. While the Chippewas' acceptance of the Cameron transaction does not amount to a formal surrender, it is a fact that may be considered in the exercise of the court's discretion to grant or withhold a remedy.

269 In *Immeubles Port Louis Ltée*, *supra* at 372, Gonthier J. indicated that the discretion to refuse a remedy could be exercised " apart from situations where there is a total absence of jurisdiction". We do not accept the submission that the nature of the illegality committed here fell into that category or that it was sufficient to require a court to set aside the Cameron patent without taking into account third party interests. The Governor in Council had jurisdiction to grant patents and there was not" a total absence of jurisdiction". The error in failing to obtain a formal surrender was, in our view, akin to the failure of the municipality to provide its municipal electors with the required statutory notice. If anything, the error in the present case was less significant.

270 While we do not doubt the importance of a proper formal surrender, as appears from our review of the facts, from a purposive perspective, many elements of a formal surrender were in fact accomplished. Although there was no formal meeting to consider a surrender, the transaction was discussed on more than one occasion at Band meetings.

271 The transaction did not occur without the interposition of the Crown between the Chippewas and Cameron to ensure that the Chippewas' interests were protected. The terms Cameron first negotiated with the Chippewas were not acceptable to Crown officials who insisted that provision be made for the payment of interest on the unpaid portion of the purchase price. The transaction was approved by the Governor in Council. The consideration did not flow between Cameron and the Chippewas, but rather the proceeds were paid by Cameron to the Crown, held in trust for the Chippewas, and Cameron acquired his title by way of Crown patent.

272 There is every indication that the Crown officials intended to follow the usual practice and obtain a formal surrender. As the motions judge found, the failure to obtain a proper surrender did not result from any fraud or advantage taken of the Chippewas or from any attempt to deny or override their rights: " It appears that the officials of the day thought the price was fair, thought they were getting a good enough deal for the Chippewas, and *simply neglected to secure a surrender because it fell through the cracks in a dysfunctional bureaucracy*" (para. 752) (emphasis added). In our view, the courts have a discretion to refuse a remedy with respect to the inadvertent error of a dysfunctional bureaucracy that has been relied on for 150 years by innocent third parties.

273 The second factor is the nature of the delay and its consequences for third parties. We are not satisfied that there has been any adequate explanation for the delay that should lead us to excuse its impact. In assessing the delay, due consideration must be given to the motions judge's findings of the historically vulnerable situation of the Chippewas, their lack of formal legal capacity for approximately 100 of the 150 years and their dependence on the Department of Indian Affairs with respect to legal claims until the late 1970s or early 1980s. However, the delay here went well beyond failure to take legal proceedings. The motions judge found that as early as 1851, the Chippewas knew that their lands had been taken without a formal surrender. The Chippewas knew that the lands had been sold, as confirmed by their inquiries about payment of the price. Despite the obvious fact that settlers were on what had formerly been reserve lands, there was not a whisper of complaint from the Chippewas.

Moreover, with respect to other matters affecting their interests, the Chippewas demonstrated both the ability and the willingness to bring grievances to the attention of the appropriate officials. A court cannot ignore the fact that for more than 150 years, the Chippewas made no complaint whatsoever of the evident possession by others of lands formerly within their reserve. The Chippewas gave no indication of any dissatisfaction with that state of affairs and gave every indication that they fully accepted and acquiesced in the transfer of their lands. A delay of this nature and length brings the Chippewas' situation squarely within the category of case where, on established legal principles, the court will refuse to grant a remedy.

274 The failure to obtain a formal surrender renders the Cameron patent subject to judicial review, but the fact that it appears not to have been the perceived source of any mischief or prejudice at the time the Chippewas gave up their land in exchange for a monetary payment and was not the source of complaint for over 150 years is relevant to the question of remedy. For almost 150 years, third party purchasers have relied on the Cameron patent as a valid source of title to the lands. Property has been bought and sold and millions of dollars have been spent on improvements. It is difficult to imagine a stronger case of innocent third party reliance than that presented by the landowners.

275 We have found that there was no proper surrender of the aboriginal title to the lands. As already mentioned, aboriginal title is a fundamental and constitutionally protected right. It will require exceptional circumstances for a court to withhold a remedy to protect or vindicate aboriginal title. For the foregoing reasons, we are persuaded that exceptional circumstances exist in the present case. The interests of innocent third parties who have relied upon the apparent validity of the Cameron patent must prevail to the extent that the Chippewas assert a remedy that either directly or by necessary implication would set aside the Cameron patent. In so holding, we repeat here that we do not intend to preclude or limit the right of the Chippewas to proceed with their claim for damages against the Crowns.

C. Private Law Remedies

276 From the perspective of the private law of property, discretionary factors are traditionally associated with the determination of equitable claims and the availability of equitable remedies. Until the fusion of law and equity in the mid-19 th century, a rigid line was drawn between law and equity, and discretion was associated with claims arising from equity as distinct from purely legal claims. That rigid dichotomy has since broken down, but historical factors continue to influence the applicability of equitable principles to claims traditionally associated with the common law. The issue to be addressed here is whether, from the private law perspective, the remedies claimed by the Chippewas are subject to the discretion traditionally associated with equity.

277 The Chippewas submit that a finding that there was no surrender of the lands covered by the Cameron patent must inevitably lead to the conclusion that their aboriginal title to the lands remains unextinguished and that they have a present entitlement to possession of the lands. The Chippewas rely on the *nemo dat quod non habet* principle - no one gives what he does not have. The Chippewas submit that as there was no surrender, the Crown had nothing to grant and that the Cameron patent did not and could not convey the fee simple to the lands unencumbered by the aboriginal title. The Chippewas contend that given the nature of aboriginal title, it is not subject to the discretionary factors governing the availability of equitable relief. There are two aspects to this submission. First, the Chippewas submit that aboriginal title is strictly legal rather than equitable in nature. Second, it is submitted that application of equitable doctrines to preclude the Chippewas' claim to the lands would constitute an unauthorized extinguishment of aboriginal title in favour of private interests, contrary to the fundamental rule that aboriginal title can only be surrendered to the Crown.

1. Equitable Nature of Remedies Sought

278 In our view, the Chippewas' position that equitable principles have no bearing upon their claim cannot be accepted. To the extent that the Chippewas claim the lands as distinct from damages, they assert a claim for an equitable remedy. Before the motions judge, the Chippewas asserted a claim for declaratory relief. In the factum filed on this appeal, the Chippewas reiterated that claim and sought as well an order requiring the Crown in right of both Canada and Ontario to enter negotiations with a view to resolving the Chippewas' claim. In oral argument before this court, Mr. Cherniak on behalf of the Chippewas maintained the position that the primary relief sought by the appellants was for a declaratory judgment, accompanied by a claim

for an order directing the negotiations. However, Mr. Cherniak also pointed out that the statement of claim contained a claim for an immediate vesting order, and on behalf of his clients, he asserted that claim should this court consider that a declaratory order should not be granted on discretionary grounds.

279 It is well established, and not disputed before us, that the remedy of a declaratory judgment is equitable in origin and that its award is subject to the discretion of the court: see *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 (S.C.C.), at 189-92; Sarna, *The Law of Declaratory Judgments* (2nd ed., 1988), in particular at 17-19; Zamir, *The Declaratory Judgment* (1962) at 7-9; *Russian Commercial & Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (U.K. H.L.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), at 481-2; *Dyson v. Attorney General* (1910), [1911] 1 K.B. 410 (Eng. C.A.).

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

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

281 Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42. As explained by Proudfoot V.C. in *Robertson, Re* (1875), 22 Gr. 449 (Ont. Ch.), at 456, the statute gives the court the power "to make a vesting order whenever it might have ordered a conveyance to be executed". Quite apart from its equitable origins, by the very terms of s. 100, the power to grant a vesting order lies in the discretion of the court. Cases decided under s. 100 explicitly refer to the power to grant a vesting order in discretionary terms: see *Ontario Housing Corp. v. Ong* (1988), 63 O.R. (2d) 799 (Ont. C.A.); *Holmsten v. Karson Kartage Konstruction Ltd.* (1997), 33 O.R. (3d) 54 (Ont. Gen. Div.).

282 Assuming, without deciding, that such an order could be made, an order requiring the Crown to enter negotiations with the Chippewas would be a novel remedy, not readily classified in conventional terms. Such an order would have a mandatory aspect and would require the ongoing involvement and supervision of the court. An order having these features plainly could not be available as of right. However such a remedy should be classified in the traditional terms of law and equity; its award must therefore necessarily be subject to the discretion of the court.

283 In our view, the Chippewas cannot escape the fact that, from a private law perspective, they are claiming remedies that are discretionary in nature and subject to equitable defences.

2. Aboriginal Title and Equitable Principles

284 Nor do we accept the submission that a claim to aboriginal title is strictly legal in nature and immune from the overriding principles of equity, particularly where equitable remedies are being claimed.

285 The Chippewas rely on recent decisions of the Supreme Court of Canada elaborating the nature of aboriginal title as a *sui generis* legal property right: see for example *Guerin*, *supra*, at 382; *Delgamuukw*, *supra*, at 1081-97. These statements must not be taken out of context. They reflect the repudiation by the Supreme Court of Canada of the view that aboriginal title is a mere interest, held by grace and at the pleasure of the Crown. The important recognition of the legally enforceable nature of aboriginal title does not, however, reflect a rigid classification of aboriginal title as strictly legal in nature, immune from the principles of equity. Rights of equitable origin are every bit as legally enforceable as rights of a common law origin. By insisting that aboriginal title is legally enforceable, the Supreme Court of Canada did not, in our view, intend to classify aboriginal title in terms more relevant to the 19th century, pre-*Judicature Act*, pre-fusion of law and equity phase of our legal development.

286 The submission that aboriginal title is a strictly legal interest, untouched and untouchable by equitable considerations, ignores several important factors. As stated above, the Supreme Court of Canada has insisted that aboriginal title must not be considered in the strictly formal and traditional terms of the common law tradition, but rather that it must be seen as *sui generis* in nature. The Supreme Court has also held that in aboriginal title cases there is a "necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle" (*Guerin*, *supra* at 380). The court has also stated that "native land rights are in a category of their own, and as such, traditional real property rules do not aid" and that courts " do not approach [a case involving assertion of aboriginal title] as would an ordinary common law judge, by strict reference to intractable real property rules" (*St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657 (S.C.C.), at 667). Moreover, in this area, courts "must ensure that form not trump substance" (*Delgamuukw*, *supra* at 1090).

287 There can be no doubt that the juridical character of aboriginal title has been influenced and shaped by equitable principles. The very nature of aboriginal title, in particular the core concept that aboriginal lands are inalienable except to the Crown, gives rise to a fiduciary duty. The fiduciary relationship imposed upon the Crown to deal with surrendered Indian lands for the benefit of the Indians is a central and fundamental aspect of aboriginal title. In *Guerin*, the case that identified and imposed the fiduciary duty upon the Crown, Dickson J. stated at 376 that "[t]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title".

288 It is difficult to see why a right having these characteristics and drawing so heavily upon the principles of equity for its shape and definition should be entirely immune from the principles of equity from a remedial perspective. Surely, a *sui generis* right should draw freely upon all otherwise relevant principles of our law, whatever their historic origin. An analogy may be drawn from *Cadbury Schweppes Inc. v. FBI Foods Ltd.*, [1999] 1 S.C.R. 142 (S.C.C.), at 179 where the *sui generis* nature of breach of confidence was found to support the argument for modifying the remedial strictures of the categories of common law and equity. Referring to the line of authority, discussed in the next paragraph, to the effect that "[e]quity, like the common law, is capable of ongoing growth and development," Binnie J. held that the authority to award damages is "inherent in the exercise of general equitable jurisdiction" and is no longer dependent upon the " niceties" of specific statutory authority to award damages in lieu of an injunction. He added, at 179-80:

> This conclusion is fed, as well, by the *sui generis* nature of the action. The objective in a breach of confidence case is to put the confider in as good a position as it would have been in but for the breach. To that end, the Court has ample jurisdiction to fashion appropriate relief out of the full gamut of available remedies, including appropriate financial compensation.

289 To hold that aboriginal rights are immune from the principles of equity would be inconsistent with the repudiation of the traditional dichotomy between law and equity by this Court, the Supreme Court of Canada and by the House of Lords, particularly in relation to remedial issues. As Grange J.A. stated in *LeMesurier v. Andrus* (1986), 54 O.R. (2d) 1 (Ont. C.A.), at 9 with reference to the legislative direction that the courts " shall administer concurrently all rules of equity and the common law" (now found in the *Courts of Justice Act*, s. 96(1)), "the fusion of law and equity is now real and total". In *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534 (S.C.C.), at 582 La Forest J. adopted Lord Diplock's assertion in *United Scientific Holdings Ltd. v. Burnley Borough Council* (1977), [1978] A.C. 904 (U.K. H.L.), at 924-5 that the merger of law and equity is complete and that " the waters of the confluent streams of law and equity have surely mingled now."

290 While no doubt the categories that were shaped by the historical influences of common law and equity of law remain relevant for certain purposes, the spirit of the fusion of the two streams is the dominant theme and influence in the modern era. In our view, the modern conception of our private law as a fusion of equitable and legal principles provides added weight to the argument that the discretionary factors associated with equitable remedies may be considered in the present case. For these reasons, we reject the contention that the *sui generis* right of aboriginal title should be rigidly classified as falling exclusively into one of the historic streams of our legal history, completely immune from the influence of the other. Accordingly, as the Chippewas seek remedies that are discretionary in nature to vindicate a *sui generis* right that draws upon both common law and equitable sources, we conclude that it is appropriate to consider the effect of the Chippewas' 150-year delay in asserting a remedy and the consequent impact upon third parties of granting the Chippewas the remedies they seek.

291 On the facts of this case, we do not accept the submission that holding the Chippewas bound by the rules that govern the availability of equitable remedies constitutes an unauthorized extinguishment of aboriginal title. First of all, it is the Chippewas who invoke the principles of equity by their claim for the remedies described above. It is difficult to see a case for granting those remedies other than on the well-established principles governing their availability. Second, as indicated in our analysis of public law remedies, we are satisfied that although formal surrender procedures were not followed, the purpose of the surrender procedure - to protect the aboriginal interest - was fully met by the interposition of the Crown in the Cameron transaction.

3. The Nemo Dat Principle

292 The Chippewas submit that as there was no surrender of aboriginal title to the Crown, the Crown had nothing it could grant to Cameron by way of patent. It follows, in the submission of the Chippewas, that the Cameron patent was void and that nothing was conveyed. We have already dealt with the submission that the patent was "void" and concluded that established legal principles require the court to take into account the interests of innocent third parties before declaring a patent "void". In our view, the *nemo dat* principle, as it was applied to Crown patents, is entirely consistent with that view.

293 An early Canadian case, *Doe d. Malloch v. Principal Officers of Her Majesty's Ordinance* (1847), 3 U.C.Q.B. 387 at 394 dealt with a patent of land already set aside for another purpose. The judgment of Robinson C.J. was to the effect that at common law, the question whether such a patent was void or voidable was unsettled, although he was inclined to the view that it was merely voidable.

294 Other cases show that the *nemo dat* principle did not render void all Crown patents of lands to which the Crown lacked title. *Alcock v. Cooke* (1829), 5 Bing. 340 (Eng. C.P.) states that in the case of the Crown, the *nemo dat* rule was based on the notion that in making a subsequent grant of lands the Crown had already conveyed to another, the Crown must have been deceived. As Crown grants were "enrolled", in other words, officially recorded, the subject had the means of determining what grants had been made and was under a duty to inform the King of the existence of the prior grant before accepting a subsequent grant. It followed that the recipient of the grant previously made to another could assert no claim under the subsequent grant. However, where the Crown granted lands that were not subject to an " enrolled" grant, the court stated that the doctrine had no application. The following example was given by Best C.J. at 349:

> The attention of the court has been called to the circumstance of this being a lease from the king, which must be enrolled; and the doctrine which I am now laying down is applicable only to grants so enrolled: because, if an individual grants a lease, and the estate of which that individual grants a lease afterwards comes to the king, if the king regrants that, as the subject could not know with certainty that there was a previously existing lease, the position I have been laying down would not apply. The doctrine that I am delivering is applicable to a case where the subject cannot be deceived, and he must be deceiving the king; for if the king's prior lease be enrolled, the subject has the means of knowing of the existence of that lease, and it is his duty to inform the king of its existence.

295 These authorities show that competing claims between subjects were reconciled according to concepts akin to modern registry systems and equitable doctrines of constructive notice. The *nemo dat* principle did not automatically invalidate Crown patents. As we have already explained, where the validity of a patent is impugned, established legal principles require that the interests of innocent third parties must be considered.

4. Nature of Discretion to be Exercised

296 Accordingly, it is our view that whether the case is considered from the perspective of public law principles or from the perspective of private law, the discretion of the court is engaged. The discretionary factors bearing upon the availability of public law remedies is closely paralleled by equitable considerations applicable as between private parties in respect of proprietary claims. As with public law remedies, the discretion to grant or withhold an equitable remedy is constrained and is closely defined by established principles. Although the tradition of equity requires that the decision-making process be described as discretionary, upon analysis, it is apparent that there are well-defined rules and doctrines that shape the decision and control the result. Discretion is, as Lord Mansfield explained in *R. v. Wilkes* (1770), 4 Burr. 2527 (Eng. K.B.), at 2539, a " sound

discretion guided by law. It must be governed by rule not by humour; it must not be arbitrary, vague and fanciful but legal and regular." Birks, "Rights, Wrongs and Remedies" (2000), 20 *Oxford Journal of Legal Studies* 1 at 16 aptly describes the orders rooted in the Court of Chancery as "weakly discretionary" in that the court acts upon firm discretionary rules that have "been settled over the centuries".

5. Laches and Acquiescence

297 Delay in asserting a right gives rise to the equitable doctrines of laches and acquiescence. The test for these defences was explained in the following terms by La Forest J. in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 (S.C.C.), at 77-8:

> A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, [*Equitable Doctrines and Remedies*, (1984)] at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
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> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (a) acquiesced in the defendant's conduct or (b) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb . . . .
>
> Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as in the case with any equitable doctrine.

298 The doctrine of laches has been applied to bar the claims of an Indian band asserting aboriginal land rights: *Ontario (Attorney General) v. Bear Island Foundation* (1984), 49 O.R. (2d) 353 (Ont. H.C.), at 447 (aff'd on other grounds (1989), 68 O.R. (2d) 394 (Ont. C.A.); [1991] 2 S.C.R. 570 (S.C.C.)); *Roberts v. R.* (1995), 99 F.T.R. 1 (Fed. T.D.), at 77 and 79. There are also *dicta* in two decisions of the Supreme Court of Canada considering, without rejecting, arguments that laches may bar claims to aboriginal title: *R. v. Smith*, [1983] 1 S.C.R. 554 (S.C.C.), at 570; *Guerin*, *supra* at 390.

299 The facts relevant to the defences of laches and acquiescence have already been discussed with respect to the consideration of delay in relation to public law remedies and it is unnecessary to repeat them here. In our view, those facts bring this case squarely within the principles governing laches set out in *M. (K.) v. M. (H.)*, *supra*. The Chippewas accepted the transfer of their lands and acquiesced in the Cameron transaction. The landowners altered their position by investing in and improving the lands in reasonable reliance on the Chippewas' acquiescence in the *status quo*. This is a situation that would be unjust to disturb.

300 The motions judge refused to apply the defence of laches on the ground that there was no evidence that the Chippewas had knowledge of the actual terms of the Cameron transaction and that "[i]t is clear from *Guerin* that laches cannot bar an aboriginal claim unless the claimant has knowledge of the actual terms of the disputed transaction." The relevant passage from Dickson J.'s judgment in *Guerin* appears at 390:

> Little need be said about the Crown's alternative contention that the Band's claim is barred by laches. Since the conduct of the Indian Affairs Branch personnel amounted to equitable fraud; since the Band did not have actual or constructive knowledge of the actual terms of the golf club lease until March 1970; and since the Crown was not prejudiced by reason of the delay between March 1970 until suit was filed in December 1975, there is no ground for application of the equitable doctrine of laches.

301 On the facts of *Guerin*, the terms of the transaction were essential elements of the claim and without knowing the specific terms, which had been concealed by the Crown, the Band would not know it had a claim. The specific terms of the Cameron transaction are not an integral element of the Chippewas' claim in the present case. The claim is not based on the terms of the

transaction, but on the assertion that the lands were transferred without a proper surrender. At para. 653, the motions judge found that the Chippewas had full knowledge of the facts essential to their claim in the 1850s:

> The Chippewas knew by 1851 that their unsurrendered land was occupied openly and notoriously by disagreeable settlers. They confirmed this knowledge, and more, in 1855 by their inquiries about the price and terms of payment. About the actual loss of their land, as opposed to the particulars of the Cameron transaction, there was nothing hidden or unknown. By January 9, 1851 at the latest their loss was clear and obvious. They knew with certainty that the disputed lands had been taken from them without a surrender. There is no evidence as to the point in time that this knowledge was lost to the plaintiffs.

302 In our view, this amounts to a finding that the Chippewas had knowledge of the facts necessary to assert a claim, and in view of that knowledge, *Guerin* is distinguishable. As we have already noted in the discussion of delay in relation to public law remedies, we are of the view that the Chippewas not only knew that the lands had been given up but actively acquiesced in the transfer by seeking and receiving payment of the proceeds. On these facts, we can see no reason why the equitable defences of laches and acquiescence should not apply.

6. Good Faith Purchaser for Value

303 The second equitable doctrine that bears upon the claim advanced by the Chippewas is the protection accorded a good faith purchaser for value. As the motions judge held: "the defence of good faith purchaser for value without notice is a fundamental aspect of our real property regime designed to protect the truly innocent purchaser who buys land without any notice of a potential claim by a previous owner." The motions judge described the defence in the following way (at paras 686-7):

> The defence of good faith purchaser for value without notice has been a fundamental element of our law for centuries. It protects the security of title to land acquired without notice of claim. It reflects a basic social value that protects the rights of innocent parties. Based in simple fairness, it provides a strong defence for the truly innocent purchaser. As Lord Justice James said over a hundred years ago in the case of *Pilcher v. Rawlins* [(1872), L.R. 7 Ch. App. 259 per Sir W. M. James, L.J. at p. 268]:
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> > . . . according to my view of the established law of this Court, such a purchaser's plea of purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in his plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence of the absence of notice; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which, without breach of duty, he has had conveyed to him.

304 Mellish L.J. in the same case said [at 273]:

> The general rule seems to be laid down in the clearest terms by all the great authorities in equity, and has been acted on for a great number of years, namely that this Court will not take an estate from a purchaser who has bought for valuable consideration without notice....

305 The motions judge found that while it was arguable that Cameron had knowledge of the failure of the Crown to secure a proper surrender of the lands, there was no evidence to suggest that any subsequent owner knew or ought to have known that the Cameron lands were unsurrendered Indian lands. Moreover, the motions judge found that there was no evidence of equitable fraud on the part of Cameron that would defeat the operation of the defence in favour of those who acquired title from Cameron. He found that a prudent purchaser and conveyancer would consider that the Cameron patent, regular on its face, was a good root of title and would make no further inquiry.

306 The good faith purchaser defence is an equitable doctrine and the Chippewas assert that their interest in the lands is a purely legal one not caught by purely equitable defences. For reasons already given, we do not accept this argument. To the extent that the Chippewas assert a claim for the return of the lands, they assert a claim to an equitable remedy that is subject to equitable defences.

307 The good faith purchaser for value defence applies to the benefit of any purchaser who satisfies its requirements. On the findings of the motions judge, all purchasers from Cameron, the last of whom acquired lands in 1861, were good faith purchasers for value. However, the motions judge held that a rigid and unqualified application of the defence to cut off the Chippewas' claims in 1861 was too drastic given the nature of the aboriginal claim that was being asserted. He concluded that the need to reconcile the aboriginal and treaty rights with the rights of the landowners precluded the immediate application of the defence as of 1861, and, relying on *M. (K.) v. M. (H.) supra*, he imposed an "equitable limitation period" of sixty years, during which the aboriginal right would survive. The practical implication of this finding was that the Chippewas' damages claim against the Crown would have crystallized in 1921 rather than in 1861.

308 In our view, the imposition of a strict sixty-year "equitable limitation period", extending the time within which the Chippewas could assert their claim to the lands unaffected by the operation of the good faith purchaser for value defence, is not supportable in law. A limitation period prescribes the time within which a claim must be brought. *M. (K.) v. M. (H.)* goes no further than affirming that, in some circumstances, to prescribe a claim that was concurrently legal and equitable, a court of equity would apply by analogy a legal limitation period. Properly understood, the sixty-year period created by the motions judge is not a limitation period at all. On the findings of the motions judge, the good faith purchaser defence would have defeated the Chippewas' claim in 1861. The sixty-year period he imposed was an " extension period", suspending the operation of a valid defence, and allowing a claim to be asserted after the point at which, by operation of ordinary legal principles, it would have been defeated. There is nothing in *M. (K.) v. M. (H.) supra*, that would support this.

309 On the other hand, we accept that the factors that motivated the creation of the sixty-year "equitable limitation period", namely the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis. It may well be that where the denial of the aboriginal right is substantial or egregious, a rigid application of the good faith purchaser for value defence would constitute an unwarranted denial of a fundamental right. It is unnecessary to consider that possibility on the facts of the case before us. As we have concluded that the Chippewas accepted the terms of the Cameron transaction at the time it was entered, we can see no reason why the good faith purchaser for value defence should not be applied to preclude the Chippewas from asserting their claim against the landowners.

D. Conclusion on Remedies

310 For these reasons, we conclude that established rules governing the availability of public and private law remedies require the court to take into consideration the Chippewas' delay in asserting its claim and the reliance of innocent third parties on the apparent validity of the Cameron patent. On the facts of this case, it is our view that the Chippewas' delay, combined with the reliance of the landowners, is fatal to the claims asserted by the Chippewas.

VII. Disposition

311 For these reasons, we would allow the appeals and cross-appeals by Canada, Ontario and the landowners and we would dismiss the appeal by the Chippewas. Consequently, paragraphs 1, 2, 5 and 6 of the motions judge's order dated April 30, 1999 are set aside, and in substitution therefor, this court orders that:

1. The landowners' motion for summary judgment dismissing the Chippewas' claim in respect of the invalidity of the Cameron patent is allowed.

2. The Chippewas' motion for summary judgment in respect of the invalidity of the Cameron patent is dismissed.

312 In all other respects, the judgment of the motions judge is confirmed. The parties can submit written submissions on costs and they are directed to confer with Goudge J.A. to make the necessary arrangements.

Appeal by Crown allowed in part and appeal by band dismissed; cross-appeal by owners allowed in part.

Footnotes

1 The white man had various names for the Chippewas (Ojibway, Saulteux). In their own language, the Nation is referred to as Anishnabek. We will use the name Chippewas as it appears to be the appellation most commonly used in the record. We also use the words Indian, aboriginal and First Nations people interchangeably as did the parties to the appeal.

2 *Chippewas of Sarnia Band v. Canada (Attorney General)* (January 27, 2000), Doc. CA M24443, M24616, M24617, C32170 (Ont. C.A.).

3 There is a dispute over whether Cameron paid the full amount of the principal owed and whether he paid all of the interest owed. The affidavit of James Wells traces the documentary record of the payments. This dipute will figure in the outstanding damages by the Chippewas against the federal and provincial Crowns.

4 In 1860, the imperial government approved provincial legislation transferring control over the Indian Department to the provincial government: An Act respecting the management of the Indian lands and property, S.C. 1860, 23 Vict. C. 151.

5 Some eighty years later in the Bagot Report (1844), it was observed that the First Nations had kept a copy of the Proclamation and described it as their " Charter".

6 The continued Crown policy against sale of Indian land to individuals is exemplified by Superintendent Jarvis' refusal to sanction a private sale of 100 acres of the Upper Reserve in 1841 despite the fact that the chiefs supported the sale.

7 It appears that these two chiefs were allies of Wawanosh in November 1839, although at other times they were opposed in interest to Wawanosh.

8 Jarvis also overstated the amount of land involved, indicating that Cameron had agreed to buy some 4,000 acres. In fact he had agreed to buy 2,540 acres. There is no explanation for the mistake.

9 There is evidence that the policy of establishing permanent farming settlements on the reserves had the support of some 39 Chippewa chiefs in 1840. The Chippewas on the Upper Reserves had cleared some 100 acres for farming by 1841.

10 There is a reference in a letter written by Cameron in February 1850 to a Council having been held. The motions judge dismissed this letter as a self-serving characterization of events some eleven years after the fact. That finding is not unreasonable.

11 See, *supra*, n. 3.

12 The only document authored by a Chippewa was an August 22, 1840 letter from David Wawanosh, the teenage son of Chief Wawanosh. He went to school at Upper Canada College and spoke and wrote English. The letter expressed regret that the Chippewas had sold so much of their land to the white man, but also affirmed commitment to the "civilization" policy.

13 There is no indication in the evidence that Wawanosh favoured a survey of the entire reserve or would have agreed to the request that the entire reserve be surveyed.

14 The Lords of Trade formed the committee of the Privy Council responsible for the conception, drafting and making of the *Royal Proclamation*.

15 Section 25 provides in part:

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763 . . .

16 *An Act to amend and render more effectual an Act made in the Twenty-first year of the Reign of King James the First, entitled, An Act for the general Quiet of the Subjects against all Pretences of Concealment whatsoever* (1769), 9 Geo. III, c. 16 (U.K.).

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TAB 9

2004 CarswellOnt 2653
Ontario Court of Appeal

Regal Constellation Hotel Ltd., Re

2004 CarswellOnt 2653, [2004] O.J. No. 2744, 132 A.C.W.S. (3d) 215, 188 O.A.C. 97, 23 R.P.R. (4th) 64, 242 D.L.R. (4th) 689, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, 71 O.R. (3d) 355

In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004
Judgment: June 28, 2004
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.
Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited
Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.
James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Real property
III Sale of land
III.6 Judicial sale
III.6.d Vesting order

Headnote

Sale of land --- Judicial sale — Vesting order

Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Table of Authorities

Cases considered by *Blair J.A.*:

Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

Chippewas of Sarnia Band v. Canada (Attorney General) (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

Durrani v. Augier (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

Foulis v. Robinson (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) — referred to

National Life Assurance Co. of Canada v. Brucefield Manor Ltd. (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

R.A. & J. Family Investment Corp. v. Orzech (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

Regal Constellation Hotel Ltd., Re (July 4, 2003), Cumming J. (Ont. S.C.J.) — referred to

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

Royal Trust Corp. of Canada v. Karenmax Investments Inc. (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

Toronto Dominion Bank v. Usarco Ltd. (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

Statutes considered:

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

s. 100 — considered

Land Titles Act, R.S.A. 2000, c. L-4

s. 191 — referred to

Land Titles Act, R.S.O. 1990, c. L.5

Generally — referred to

Pt. IX — referred to

Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

s. 78(4) — considered

ss. 155-157 — referred to

Regulations considered:

Land Titles Act, R.S.O. 1990, c. L.5

General, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

***Blair J.A.*:**

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership. [1]

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of $23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

Facts

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed $33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was $45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for $25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a $1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for $31 million. While the HIG bid was accompanied by a $1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its $31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same $25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the $2 million in deposit funds that had been submitted by 203. These proceedings were settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a $2.5 million deposit plus $500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for $24 million. It was again unconditional and this time was buttressed by a $20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for $2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of $24 million, HSBC would be suffering a shortfall on its secured debt of approximately $9 million; in addition there are unsecured creditors of the hotel with claims exceeding $2 million. As the receiver had not been able to generate any other new offers at a price comparable to the $24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the $3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of $27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver $24

million and registered the vesting order on title. Aareal Bank's $20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by $20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> . . . . .
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

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

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

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

25 In *Soundair* as well, 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".

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or

unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver's standard of care that the receiver "must act with meticulous correctness, but not to a standard of perfection": *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

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

Analysis

The Vesting Order and the Motion to Quash

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court's power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.'s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its $20 million mortgage against the title to the hotel property following registration of the vesting order.

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

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

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

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

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

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be

registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions [2] - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

> 69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,
>
> > (a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or
> >
> > (b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.
>
> 78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed "to be embodied in the register and to be effective according to its nature and intent". Here the nature and effect of Sachs J.'s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances. [3] When it is "embodied in the register" it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an "order" is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

> The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset [italics added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

[40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

[41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, Registration of Title to Land, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

[42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,

"Indefeasibility of Title in the Canadian Context" (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected, [4] in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

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

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any err [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

The Appeals on the Merits

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed $45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its $31 million bid on September 2, 2003 - just the day before the First 203 Offer for $25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in its view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that $20 million has been advanced by Aareal Bank A.G. on the strength of the registered

vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the $45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the $45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of $45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

57 I turn, then, to the $31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower $25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional $25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the $24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of $9 million. In addition, there are outstanding unsecured creditors with over $2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted $45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

Disposition

The Appeals

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

Costs

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought $57,123.25 on a partial indemnity basis if successful. The receiver asks for $61,919.00 and Aareal Bank requests $12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of $137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

a) To the receiver, in that amount of $40,000;

b) To 203, in the amount of $40,000; and,

c) To Aareal Bank, in the amount of $12,225.

69 These amounts are inclusive of fees, disbursements and GST.

***Laskin J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal dismissed.

Footnotes

1 I shall refer to Regal Constellation Hotel Limited as "the Hotel" throughout these reasons.

2 See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.

3 Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.

4 For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

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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Peter Scrutton, for Intervener, Attorney General of Ontario
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Ewa Krajewska, for Intervener, Income Security Advocacy Centre
Robert S. Anderson, Q.C., for Interveners, 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. and Citytv, a division of Rogers Media Inc.
Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association
Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

Subject: Civil Practice and Procedure; Criminal; Estates and Trusts
Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.13 Powers and duties of appellate court
XXIII.13.e Evidence on appeal

XXIII.13.e.i New evidence
Judges and courts
XVI Jurisdiction
XVI.11 Jurisdiction of court over own process
XVI.11.c Sealing files

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.

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Generally — referred to

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

Most Negative Treatment: Distinguished
Most Recent Distinguished: Party A v. The Law Society of British Columbia | 2021 BCCA 130, 2021 CarswellBC 872, 48 B.C.L.R. (6th) 238, 83 Admin. L.R. (6th) 250, [2021] 9 W.W.R. 379, 329 A.C.W.S. (3d) 457, 458 D.L.R. (4th) 77 | (B.C. C.A., Mar 29, 2021)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

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

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

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

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

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

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

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

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental
Related Abridgment Classifications
Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous
Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege
XII.4.h.ix.F Miscellaneous
Evidence
XIV Privilege
XIV.8 Public interest immunity

XIV.8.a Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents

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

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges

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

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges

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

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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s. 486(1) — referred to

Rules considered:

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R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

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

I. Introduction

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

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

II. Facts

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

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

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

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

IV. Judgments below

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

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

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

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

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

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

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

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found

that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

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

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

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

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

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

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

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

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

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

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

(2) Robertson J.A. (dissenting)

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

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

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

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

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

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

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

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

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

V. Issues

35

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

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

VI. Analysis

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

(1) The General Framework: Herein the Dagenais Principles

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) The Rights and Interests of the Parties

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

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

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

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

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

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

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

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

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

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

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

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

B. Application of the Test to this Appeal

(1) Necessity

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

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

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

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

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

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

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

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

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

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

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

(2) The Proportionality Stage

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

(a) Salutary Effects of the Confidentiality Order

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

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

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

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

(b) Deleterious Effects of the Confidentiality Order

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

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

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

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

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

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

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

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

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

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

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

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a

confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values," we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

> Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-1354:

> One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would

be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

Appeal allowed.

Pourvoi accueilli.

End of Document

TAB 12

2005 CarswellOnt 3126
Ontario Superior Court of Justice [Commercial List]

Bank of Montreal v. Trent Rubber Corp.

2005 CarswellOnt 3126, [2005] O.J. No. 3065, 13 C.B.R. (5th) 31, 140 A.C.W.S. (3d) 930

Bank of Montreal (Applicant) and Trent Rubber Corp., 947695 Ontario Ltd., Pilotte Marketing Corp., Trent Rubber Equipment Ltd., Cupples Inner Tubes of American Inc. and Trenvest Inc.

Cumming J.

Heard: July 12, 2005
Judgment: July 13, 2005
Docket: 05-CL-5836, 31-443801, 31-443802, 31-443803, 31-443804, 31-443805, 31-443806

Counsel: Mario Forte for Interim Receiver, RSM Richter Inc.
John Marshall for Bank of Montreal
Robert Harason for All Respondents
No one for Trustee under Proposal of Respondents, John Page

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

Related Abridgment Classifications

Bankruptcy and insolvency
VI Proposal
VI.2 Time period to file
VI.2.a Extension of time
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Headnote

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

Receiver was appointed as interim receiver for debtor companies — Bank was primary secured creditor of debtor companies — Bank delivered notice of intention to enforce security in March 2005 — Debtor companies filed notice of intent to make proposal under Bankruptcy and Insolvency Act in April 2005 and had been granted two extensions to June 21, 2005 to file proposal — Receiver marketed assets of debtor companies and received several bids including liquidation proposal by C Inc. and several going-concern offers — Receiver concluded C Inc.'s proposal was likely to realize maximum amount for creditors and more than best going-concern offer received — Receiver recommended it be given authority to accept C Inc.'s bid and enter liquidation arrangement with C Inc. — Bank supported receiver's recommendation — Receiver brought motion to approve sale of assets and approve its conduct and for sealing order of bids — Bank brought motion to amend receivership order — Debtor companies brought motions for extension of time to file proposal — Receiver's and bank's motions granted; debtor companies' motions dismissed — Receiver's opinion and recommendations were prudent and best course of action — Bank would probably suffer significant loss under each going-concern bid — Business was losing money and passage of time eroded bank's realization upon its security — Evidence established that receiver had acted properly and responsibly, followed court-sanctioned marketing process and acted in good faith and with fairness — Sealing order of bids was ordered since some assets would be sold on open market and disclosure of their notional minimum values was potentially prejudicial to sale.

Bankruptcy and insolvency --- Proposal — Time period to file — Extension of time

Receiver was appointed as interim receiver for debtor companies — Bank was primary secured creditor of debtor companies — Bank delivered notice of intention to enforce security in March 2005 — Debtor companies filed notice of intent to make

proposal under Bankruptcy and Insolvency Act in April 2005 and had been granted two extensions to June 21, 2005 to file proposal — Receiver marketed assets of debtor companies and received several bids including liquidation proposal by C Inc. and several going-concern offers — Receiver concluded C Inc.'s proposal was likely to realize maximum amount for creditors and more than best going-concern offer received — Receiver recommended it be given authority to accept C Inc.'s bid and enter liquidation arrangement with C Inc. — Bank supported receiver's recommendation — Receiver brought motion to approve sale of assets and approve its conduct and for sealing order of bids — Bank brought motion to amend receivership order — Debtor companies brought motions for extension of time to file proposal — Receiver's and bank's motions granted; debtor companies' motions dismissed — Receiver's opinion and recommendations were prudent and best course of action — Bank would probably suffer significant loss under each going-concern bid — Business was losing money and passage of time eroded bank's realization upon its security — Evidence established that receiver had acted properly and responsibly, followed court-sanctioned marketing process and acted in good faith and with fairness — Sealing order of bids was ordered since some assets would be sold on open market and disclosure of their notional minimum values was potentially prejudicial to sale.

Table of Authorities

Cases considered by *Cumming J.*:

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

Statutes considered:

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

Generally — considered

s. 50.4(1) [en. 1992, c. 27, s. 19] — referred to

MOTION by interim receiver to approve sale of assets, approve its conduct and for sealing order of bids; MOTION by bank to amend receivership order; MOTIONS by debtor companies for extension of time to file proposal under *Bankruptcy and Insolvency Act*.

***Cumming J.*:**

The Motions

1 The Respondent corporations are collectively called the "Trent Group". RSM Richter Inc. ("Richter") is the interim receiver of the assets of each Respondent, appointed by Campbell J. April 11, 2005. Richter brings a motion to authorize a sale of assets of the Respondents and for approval of the Receiver's actions to date. Richter seeks authority to accept the liquidation proposal received from Corporate Assets Inc. ("CAI"), to seal the offers received through the Court approved marketing process, and to approve Richter's actions.

2 The Bank of Montreal ("Bank") is the primary secured creditor, with some $4.7 million owing to it by the Trent Group. The Bank brings a motion for an amended and restated receivership order going forward.

3 As interim receiver, Richter has been endeavouring to market the assets for the best price possible. This has culminated in the Fifth Report from Richter, after receiving four revised offers July 4, 2005 pursuant to a marketing process approved by Court order given by Cameron J. June 21, 2005.

4 The Respondents bring motions which seek to extend the time under the *Bankruptcy and Insolvency Act* ("*BIA*") for the filing of a proposal with the Official Receiver and to adjourn the motions of Richter and the Bank.

5 My decisions in respect of the above motions were given at the conclusion of the hearing with written reasons to follow. These are my reasons.

Analysis

6 Richter has provided as Exhibit "A" to its Fifth Report, which provides a summary of the revised offers received, the four offers and a comparative potential estimated realization, together with Richter's recommendation.

7 Richter concludes that CAI's proposal will likely realize the maximum amount for the creditors. Richter recommends that it be given authority to accept the net minimum guarantee proposal of CAI and enter into a liquidation/auction agreement with CAI. In the judgment of Richter a liquidation of the assets will likely yield realizations higher than the best going-concern offer received. The Bank supports Richter's opinion and recommendation.

8 In my view, and I so find, Richter's opinion and recommendations are the prudent and best course of action. I mention that under each of the four bids the Bank would probably ultimately suffer a significant loss of at least a couple of million dollars.

9 One of the bidders is 2074253 Ontario Inc. ("2074"), controlled by Mr. Ron Bruhm, who has provided an affidavit in support of the Respondents in their motion to extend the time for the filing of a proposal and to adjourn Richter's and the Bank's motions. 2074 is the holding company for the shareholdings in the Trent Group. Mr. Bruhm is also a principal of Viceroy Rubber & Plastics Limited which has a secondary secured interest in the Respondent debtors' assets for debts of some $7 million.

10 The record evidences that the Trent Group has had significant financial problems for some time. The Bank delivered its notice of intention to enforce its security March 31, 2005.The filing of the notice of intention to make a proposal under s. 50.4(1) of the *BIA* by the Respondent debtors was made April 11, 2005. An extension was granted by Ground J. May 9, 2005. Campbell J. granted a second extension on June 6, 2005 to June 21, 2005. Mr. Bruhm is now of the view that it would take until at least August of this year to find another lender to finance a purchase transaction and the businesses continuing operations.

11 It is not disputed that the businesses are losing money and that the passage of time erodes the Bank's realization upon its security.

12 Mr. Bruhm favours a going-concern sale and that in theory would be in the best interests of the employees, the Town of Lindsay where the business is located and Mr. Bruhm himself as the indirect substantial shareholder and creditor of the Respondents. However, the record establishes that in reality it would not be in the best interests of the Bank to delay matters and that in any and all events the Bank will have a substantial loss.

13 The opinion of Richter is that the bid of CAI is superior to that of 2074 (and the other two bids). In my view, Richter's opinion is reasonable, considering all the circumstances. Indeed, the CAI bid is probably significantly superior.

14 The Respondents raise several criticisms in respect of the marketing process and Richter's actions. In my view, none of these allegations have any merit. Indeed, the criticisms, while nominally advanced on behalf of the Respondent debtors, are really advanced on behalf of Mr. Bruhm, the losing bidder if Richter's recommendations are accepted.

15 I emphasize that all of the principles articulated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as being required of a receiver, have been met in the instant situation. The record establishes that Richter has acted properly and responsibly in accordance with its mandate, followed the Court sanctioned marketing process and acted in good faith and with fairness throughout.

16 Richter seeks a sealing order in respect of its Confidential Exhibit "A" to its Fifth Report. There will be some remaining assets of the Respondents after the sale of some of the assets to CAI. Richter and the Bank submit it would be potentially prejudicial to disclose the notional minimum values attributed to these assets before they are disposed of in an open market or to disclose the CAI offer itself prior to the closing of the transaction with CAI. I agree.

17 Moreover, there has been ample discussion in open Court as to the substance of Exhibit "A" so that there is not any real need to the disclosure of the details thereof to the debtors (in reality, to Mr. Bluhm). It is enough to say that it is reasonable to conclude that the CAI bid probably is far superior to any other bid and accordingly, should be accepted. A reasonable person in the position of Richter, on an objective test, would make the informed opinion (as seen from the record at hand) that the CAI bid was the best bid received and that it should be accepted.

18 Having said that, I will make one specific observation. The 2074 bid by Mr. Bluhm is in reality a bid for less than half its professed value because personal guarantees given to the Bank relating to the Respondent's indebtedness would, in effect, be removed if the bid were to be accepted.

Disposition

19 For the reasons given, the motions of the Respondent debtors for an extension of the filing date for a proposal are dismissed, the motion of Richter for authority to proceed with the sale to CAI, for approval of Richter's activities and for a sealing order is allowed (with the requisite Order signed), and the Bank's motion for an amended and restated receivership order going forward is allowed (with the requisite Amended and Restated Receivership Order signed).

Order accordingly.

TAB 13

2023 ONSC 832
Ontario Superior Court of Justice [Commercial List]

Rose-Isli Corp. v. Frame-Tech Structures Ltd.

2023 CarswellOnt 1532, 2023 ONSC 832

ROSE-ISLI CORP., 2631214 ONTARIO INC., SEASIDE CORPORATION, and 2735440 ONTARIO INC. (Applicants) and FRAME-TECH STRUCTURES LTD., MICHAEL J. SMITH, FRANK SERVELLO, CAPITAL BUILD CONSTRUCTION MANAGEMENT CORP., and 2735447 ONTARIO INC. (Respondents)

Kimmel J.

Heard: December 15, 2022; January 6, 2023; January 26, 2023
Judgment: February 2, 2023
Docket: CV-22-00682959-00CL

Counsel: Jason Wadden, Carlos Sayao, for Plaintiff, Applicant, Moving Party, Crown, Rose-Isli Corp., 2631214 Ontario Inc., Seaside Corporation, 2735440 Ontario Inc.
Sharon Kour, for Receiver, Ernst & Young Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Headnote
Debtors and creditors --- Receivers — Conduct and liability of receiver — General conduct of receiver
Debtor engaged in joint venture for development of proposed six-story mixed use residential and commercial development — Secured fulcrum creditor held second mortgage on property, and first mortgage was later assigned to secured fulcrum creditor's financier — Receiver was appointed under oppression remedy in Business Associations Act — Receiver engaged in sale process, in which secured fulcrum creditor participated but ultimately did not make bid that was accepted — After receiver approved sale to purchaser, secured fulcrum creditor claimed it wished to redeem mortgage on property — Receiver brought motion to approve sale and for related relief, secured fulcrum creditor brought cross-motion to redeem property — Motion granted, cross-motion dismissed — Secured fulcrum creditor only sought to redeem at end of sale process that it was consulted on and participated in, after it became apparent that it was not able to make competitive bid by time of extended bid deadline — If sale process is sound, it should not be permitted to be interfered with by later attempt to redeem — Other stakeholder interests were either neutral or militated in favour of preserving integrity of sale process — Order made to approve deemed termination of unit purchaser agreements in development — Principles for approving sales agreement were met — Ancillary orders including sealing order were approved.
Table of Authorities
Cases considered by *Kimmel J.*:
BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc. (2020), 2020 ONSC 3659, 2020 CarswellOnt 8665, 81 C.B.R. (6th) 283 (Ont. S.C.J.) — considered
Bank of Montreal v. Hester Creek Estate Winery Ltd. (2004), 2004 BCSC 724, 2004 CarswellBC 1265, 2 C.B.R. (5th) 61, 32 B.C.L.R. (4th) 149 (B.C. S.C.) — considered
Business Development Bank of Canada v. Marlwood Golf & Country Club Inc. (2015), 2015 ONSC 3909, 2015 CarswellOnt 9453, 27 C.B.R. (6th) 166 (Ont. S.C.J. [Commercial List]) — referred to

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — referred to

Kruger v. Wild Goose Vintners Inc. (2021), 2021 BCSC 1406, 2021 CarswellBC 2265, 91 C.B.R. (6th) 305 (B.C. S.C.) — referred to

Ravelston Corp., Re (2005), 2005 CarswellOnt 9058, 24 C.B.R. (5th) 256 (Ont. C.A.) — considered

Ron Handelman Investments Ltd. v. Mass Properties Inc. (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) — considered

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

Sherman Estate v. Donovan (2021), 2021 SCC 25, 2021 CSC 25, 2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 458 D.L.R. (4th) 361, 72 C.R. (7th) 223 (S.C.C.) — referred to

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, 287 N.R. 203, 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, 223 F.T.R. 137 (note), [2002] 2 S.C.R. 522, 2002 CSC 41 (S.C.C.) — referred to

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531, 96 O.T.C. 172 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

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

Generally — referred to

Business Corporations Act, R.S.O. 1990, c. B.16

s. 248 — referred to

Construction Act, R.S.O. 1990, c. C.30

s. 44(1) — referred to

Mortgages Act, R.S.O. 1990, c. M.40

s. 2 — referred to

s. 2(1) — referred to

s. 2(2) — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 64 — referred to

MOTION by receiver for approval of sale and related relief; CROSS-MOTION by creditor to redeem mortgage.

***Kimmel J.*:**

1 The court appointed receiver, Ernst & Young Inc., (the "Receiver") of 2735447 Ontario Inc. (the "Company") brings this motion for an approval and vesting order ("AVO") and an order for ancillary relief. This proceeding has a unique procedural history that has resulted in several court attendances and interim endorsements.

2 The circumstances are unusual because of the dealings between 2735440 Ontario Inc. ("273 Ontario") and the Receiver, as well as the different interests that 273 Ontario has in the Property (defined below). 273 Ontario is both a second mortgagee that wants to be paid and a joint venture participant in the Rosehill Project that was to be developed on the Property. The Receiver was appointed upon 273 Ontario's application under the oppression remedy, s. 248 of the Business Corporations Act, R.S.O. 1990, c. B-16.

3 This is the court's final decision on the Receiver's motion. It is also the final decision on 273 Ontario's cross-motion to redeem the Property or, in the alternative, for an order approving its credit bid in the court ordered sales process. [1]

4 For the reasons that follow, the Receiver's motion is granted and the cross-motion is dismissed.

Prior Court Orders

5 Ernst & Young Inc. was appointed as the Receiver and manager over all the assets, undertakings and properties of the Company by order dated July 8, 2022 (the "Appointment Order"). This included the real property municipally described as 177, 185 and 197 Woodbridge Avenue, Vaughan, Ontario, and all proceeds thereof (the "Property"). These are the lands upon which the proposed "Rosehill Project" was to be constructed.

6 The Receiver's powers under paragraph 3 of the Appointment Order include:

> (j) [T]o 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, and without limiting the generality of the foregoing, to take into account any offers to purchase the Lands or other assets of the Company that have been received and/or accepted to date as part of the sales process described in the Grossi Affidavit;
>
> (k) [W]ith the approval of this Court, to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business; provided, however, that in each such case notice under subsection 63(4) of the *Ontario Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

7 The Appointment Order contemplates that the Receiver may seek court approval to convey, transfer or sell the Property and seek vesting or other orders as may be needed to convey the Property to a purchaser free and clear of any liens, encumbrances or other instruments affecting it.

8 The prescribed responsibilities and powers of the Receiver under the Appointment Order are similar to those prescribed in insolvency situations when a receiver is appointed under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. However, the Appointment Order was not predicated upon any finding that the Company was insolvent. It was made in the context of the within oppression remedy application commenced by 273 Ontario and others as a result of a breakdown in the relationship between the joint venture participants in the Rosehill Project.

9 While the Company has not been declared insolvent, the Receiver suggests that it may now be. In any event, that issue is not before the court.

10 When the Receiver was appointed, there appeared to be a consensus that the Property would be sold. While a credit bid from 273 Ontario was not ruled out, it declined to make a stalking horse bid.

11 The Receiver developed a sale and marketing process in consultation with, among others, 273 Ontario. Although not required in light of the powers granted to it under the Appointment Order, the Receiver sought, and was granted, an order approving its proposed sale and marketing process. No party opposed the requested order and it was granted on September 12, 2022 (the "Sale Process Order"). The Sale Process Order authorized and directed the Receiver to commence the Sale Process (described in the Receiver's First Report) for the purpose of soliciting interest in and opportunities for a sale of the Property.

12 The approved Sale Process was to proceed on an estimated timeline of 60 days and included the following: the retention of a listing broker, the establishment of a data room, the preparation of a confidential information memorandum, form of confidentiality agreement, teaser for prospective purchasers, the broker contacting potentially interested parties, a bid deadline of approximately 45-50 days for submissions by interested parties of a binding, irrevocable and unconditional asset purchase agreement (the "Binding APA") that was to comply with specified requirements (including a ten percent deposit, proof of financing and a closing date within five days of court approval, among other things) and the eventual selection of a successful bidder.

13 The Receiver had the authority to extend the Sale Process timeline, acting reasonably, with a view to securing a fair and reasonable bid for the Property. The Receiver also had the authority to extend the bid deadline or cancel the Sale Process.

14 Under the Sale Process, the successful bid and transaction would require court approval to transfer of the Property free and clear of all liens and claims, subject to any permitted encumbrances, pursuant to an approval and vesting order.

15 The Sale Process allowed that "[i]f the Receiver receives one or more Binding APAs, it may, in the Receiver's sole discretion, negotiate with such bidders with a view to improving the bids received."

16 The Sale Process required the Receiver to consider and review each Binding APA based on several factors, including:

> Items such as the proposed purchase price and the net value provided by such bid, the claims likely to be created by such bid in relation to other bids, the counterparties to such transactions, the proposed transaction documents, other factors affecting the speed and certainty of the closing of the transaction, the value of the transaction, any related transaction costs, the likelihood and timing of consummating such transactions, and such other matters as the Receiver may determine.

17 The bid deadline was November 25, 2022.

The Motions

18 The procedural history is somewhat lengthy but provides important context. It was detailed in the court's January 18, 2023 endorsement and is repeated, with necessary additions and amendments, for ease of reference herein. Capitalized terms not defined herein shall have the meaning ascribed to them in the Receiver's Reports filed in connection with these motions: the Second Report filed December 11, 2022, the First Supplement to the Second Report filed December, 19, 2022 ("Supplementary Report"), and the Second Supplement to the Second Report Filed January 25, 2023 ("Second Supplementary Report").

19 The Receiver seeks an AVO, *inter alia*:

> a. approving the agreement of purchase and sale dated December 9, 2022 (the "APS") between the Receiver and ORA Acquisitions Inc. ("Ora" or the "Purchaser") for the purchase and sale of the assets, undertakings and properties of the Company (the "Purchased Assets"), including but not limited to the Property, and authorizing the Receiver to complete the transaction contemplated therein (the "Transaction");
>
> b. vesting the Purchased Assets in the Purchaser upon the closing of the Transaction, free and clear of all security interests, liens and the like, whether secured or unsecured; and
>
> c. ordering that immediately after the delivery of the Receiver's certificate confirming the closing of the Transaction, each of the Unit Purchaser Agreements (as defined hereinafter) shall be deemed to have been terminated by the Receiver and any rights or claims thereunder or relating thereto are not continuing obligations effective against the Property or binding on the Purchaser.

20 The Receiver is also asking the court to grant an ancillary order (the "Ancillary Order") for, *inter alia*, the approval of: (i) the Receiver's actions and activities and statement of receipts and disbursements described in its Second Report, (ii) the creation of appropriate reserves for the fees of the Receiver and its counsel, future anticipated receivership expenses and a reserve for Registered Lien Claims (defined hereinafter), (iii) proposed distributions that would satisfy the first mortgage charge in favour of Trez Capital Limited Partnership ("Trez") [2] and the Receiver's Borrowings Charge (as defined in the Appointment Order), and (iv) a limited sealing order in respect of certain identified confidential exhibits to the Receiver's Second Report dated December 11, 2022.

21 The Receiver's motion was originally returnable on December 22, 2022. It was adjourned to January 6, 2023 at the request of 273 Ontario. 273 Ontario, as a secured creditor of the Company, a joint venture participant and a bidder for the purchase of the Property, wanted the opportunity to make submissions on a more fulsome record regarding, among other things, the factors set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). *Soundair* sets out the legal framework for the court to determine whether to approve the APS and Transaction.

22 At the January 6, 2023 return date, 273 Ontario also brought its own cross-motion for an order permitting it to redeem the Property upon payment of the amounts found owing in priority to its second mortgage and asked the court to schedule a motion to disallow the Registered Lien Claims. Alternatively, 273 Ontario's cross-motion seeks an order approving its bid submitted on December 9, 2022 and supplemented on December 12, 2022 (the "Credit Bid").

23 During the January 6, 2023 hearing, the court raised a question about the aspect of the relief sought by the Receiver that would deem the condominium unit purchase agreements (the "Unit Purchaser Agreements") to be terminated upon the closing of the Transaction. The Unit Purchaser Agreements were entered into by the Company prior to the receivership with purchasers of pre-sale residential and commercial condominium units (the "Unit Purchasers").

24 Specifically, the court asked for the authority upon which the Receiver asserted that the interests of the Unit Purchasers are not affected by the requested order. The Receiver said (for example, in paragraph 94 of its Second Report) that this was predicated upon these Unit Purchasers having no interest in (or any claim to) the Property. This was also the basis upon which the Receiver determined that the Unit Purchasers did not need to be served with the Receiver's motion. The Receiver argued that the legal rights of the Unit Purchasers are protected by its proposal that deposits paid pursuant to the Unit Purchaser Agreements, and held by the law firm Schneider Ruggiero Spencer Milburn LLP, will be returned if the Unit Purchaser Agreements are terminated after the closing of the Transaction.

25 At the court's request, further written submissions (reflecting inputs from both the Receiver and 273 Ontario) on this point were provided to the court on January 13, 2023.

26 By an endorsement dated January 18, 2023, the court reluctantly further adjourned the Receiver's motion and 273 Ontario's cross-motion, for, among others, the following reasons:

a. There may have been a misunderstanding between the Receiver and 273 Ontario about the importance and timeliness of the request by 273 Ontario for the Receiver to determine the validity of 273 Ontario's security and confirm the accepted amount of the 273 Ontario Loan and to determine the Registered Lien Claims. 273 Ontario considered both requests to be essential to its ability to exercise its right of redemption and/or make a Credit bid and to determine its essential conditions and structure. Once received, the prospect of an alternative transaction emerged (under the 273 Ontario Credit Bid or by virtue of the exercise of a right of redemption, if permitted) that does not terminate or disclaim the Unit Purchaser Agreements, albeit proposing to treat other stakeholders, such as the Registered Lien Claimants, less favourably than under the Transaction. The full implications of this have not been canvassed.

b. Thus far, 273 Ontario's position on the cross-motion had been that its Credit Bid (or terms of redemption) will not include sufficient cash to establish a reserve for the Registered Lien Claims pending their final adjudication or resolution. Under these circumstances, the court would like to be satisfied that both Registered Lien Claimants are on notice of that position and have been given the opportunity to address the court on that issue in light of the cross-motion.

c. While it may be reasonable to infer what the Registered Lien Claimants would prefer (to have a reserve established to protect their Registered Lien Claims until they have been determined), the court will not presume to know what the Unit Purchasers might say or what outcome they might prefer (particularly in light of the falling real estate market).

d. There is a strong argument in favour of the Receiver's position that the Unit Purchasers have no interest in the Property and no right to any remedy other than the return of their deposits. However, this is not an absolute or guaranteed outcome. Cases on this point indicate that prejudice to those purchasers can be a relevant consideration. Even if their legal rights are determined by the Unit Purchaser Agreements, there are stakeholders whose interests (which can extend beyond strict legal rights) may also be relevant when the court decides whether to allow 273 Ontario to redeem the Property or to grant the requested AVO and Ancillary Order.

e. Given that the termination of the Unit Purchaser Agreements is an explicit condition of the APS and sought as part of the AVO, and in the particular circumstances of this case, the Unit Purchasers should have been given notice of the Receiver's

motion and the opportunity to respond to it. They may not oppose, or, their opposition may not be successful; however, they should be given the opportunity to be heard.

f. The court would also prefer to be fully informed about whether the Receiver has valid contractual grounds upon which to terminate the Unit Purchase Agreements that it relies upon.

g. Not every situation involving a deemed termination or approval of disclaimer of purchase agreements in pre-sale condominium projects in receivership will necessarily require notifying purchasers. Each case must be considered on its own facts. As noted, the legal rights of these purchasers may be limited, even if their interests are not necessarily limited to their strict legal rights.

h. Prejudice (if it can be established) is also a relevant consideration. It is not just the prejudice to the Unit Purchasers, but also to the Registered Lien Claimants and to the Purchaser, that must be considered and balanced (along with the interests of the secured creditors and any other creditors that the court is typically concerned with on these types of approval motions).

i. The Receiver will need to determine the most efficient way to put the Unit Purchasers (and perhaps the Registered Lien Claimants) on notice of the next return date and to set out a process for their positions, if any, to be coherently and efficiently put before the court.

j. Pending the input of the Unit Purchasers, if any, the satisfaction of the condition of the APS that the Unit Purchaser Agreements be terminated or disclaimed remains uncertain.

27 In the court's January 18, 2023 endorsement, the court cautioned that the Unit Purchaser's positions would not be the only, or determinative, factor. It was noted that when the matter returned to court on January 26, 2023, the determination of the two remaining substantive issues: a) the purported exercise of 273 Ontario's right to redeem, and b) the approval of the APS, Transaction and proposed AVO, will involve, among other things, the court's consideration of the interests of, and prejudice to, all of the different stakeholders whose rights and interests are impacted differently by the different potential outcomes: see Kruger v. Wild Goose Vintners Inc., 2021 BCSC 1406, at para. 74; BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at para. 47; *Royal Bank of Canada* ; Ravelston Corp. Re.200524 C.B.R. (5th) 256 (Ont. C.A.), at para. 40.

28 The court foreshadowed in the January 18, 2023 endorsement that the ultimate consideration, involving the balancing of interests and alleged prejudices, may still favour approval of the APS, Transaction and AVO. That is in fact what has been decided.

Factual Background

29 Much of the factual background was reviewed in the court's January 18, 2023 endorsement. Relevant portions, not addressed elsewhere in this endorsement, are recapped below in this section for ease of reference. [3]

The Project, Existing Mortgages and Sales Efforts Around the Time of the Appointment Order and Sale Process Order

30 The Purchased Assets and the Property were part of the Rosehill Project, a joint venture between the applicants and the respondents for the development of a proposed six-story mixed use residential and commercial development. The Rosehill Project is anticipated to comprise of approximately 80 condominium units. The Company is the entity through which the joint venture was developing the Rosehill Project and is the registered owner of the Property. As at the date of the Appointment Order, 60 residential suites and one commercial unit had been pre-sold.

31 Trez (an arm's length third party lender) provided mortgage financing to the Company, secured by a first charge on the Property that initially went into default and then matured in August and September of 2022.

32 273 Ontario provided mortgage financing to the Company secured by a second charge on the Property.

33 Prior to the Appointment Order, the Company had begun marketing the Rosehill Project for sale. After the Appointment Order, the Receiver's efforts to re-engage with a pre-appointment prospective purchaser were unsuccessful.

34 Before the court approved the Sale Process, the Receiver and 273 Ontario discussed the possibility of 273 Ontario being a stalking horse bidder or assuming the Trez first mortgage loan. 273 Ontario did not pursue either option at that time. The Sale Process did not foreclose the possibility of 273 Ontario making a bid.

The Registered Lien Claims

35 The Receiver's First Report filed in connection with its motion to approve the Sale Process identified a construction lien registered by Capital Build on title to the Property for over $2 million (the "Capital Build Lien"). When the Sale Process was approved, the Receiver had not completed an analysis to validate the work performed to support the Capital Build Lien or its priority.

36 In addition to the Capital Build Lien, another lien is registered on title to the Property by an architect (the "KNYMH Lien"). The KNYMH Lien and the Capital Build Lien comprise the "Registered Lien Claims" and "Registered Lien Claimants" as the case may be.

37 273 Ontario indicated to the Receiver that it challenged the legitimacy of the Registered Lien Claims and its priority over 273 Ontario's second mortgage. 273 Ontario wanted the Receiver to determine the validity of the Registered Lien Claims before it made its bid.

38 In October 2022, 273 Ontario made a specific request of the Receiver to review and determine the validity of the Registered Lien Claims. The Receiver reviewed the supporting documents for the Capital Build Lien and concluded that it was insufficient. The Receiver has advised that it intends to bring a motion for court approval to disallow that claim. The Receiver also reviewed the KNYMH Lien Claim, but allowed it. The Receiver understands that parties interested in the Registered Lien Claims may dispute the Receiver's determinations of their respective validity and priority. Moreover, it is expected that the court will eventually have to adjudicate their validity, amount and priority.

The 273 Security and Loan Amount

39 On October 14, 2022, counsel for 273 Ontario requested that the Receiver review 273 Ontario's security based on the supporting documentation 273 Ontario had provided. On or around November 15, 2022, counsel for 273 Ontario asked the Receiver to confirm whether 273 Ontario's security was valid and enforceable. On November 18, 2022, counsel for the Receiver confirmed with counsel for 273 Ontario that its security was valid and enforceable, and that the Receiver accepted $6,389,204 as owing to 273 Ontario, assuming a payout as of December 31, 2022.

40 On November 21, 2022, counsel for 273 Ontario wrote to the Receiver objecting to that amount. 273 Ontario claimed that it was owed $7,047,395.23, which included, among other things, interest to the July 16, 2023 maturity date of its loan (the "273 Ontario Loan").

The Bidding Process

a) The 273 Ontario Bid

41 The Receiver advised counsel for 273 Ontario that any Credit bid made by 273 Ontario must provide cash in the amount of the Registered Liens Claims. That cash was to be set aside until the final determination of the validity and priority of the Registered Lien Claims, or the settlement thereof.

42 273 Ontario had concerns about submitting a Binding APA containing a Credit bid by the bid deadline given that: a) the Registered Lien Claims, which 273 Ontario did not believe were legitimate, had not been determined and 273 Ontario was not certain it could raise sufficient financing to satisfy both the Trez mortgage as well as the Registered Lien Claimants; and

b) there was a discrepancy between the calculations of the Receiver and 273 Ontario as to the amount outstanding of the 273 Ontario Loan and that could be applied to the Credit bid.

43 Counsel for 273 Ontario asked that the Receiver take no steps to "declare a winning bid or disregard [his] client's bid" until the hearing of a proposed motion to extend the bid deadline, proposed to be scheduled on November 29, 2022. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver had discretion to extend the November 25, 2022 bid deadline if necessary.

44 Regardless of what may, or may not, have transpired in the lead up to the November 25, 2022 bid deadline, counsel for the Receiver worked with counsel for 273 Ontario to attempt to address 273 Ontario's concerns thereafter. This included a suggestion that 273 Ontario submit a Credit bid which: (i) was conditional on the Registered Lien Claims being resolved to its satisfaction, and (ii) provided for a Credit bid of 273 Ontario's debt of not less than a specified amount. Counsel for the Receiver advised counsel for 273 Ontario that the Receiver would consider any written offer made by 273 Ontario by the bid deadline, and that no motion was necessary to extend the bid deadline.

45 273 Ontario submitted a non-binding letter of intent on the bid deadline. Even though it did not satisfy the requirements for bids under the Sale Process (nor was it accompanied by a commitment for firm irrevocable financing or a deposit), the Receiver received and considered its terms and continued discussions with 273 Ontario thereafter.

46 By December 2, 2022, the amount in dispute between the Receiver's alleged amount owed under the 273 Ontario Loan, and 273 Ontario's alleged amount owed, was about $700,000. The Receiver advised 273 Ontario that it would accept, for the sole purpose of 273 Ontario's Credit bid, 273 Ontario's claim that $7,047,395.23 was owed under the 273 Ontario Loan.

b) Ora and other Bids

47 Ora and two other bidders submitted bids compliant with the requirements under the Sale Process on the bid deadline of November 25, 2022. The Receiver negotiated with Ora with respect to various terms of its bid. The result was that the Ora submitted an unconditional, all cash, Binding APA on December 7, 2022 (the "Ora Binding APA"), a requirement of which is that all Unit Purchaser Agreements and the unit deposits received thereunder be excluded from the Purchased Assets (as defined in the Ora Binding APA).

c) Request for Binding APA from 273 Ontario

48 After receiving the unconditional, executed Ora Binding APA on December 7, 2022, the Receiver asked 273 Ontario to submit a Binding APA with proof of financing and a deposit by December 9, 2022.

49 On Friday December 9, 2022, 273 Ontario submitted its Credit Bid. The bid was conditional on financing (but accompanied by a commitment letter) and was submitted with an unconditional Binding APA that the Receiver could accept.

d) The Receiver's Decision

50 The Receiver evaluated the Credit Bid and determined that it had significant risk around both the certainty of closing and 273 Ontario's ability to pay the cash component of the purchase price that was dependent on financing, which was itself contingent.

51 The Receiver thereafter decided to accept the Ora Binding APA, as it contained fewer conditions, carried less closing risk and had a greater certainty of recovery for creditors generally. The Receiver considers the Ora Binding APA to represent the best executable offer received in the Sale Process. The Receiver accepted the Ora Binding APA on December 10, 2022. [4]

52 On Monday, December 12, 2022, 273 Ontario supplemented its Credit Bid with financing commitments sufficient to pay certain priority payables, including the Trez Loan and the Receiver's Borrowing Charge, but not the Registered Lien Claims. Rather, the Credit Bid contains a closing condition that requires the Registered Lien Claims to be withdrawn or declared by the court to be invalid or dismissed. The Credit Bid does not require the termination or vesting out of the Unit Purchaser Agreements.

53 After accepting the Ora Binding APA, the Receiver received and considered some additional material and terms presented by 273 Ontario. The Receiver attempted to facilitate a settlement between Ora and 273 Ontario that involved 273 Ontario paying a break fee to Ora. There appeared to be a settlement but 273 subsequently advised that it was not prepared to proceed with that settlement in advance of the initial return date of the Receiver's motion on December 15, 2022. This led to the request by 273 Ontario for an adjournment so that it could bring its cross-motion and make further submissions in opposition to the Receiver's motion (that procedural history is discussed above).

The APS

54 The APS (comprised of the Ora Binding APA accepted by the Receiver) requires that title to the Property be vested in the Purchaser free and clear of the Unit Purchaser Agreements. As such, the proposed AVO vests out the Unit Purchaser Agreements.

55 The net sale proceeds under the APS are expected to repay the first mortgage in full, and, subject to the final determination of the Registered Lien Claims, part of the 273 Ontario mortgage.

56 Since the Property is to be transferred free and clear of all encumbrances and the Registered Lien Claims have not been finally determined, the Receiver seeks approval to hold back the following amounts comprising a proposed reserve for Registered Lien Claims (the "Reserve") until the Registered Lien Claims have been finally determined or resolved:

a. Until such time that the KNYMH Lien is resolved, the Receiver proposes to hold a cash reserve of $259,211 from the net sale proceeds of the proposed Transaction, being the full amount of the KNYMH Lien, pending further order of the court.

b. Until such time as the validity and priority of the Capital Build Lien has been resolved, the Receiver proposes to hold a cash reserve of $2,000,665 from the net sale proceeds of the proposed Transaction, being the full amount of the Capital Build Lien, pending further order of the court.

57 Ora has permitted its ten percent deposit to be held in a non-interest bearing account pending the court's determination of these motions. It has also kept liquid cash available so that it can close (with payment of its all cash purchase price) within five days of any court approval of the Transaction.

The Assignment of the Trez First Mortgage Position

58 Trez gave notice of default under its first mortgage in August 2022. The mortgage loan matured and became due and payable in September 2022. The net proceeds from the Transaction are projected to exceed the amounts owing to Trez. As noted above, the AVO contemplates paying out this first mortgage in full.

59 273 Ontario advised the court that, since the hearing on January 6, 2023, it continued to work with its financier, Toronto Capital Corp. ("Toronto Capital"), towards redeeming the Property. To that end, Toronto Capital and Trez entered into a Loan Sale Agreement (and ancillary agreements) whereby Trez assigned the first mortgage charge to Toronto Capital (the "Toronto Capital Assignment").

60 Pursuant to the Toronto Capital Assignment, Trez was paid out in full on the first mortgage and Toronto Capital became the first priority secured creditor. This transaction closed, and the security was transferred from Trez to Toronto Capital on the morning of January 26, 2023, just prior to the hearing.

61 Toronto Capital opposes the sale to Ora, among other things. As such, both the first-ranking (Toronto Capital) and second-ranking (273 Ontario) secured creditors now oppose the sale to Ora, and support either (i) the completion of the redemption of the Property by effecting a transfer of the Property to 273 Ontario; or (ii) the approval of the Credit Bid to effect a sale of the Property to 273 Ontario, both with the assumption of Toronto Capital's interest such that it is preserved.

62 273 Ontario has advised that it incurred financing fees of approximately $235,000 to arrange for the Toronto Capital Assignment, plus legal costs. These expenses are in addition to the amounts it has already spent funding the receivership and these proceedings.

Issues to be Decided

63 The issues to be determined on the Receiver's motion and 273 Ontario's cross-motion were outlined in the January 18, 2023 endorsement to be as follows:

a. Are there stakeholders who should have been served with the motions:

i. The Unit Purchasers?

ii. The Registered Lien Claimants?

b. Does 273 Ontario have the right to redeem the Property?

c. Should the Transaction and the APS be approved and the proposed AVO be granted?

d. Should the Ancillary Order be granted?

Analysis

Preliminary Issues Regarding Service and Notice, and Updated Positions Regarding the Unit Purchasers and Registered Lien Claimants

64 The service issues were addressed in the January 18, 2023 endorsement. The Receiver's Second Supplement to the Second Report provided the following updates and information arising out of that endorsement:

a. The Receiver made efforts to contact the Unit Purchasers and their counsel of record to notify them of the motions and provide them with the link to access the court materials by email and phone. They were invited to respond to the Receiver if they wished to put their positions before the court.

b. Some Unit Purchasers contacted the Receiver and all who expressed a desire to attend the January 26, 2023 hearing were provided with the video link.

c. A number of Unit Purchasers attended the hearing (approximately 30), and three requested and were given the opportunity to address the court.

d. As at January 24, 2023, of the 62 residential and commercial Unit Purchasers contacted by the Receiver, 32 indicated that they would prefer their Unit Purchaser Agreements be terminated, 9 indicated they would prefer their Unit Purchaser Agreements be maintained, and 21 did not respond, or responded without indicating a preference.

e. The Registered Lien Claimants are represented by counsel on the Service List and both were served prior to the motion dates on December 22, 2022 and January 6, 2023. Capital Build's Bankruptcy Trustee, and the Trustee's counsel, were also served with the motion materials. KNYMH's counsel attended the January 26, 2023 hearing.

f. The Receiver does not rely on the contractual provisions of the Unit Purchaser Agreements to terminate those contracts. The Receiver relies on the powers granted to it under paragraph 3(c) of the Appointment Order "to manage, operate, and carry on the business of the Company, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Company", as well as the court's inherent jurisdiction as the basis for terminating the contracts and returning deposits to the Unit Purchasers.

65 At the January 26, 2023 hearing, some Unit Purchasers expressed the view that they would like to receive their deposits back and to have their Unit Purchaser Agreements terminated, having lost faith in the Rosehill Project coming to fruition. Others indicated that they would like to see the Rosehill Project built and to proceed with their purchase. One purchaser in particular (who also provided a statutory declaration) emphasized the attractive location, its proximity to amenities and services for seniors in the area and the enhancements to their unit to accommodate their particular needs. This purchaser expressed concerns about retirement plans and the detriment to purchasers and the community over the loss of the Rosehill Project.

66 In its submission to the court on January 26, 2023, 273 Ontario advised that if it is permitted to redeem or has its Credit Bid approved, it will provide the Unit Purchasers with 30 days to advise whether they wish to have their units put back into the pool of units to be sold by 273 Ontario going forward, and if such sales are achieved (without loss) then 273 Ontario will cancel their contracts without cost or penalty to them. 273 Ontario is prepared to have any court order approving the redemption or acceptance of its Credit Bid incorporate such a provision into the order.

67 273 Ontario also indicated that it is prepared to have any court order approving the redemption or acceptance of its Credit Bid contain the following mechanisms to preserve the rights of the Registered Lien Claimants pending the determination of their rights by the court as follows:

> 273 is prepared to bond off 10 percent of the respective amount of the Capital Build and KNYMH Liens. Alternatively, in the event the Court approves the 273 Credit Bid or permits 273 to redeem the Property, the resulting order can provide that KNYMH's and Capital Build's rights under the Liens are preserved in the Property to the extent they are found to be in priority to the 273 mortgage following the closing of the transaction.

68 Counsel for KNYMH indicated at the hearing that as long as its rights under s. 44(1) of the Construction Act, R.S.O. 1990, c. C.30 are preserved, and its lien is terminated on the basis of the payment of appropriate funds into court (the entire amount of the lien plus 25 percent for costs), or alternatively, its lien is preserved in the Property until such time as any process for the determination of the Registered Lien Claims has run its course, it takes no position on the motions.

Does 273 Ontario Have the Right to Redeem the Property and Should the Court Permit it to do so?

The Right to Redeem

69 273 Ontario argues that s. 2 of the Mortgages Act, R.S.O. 1990, c. M.40 guarantees a secured creditor's right to redeem. According to 273 Ontario, "[i]t permits the mortgagor or any 'encumbrancer', such as 273 [Ontario] as [a] secured creditor, to 'assign the mortgage debt and convey the mortgaged property' to any person."

70 Section 2(1) of the Mortgages Act entitles the mortgagor to require the mortgagee to assign the mortgage debt and convey the property as the mortgagor directs. The mortgagee is bound to assign and convey accordingly. Section 2(2) of the Act allows that right to be enforced by each encumbrancer. A requisition of an encumbrancer prevails over that of the mortgagor.

71 The right to redeem is a right of a debtor, upon payment of a debt, to recovery the property pledged to a creditor as security for payment of a debt: see *Wild Goose*, at para. 69.

72 In this case, 273 Ontario seeks to convey the Property to itself (and would have sought to assign the first mortgage debt to its financier, Toronto Capital, but that has now preemptively occurred).

73 Neither the Receiver nor Ora appear to disagree with 273 Ontario's theoretical right to redeem the Property as the second mortgagee. While this typically arises in foreclosure or court ordered sales (under, for example, r. 64 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194), 273 Ontario's request to redeem it is not opposed on the basis that no such right could ever arise in the context of a court ordered sale process in a receivership.

74 Rather, what the Receiver and Ora oppose is the timing of 273 Ontario's purported exercise of this right. They maintain that the court should not exercise its discretion to allow a creditor to exercise a right of redemption after a court-ordered Sale

Process is in place and a bid has been accepted. Particularly in this case, a Sale Process that the creditor (273 Ontario) was consulted about and did not oppose when it was approved by the court.

Should 273 Ontario be Permitted to Redeem the Property?

75 The Receiver relies on Ron Handelman Investments Ltd. v. Mass Properties Inc.200955 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]) (Ont. S.C.) to argue that 273 Ontario should not be permitted to exercise its right of redemption at this stage in the proceedings.

76 In *B&M Handelman*, the court relied on the wording of the order authorizing the receiver to sell the subject property to preclude an automatic right to redeem. The court noted that in each case where the Receiver took steps to market the Property and to sell it in the ordinary course of business with the approval of the court, "it was exclusively authorized and empowered to do so, to the exclusion of all other persons including debtors and without interference from any other person": *B&M Handelman* , at para. 21. It was "[i]n the face of these provisions", that the court precluded an automatic right to redeem. [5]

77 The Receiver argues that the Appointment Order and Sale Process Order in this case should be read as containing similar language that precludes a right of redemption. I have not found similarly prescriptive language in the court orders in this case.

78 Of more direct concern in this case is the impact that allowing 273 Ontario to exercise its right of redemption would have on the integrity of the court approved Sales Process. The policy considerations that weighed heavily on the court in *B&M Handelman*, at para. 22 are of equal concern in this case:

> A mockery would be made of the practice and procedures relating to receivership sales if redemption were permitted at this stage of the proceedings. A receiver would spend time and money securing an agreement of purchase and sale that was, as is common place, subject to Court approval, and for the benefit of all stakeholders, only for there to be a redemption by a mortgagee at the last minute. This could act as a potential chill on securing the best offer and be to the overall detriment of stakeholders.

79 These policy considerations are discussed in many of the cases decided after the case that 273 Ontario relies upon most heavily, *Bank of Montreal v. Hester Creek Estate Winery Ltd.*, 2004 BCSC 724, 2004 B.C.L.R. (4th) 149. They do not appear to have factored in the court's decision in *Hester*, in which the court was unequivocal on the use of a redemption in a sales process:

> [t]he integrity of the court process is not compromised by allowing a debtor or its trustee in bankruptcy to redeem the mortgaged property on the eve of an application to approve a sale of the property. Whenever there is a court-ordered sale process, it is always implicit that the conduct of the sale is subject to the debtor being able to pay off the secured creditor before a sale is approved by the court.

80 The policy considerations inform the analysis in the cases decided after *Hester*, starting with *B&M Handelman* . Most recently, in *Wild Goose* at para. 74, the court noted that "[i]n a case in which a debtor seeks to redeem security after a sale has been negotiated by a receiver before a sale has been approved, consideration of the purchaser's interest and the efficacy and the integrity of the process by which an offer was obtained *may* favour approval of the sale" (emphasis added).

81 While the court in *Wild Goose*, at para. 78 distinguishes *Hester* on the basis that all the secured creditors were protected by the redemption in *Hester*, the decision on whether to allow a redemption in *Wild Goose* still appears to have turned on the integrity of the sales process. At para. 80 the court notes, "[i]n my view, protecting the integrity of the sales process contemplated by the sale solicitation order outweighs Wild Goose's claim that it should be entitled to redeem the petitioner's security in the circumstances of the case."

82 What emerges from these more recent cases is that the integrity of a court approved sale process is an important consideration. If a sale process is found to be sound, it should not be permitted to be interfered with by a later attempt to redeem. Further support for this approach can be found in the court's reasoning in *BDC v.* Marlwood Golf & Country Club,2015 ONSC

3909, 27 C.B.R. (6th) 166, at para. 27: "[i]n this case, the sales process was properly run. Redemption of its mortgage by Marlwood in these circumstances would interfere with the integrity of that process."

83 The court engages in a balancing analysis of the right to redeem against the impact on the integrity of the court approved receivership process: see BCIMC Construction Fund Corporation et al. v. The Clover on Yonge Inc., 2020 ONSC 3659, at para. 41. The importance of the timing of the process in relation to the purported exercise of the right to redeem is emphasized at para. 36:

> In [*B&M*] *Handelman*, the Receiver had already run a bid process, had selected a purchaser and was moving to approve the purchase. Different considerations arise at that late a stage. Allowing debtors to redeem property on the sale approval motion would discourage potential purchasers from submitting bids in the first place and threaten the utility of the receivership process more generally.

The Balancing of Interests

84 The rights enunciated in *Hester* and relied upon by 273 Ontario must be balanced with the integrity of the court approved sale process. That in turn requires a consideration of whether that sale process was carried out in a procedurally fair manner, with a view towards achieving the best (and not an improvident) price, and with regard to the interests of all stakeholders. That consideration is part of the analysis that the court must engage in under the *Soundair* principles when deciding whether to approve the Transaction and grant an AVO, discussed in the next section of this endorsement.

85 The potential for prejudice to the different stakeholders is another consideration that is to be factored into the balancing exercise undertaken by the court in determining whether to permit the exercise of a right to redeem: see *Wild Goose*, at para. 74; *BCIMC* , at para. 47.

86 The stakeholder interests identified in this case include:

a. The interest of 273 Ontario, a joint venture and the fulcrum creditor, in acquiring the Property to try to preserve its debt and equity in the Rosehill Project (and avoid the losses that it will suffer if the Transaction is approved), as manifested by the relief sought in its cross-motion for the court's approval of its request to redeem or its Credit Bid.

b. The interest of the Receiver, in its capacity as the court appointed officer that sought the Sale Process Order and carried out the Sale Process, to protect the integrity of the court approved Sale Process.

c. The Purchaser is also invested in the integrity of the Sale Process, having participated in it in good faith. It also has a financial interest not only in the acquisition of the Property at the price agreed to under the Ora Binding APA, but in the lost opportunity costs by allowing its deposit to be held in a non-interest bearing account since November 25, 2022 and by maintaining sufficient liquidity to close the all-cash Transaction within five days of any court approval. While it engaged with the Receiver knowing that the Sale Process could be terminated by the Receiver, that never happened.

d. The priority interests of the first mortgagee (previously Trez and now Toronto Capital) and the Registered Lien Claimants are now protected under both the Ora Transaction and the redemption/Credit Bid scenario, so they have no prejudice to be considered. Any prejudice to Toronto Capital in respect of its plans to finance 273 Ontario has been created after the Receiver accepted the Ora Binding APA and is not a relevant consideration.

e. The Unit Purchasers whose Unit Purchase Agreements will be terminated (and deposits returned) under the proposed Transaction, if approved. They have now been given notice and have not come forward with a strong voice of opposition to the termination of those agreements by the court. [6] Of those who have expressed a view, more prefer this than oppose it, and more still were silent on the point. The number and substance of the opposition is underwhelming, given how far away the Rosehill Project is from completion. [7]

f. Any other remaining unsecured creditors are unlikely to recover under either scenario and are not being directly impacted beyond the non-recovery of their debt.

87 The court recognizes that all stakeholder interests may not be equal: "[a]lthough 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": Skyepharma PLC v. Hyal Pharmaceutical Corp.199912 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]) (Ont. S.C.), at para. 6.

88 The other stakeholder interests in this case are either neutral or militate in favour of preserving the integrity of the Sale Process, which is what is stacked up against 273 Ontario's interests as a secured creditor and joint venture participant that will not fully recover its debt, investment or costs of the receivership if the Transaction is approved and is completed.

89 While the situation in this case is distinguishable from most of the decided cases in that it is a secured fulcrum creditor, rather than the debtor company in default, seeking to redeem, that does not diminish the importance of the integrity of the court approved Sale Process.

90 The normal course would be for the Credit Bid to be made at the outset of the Sale Process as the stalking horse bid. However, 273 Ontario was not willing or able to put forward a bid at the outset of the process. Asking the court to consider an improved Credit Bid (as of January 26, 2023) that may now be executable more than a month after the extended bid deadline under the Sale Process (and almost two months after the original bid deadline) undermines the integrity of the Sale Process.

91 Similarly, 273 Ontario only sought to redeem at the end of the court approved Sale Process that it was consulted on and participated in, after it became apparent that it was not able to make a competitive bid by the time of the extended bid deadline it was given of December 9, 2022. Allowing this right to be exercised at that late stage also undermines the Sale Process. If 273 Ontario had wanted to reserve its right to redeem to the end of the Sale Process, that is something that should have been expressly addressed at the time the Sale Process Order was made.

92 To be clear, it is not, as was suggested by 273 Ontario, the mere fact that the Receiver decided to accept the Ora Binding APA on December 10, 2023 that the court is looking at when considering whether the right to redeem is available. It is the fact that there was a court approved Sale Process that 273 Ontario was consulted about, did not oppose and participated in and only sought to override by a redemption when it was unable to make a competitive bid.

93 The existence of the APS (accepted Ora Binding APA) was always subject to court approval. If not approved, or if the court was not prepared to order the deemed termination of the Unit Purchase Agreements (with the result that the condition of the APS would have failed unless waived by both the Receiver and Ora) then 273 Ontario might have been permitted to step in with its redemption or Credit Bid. But that has not transpired.

94 The court has the jurisdiction to approve the deemed termination of the Unit Purchaser Agreements. The proposed treatment of the Unit Purchasers upon said termination is consistent with their contractual remedies for a breach of their agreements. No compelling reason has been presented not to approve this, if it is otherwise determined that the *Soundair* principles are satisfied (discussed in the next section).

95 The weighing of the interests (and prejudice) of all stakeholders is also an integral part of the consideration of the *Soundair* principles. If the Receiver is found to have carried out the court approved Sale Process in a manner consistent with the *Soundair* principles, the balance will favour protecting the integrity of the Sale Process over 273 Ontario's right of redemption.

Should the Transaction and APS be Approved and the Proposed AVO Granted?

96 The proposed sale to Ora must be demonstrated to meet the sale approval test from *Soundair*. To do so, the Receiver must demonstrate that:

a. sufficient effort was made to obtain the best price and that the receiver has not acted improvidently;

b. it has considered the interests of all stakeholders;

c. the process under which offers were obtained and the sale agreement was arrived at was consistent with commercial efficacy and integrity; and

d. there has not been any unfairness in the working out of the process.

a) The Receiver's Efforts and Actions Were Provident

97 According to the Court of Appeal in *Soundair*,

> [W]hen 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.
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> 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.

98 The Receiver consulted with stakeholders, including 273 Ontario, in developing the Sale Process, which was followed. The confidential exhibits filed indicate a range of bid prices with differing conditions. Even the pre-Sale Process bid was conditional on due diligence and was withdrawn. Aside from that one withdrawn pre-Sale Process bid, the Ora Binding APA reflects a purchase price within the range of other all cash bids received and within the (low end of the) range of estimates of value from three independent brokers.

99 If there was a subsequent bid that demonstrates that Ora's price was improvidently low, that might be a relevant *ex post facto* consideration, but there is no comparable bid in this case. What we have is just a willingness on the part of 273 Ontario, a second mortgagee and investor who stands to lose a lot under the Ora Transaction to take on the risk and burden of the first mortgage, the Registered Lien Claims (to the extent they are ultimately determined to be valid and payable) and other expenses that will rank ahead of the second mortgage. 273 Ontario argues that its bid is almost 50 percent higher than the Ora Binding APA purchase price. However, that is not a reasonable comparison as the 273 Ontario Credit Bid is not a market bid that reflects any independent value assessment to which the court could compare the Ora bid. It is more appropriately characterized as the by-product of the value of the registered security on the Property.

100 Some of the other criticisms of 273 Ontario about the Receiver's conduct and actions are addressed under the third category of *Soundair* (process related) considerations, although there may be some overlap between the first and third categories.

101 For purposes of this first part of the analysis, the Ora Binding APA has not been demonstrated to be improvident.

b) Consideration of Stakeholder Interests

102 Under the second consideration, I agree with 273 Ontario that the court should be primarily concerned with the interests of creditors. It is secondarily concerned with the process considerations and the interests of other stakeholders: see *Soundair*, citing *Crown Trust Co. et al. v. Rosenberg et al.*, (1986), 60 O.R. (2d) 87 (H.C.).

103 The fact that the secured creditor (273 Ontario now effectively operating from the first and second secured positions) supports its own bid is not surprising or a particularly weighty factor. However, as was observed in the concurring opinion in the Court of Appeal's decision in *Soundair*,

> 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 therefrom), the wishes of the interested creditors should be very seriously considered by the receiver.

104 The court understands that 273 Ontario stands to lose a great deal if the Transaction and the Ora Binding APA are approved. There can be no doubt that the interests of the creditors are an important consideration and that the opinion of the creditors as to which offer ought to be accepted is something to be taken into account. However, that should not be at the expense of the integrity of the Sale Process.

105 273 Ontario's desire to have the opportunity to make a Credit Bid was facilitated by the Receiver in the accommodations it afforded to 273 Ontario up to December 9, 2022. The Receiver went to great lengths to accommodate 273 Ontario, but 273 Ontario was not able to put together a firm unconditional bid by December 9, 2022, when it was told it had to.

106 At that time, the Receiver also had to consider the interests of Trez (the first priority secured creditor) and make a business judgment about whether to proceed with the Ora Binding APA or 273 Ontario's Credit Bid after it was received on December 9, 2022. That decision was made with regard to the factors that were outlined in the court approved Sale Process, including the relative closing and execution risks associated with each.

107 273 Ontario complains that the Receiver rushed to accept the Ora Binding APA on December 10, 2022 rather than continuing to engage with a view to receiving an unconditional Credit Bid from 273 Ontario, after it threatened to exercise its right to redeem the Property. However, by December 10, 2022, the Receiver was in the position of having to accept the Ora Binding APA or risk losing the Transaction. The Ora Binding APA was the only available closable deal at the time that had a certain outcome of full recovery for the first secured creditor, Trez. This is owing to the fact that 273 Ontario did not have firm financing to satisfy the first priority secured loan, whether by redemption or through a Credit Bid.

108 The Receiver, in its discretion, determined that there was a risk of losing the Ora Binding APA and that is what led to the decision to accept it after evaluating the two options available. The Receiver's judgment at the time, for which no grounds have been suggested as warranting a lack of deference, was that Ora could walk from the Transaction if the Receiver did not sign back the Ora Binding APA. The Receiver was worried about the terms and conditions of the Credit Bid and its conditional financing at the time. [8] The Receiver's business judgment about the potential loss of the Ora Binding APA, weighed against the inability of 273 Ontario to come forward with a firm Credit Bid, is not something that the court should second guess.

109 As was observed in the earlier discussion about balancing stakeholder interests, in this case it largely comes down to a balancing of the integrity of the Sale Process against 273 Ontario's interests. The following passage from *Soundair* is instructive:

> 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.

110 The integrity of the Sale Process is not just about the fact that the Ora Binding APA had been accepted, for reasons indicated earlier.

111 The record is clear that consideration was given to all stakeholders' interests. The Purchaser's interests were not given more or undue weight over the interests of secured creditors. If anything, it was the interests of Trez, the first secured lender at the time, that the Receiver was, justifiably, concerned about if the Transaction was lost. The second secured lender's interests were not disregarded, ignored or given unfair consideration; they just did not tip the balance in the ultimate decision by the Receiver to accept the Binding Ora APA.

112 Similarly, the interests of the Unit Purchasers, whose agreements the court is being asked to deem to have been terminated, were considered. It was determined that they were being treated in accordance with their contractual rights upon any breach or termination of the Unit Purchase Agreements by the Company. Although their contractual remedies upon termination are

not being compromised (they are getting their deposits back as they would be entitled to on any breach), a minority of them, when given the opportunity, expressed disappointment that their expectation of purchasing a completed unit in the Rosehill Project will not be met. The majority appear to be content with the preservation of their contractual remedies upon termination or breach and the return of their deposits, a reasonable expectation that will be met if the Transaction is approved.

113 In the end, what is important is that all relevant stakeholder interests were considered and balanced by the Receiver, including those of 273 Ontario. I am satisfied that they were.

c) The Commercial Efficacy and Integrity of the Sale Process

114 273 Ontario has criticized the manner in which the Receiver reached out to some prospective bidders (and failed to follow-up directly with one of the known pre-Sale Process bidders), as well as the fact that an outdated draft non-reliance appraisal report was not in the data room. The Receiver has explained its actions with reference to these criticisms in a manner that satisfies the court. They do not diminish the integrity of the Sale Process that the Receiver followed.

115 273 Ontario also criticizes the Receiver for running a "fire sale" because it was mentioned in its materials for the Sale Process that the Rosehill Project had "fallen into receivership," thereby suggesting there was an insolvency situation. Having considered all the evidence about the implementation of the Sale Process, I do not consider this to be a fair characterization of the Receiver's conduct during the Sale Process. Nor was it improper for the fact that the Rosehill Project was in receivership to have been mentioned; the Receiver has to identify itself as such when engaging with prospective purchasers.

116 It has not been suggested that the court approved Sale Process itself lacked commercial efficacy or integrity. Nor has it been demonstrated that the Receiver failed to follow that process. I am satisfied that the process under which bids were obtained and the APS was arrived at was consistent with commercial efficacy and integrity.

d) No Unfairness in the Working out of the Process

117 The Receiver engaged with 273 Ontario and made efforts to take its interest in making a bid into account. Even after it missed the bid deadline, 273 Ontario's offer letter was received and considered and 273 Ontario was encouraged and given time to compile a bid.

118 Further, the Receiver treated 273 Ontario fairly in receiving and considering the bid it eventually made, which was not accompanied by proof of financing and was no accompanied by a Binding APA. Whereas the Receiver could have rejected this for non-compliance, it did not do so.

119 273 Ontario complains that it was "jammed" because of the Receiver's delay in confirming the validity, enforceability and amount owing under the 273 Ontario Loan and in dealing with the Registered Lien Claims, both of which 273 Ontario maintains impacted its ability to submit a Binding APA. The Receiver maintains that it responded in a timely manner to requests from 273 Ontario about these matters. It even eventually agreed to allow 273 Ontario's second mortgage claim to be valued at the full amount 273 Ontario submitted, and not at the lesser amount that the Receiver had valued it at for other purposes.

120 273 Ontario also complains that the Receiver first invited it to make its Credit Bid conditional upon the resolution of the Registered Lien Claims to 273 Ontario's satisfaction and then gave as one of its reasons for preferring the Ora Binding APA that 273 Ontario's Credit Bid was conditional upon the Registered Lien Claims being withdrawn or found to be invalid. The suggestion that a bid could be made conditional upon a satisfactory resolution of these claims does not mean that this condition would not be factored into the evaluation of the bid, it just meant that the requirement that the bid be unconditional for it to even be considered was being waived (as an accommodation to 273 Ontario, something that the Receiver did not have to do).

121 It is suggested that the Receiver should have started to validate 273 Ontario's mortgage security in July 2022, and that its delay until its final confirmation of the amount on December 3, 2022 was unreasonable. The Receiver has explained the normal course approach to validating a security. Moreover, the record demonstrates a timely response to 273 Ontario's request that it

do so when made in October 2022, including allowance for a higher amount than what the Receiver considered appropriate for the purposes of the Credit Bid that it permitted 273 Ontario to make after the bid deadline had already passed.

122 Similar criticisms are made about the Receiver's failure to prioritize the evaluation of the Capital Build Lien (which 273 Ontario had maintained was fraudulent from the outset). Yet, when asked to prioritize this, the Receiver did so and made the decision to seek approval from the court to disallow it. The timing of 273 Ontario's requests for the security review (and subsequent request for confirmation of the accepted amount of the 273 Loan) and for the determination of the Registered Lien Claims have been addressed earlier in this endorsement. 273 Ontario suggests that, because it was funding the receivership, its requests should have been given priority by the Receiver. The Receiver's duties are to the court and all stakeholders. But it did prioritize issues when they were raised by 273 Ontario, so these complaints are unfounded both legally and factually.

123 If 273 Ontario had wanted its mortgage security validated and the Registered Lien Claims dealt with before the bid deadline under the Sale Process, it could have asked that this be done at the time of the court's approval of the Sale Process Order. It did not do so. Now it suggests that the Receiver was remiss in not appreciating how important this was to 273 Ontario's participation in the Sale Process. I do not accept that to be a valid criticism of the Receiver.

124 At worst, there appears to have been a misunderstanding between the Receiver and 273 Ontario about whether the Receiver was working on evaluating 273 Ontario's security and the Registered Lien Claims prior to the specific requests from 273 Ontario that it do so commencing in October 2022. The Receiver addressed these points during the Sale Process when it was asked to do so in October 2022. The real issue is that 273 Ontario did not agree with, and was perhaps surprised by, the Receiver's assessments once received. The court does not accept the assertion by 273 Ontario that the Receiver did not address these matters in a timely and diligent manner. Even if 273 Ontario had thought, or hoped, they were being addressed earlier, that possible misunderstanding does not rise to the level of a failing on the Receiver's part.

125 273 Ontario argues that, but for the Receiver's artificial and aggressive deadlines, and its failure to address the two issues 273 Ontario requested it to take care of well before the bid deadline, the Toronto Capital funding commitment would have been provided to the Receiver before the bid deadline and its bid would not have suffered from the identified execution risks. I have difficulty with the position that this delay was the Receiver's fault. The deadlines were prescribed under the Sale Process. It is not lost on the court that 273 Ontario was engaged in a Sale Process that was primarily directed to prospective third-party purchasers. It declined to put in a stalking horse bid in advance of the Sale Process Order and then had to scramble when it decided to do so once the Sale Process was underway.

126 273 Ontario, at some point in the process, became concerned about the value of the bids that might materialize and began to work on its Credit Bid. 273 Ontario then found itself scrambling to find financing for a Credit Bid and was not able to do so even by the extended deadline of December 9, 2022. I am not persuaded that this was a function of any unfairness in the Sale Process that the Receiver followed, or its conduct in dealing with requests from 273 Ontario to review its security and determine the Registered Lien Claims.

127 273 Ontario then complains that after it submitted its Credit Bid, it was rejected out of hand without any further negotiation after the Receiver rushed to accept the Ora Binding APA. 273 Ontario complains that the Receiver did not contact it to invite it to remove conditions before accepting the Ora Binding APA. 273 Ontario suggests that this was done for Ora between November 25 and December 6. In fact, it was done for both Ora and 273 Ontario before the December 9, 2022 deadline. Suggestions were made in an effort to assist 273 Ontario in putting in its Credit Bid despite the challenges it was facing. 273 Ontario did not raise concerns about conditions on its financing with the Receiver before submitting its Credit Bid on December 9, 2022.

128 The Receiver extended an accommodation to 273 Ontario by allowing it to continue in the Sale Process after the November 25, 2022 Bid Deadline and to work forward from its offer letter to its Credit Bid on the same time line as it afforded to Ora to move forward from its initial Bid to the Binding Ora APA that was submitted on December 7, 2022, and then 273 Ontario was given two days after that to submit its Credit Bid. 273 Ontario was not treated unfairly in this process. Ora and 273 Ontario were both afforded opportunities to improve their bids after November 25, 2022 and were treated equitably during that period.

129 Events that occurred after the Ora Binding APS was accepted on December 10, 2022 are of marginal relevance, unless they shed light upon matters that were known or ought to have been known at the relevant time. In the category of marginal relevance would be the assignment of the Trez first priority mortgage to Toronto Capital that has alleviated some of the execution risk associated with the 273 Ontario Credit Bid that the Receiver had identified when it decided to accept the Ora Binding APA. The fact that almost two months later, 273 Ontario was able to get financing in place to take out the first secured mortgage does not diminish the legitimacy of the Receiver's concerns about the relatively more significant execution risk associated with the Credit Bid when it was considering which bid was in the best interests of the stakeholders of the Company on December 10, 2022.

130 Lastly, I do not find there to have been anything unfair about the Receiver's efforts to facilitate a commercial resolution between 273 Ontario and Ora after the Ora Binding APA had been accepted and 273 Ontario was able to obtain financing. No one tried to hold 273 Ontario to that resolution, even though it agreed to it and later indicated that it had felt pressured to enter into it and was not prepared to follow through with it.

131 The fact that the terms and limitations on the 273 Credit Bid ultimately submitted were less favourable in the Receiver's assessment than other bids does not mean it was not properly considered. I find that 273 Ontario was treated fairly by the Receiver in the working out of the Sale Process.

e) Approval of the APS, Transaction and AVO

132 Accordingly, the *Soundair* principles having been satisfied, the APS and Transaction are approved and the AVO is granted.

Should the Ancillary Order be Granted?

133 Counsel for 273 Ontario suggested that the requested ancillary relief should be delayed, regardless of the outcome of the decision on the AVO because there are concerns about fees that 273 Ontario has not had time to address. However, the Receiver is not seeking approval of its fees under the Ancillary Order. The relief it is seeking is related to the AVO.

134 If the *Soundair* requirements are found to have been met and the Receiver's conduct in carrying out the Sale Process is not impugned, it should not be open to further challenge. The Receiver's actions and activities during the relevant period should be approved. The approval of the statement of receipts and disbursements is simply a recognition of what amounts were received and paid. It is not an approval of any amounts that may have been paid to the Receiver and its counsel. The Receiver will still be required to seek those approvals in the normal course with the appropriate fee affidavits.

135 In the meantime, establishing a reserve or holdback from the sale proceeds to satisfy the fees, in such amounts as may ultimately be approved, is a prudent and reasonable thing to do, particularly given the breakdown in the relationship between the Receiver and 273 Ontario.

136 The proposed distributions, to the first mortgagee and on account of the Receiver's Borrowing Charge (for amounts borrowed and previously approved) appear to be reasonable. If the new first mortgagee, Toronto Capital, does not want to be paid out then that can be addressed in the context of the Ancillary Order being settled. I will hold off in signing it for now, but if it does want to be paid out, I would approve that distribution.

137 Finally, the requested sealing order is appropriate.

138 The requested partial sealing order is limited in its scope (only specifically identified confidential exhibits) and in time (until the Transaction is completed). It is necessary to protect commercially sensitive information that could negatively impact the Company and its stakeholders if this transaction is not completed and further efforts to sell the property must be undertaken.

139 The proposed partial sealing order appropriately balances the open court principle and legitimate commercial requirements for confidentiality. It is necessary to avoid any interference with subsequent attempts to market and sell the property, and to avoid any prejudice that might be caused by publicly disclosing confidential and commercially-sensitive information prior to the completion of the now approved Ora Transaction.

140 These salutary effects outweigh any deleterious effects, including the effects on the public interest in open and accessible court proceedings. I am satisfied that the limited nature and scope of the proposed sealing order is appropriate and satisfies the *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 requirements, as modified by the reformulation of the test in Sherman Estate v. Donovan, 2021 SCC 25, 458 D.L.R. (4th) 361, at para. 38.

141 Granting this order is consistent with the court's practice of granting limited partial sealing orders in conjunction with approval and vesting orders.

142 The Receiver is directed to ensure that the sealed confidential exhibits are provided to the court clerk at the filing office in an envelope with a copy of this endorsement and the signed order with the relevant provisions highlighted so that the confidential exhibits can be physically sealed. At the appropriate time, the Receiver shall also seek an unsealing order.

Costs and Final Disposition

143 The Receiver's Motion for an AVO and Ancillary Order is granted on the terms indicated herein. 273 Ontario's cross-motion is dismissed.

144 There was not sufficient time booked at any of the hearings to address the issue of costs. The parties should exchange cost outlines and try to reach an agreement on costs. If they are unable to do so they are directed to arrange a scheduling appointment before me so that an efficient procedure can be established for the costs of these motions to be determined.

145 Before signing the proposed AVO and Ancillary Order, I wanted to give the parties the opportunity to consider if anything further needs to be changed in the forms that were originally submitted by the Receiver, given the passage of time and with the benefit of the court's endorsement. Updated forms of orders may be submitted to me for consideration (with blacklines to indicate changes made) by emailing them to my judicial assistant: *lina.bunoza@ontario.ca*

146 The court recognizes that this decision will have significant implications for 273 Ontario and the Rosehill Project. However, after permitting the adjournments to allow for a full airing of the multitude of issues raised on the merits, this is the outcome that has been reached. I am appreciative of the efforts and helpful submissions provided by all counsel.

Motion granted; cross-motion dismissed.

Appendix

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP

COURT FILE NO.:	*CV-22-00682959-00CL*	*HEARING DATE: 26 JANUARY 2023*
	.....	.....

NO. ON LIST: 3

TITLE OF PROCEEDING: ROSE-ISLI CORP. et al v. FRAME-TECH STRUCTURES LTD. et al

BEFORE JUSTICE: MADAM JUSTICE KIMMEL

PARTICIPANT INFORMATION

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In total there were approximately 38 observers and participants at the hearing, including the above named counsel and a number of individual purchasers. Three purchasers, *MARY RAPPULO, NICOLA LACANTORE*, and *VINCENZO PATERINO* addressed the court.

Footnotes

1 It was noted that, as a practical matter, the latest version of 273 Ontario's credit bid would form the basis for the implementation of the right of redemption if that relief were to be granted.

2 After the court's endorsement of January 18, 2023, and just prior to the re-attendance of the parties on January 26, 2023, the Trez first mortgage was paid out and assigned to Toronto Capital. Toronto Capital is now the first ranking creditor on the Project. Unlike Trez, it supports the position of 273 Ontario and the redemption right that 273 Ontario seeks to exercise. However, the court assumes that, if the AVO is granted and the Transaction with Ora is approved, Toronto Capital, now standing in the position of Trez, will want to receive the same proposed distributions that the Receiver had sought the court's approval to make to Trez to satisfy the first mortgage charge. That should be clarified before the final draft of the AVO is provided to the court to be signed.

3 Counsel for 273 Ontario pointed out at the January 26, 2023 hearing (and counsel for the Receiver did not disagree) certain inaccuracies contained in the court's January 18, 2023 endorsement regarding the timing of registration of the Registered Lien Claims which are corrected herein.

4 There was some discrepancy in the evidence about the date on which the Ora Binding APA was accepted, but it was confirmed during the January 26, 2023 hearing to have been accepted on December 10, 2022.

5 As a result of *B&M Handelman* , the court in *Wild Goose*, at para. 67 expressly reserved in the court order Wild Goose's right to redeem "that might otherwise be lost on the reasoning in [*B&M Handelman*,]."

6 The purpose of requiring that the Unit Purchasers be given notice of the relief sought was so that they were made aware and given the opportunity to make submissions about whether the court could or should make the requested order deeming the Unit Purchaser Agreements to have been terminated..

7 After the Unit Purchaser feedback was received and reported, 273 Ontario argued that only the interests of those who want to continue with their Unit Purchase Agreements should be considered. This was said to be logical because the court is being asked to allow the Receiver to break those agreements, whereas the Unit Purchasers in favour of that happening do not have a right themselves to break their agreements. That takes too narrow a view of the Unit Purchasers' interests. They all have an interest in what happens to their

Unit Purchase Agreements as a consequence of the Transaction that the court is being asked to approve, even if they do not have the right to break, or specifically enforce, their agreements because of the terms of the Appointment Order.

8 273 Ontario suggested that the Receiver should have known, or could have asked and been told, that the financing would be waived by the lender, despite what the commitment letter said. If that was the case, that was something 273 Ontario could have conveyed to the Receiver, but did not do so.

End of Document

TAB 14

2017 ONSC 7161
Ontario Superior Court of Justice [Commercial List]

Hanfeng Evergreen Inc., (Re)

2017 CarswellOnt 19036, 2017 ONSC 7161, 286 A.C.W.S. (3d) 275, 55 C.B.R. (6th) 211

IN THE MATTER OF AN APPLICATION UNDER SECTION 101 OF THE COURTS OF JUSTICE ACT, R.S.O. c.C.43 (as amended)

IN THE MATTER OF HANFENG EVERGREEN INC. (Applicant)

F.L. Myers J.

Heard: November 20, 2017
Judgment: November 30, 2017
Docket: CV-14-10667-00CL

Counsel: Daniel S. Murdoch, Haddon Murray, for Receiver, Ernst & Young Inc.
David C. Moore, Karen M. Mitchell, for Lei Lo and Xinduo Yu

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.8 Remuneration of receiver
VII.8.b Remuneration
VII.8.b.i General principles

Headnote

Debtors and creditors --- Receivers — Remuneration of receiver — Remuneration — General principles

Timing — Debtor was Ontario public corporation used as financing vehicle to raise money from investors interested in investing in fertilizer business operated by subsidiary of debtor in China — Due to debtor's inability to comply with shareholder approval requirements, receiver was appointed to complete sale of subsidiary to purchaser — Purchaser paid $2.4 million deposit to receiver, subject to guarantee given by debtor's founder, but transaction did not proceed due to alleged impropriety of founder in orchestrating sham transaction and depleting debtor's value — Receiver defended action brought against it and founder in China by purchaser, whose entitlement to return of deposit was subject of pending appeal — Receiver brought action in Ontario against founder and his spouse for damages — Receiver brought motion for approval of its recent activities as well as its fees and disbursements and those of its counsel — Motion granted on terms — Approval of receiver's activities was intended to be without prejudice to any procedural or substantive rights of receiver, founder, or spouse in respect of Ontario action — Any potential adverse impact of approval on debtor's and spouse's ability to bring counterclaim against receiver was not basis to withhold approval — Existence of pending appeal in China was also not basis for withholding approval of receiver's activities, especially its activities in defending and participating fully in that case — Approval did not affect ongoing litigation in China, nor did it affect priorities in deposit — Fees and disbursements were sufficiently supported by evidence notwithstanding redaction of privileged information and were fair and reasonable.

Table of Authorities

Cases considered by *F.L. Myers J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — referred to

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.) — followed

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.) — followed

Essery Estate (Trustee of) v. Essery (2016), 2016 ONSC 321, 2016 CarswellOnt 1443, 66 R.P.R. (5th) 307 (Ont. S.C.J.) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 2006 SCC 35, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, *(*sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, 351 N.R. 326, *(*sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193, 215 O.A.C. 313, [2006] 2 S.C.R. 123 (S.C.C.) — referred to

Target Canada Co., Re (2015), 2015 ONSC 7574, 2015 CarswellOnt 19174, 31 C.B.R. (6th) 311 (Ont. S.C.J.) — considered

Statutes considered:

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

Generally — referred to

MOTION by receiver for approval of its recent activities as well as its fees and disbursements and those of its counsel.

***F.L. Myers J.*:**

1 Ernst & Young Inc. moves for approval of its activities as receiver and manager of Hanfeng Evergreen Inc. as described in the Supplement to its First Report, its Fourth Report, and its Fifth Report. It also seeks approval of its fees and disbursements including the fees and disbursements of its counsel here and abroad.

2 Xinduo Yu, the founder and former CEO of Henfeng Evergreen Inc. and his spouse Lei Li oppose the approval of the receiver's reports at this time. They seek, at minimum, the imposition of conditions to protect their positions in separate litigation that the receiver has brought against them. They also argue that the receiver has failed or refused to deliver sufficient evidence to support its claim for approval of its fees and disbursements. They invite the court to require the receiver to engage in a document disclosure process so as to create a sufficient factual record on which they can make submissions and the court can meaningfully assess the fees and disbursements of the receiver and its counsel.

3 For the reasons that follow the receiver's motion is granted on the terms set out below.

Brief Background

4 Hanfeng Evergreen Inc. is an Ontario public corporation. Henfeng was a financing vehicle to raise money from investors who were interested in investing in the fertilizer business operated by a subsidiary in the People's Republic of China. By 2014, Henfeng's sole operations were limited to the fertilizer business.

5 When this proceeding began, Mr. Yu was a member of the board of directors of Henfeng. He was a principal contact for the receiver. He controlled Chinese management of the business.

6 The receiver advises that in 2011, Henfeng's biggest customer was a company run by the state in China. It sought to buy 30% of the fertilizer business to ensure its control over its supply. By February, 2013, an agreement had been prepared whereby Henfeng would sell its shares in the fertilizer subsidiary to a company controlled by Mr. Yu. Mr. Yu agreed to sell 30% of that company's shares to the state actor. The transactions were expected to close in April, 2013.

7 The deal did not close as expected. Eventually Henfeng established a special committee representing shareholders independent of management. Acrimony developed between the special committee and Mr. Yu. In December, 2013, the purchaser terminated the transaction. The board of directors proceeded to fire Mr. Yu.

8 A proxy battle ensured. During the proxy battle, Henfeng's auditor KPMG resigned. Thereupon, the rest of the board of directors resigned. Ultimately, Mr. Yu regained control of the public corporation.

9 In April, 2014, Mr. Yu brought forward a transaction to sell the operating subsidiary to an established third party business in China for a price of approximately $40 million. The transaction would have provided meaningful recovery to shareholders. The transaction required shareholder approval. However, without an auditor, Henfeng could not produce the material required to call a shareholders' meeting under Ontario securities laws. Therefore, this receivership was proposed as a way to convey title in a solvent transaction.

10 Negotiations with the buyer proved difficult. The receiver retained the Mayer Brown law firm to help it obtain a deposit of approximately $2.4 million required by the agreement and to deal with some Chinese regulatory matters that arose. The purchaser was also supposed to put funds in escrow. With Mayer Brown's assistance some funds were escrowed. But then they were released back to the purchaser by the escrow agent ostensibly with Mr. Yu's cooperation. In addition, the receiver says that the buyer's name seems to have changed subtly in the documents over time. While initially Mr. Yu represented that the buyer was an established third party, the ultimate buyer may have been a company with a similar name that is actually a shell controlled by Mr. Yu. Further, the receiver alleges that while the transaction was playing out, Mr. Yu obtained very substantial loans in China on the credit of the subsidiary so that they he has effectively taken the value of the business leaving the other shareholders with nothing.

11 The receiver has sued Mr. Yu and Ms. Li for damages exceeding $100 million.

12 In addition, the ostensible purchaser has sued the receiver in China for the return of the $2.4 million deposit. Mr. Yu is a defendant in that case as he is a guarantor under the terms of the relevant agreement. Whether he is also behind the plaintiff/purchaser remains to be proven.

13 The purchaser succeeded against the receiver at first instance in China. But an appellate court overruled the first decision. As of this moment therefore, the deposit has been forfeited and is properly counted among the funds realized by the receiver. The purchaser has appealed from that decision however and the further appeal is pending.

14 In this receivership proceeding, Mr. Yu is concerned to ensure that the receiver does not consume the deposit on its own fees and disbursements in case it is required to return the deposit to the purchaser by the ultimate appeal court in China. If the purchaser succeeds in China, there may be a priorities dispute between the purchaser and the receiver over which has a better claim to the deposit funds in the receiver's hands. In any event, Mr. Yu argues that as guarantor of the return of the deposit, he has an interest in protecting the deposit in the receiver's hands and in minimizing or delaying the receiver's use of the deposit to pay its fees and disbursements until the Chinese litigation ends.

Approval of the Receiver's Activities

15 In *Target Canada Co., Re*, 2015 ONSC 7574 (Ont. S.C.J.) (CanLII), Morawetz RSJ discussed the process for approval of the reports of a court officer. In that case the court dealt with a Monitor under the CCAA. The same principles apply in a receivership in my view.

16 In *Target*, Morawetz RSJ recognized that the effect of the approval of the reports of a court officer varies with the context. Where a report is delivered for a specific purpose, such as a sale transaction, express findings of fact may be required to support the relief being sought. An affidavit may be delivered to support the findings or not. In either case, the court is called up to address squarely specific facts and to make specific findings that will be binding in future.

17 However, the context of a general approval of activities, such as the motion that is currently before me, is different. As discussed by Morawetz RSJ:

> [20] The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

18 In this case, Mr. Yu and Ms. Li do not want the approval of the receiver's activities to impact on their litigation with the receiver including their desire to counterclaim against the receiver in that litigation. Apparently they have sought directions regarding a possible counterclaim although no motion for leave to proceed has been heard as yet. Regional Senior Justice Morawetz held that the general approval of a court officer's activities should not affect third party dealings generally. He accepted however that the approval of the receiver's activities does affect the court officer's own status. For example, there is case law suggesting that a stronger showing on the merits is required to obtain leave to sue a receiver in respect of activities that have been approved than for unapproved activities. [1]

19 Mr. Yu and Ms. Li argue that if they are prejudiced by the approval of the receiver's activities, then they would be required to contest in this motion the substance of their concerns in order to protect themselves in their other litigation. I agree that it is not the purpose of this summary proceeding to engage in fact finding that might prejudge or affect the fact finding process in other litigation. As such, there is no need to delve deeply into the concerns raised by the objectors with the receiver's characterization of their behaviour or the other details of specific issues of fact that may become the subject matter of proceedings later. There will be no findings of contested facts that might bind Mr. Yu or Ms. Li elsewhere.

20 The receiver argues that it seeks broad, general approval for its decisions to bring litigation against Mr. Yu and Ms. Li and to defend the litigation in China. It notes that its prior activities have already been approved in relation to the approval of its earlier reports.

21 Under the terms of its appointment order, the receiver is already authorized to litigate on behalf of the debtor generally. As such, Mr. Yu and Ms. Li argue that it does not need any further approval of its litigation activities. But, I agree with Morawetz

RSJ that there are additional proposes to a court officer's reporting and the court's approval functions such as those listed in para. 23 of *Target* above. In this case for example, concerns of stakeholders can be considered and addressed in real time rather than waiting until matters are concluded some years hence. Moreover, stakeholders are given an opportunity to bring to the fore any concerns with the receiver's prudence and diligence in the issues under consideration. Here, for example, no one — not even Mr. Yu or Ms. Li — contest the prudence of the receiver's decisions to defend the deposit in China or to commence the litigation here against Mr. Yu and Ms. Li.

22 The receiver also argues that is wants its activities approved so as to protect it from personal liability for costs in the event that it is later determined that the deposit must be returned to the purchaser with the result that the receiver may not have any assets left in the estate to fund any costs liability that it may incur. The receiver refers to the decision of Pattillo J. in *Essery Estate (Trustee of) v. Essery*, 2016 ONSC 321 (Ont. S.C.J.). At para. 72 of that decision, Pattillo J. wrote:

> [72] In receiverships, the general rule is that costs are awarded against a receiver personally in rare cases. Where a receiver engages in litigation in its capacity as receiver in the normal course of the receivership, is it is subject to the costs in accordance with s. 131 of the CJA and Rule 57.01. To the extent that costs are awarded against a receiver they are normally covered by receivership funds or by an indemnity agreement with a secured creditor. It is only when the receiver embarks on a course of action extraneous to the credit-driven relationship which effectively undermines its neutral position as an officer of the court and turn itself into a "real litigant' [*sic*] that a receiver exposes itself to costs personally: see *Akagi v Synergy Group (2000)*, 2015 ONCA 771 (Ont. C.A.), at para. 18.

23 In my view, the receiver reads too much into this quotation. I do not read *Essery* as altering the receiver's risk of personal liability for costs. Rather, Pattillo J. explains the court's historic hesitation to award costs against receivers because they can bear personal liability for costs. In my view *Essery* does not create any special protection for receivers' costs liability. Neither does the approval of a receiver's activities provide it with any special protection in relation to costs awards in subsequent litigation. That is the reason that Pattillo J. noted that before undertaking litigation, receivers typically will consider the sufficiency of the assets under their charge to meet a costs award or obtain an indemnity from a creditor to protect themselves from the risk of adverse costs.

24 It is clear therefore that in approving the receiver's general activities broadly and summarily in this motion, I am not finding any facts beyond expressing satisfaction with the general scope and direction of the receiver's activities as set out in the three reports that are before me. However, if the law post-*TCT* still provides that the approval of a receiver's conduct raises the bar for those who seek to sue a receiver, as referenced in the footnote above, that is indeed a consequence of approval and nothing I say or do not say should affect that outcome. The fact that approval may have some effect is not a basis to withhold or deny approval. Rather it reflects the intention of the law as it applies in circumstances where the court is satisfied with the activities undertaken by its officer and with the protections that the law affords court officers in such circumstances as discussed by Morawetz RSJ above.

25 I also do not see the existence of an outstanding appeal in China as a basis to defer or withhold approval of the receiver's activities, especially its activities in defending and participating fully in that case. Approval does not affect the ongoing litigation in China. Neither does it affect the priorities in the deposit or authorize or embolden the receiver to distribute to itself or to its counsel funds that it currently holds. If the court in China rules that the funds are a deposit that are to be returned to the purchaser, legal results flow. As noted above, if that creates a priority issue here, that issue may have to be determined.

26 As argument of this aspect of the motion was drawing to a close, it appeared that counsel might be able to agree upon language to resolve the issues in dispute. I invited them to advise me within 48 hours if they reached agreement. On November 22, 2017, counsel advised that while they had not agreed to resolve the objections of Mr Yu and Ms. Li, they had agreed upon some language to limit the relief granted should I determine to approve the receiver's activities.

27 The term agreed upon by counsel reflects the limitations that I have discussed above as follows:

> THIS COURT ORDERS that the approval of the Fourth Report and the Fifth Report shall be without prejudice to any of the procedural or substantive rights of the Receiver, Xinduo Lu and Lei Li in respect of Action No. CV-16-11325-00CL, and, without limiting the generality of the foregoing, shall be deemed not to constitute any finding or determination of any kind whatsoever in respect of any allegations, issues or defences in said Action.

28 While this term does not satisfy all of the concerns of Mr. Yu and Ms. Li, it does satisfy mine. Accordingly, it is appropriate to approve the activities of the receiver as set out in the three reports that are before the court on the term set out in the immediately preceding paragraph.

Receiver's Fees

29 In accordance with the principles set out in *Confectionately Yours Inc., Re* [2002 CarswellOnt 3002 (Ont. C.A.)], 2002 CanLII 45059, the receiver delivered affidavits supporting its fees and disbursements including those of its counsel. Cross-examinations ensued. Mr. Yu and Ms. Li argue that there is insufficient disclosure of information to enable the court to determine the reasonableness of the receiver's fees and disbursements. They say they have delivered letter after letter for months seeking production of documents relating to matters set out in the receiver's invoices so as to be able to understand the work performed by the receiver and to make proper submissions on the fees and disbursements sought in relation to the work. In addition, the receiver delivered dockets (belatedly in some cases) that are heavily redacted to prevent disclosure of the subject matter of much of the work that is the subject of the docket entries.

30 The receiver argues that the scope of its discussions with its counsel and the work being performed by its counsel on its behalf are privileged — both under lawyer client privilege and litigation privilege. I agree. Disclosing the subject matter of a meeting is essentially disclosing the communication from client to lawyer (or vice versa) concerning the topic on which advice was being sought or given. That does not mean however that the receiver is entitled to approval of its fees or disbursements without providing proper supporting evidence. If the claims of privilege prevent the court from making the assessment required, then the motion will not succeed until sufficient evidence is duly adduced to meet the required standard.

31 In *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (Ont. C.A.) (CanLII), the Court of Appeal discussed the test for assessment of a receiver's fees as follows:

> [32] In *Bakemates*, this court described the purpose of the passing of a receiver's accounts and also discussed the applicable procedure. Borins J.A. stated, at para. 31, that there is an onus on the receiver to prove that the compensation for which it seeks approval is fair and reasonable. This includes the compensation claimed on behalf of its counsel. At para. 37, he observed that the accounts must disclose the total charges for each of the categories of services rendered. In addition:
>
> > The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.
>
> [33] The court endorsed the factors applicable to receiver's compensation described by the New Brunswick Court of Appeal in *Belyea: Bakemates*, at para. 51. In *Belyea*, at para. 9, Stratton J.A. listed the following factors:
>
> • the nature, extent and value of the assets;
>
> • the complications and difficulties encountered;
>
> • the degree of assistance provided by the debtor;
>
> • the time spent;
>
> • the receiver's knowledge, experience and skill;

- the diligence and thoroughness displayed;
- the responsibilities assumed;
- the results of the receiver's efforts; and
- the cost of comparable services when performed in a prudent and economical manner.

These factors constitute a useful guideline but are not exhaustive: *Bakemates*, at para. 51.

32 The Court of Appeal also noted in *Diemers* that while the calculation of billable hours times hourly rates is not the most desirable metric for conducting this review, it is the predominant methodology in the case law. Moreover, while counsel for Mr. Yu and Ms. Li submitted that this is not to be a mathematical exercise, the bulk of their complaints are essentially directed to the question of whether there has been duplication in the dockets or, more specifically, whether the claims of privilege prevent them and the court from determining with any degree of precision whether there is duplication in the dockets that ought to be excluded from the value calculus. While I certainly do not dismiss the risk of duplication in an assessment of the reasonableness of the fees, it is but one factor and not an especially important one in my view. Duplication might suggest a lack of value-added but not necessarily so in a holistic review. If an issue takes time to resolve, there may be several docket entries that look similar. That does not make them duplicative. More than one person may be involved providing different services and docket to the same issue — either at different levels of seniority or different subject matters. Reading brief docket descriptions years after complex work is performed is a poor method to learn precisely what was accomplished by any single person on any given day. A full assessment of the file accompanied by oral narrative is required to assess professional accounts. That is what assessment officers routinely do in formal cost assessment hearings. But that is not what is anticipated or even desirable in fee approval hearings of this type.

33 It is not lost on me that what was also at play on Mr. Yu's side of the table is possibly a desire for discovery in the other litigation or at least opening up a threat to the receiver's remuneration as a strategy to provide bargaining leverage. Thus, rather than responding to the receiver's request for the specifics of documents required or bringing their own motion (or 9:30 appointment) seeking production of documents that they actually need, Mr. Yu and Ms. Li were content to make request after request and then graciously offer to allow the receiver an adjournment to give it time to make yet further production. I have little doubt that were any further documents produced, Mr. Yu and Ms. Li would just ask for more. After all, if you want to assess what every person acting for counsel and the receiver have done every day, then every draft of every document and communication is ostensibly relevant. The eight, non-exhaustive *Belyea* factors do not require or anticipate a full fee assessment process. Mr. Yu and Ms. Li's digging for more and ever more documents ostensibly to allow them to review in minute detail the receiver's fees was misdirected from the outset.

34 Mr. Yu and Ms. Li make much of the fact that the receiver's Ontario counsel had 27 billers on the file over a period of three years. Counsel for the receiver took me through each biller's name and role. Apart from a few students, there was one partner and an associate in each relevant area at each time. The associate generally performed the bulk of the work. As the project evolved from a consensual corporate transaction to contested litigation, the identities and focus of the partners involved changed. There is nothing untoward or even suspicious in the identification of the lawyers engaged despite the effort to evoke an emotional reaction to the overall number of billers. I am perfectly satisfied that given the complexity and evolution of the matter over time, staffing raises no significant concerns. Given the limited numbers of people involved in each specialty area, and the swing from corporate to contested litigation, duplication is not a significant issue in my view.

35 The receiver has not provided docket level evidence of activities from its litigation counsel in China. However that lawyer was retained on a fixed fee of $100,000. The litigation involved securing the receiver's right to keep the deposit of approximately $2.4 million. A fee of 4% of the fund whose preservation is in issue strikes me as quite reasonable. Dockets would not assist the understanding of the flat fee account in this circumstance.

36 Other counsel were retained for other specific purposes. Each had to be briefed so, once again, it is not surprising to see docket entries where people discuss similar things. They are instructing or reporting back to each other. Mr. Yu and Ms. Li pointed to docket entries in which telephone inter-firm communications are set out but only by one firm. The unstated implication is that unless both sides docketed the call, then the docket that was recorded is suspect and may be fraudulent. I do not know a more innocent word to characterize a docket of a call that did not happen. But Mr. Yu and Ms. Li forgot to account for the International Date Line. When one looks to see if telephone calls from this side of the globe were docketed in China on the next day, many of the calls were indeed recorded. I cannot draw an inference of fraud, or even suspicion from noting that a firm did not record every single telephone call it ostensibly received or made. Docketing practices can differ. I did not look to see if the calls that were not recorded by both sides were recorded as being short or long duration for example. In any event, I do not see how a few calls has much impact on the assessment of the *Belyea* factors.

37 The receiver's counsel has provided a lengthy assessment of the *Belyea* factors in para. 60 of its factum. Again, without making findings of fact on the level of cooperation or the lack thereof by Mr. Yu and Ms. Li, in my view in para. 60 the receiver provided a very fair analysis of the relevant factors and I adopt it in full.

38 In all, I am satisfied that the fees and disbursement of the receiver, including those of its counsel, are fair, reasonable and ought to be approved as sought.

39 Costs should be agreed upon. Barring exceptional circumstances, I would expect them to follow the event on a partial indemnity basis. If counsel cannot agree on costs then they should exchange Costs Outlines and schedule a telephone case conference through my Assistant for oral argument of costs.

Motion granted on terms.

Footnotes

1 Compare and contrast for example, *Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.) with *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, 2006 SCC 35 (S.C.C.) (CanLII). See also: Houlden, Morawetz & Sarra, *The 2007 Annotated Bankruptcy and Insolvency Act*, (Thomson Reuters, Toronto) at L§26. Whether *Wilann* remains good law after *TCT* is an issue that is not before the court today.

TAB 15

2015 ONSC 7574
Ontario Superior Court of Justice

Target Canada Co., Re

2015 CarswellOnt 19174, 2015 ONSC 7574, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

In the Matter of a Plan of Compromise or Arrangement of Target Canada Co., Target Canada Health Co., Target Canada Mobile GP Co., Target Canada Pharmacy (BC) Corp., Target Canada Pharmacy (Ontario) Corp., Target Canada Pharmacy Corp., Target Canada Pharmacy (SK) Corp. and Target Canada Property LLC.

Morawetz R.S.J.

Judgment: December 11, 2015
Docket: CV-15-10832-00CL

Counsel: J. Swatz, Dina Milivojevic, for Target Corporation
Jeremy Dacks, for Target Canada Entitites
Susan Philpott, for Employees
Richard Swan, S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.
Jay Carfagnini, Alan Mark, for Monitor, Alvarez & Marsal
Jeff Carhart, for Ginsey Industries
Lauren Epstein, for Trustee of the Employee Trust
Lou Brzezinski, Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals
Linda Galessiere, for Various Landlords

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.iv Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — Miscellaneous
Approval of reports — Monitor in proceedings under Companies' Creditors Arrangement Act (CCAA) brought application for approval of reports and activities set out in reports — Application was opposed by two of applicants' landlords — Application granted in part — Monitor played integral role in balancing and protecting various interests in CCAA environment — Court specifically mandated monitor to undertake various activities — In its reports, monitor had provided helpful commentary to court and to stakeholders about progress of CCAA proceedings — In circumstances where monitor was requesting approval of its reports and activities in general sense, caution was to be exercised to avoid broad application of res judicata and related

doctrines — Benefit of any approval of monitor's reports and its activities should be limited to monitor itself — Limiting effect of approval addressed concerns of objecting parties and it did not impact prior court orders.

Table of Authorities

Cases considered by *Morawetz R.S.J.*:

Bank of America Canada v. Willann Investments Ltd. (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — referred to

Forrest v. Vriend (2015), 2015 BCSC 1878, 2015 CarswellBC 2979 (B.C. S.C.) — considered

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2006), 2006 CarswellOnt 2835, 19 C.B.R. (5th) 165 (Ont. S.C.J. [Commercial List]) — referred to

Toronto Dominion Bank v. Preston Springs Gardens Inc. (2007), 2007 CarswellOnt 1182, 2007 ONCA 145, 31 C.B.R. (5th) 167 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 11.7 [en. 1997, c. 12, s. 124] — considered

s. 23(1) — considered

s. 23(2) — considered

APPLICATION by monitor for approval of reports and activities set out in reports.

***Morawetz R.S.J.*:**

1 Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

2 Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

3 Such is not the case in this matter.

4 The requested relief is opposed by Rio Can Management Inc. ("Rio Can") and KingSett Capital Inc. ("KingSett"), two landlords of the Applicants (the "Target Canada Estates"). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

5 The essence of the opposition is that the request of the Monitor to obtain approval of its activities — particularly in these liquidation proceedings — is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

6 Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

7 Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

> provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.

8 The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

9 The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

> (2) Monitor not liable — if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

10 Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

11 In addition, paragraph 51 of the Amended and Restated Order provides that:

> ... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

12 The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

> (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
>
> (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
>
> (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
>
> (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
>
> (e) provides protection for the monitor, not otherwise provided by the CCAA; and
>
> (f) protects creditors from the delay in distribution that would be caused by:
>
> > a. re-litigation of steps taken to date; and
> >
> > b. potential indemnity claims by the monitor.

13 Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

14 Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel. The issue was recently considered in *Forrest v. Vriend*, 2015 CarswellBC 2979 (B.C. S.C.), where Ehrcke J. stated:

25. "TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

> 21 *Res judicata* is mainly concerned with two principles. First, there is a principle that "... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.": see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This "... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.": *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.
>
> . . . . .

30. It is salutary to keep in mind Mr. Justice Cromwell's caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

> 25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that "could" have been raised does not fully reflect the present law.
>
> . . . . .
>
> 30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> . . . . .
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson*, *supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

15 In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

16 Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

17 Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor's Reports are in fact relied upon and used by the court in arriving at certain determinations.

18 For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor

in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

19 On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that res judicata and related doctrines apply to approval of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, [2006] O.J. No. 1834 (Ont. S.C.J. [Commercial List]); *Toronto Dominion Bank v. Preston Springs Gardens Inc.*, 2007 ONCA 145 (Ont. C.A.) and *Bank of America Canada v. Willann Investments Ltd.*, [1993] O.J. No. 3039 (Ont. Gen. Div.)).

20 The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

21 In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of res judicata and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

22 I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

23 By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

(a) allows the Monitor to move forward with the next steps in the CCAA proceedings;

(b) brings the Monitor's activities before the Court;

(c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,

(d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;

(e) provides protection for the Monitor not otherwise provided by the CCAA; and

(f) protects the creditors from the delay and distribution that would be caused by:

(i) re-litigation of steps taken to date, and

(ii) potential indemnity claims by the Monitor.

24 By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

25 Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

26 The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Application granted in part.

2015 ONSC 7574, 2015 CarswellOnt 19174, 261 A.C.W.S. (3d) 518, 31 C.B.R. (6th) 311

End of Document

TAB 16

2023 ONSC 3400
Ontario Superior Court of Justice [Commercial List]

Triple-I Capital Partners Limited v. 12411300 Canada Inc.

2023 CarswellOnt 8707, 2023 ONSC 3400

APPLICATION UNDER Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Triple-I Capital Partners Limited (Applicant) and 12411300 Canada Inc. (Respondent / Debtor)

Peter J. Osborne J.

Heard: June 6, 2023
Judgment: June 6, 2023
Docket: CV-22-00684372-00CL

Counsel: Kevin Sherkin, Monica Faheim, Hans Rizarri, for Receiver, Crow Soberman Inc.
Avi Freedland, for Respondent / Debtor

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

Headnote

Bankruptcy and insolvency
Civil practice and procedure
Real property

Table of Authorities

Cases considered by *Peter J. Osborne J.*:

Bank of Nova Scotia v. Diemer (2014), 2014 ONCA 851, 2014 CarswellOnt 16721, 20 C.B.R. (6th) 292, 327 O.A.C. 376 (Ont. C.A.)

Confectionately Yours Inc., Re (2002), 2002 CarswellOnt 3002, 36 C.B.R. (4th) 200, 164 O.A.C. 84, 25 C.P.C. (5th) 207, 219 D.L.R. (4th) 72 (Ont. C.A.)

Confectionately Yours Inc., Re (2003), 2003 CarswellOnt 1043, 2003 CarswellOnt 1044, 41 C.B.R. (4th) 28, 312 N.R. 195 (note), 181 O.A.C. 197 (note) (S.C.C.)

Target Canada Co., Re (2015), 2015 ONSC 7574, 2015 CarswellOnt 19174, 31 C.B.R. (6th) 311 (Ont. S.C.J.)

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 131

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 57.01

***Peter J. Osborne J.*:**

1 Crowe Soberman Inc., in its capacity as Receiver, moves for approval of the Third Report of the Receiver dated January 4, 2023, and the activities set out therein, approval of the statement of receipts and disbursements, approval of fees and disbursements of the Receiver and its counsel, and discharge.

2 The Respondent, 12411300 Canada Inc. (the "Debtor"), does not oppose approval of the Third Report or the activities, but it does oppose approval of the fees and disbursements of the Receiver and its counsel. Neither the Lender Applicant, Triple-I Capital Partners Limited (the "Applicant"), nor the Second Mortgagees (defined below) appeared.

Chronology of This Matter

3 The Applicant advanced to the Debtor $6,400,000 in December 2021, to purchase an industrial property in Brampton, Ontario, secured by a mortgage registered against title to the property. The maturity date of the mortgage was May 1, 2022. The Debtor failed to repay the principal and interest owing, and the Applicant commenced this proceeding.

4 The Receiver was appointed by order of Cavanagh J. dated July 22, 2022 (the "Receivership Order"). It is not disputed that the primary asset of the Debtor is that piece of industrial land and a building located on that land of approximately 18,200 ft. [2] .

5 As of the date of the Receivership Order, the Debtor was indebted to the Applicant in the amount of $6,865,154 plus additional interest and accrued expenses.

6 Eight individuals who hold mortgages in second position subordinate to Triple-I, (collectively, the "Second Mortgagees"), were owed $2 million, although on October 10 the Debtor made a payment to them in the amount of $410,000, with the result that the principal amount owing to them was in the amount of $1,590,000. There were no other significant creditors.

7 After being appointed, the Receiver took certain steps, in accordance with the Receivership Order by which it was appointed, to prepare for the implementation of a sales process to market and sell the property.

8 The Receiver then brought a motion for approval of a sales process.

9 Following the service and filing of those motion materials, the Receiver was advised that the Debtor was in the process of finalizing an imminent refinancing of the property.

10 On October 14, 2022, Cavanagh J. issued a sale process approval order and an ancillary order, which had the effect of pausing the implementation of the sales process by the Receiver as approved, pending refinancing efforts being undertaken by the Debtor.

11 That ancillary order also approved the First Report of the Receiver dated August 8, 2022, the Second Report of the Receiver dated October 7, 2022, and the activities of the Receiver as described in both Reports.

12 On October 21, 2022, the Court extended the temporary pause for an additional four days until October 25, to permit the Debtor additional time to complete the closing of the refinancing transaction.

13 On October 28, 2022, this Court issued an order directing the payment of certain funds, by the Debtor to the Applicant and the Receiver, discharging various charges on the property, and addressing other steps to be taken in connection with the closing of the Debtor's refinancing transaction.

14 That same day, funds in the amount of $6,861,223.16 were paid by the Debtor to the Applicant and Receiver (through counsel), for the purpose of satisfying the secured debt owed by the Debtor to the Applicant.

15 The payment was made in two tranches given the dispute that underlies this motion. The first tranche of $6,464,232.96 represented the net amount owing with respect to the principal loan and interest to October 26, together with taxes owing to the municipality. The second tranche in the amount of $396,990.20 represented the portion that the Debtor disputes related to professional fees and disbursements of the Receiver, its counsel and counsel to the Applicant.

Should the Fees of the Receiver and its Counsel be Approved?

Material Filed and Positions of the Parties

16 The Receiver relies on all of its Reports, but principally the Third Report and appendices thereto, including fee affidavits of the Receiver and its counsel.

17 The Debtor relies on an affidavit from its own counsel who argued the motion sworn in support of its position. This practice is not to be preferred, particularly for matters that are contentious. Here, the Receiver submits that the affidavit should not be relied upon. In the main, it appears to contain a summary of the chronology of certain key events and other statements that are more in the nature of argument or submissions and therefore more properly belong in a factum.

18 Today, the Receiver seeks approval of fees of $106,722.25 plus disbursements of $32,851.56 and HST in the amount of $17,364.40, together with fees for its counsel (inclusive of HST and disbursements) of $91,014.94. That would bring the total amount of fees and disbursements charged by the Receiver together with those of its counsel since its appointment to $247,953.15.

19 The Receiver submits that the fees are fair and reasonable in the circumstances and have been properly incurred in respect of activities undertaken all in accordance with the Receivership Order.

20 The Respondent submits that the fees are unreasonable, the Receiver has duties to all stakeholders, including the Debtor, and that the receivership itself was opposed by both the Debtor and the Second Mortgagees.

21 The Respondent submits that this Court ought to approve 50 percent of total fees ($53,361.13 instead of $106,722.25) and 80 percent of disbursements ($26,281.25 instead of $32,851.56), plus HST in each case. The Respondent submits that the Receiver's counsel fees and disbursements (inclusive of HST) also ought to be approved at a rate of 50 percent ($45,507.47 instead of $91,014.94). That would bring the total amount of fees and disbursements for the Receiver and its counsel to $125,149.85.

22 The Debtor notes that this motion addresses only the fees of the Receiver and its counsel, and states that the Debtor is disputing the fees of the Applicant and mortgage charges through an assessment officer.

The Test

23 The factors to be considered have been sent out by the Court of Appeal for Ontario: Bank of Nova Scotia v. Diemer, 2014 ONCA 851, 327 O.A.C. 376, at para. 33:

> a. the nature, extent and value of the assets;
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> b. the complications and difficulties encountered;
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> c. the degree of assistance provided by the debtor;
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> d. the time spent;
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> e. the receiver's knowledge, experience and skill;
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> f. the diligence and thoroughness displayed;
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> g. the responsibilities assumed;
>
> h. the results of the receiver's efforts; and
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> i. the cost of comparable services when performed in a prudent and economical manner.

24 The Court of Appeal noted that these factors constitute a useful guidance but are not exhaustive: *Diemer* , at para. 33, citing with approval Confectionately Yours Inc., Re(2002), 164 O.A.C. 84 (C.A.), leave to appeal refused, [2002] S.C.C.A. No. 460.

25 The Court of Appeal went on to observe that the cost of legal services is highlighted in the context of a court-supervised insolvency due to its public nature. While observing that it is not for the court to tell lawyers and law firms how to bill, the

Court noted that proceedings supervised by the court and particularly where the court is asked to give its *imprimatur* to legal fees, the court must ensure that the compensation sought is indeed fair and reasonable.

26 While the above factors, including time spent, should be considered, value provided should predominate over the mathematical calculation reflected in the hours times hourly rate equation. The focus of the fair and reasonable assessment should be on what was accomplished, not on how much time it took. The measurement of accomplishment may include consideration of complications and in difficulties encountered in the receivership (*Diemer* , at para. 45).

Application of the Test to This Case

27 In this case, the Receivership Order provides that the Receiver and its counsel shall pass their accounts from time to time. For this purpose, the accounts of the Receiver and its counsel are referred to a judge of the Commercial List. Accordingly, the issue is properly before this Court.

28 The Receiver submits that its work consisted of two phases: lead up and preparatory work; and possession of the premises and preparation for the sales process.

29 The Receiver further submits and the Record reflects, that the activities of the Receiver as set out in its First and Second Reports have already been approved. The sales process approval order of Cavanagh J. dated October 14, 2022 approving the first two reports and the activities described therein, was not opposed. Moreover, there was no reservation of rights by the Debtor (or any other party such as the Second Mortgagees) to seek to challenge the fees associated with those activities in the future.

30 The Receiver submits, therefore, that the Debtor cannot challenge the fees related to those activities. In my view, that does not follow. While I agree that it is too late for the Debtor to challenge the activities that have already been approved by this Court (and therefore the fair and reasonable fees and disbursements in respect thereof), nothing in Cavanagh's J. October 14 sales process approval order approved any fees or disbursements in respect of the activities set out in the first two Reports. Indeed, there was no request for such relief and none of that material was before the Court. The issue of approval of all of the fees and disbursements of the Receiver and its counsel are now before the Court for the first time.

31 The Receiver submits that the fees and disbursements are fair and reasonable in what was a challenging receivership. Detailed invoices from the professionals involved are appended to the Third Report. Rates charged are consistent with rates charged by law firms practising in the insolvency and restructuring area in the Toronto market, and the time spent is reasonable.

32 The accounts submitted meet the technical requirements and disclose in detail the name of each professional who rendered services, the applicable rate, the total charge, and the date on which services were rendered. The accounts of both the Receiver and its counsel are verified by a sworn affidavit from and on behalf of each.

33 The Receiver submits that this receivership proceeding was not simple or straightforward, and a number of the complications arose specifically due to the conduct of the Debtor. These include, for example, what appeared to the Receiver to be a break and enter at the premises of the Debtor and the removal of locks, which ultimately turned out to have been done by the Debtor, who submitted that it was unaware that it was not entitled to show the property to prospective purchasers or investors. The Receiver was therefore obliged to arrange for a bailiff to change the locks, replace fence chains and secure equipment.

34 Most substantively, the Receiver and its counsel had to prepare a sale and marketing process to prepare for the implementation of a process to market and sell the property, and engage a commercial real estate broker. The Receiver argues that the fact that the sale process never ultimately proceeded does not make the work completed in the course of preparing for the sale, in accordance with the sales process already approved by the Court (and not challenged by the Debtor at that time), non-compensable and nor does it make the fees automatically unfair or unreasonable. That assessment must focus on the circumstances as they existed at the time the fees were incurred.

35 At that time, as submitted by the Receiver, the Debtor did not have, contrary to its promises, the "imminent refinancing", and the Receivership Order was in full force and effect.

36 The Receiver further submits that the Receiver and the Debtor, through counsel, spent significant time and effort negotiating the terms of proposed orders in advance of numerous hearings before this Court, including in particular the October 13 motion. The Debtor was to a large extent uncooperative and therefore increased the challenges of the work carried out by the Receiver which are now under attack. It submits that the Disbursements are reasonable, and included such necessary expenses as insurance premiums for the property which were necessary to preserve the asset of the value for the estate.

37 The fees claimed by the Receiver are supported by the Affidavit of Hans Rizarri sworn January 4, 2023. Mr. Rizarri is a Licensed Insolvency Trustee with the Receiver firm. His affidavit states that he has reviewed the detailed statement of account and considers the time expended and the fees charged to be reasonable in light of the services performed and the prevailing market rates for such services.

38 As Exhibit 1 to his affidavit, Mr. Rizarri sets out the Billing Worksheet Report which in turn reflects individual docket entries for all of the time spent by the Receiver.

39 The fees claimed by counsel to the Receiver are supported by the Affidavit of Monica Faheim sworn January 3, 2023. Ms. Faheim is a lawyer with the firm of counsel to the Receiver. The exhibits to her affidavit set out true copies of the detailed invoices for fees, and a schedule including a summary of the invoices, itemizing fees charged, disbursements and HST, and a further schedule summarizing billing rates, year of call, total hours and total fees charged, organized by billing professional (lawyer or law clerk), together with an estimate for remaining fees to complete all work not to exceed $5000 including HST. Ms. Faheim states that to the best of her knowledge, the rates charged are comparable for the provision of similar services to the rates charged by other law firms in the Toronto market.

40 The Debtor challenges the quantum of fees and disbursements. It relies on the affidavit of counsel sworn January 23, 2023. No other evidence is filed in support of its position on this motion. Notwithstanding that counsel who swore the affidavit appeared to argue this motion, I heard the submissions.

41 The Debtor submits, essentially, that the receivership was straightforward because the Debtor had only one major asset, being the real property and building referred to above. The value of that property is dependent upon the premises being used for the production of cannabis. That in turn required the cannabis licence referred to above.

42 Boiled down, the Debtor argues that the receivership only came about in the first place since the Debtor was unable to obtain refinancing prior to maturity of a mortgage in turn because it was in the final stages of obtaining the cannabis licence but that had not yet been issued.

43 In my view, this argument does not advance the position of the Debtor. The facts as submitted may well be accurate but do not change certain key facts. The mortgage went into default. This Court concluded that the test for the appointment of a receiver was established by the Applicant. This Court then concluded that a sale process should be approved, with a view to monetizing and maximizing the recovery in respect of the sale of the one key asset: the land and building.

44 The argument of the Debtor really amounts to another version of the argument advanced earlier in this proceeding that implementation of the Receivership Order should be delayed to permit imminent refinancing. None of that changes the fact that a receivership was appropriate, just as this Court previously concluded.

45 The Receiver submits, and I accept, that its efforts undertaken with respect to the sale process were appropriate, in accordance with Court approval, and the fact that ultimately, a refinancing was concluded such that a sale was not necessary, does not render, retroactively, those efforts unnecessary nor the fees in respect of those efforts inappropriate and unrecoverable.

46 The Debtor submits that the receivership did not take an extended length of time, noting that the hearing for the Receivership Order took place less than two months after the mortgage default. The Debtor submits in its materials (and in argument on this motion) that given the dates in respect of which the stay period was in effect, there were a very limited number of days,

or "workdays" when the receiver and its counsel could have been actually working on the file (and the amounts charged for those periods of time are excessive).

47 Counsel for the Debtor submits in his affidavit the hearsay evidence that he received advice from the broker that represents the Second Mortgagees (whom, I pause to observe again, did not take a position on this motion or file any evidence on this motion) that the Receiver's work over that period of time [late July and early August, see para. 18 of the Debtor's factum] "brought no value to the Corporation or its creditors, including the Second Mortgagees". I cannot give any weight to this submission based on that evidence.

48 The Debtor then, in the same manner, challenges as unreasonable the fees of the Receiver and its counsel charged for the period from late September until mid-October 2022 [factum, paras. 18-19], submitting that once the Health Canada licence was issued in late September, a commitment for mortgage refinancing was finalized shortly thereafter, resulting in the request by the Debtor for an extension of the stay or pause of the receivership until November 4, 2022.

49 The Debtor made vigourous submissions to the effect that the Applicant acted unreasonably in refusing to consent to extensions to the stay, to allow for the refinancing and pay out in full of the mortgage loan owing to the Applicant.

50 The position of the Debtor is in large part summed up in paragraphs 42 and 43 of its Factum, and these submissions were repeated in oral argument. The Debtor argues:

> Lastly, all hearings and preparation conducted by the Receiver and its counsel could have been avoided if the Receiver had acted reasonably and allowed for the Refinance to take place. Instead, the Receiver booked, attended and forced counsel for the Lender to attend unnecessary hearings while it knew the Refinance was imminent.
>
> The Refinance closed without any input or aid from the Receiver or Lender whose only interest, it seems, was forcing counsel for the Corporation to attend unnecessary hearings and meetings to incur expenses with respect to the Receivership, which are dubious at best.

51 The source for this submission is the lawyer's own affidavit at paragraphs 29 - 32 (CaseLines B-1-17).

52 The affidavit states at paragraph 53 that certain amounts have been charged by the Receiver and its counsel as set out in chart form. At paragraph 54, the affidavit states that: "I believe that it [attending court and reviewing court documents] brought no value to the Corporation or its creditors and was wasteful. Further, I doubt the necessity of any of .... the work .....".

53 In my view, it is not the role of the Court to attempt to undertake a lawyer by lawyer, line by line, forensic analysis of the invoices for professional fees. Nor is it the role of the Court to attempt to evaluate each docket entry and attempt to come to a determination, particularly on a record like this, as to whether each individual activity on a certain day by a certain professional added demonstrable value.

54 Rather, the Court of Appeal was clear in *Diemer* that such an item-by-item evaluation is what should not be undertaken, in favour of a more holistic review of the constellation of all relevant factors, each of which is an input into the ultimate analysis of whether the fees are fair and reasonable in the circumstances of this particular case.

55 Here, I accept that the professional fees of the Receiver and its counsel were not immaterial. Total fees and disbursements of approximately $248,000 were significant, even considered as against the amount of the outstanding mortgage loan in default of approximately $6.5 million. However, in my view they were not unreasonable, given the circumstances and the steps that were required to be undertaken. I am not persuaded that they should be reduced as submitted by the Debtor to approximately $125,000.

56 Again, there is no issue about the loan and the default. There can be no issue about the propriety or necessity of the receivership proceeding or the sales process, both of which were approved by the Court. In the same way and as noted above, there can be no issue about the activities of the Receiver and its counsel as set out in the First and Second Reports, which were also previously approved. The issue is whether the fees and disbursements are fair and reasonable.

57 Just as it is inappropriate to consider each individual docket entry independently, I think caution should be exercised when undertaking a retrospective analysis about whether steps taken in a proceeding were reasonable, at the time they were taken. In practical terms, it is not appropriate in a receivership proceeding such as this, to effectively argue that refinancing was imminent from the outset, even prior to the Receivership Order being granted, then argue vigourously for extensions and delay throughout the proceeding because the refinancing was imminent, and then, only following a sale process order being made, actually finalize that refinancing and then submit that none of the intervening steps ought to have been necessary or reasonable at the time they were taken. The opposite is also accurate: if the refinancing had not been obtained, and the sale process and receivership continued, such facts would not automatically make the preceding steps and the fees in respect thereof necessary, fair and reasonable. In each case, all of the factors need to be considered.

58 I am satisfied that while the receivership property consisted largely of one piece of land and the building thereon, it does not follow that the issues confronting the Receiver were necessarily straightforward or uncomplicated. As admitted and indeed emphasized by the Debtor, the value of the asset reflected its unique and single-purpose: operation of a cannabis facility. That in turn required a Health Canada licence which was not issued until later in the process.

59 The chronology of Court attendances and orders does not persuade me that any of them were improper, unnecessary or duplicative. Indeed, a number of them were brought about expressly at the request of the Debtor in the course of its continued and repeated pleas, effectively, for more time within which it could arrange replacement financing and pay out the mortgage debt owing to the Applicant.

60 In oral argument, counsel for the Debtor made three main submissions: i) the Receiver has duties to all stakeholders, including the Debtor; ii) the receivership proceeding itself was opposed by the Debtor and by the Second Mortgagees; and iii) the fees charged are unreasonable.

61 As stated above, neither of the first two submissions assists the Debtor at all, in my view. The only issue on this motion is whether the fees and disbursements are fair and reasonable.

62 The Receivership Order already made provides that the reasonable fees and disbursements of the Receiver and its counsel are authorized to be paid at the applicable standard rates and charges, unless otherwise ordered.

63 As noted above, the fee affidavits and exhibits (i.e., the invoices) are sworn or affirmed statements. I am satisfied that the fees are standard and reasonable. I am satisfied that the steps taken as reflected in the detailed time entries, were reasonable and consistent with the mandate given to the Receiver and its counsel through the Receivership Order. I am unable to conclude that the fees and disbursements charged were excessive or unreasonable.

64 The fees and disbursements of the Receiver and its counsel are approved in the aggregate amount of $247,953.15.

Approval of the Third Report and Activities

65 While approval of the Third Report and the activities described therein are not challenged by the Debtor (save to the extent described above), I have reviewed them and am satisfied they are appropriate. As observed by Morawetz R.S.J. (as he then was) in Target Canada Co. (Re), 2015 ONSC 7574, 31 C.B.R. (6th) 311, at para. 22, there are good policy and practical reasons for the Court to approve of the activities of a Monitor.

66 The same observations apply to the activities of a court-appointed Receiver. It should not be a novel concept that the activities of any Court officer can and should be considered by the Court as against the mandate, powers and authority of that officer.

67 The Third Report and the activities described in it are approved.

Costs

68 Each of the Receiver and the Debtor submitted a bill of costs, and seeks partial indemnity costs of this motion in the event it is successful. The Receiver seeks the amount of $18,569.72, inclusive of fees, disbursements and HST. The Debtor seeks the amount of $10,719.18 on the same basis.

69 Section 131 of the Courts of Justice Act, R.S.O. 1990, c. C.43 provides that the costs of any step in a proceeding are in the discretion of the Court. The Receiver was successful and is entitled to its costs.

70 Having considered the factors set out in r. 57.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as they apply to this matter, in my view an appropriate award of costs is $12,500 inclusive of fees, disbursements and HST, which amount is payable by the Debtor to the Receiver within 60 days.

71 Order to go in accordance with these reasons.

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