

COURT FILE NUMBER: 2103 10970

COURT: COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE: EDMONTON

PLAINTIFF: CANADIAN WESTERN BANK

DEFENDANT: SHAMROCK VALLEY ENTERPRISES LTD.

DOCUMENT: **WRITTEN BRIEF OF THE BOWRA GROUP INC. – DECEMBER 15, 2021 APPLICATION BEFORE THE HONOURABLE MR. JUSTICE M. LEMA**

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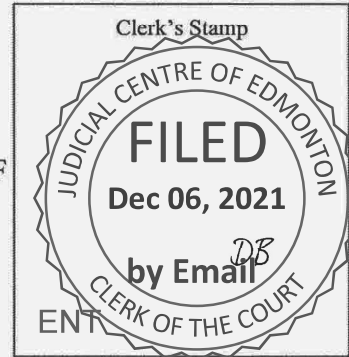


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PART 1 BACKGROUND

1. The Bowra Group Inc. (“**Bowra**” or the “**Receiver**”) was appointed as the Receiver of all of the current and future assets, undertakings and properties, including all proceeds thereof, of Shamrock Valley Enterprises Ltd. (the “**Debtor**”) by Order pronounced in the within Action on July 30, 2021 (the “**Receivership Order**”), the effect of which was stayed until August 27, 2021, by separate Order also pronounced on that date. The stay was lifted by Order pronounced on August 27, 2021.
2. The Receivership Order authorizes and empowers the Receiver to, *inter alia*, market and solicit offers in respect of the Debtor’s property or any part thereof with the approval of this Honourable Court, and to apply for any vesting order or other orders (including, without limitation, confidentiality or sealing orders) necessary to convey the same to a purchaser free and clear of any liens or encumbrances affecting such property.
3. The facts contained herein are a summary derived with reference to the First Report of the Receiver (the “**First Report**”), and the Confidential Addendum thereto (the “**CA**”). Capitalized terms not otherwise defined herein carry the meaning ascribed to them in the First Report and CA.
4. The Debtor operated out of offices located in Elk Point, Alberta, and provided services in the form of general earthworks, oil and gas infrastructure maintenance, reclamation, spill management, and fluid hauling. Its property includes a variety of heavy equipment and tools (the “**Equipment**”), as well as the land that is the subject of this Application (the “**Land**”). The Land consists of approximately 22 acres improved by shop, office and storage spaces. The Equipment is being stored on the Land.
5. The Receiver marketed the Equipment and Land pursuant to a Request for Offers to Purchase or Liquidation Proposals dated October 29, 2021 (the “**ROP**”). The ROP was sent to 79 prospective purchaser and liquidators and marketed on the Receiver’s website and the Insolvency Insider email circular.

6. A total of 31 prospective purchasers and liquidators engaged the Receiver towards conducting in-depth due diligence, including Land tours and Equipment viewings, as a result of which Bowra received 31 offers to purchase or proposals to liquidate (the “**Offers and Proposals**”) the Equipment and Land prior to the November 26, 2021, deadline provided for under the ROP.
7. Of the Offers and Proposals received, twenty proposed the *en bloc* liquidation of the Equipment and Land (the “**Proposals**”), four consisted of cash offers to purchase the Equipment and Land *en bloc*, and seven were cash offers for the purchase of specific items of the Equipment.
8. Based upon its detailed review of all Offers and Proposals, the Receiver determined that the Proposal submitted by Ritchie Bros. (the “**Ritchie Bros. Proposal**”) will provide the highest and best recovery for the Equipment and Land to the Debtor’s creditors and stakeholders. Specifically, the Ritchie Bros. Proposal:
 - (a) Provides for the payment of a substantial net minimum guarantee (the “**NMG**”), the reasonableness of which is supported with reference to appraisal and other expert advice received by Bowra in its efforts to determine the value of the Land and Equipment;
 - (b) Will result in a timely disposition, thereby maximizing recovery by reducing holding and professional costs; and
 - (c) Provides for important, albeit perhaps intangible, value-added benefits in the form of a comprehensive print and online marketing program designed to attract a wide array of local and international buyers, site preparation and asset cataloguing, the involvement of experienced personnel, the handling of post-sale inquiries, and the supervision of asset removal from the Land.
9. In view of the foregoing, the Receiver has accepted the Ritchie Bros. Proposal, subject to the approval of this Honourable Court, and negotiated and executed a Contract to Auction with Ritchie Bros. (the “**Contract**”). Bowra is of the view that the NMG provided for under the Contract is fair and reasonable in all of the circumstances, that the liquidation

provided for thereunder will result in an efficient and provident disposition of the Land and Equipment, and that the approval of the Contract is in the best interests of the Debtor and all of its stakeholders. The Receiver accordingly applies for the following relief pursuant to the authority provided to it pursuant to paragraph 3(m) of the Receivership Order:

- (a) An Order abridging the time for service of notice of this Application and the First Report to the time provided, if necessary, and an Order validating service upon the parties served or, alternatively, dispensing with service;
 - (b) An Order approving the activities of the Receiver, as described in the First Report;
 - (c) An Order i) approving the Contract; ii) authorizing the sale of the Equipment and Land by way of auction pursuant to its terms; and iv) vesting title to the Equipment and Land to the end purchasers thereof free and clear of all encumbrances, except permitted encumbrances; and
 - (d) A Restricted Court Access Order in connection with the CA.
10. The Receiver submits that the relief sought is reasonable and appropriate in the circumstances.

PART 2 ARGUMENT

The Approval of the Agreement

11. Section 243 of the *Bankruptcy and Insolvency Act* permits the Court to appoint a Receiver to do any of the following:
- (a) take possession of all or substantially all of the property of an insolvent person used in relation to the business carried on by the insolvent person;
 - (b) exercise any control that the Court considers advisable over the property and over the insolvent person's business; and
 - (c) take any other action that the Court considers advisable.
- *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("**BIA**"), s. 243(1) [TAB 1].

- ***Hyperlinks to all authorities referenced in this Brief can be found in the Table of Authorities.***

12. Section 247(b) of the *BIA* provides that a Receiver shall “act honestly and in good faith” and “deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.”

BIA, s. 247 [TAB 1].

13. *Royal Bank v. Soundair Corp.* enumerates the well-known criteria to be applied when considering the approval of a sales transaction proposed by a Receiver. When considering whether a proposed transaction should be approved and ratified, the Court is to consider and determine:

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

- *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205 at para 16 (“*Soundair*”) [TAB 2].

14. *Soundair* has been cited with approval by our Court of Appeal, including very recently.

- *River Rentals Group Ltd. v Hutterian Brethren Church of Codesa*, 2010 ABCA 16 at para 12 (“*River Rentals*”) [TAB 3].
- *PricewaterhouseCoopers Inc. v. 1905393 Alberta Ltd.*, 2019 ABCA 433 at para 10 (“*PwC*”) [TAB 4].
- *1705221 Alberta Ltd v Three M Mortgages Inc.*, 2021 ABCA 144 at para 19 (“*Three M*”) [TAB 5].

15. A Receiver plays a leading role in receivership proceedings. It acts as an officer of the Court and relies upon the advice and guidance of those it engages to assist in the sale of

the asset in question, as well as its own commercial expertise in accepting an offer subject to Court approval. In exercising its role, the Receiver is under a duty to act in a commercially reasonable manner with a view towards obtaining the best price having regards to the competing interests of the parties. It is the reviewing Court's function to ensure that these duties have been complied with, "not to consider whether a Receiver has failed to get the best price".

- *PwC* at paras. 13-14 [TAB 4].
- *Three M* at paras 22 and 32 [TAB 5].

16. If the Court is satisfied that a Receiver has acted providently in its efforts to market and sell the debtor's assets, the proposed transaction should be approved. Although a Court approving a sale recommended by a Receiver is not engaged in a perfunctory, rubberstamp exercise, deference is owed to a Court-appointed Receiver provided that its course of action and recommendation is appropriate and nothing to the contrary is shown in the evidence. To order otherwise calls into question the Receiver's expertise and authority in the receivership process, thereby weakening its central role and purpose, and compromising both the integrity of the sales process, and undermining commercial certainty. That said, "[i]t 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 *Soundair* principles.

- *Soundair* at para 14, 43 and 72 [TAB 2].
- *River Rentals* at paras 18 and 19 [TAB 3].
- *PwC* at paras 10, and 12-14 [TAB 4].
- *Three M* at para 22 [TAB 5].

17. In considering the first prong of the *Soundair* test, the Court is to have regard to the following factors:

- (a) Whether the offer is so low in relation to the appraised value as to be unrealistic;
- (b) Whether the circumstances indicate that insufficient time was allowed for the making of bids;
- (c) Whether inadequate notice of sale by bid was given; and
- (d) Whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

- *River Rentals* at para. 13 [TAB 3]; *PwC* at paras. 11-12 [TAB 4].

18. In the present case, the Receiver submits that the ROP process was fair, impartial, provident and has obtained the best recovery having regard to the competing interest of all parties. In consideration of the *Soundair* test, the Receiver submits:

- (a) With regard to the first factor, that the quantity and quality of the Offers and Proposals received is indicative that the marketing effort made pursuant to the ROP was of sufficient length and breadth to expose the Equipment and Land to a wide audience of potential purchasers. Indeed, if the auction transaction proposed by the Contract proceeds, the Land and Equipment will ultimately be exposed to an international audience of potential purchasers. Further, the portion of the NMG that is attributed to the Equipment by the Ritchie Bros. Proposal is supported by the values opined in CA. The portion of the NMG attributed to the Land is similarly supported by the analyses provided to the Receiver by two well recognized brokerages, as also set forth in the CA. There is no evidence to suggest that the transaction proposed by the Contract is not in the best interest of any of the Debtor's stakeholders.
- (b) With regard to the second factor, the Receiver submits that all stakeholders would be well served by the approval of the Contract. It provides for an efficient disposition of the Land and Equipment without the need to incur additional costs and professional fees, while maximizing a guaranteed recovery to the creditors.

- (c) With regard to the third factor, the Receiver submits that the ROP was effective, and is a well recognized strategy for marketing assets of this nature for disposition. It generated numerous competitive Offers and Proposals from a variety of sophisticated and qualified parties. It would be speculative to suggest that a longer marketing period would have generated additional, let alone better, Offers and Proposals; and
- (d) Finally, regarding the fourth factor, the Receiver submits that there is neither any evidence nor any suggestion being made that the ROP was not conducted in a fair, prudent and transparent manner.

19. Based on the foregoing, the Receiver respectfully submits that the *Soundair* criteria are satisfied, and that this Honourable Court should accordingly grant an Order approving the Receiver's acceptance of the Contract, and vest the Land and Equipment accordingly.

The Restricted Court Access Order

20. The Court's authority to grant a Restricted Court Access Order, otherwise known as a Sealing Order, is contemplated pursuant to Rule 6.28 and Division 4 of Part 6 of the *Alberta Rules of Court*.

- *Alberta Rules of Court*, AR 124/2010, Division 4 of Part 6 including Rule 6.28 [TAB 6].

21. Court proceedings are presumptively open to the public. Such an Order may be granted:
- (a) Where it is necessary 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 that risk; and
 - (b) Where the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

- *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 ("**Sierra Club**") [TAB 7].

22. In recasting this test without altering its essence, the Supreme Court of Canada has recently held that it must be established that:

- (a) Court openness poses a serious risk to an important public interest;
- (b) The order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (c) As a matter of proportionality, the benefits of the order outweigh its negative effects.

- *Sherman Estate v. Donovan*, 2021 SCC 25 at para 38 (“*Sherman Estate*”) [TAB 8].

23. It has been recognized as being appropriate and indeed necessary when assets are being sold pursuant to a Court process within an insolvency context, to seal commercially sensitive information, such as marketing proposals, valuations, offers and sales agreements. This recognition is reflected by the terms of the template Receivership Order, which specifically contemplates that the Receiver may wish to apply for such an Order in connection with its efforts to market the property to which the Order relates. This is so because further marketing efforts may be necessary where a proposed sale is approved but fails to close. This assures fair play by, for example, preventing future purchasers who may be savvy enough to obtain such information from the Court record from gaining an unfair advantage on others that may be less sophisticated.

- See e.g. *Romspen Investment Corporation v Hargate Properties Inc.*, 2012 ABQB 412 at paras 2, 10-13 [TAB 9]; *Alberta Treasury Branches v Elaborate Homes Ltd.*, 2014 ABQB 350 at para 54 [TAB 10], citing *Look Communications Inc. v. Look Mobile Corporation*, 2009 CanLII 71005 at para 17 (ONSC) [TAB 11].

24. Mindful of the foregoing jurisprudence the Receiver submits that the CA ought to be sealed considering the commercial nature of the information contained therein, the fact that the order is being sought in an insolvency context, the potential harm that could accrue to the commercial interests of the Debtor and its stakeholders if they were to be

disclosed, and the privacy interests of all parties that made the Offers and Proposals. The CA contain, *inter alia*, information that assisted the Receiver in determining an expected level of recovery. If made public, any future sales process conducted by the Receiver could be compromised to the irreparable detriment of the Debtor and its stakeholders should one be necessary in the event the proposed transaction, if approved, fails to be completed.

25. This approach is justified with reference to *Sierra Club* and *Sherman Estate*, each of which recognize that the general commercial interest of preserving confidential information is an important interest because of its public character.

- *Sierra Club* at paras. 53 and 55 [TAB 7]; *Sherman Estate* at para. 41 [TAB 8].

26. The Receiver further submits that salutary effects of the Order outweigh any potentially deleterious effects and is necessary towards assisting the Receiver in keeping with the *Soundair* principles. Not only is the granting of the Order reasonable in the circumstances, but it is also, in the Receiver's submission, appropriate and necessary.

PART 5 CONCLUSION

27. The Receiver respectfully requests that this Honourable Court grant the relief sought on this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of December, 2021.

PARLEE MCLAWS LLP

Per: 

Jeremy H. Hockin, Q.C. and
Steven A. Rohatyn

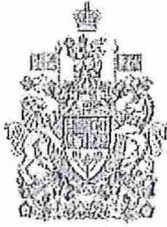
Solicitors for The Bowra
Group Inc.

TABLE OF AUTHORITIES

Citation

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, [ss. 243 and 247](#)
2. *Royal Bank v. Soundair Corp.*, [1991 CarswellOnt 205](#)
3. *River Rentals Group Ltd. v Hutterian Brethren Church of Codesa*, [2010 ABCA 16](#)
4. *PricewaterhouseCoopers Inc. v. 1905393 Alberta Ltd.*, [2019 ABCA 433](#)
5. *1705221 Alberta Ltd v Three M Mortgages Inc*, [2021 ABCA 144](#)
6. *Alberta Rules of Court*, AR 124/2010, [Division 4 of Part 6](#)
7. *Sierra Club of Canada v Canada (Minister of Finance)*, [2002 SCC 41](#)
8. *Sherman Estate v. Donovan*, [2021 SCC 25](#)
9. *Romspen Investment Corporation v Hargate Properties Inc.*, [2012 ABQB 412](#)
10. *Alberta Treasury Branches v Elaborate Homes Ltd.*, [2014 ABQB 350](#)
11. *Look Communications Inc. v. Look Mobile Corporation*, [2009 CanLII 71005](#)

TAB 1



CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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

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

Current to June 16, 2021

À jour au 16 juin 2021

Last amended on November 1, 2019

Dernière modification le 1 novembre 2019

Audit of proceedings

241 The accounts of every clerk that relate to proceedings under this Part are subject to audit in the same manner as if the accounts were the accounts of a provincial officer.

R.S., c. B-3, s. 212.

Application of this Part

242 (1) The Governor in Council shall, at the request of the lieutenant governor in council of a province, declare, by order, that this Part applies or ceases to apply, as the case may be, in respect of the province.

Automatic application

(2) Subject to an order being made under subsection (1) declaring that this Part ceases to apply in respect of a province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

Vérification des comptes

241 Les comptes de chaque greffier, relatifs aux procédures prévues par la présente partie, sont sujets à vérification de la même manière que s'ils étaient les comptes d'un fonctionnaire provincial.

S.R., ch. B-3, art. 212.

Application

242 (1) À la demande du lieutenant-gouverneur en conseil d'une province, le gouverneur en conseil déclare par décret que la présente partie commence à s'appliquer ou cesse de s'appliquer, selon le cas, dans la province en question.

Application automatique

(2) Sous réserve d'une éventuelle déclaration faite en vertu du paragraphe (1) indiquant qu'elle cesse de s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

- a) à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;
- b) à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;
- c) à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

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

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 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.

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.]:

Good faith, etc.

247 A receiver shall

- (a) act honestly and in good faith; and
- (b) deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

1992, c. 27, s. 89.

Powers of court

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

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

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

or both.

Idem

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

1992, c. 27, s. 89.

Receiver may apply to court for directions

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

1992, c. 27, s. 89.

Right to apply to court

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

Obligation de diligence

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

1992, ch. 27, art. 89.

Pouvoirs du tribunal

248 (1) S'il est convaincu, à la suite d'une demande du surintendant, de la personne insolvable, du syndic — en cas de faillite —, du séquestre ou d'un créancier que le créancier garanti, le séquestre ou la personne insolvable ne se conforme pas ou ne s'est pas conformé à l'une ou l'autre des obligations que lui imposent les articles 244 à 247, le tribunal peut, aux conditions qu'il estime indiquées :

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

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

Idem

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

1992, ch. 27, art. 89.

Instructions du tribunal

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

1992, ch. 27, art. 89.

Ordonnance d'un autre tribunal

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

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. 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.) — 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

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):

TAB 3

In the Court of Appeal of Alberta

Citation: River Rentals Group Ltd. v. Hutterian Brethren Church of Codesa, 2010 ABCA 16

Date: 20100118
Docket: 0903-0191-AC
0903-0236-AC
Registry: Edmonton

Between:

Bank of Montreal

Not a Party To the Appeal
(Plaintiff)

- and -

River Rentals Group Ltd., Taves Contractors Ltd. and
McTaves Inc.

Respondent
(Defendant)

- and -

Hutterian Brethren Church of Codesa

Appellant
(Other)

- and -

Bill McCulloch and Associates Inc.

Respondent
(Other)

- and -

Don Warkentin

Respondent
(Other)

2010 ABCA 16 (CanLII)

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice R. Paul Belzil

Memorandum of Judgment

Appeal from the Orders by
The Honourable Chief Justice A.H. Wachowich
Dated the 2nd day of June, 2009 and
Dated the 17th day of June, 2009
(Docket: 0903 03233)

Memorandum of Judgment

The Court:

[1] At the hearing of this appeal, we announced that the appeal is allowed with reasons to follow.

[2] Bill McCulloch and Associates Inc. is the court-appointed Interim Receiver and/or Receiver Manager of the corporate Respondents ("the Taves Group") by order dated March 5, 2009. Prior to that date, the Receiver had become Trustee in Bankruptcy of the Taves Group.

[3] The Receiver issued an information package and called for offers to purchase the assets of the Taves Group which included a property known as the Birch Hills Lands. The call for offers was dated April 17, 2009. The deadline for submission of offers was on or before May 7, 2009 (the tender closing date).

[4] On June 2, 2009, the Receiver brought an application before Wachowich C.J.Q.B. to approve the sale of the Birch Hills Lands to the Appellant. The Appellant's offer was \$2,205,000. An appraisal concluded that the most probable sale price was \$1,560,000. Counsel for the Receiver explained that "the Receiver did effect wide advertizing in local and national newspapers. Sent out 160 tender packages and made the tender package available on the Receiver's website." (A.B. Record Digest, 3/30-33)

[5] Fifteen offers were received on the Birch Hills Lands, six of which were for the entirety of the parcel.

[6] In his submission to the Chief Justice, counsel for the Receiver stated:

"Now, what we have advised the party that we're looking to accept is that we can't put them in possession yet until the Court approves the offer. That has caused some angst given the time of year and it is agricultural land, but we're not in a position to put people on the land before we get court approval to do so. So - - and that's fine, they're still - - they're still at the table so we're good with that.

The offer that the Receiver is recommending acceptance of is - - was from the Hutterite Church of Codesa. That offer was for \$2,205,000 ... the offer is very significant ... it was an excellent offer."

(A.B. Record Digest, 5/46 -6/19)

[7] In considering other tenders with respect to other portions of the property of the Taves Group, the Chief Justice expressed his views regarding the importance of adhering to the integrity of the tender process:

"You know, we ran a tender process, tender process is meant to be - - there are certain rules. It is like, you do not change the rules of baseball or football during the middle of the game. This is the same thing except in this particular case the Court is prepared to exercise the - - its inherent jurisdiction to extend the time in Mr. Taves' position. But I - - you know, I could be the person who says no, Mr. Taves, you were late, I am sorry. Next time use Fed Ex."

(Appeal Record Digest, 12/11-19)

And further:

"We could be coming back right and left. I am inclined, you know, to grant the applications as submitted on these tenders because the tender process was followed properly. That was the market at the time, this is the people that - - this is how they bid. You know, circumstances change and when circumstances change, somebody is the beneficiary of it, some - - somebody is the loser on this. But the rules were adhered to and having the rules adhered to if, you know - - if you want to - - if you want to go to the Court of Appeal after the order is entered and say to the Court of Appeal, guess what, oil is now at \$90, we want this one resubmitted. And if those five people are wise enough to accept that argument, then good luck to you but - - but you know, I am inclined to say we follow a process, the law has to be certain. The law has to be definite. This is what we did and we complied." (Appeal Record Digest, 12/40-13/8)

[8] One of the persons who had tendered an offer to purchase the Birch Hills Lands was the Respondent Don Warkentin. Counsel for the guarantor, Mr. Orrin Toews, addressed the Court. He explained that Mr. Warkentin had submitted an offer of \$2.1 million "on the understanding that he would be receiving possession of the property sometime in the fall." Counsel further explained that "I believe it was the Receiver while during the initial auction, that it was brought to his attention on May 21st that he would in fact get possession of the property much earlier than he was anticipating. And on that basis he increased his bid by 200,000 which brings his offer to 2.3 million dollars cash." (A.B. Record Digest, 13/27-36) He submitted that Mr. Warkentin's offer be accepted.

[9] In response, counsel for the Receiver advised the Court that he had been in written communication with counsel for Mr. Warkentin "and there was no indication in that correspondence that he thought he would get [possession of the lands] in the fall." (Appeal Record Digest, 14/18-20) He added: "I think the tender package is clear that the way it was supposed to close is after the appeal periods on any order has expired. ... So how anybody could reasonably conceive that possession wouldn't be granted until the fall based on that escapes me." (Appeal Record Digest, 14/20-25) He further added: "But the bottom line was at the time tenders closed, Mr. [Warkentin]'s offer was found wanting." (Appeal Record Digest, 14/36-38)

[10] On the basis of that information, the Court ruled as follows:

“Well, you know, rather than adjourning it to hear from Mr. Carter, what I am - - what I am inclined to do with that piece of property, because of - - is - - because of an uncertainty as to occupation, dates of occupation or potential lease or whatever it may be, it is too late to put in the crop right now anyway so - - ... Retender on this one and make it clear in the tender.” (Appeal Record Digest, 15/7-19)

[11] Wachowich, C.J. then granted an order extending the deadline to submit revised offers to purchase the Birch Hills Lands; with submissions restricted to the Appellant and Warkentin. During this extension period, Warkentin submitted a bid higher than the Appellant's. The Appellant did not increase its original offer. Subsequently, on June 17, 2009, Wachowich, C.J. granted an order directing that the Birch Hills Lands be sold to Warkentin. An application by the Appellant to reconsider the June 17, 2009 order was dismissed. The Court also granted a stay order for parts of the June 2 order and the entirety of its June 17 order, pending the determination of the appeal of the June 2 order. The Appellant appealed the June 2 order on July 22, 2009; and appealed the June 17 order on August 13, 2009 (the appeals were consolidated on August 20, 2009).

[12] On applications by a Receiver for approval of a sale, the Court should consider whether the Receiver has acted properly. Specifically, the Court should consider the following:

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

Royal Bank of Canada v. Soundair Corp., [1991] 4
O.R. (3d) 1 (C.A.) at para. 16

[13] The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

- (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

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- (b) whether the circumstances indicate that insufficient time was allowed for the making of bids;
- (c) whether inadequate notice of sale by bid was given; or
- (d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (C.A.)

Salima Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (C.A.) at para. 12.

[14] The central issue in this appeal is whether the chambers judge, mindful of the record before him, should have permitted rebidding and whether he should have thereafter entertained and accepted the higher offer of \$2.51 million plus GST tendered by Mr. Warkentin during the extension period.

[15] The relevance of higher offers after the close of process was considered by the Ontario Court of Appeal in *Royal Bank v. Soundair, supra*. Upon review of the jurisprudence, the Court stated at para. 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. ...”

[16] The chambers judge made no such finding. Indeed, he made no assessment whatever of the conduct of the Receiver. The only evidence before the Court at the June 2, 2009 application was the Receiver’s fifth report and the affidavit of Orrin Toews who proffered no evidence that the Receiver acted improvidently in accepting the offer of the Appellant.

[17] Moreover, the June 2, 2009 order neither considers the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids to purchase the Birch Hills Lands pursuant to the call for offers.

[18] This Court has consistently favoured an approach that preserves the integrity of the process. See *Salima Investments Ltd., supra*, and *Royal Bank of Canada v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93.

[19] That was also the view of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia, supra*, at para. 35:

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“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 a 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. ...”

[20] In addition, there was no cogent evidence before the chambers judge of any unfairness to Warkentin. On the contrary, the impugned order of June 2 conferred an advantage upon Warkentin who then knew the price that had previously been offered by the Appellant when re-tendering his offer.

[21] In cases involving the Court’s consideration of the approval of the sale of assets by a court-appointed Receiver, decisions made by a chambers judge involve a measure of discretion and “are owed considerable deference”. The Court will interfere only if it concludes that the chambers judge acted unreasonably, erred in principle, or made a manifest error.

[22] In our opinion, the chambers judge erred in principle and on insufficient evidence ordered that the property in question be the subject of an extended re-tendering process. The appeal is allowed. An order will go setting aside paras. 26 through 32 of the June 2, 2009 and the June 17, 2009 orders, and approving the tender of the Appellant on the terms and conditions upon which the Receiver originally sought approval.

Appeal heard on January 7, 2010

Memorandum filed at Edmonton, Alberta
this 18th day of January, 2010

Berger J.A.

As authorized: Rowbotham J.A.

As authorized: Belzil J.

Appearances:

D.R. Bieganeck

for the Respondent - River Rentals Group, Taves Contractors Ltd. and McTaves Inc.
for the Respondent - Bill McCulloch and Associates Inc.

G.D. Chrenek

for the Appellant - Hutterian Brethren Church of Codesa

T.M. Warner

for the Respondent - Don Warkentin

TAB 4

In the Court of Appeal of Alberta

Citation: Pricewaterhousecoopers Inc v 1905393 Alberta Ltd, 2019 ABCA 433

Date: 20191114
Docket: 1903-0134-AC
Registry: Edmonton

Between:

Pricewaterhousecoopers Inc. in its capacity as
Receiver of 1905393 Alberta Ltd.

Respondent/Cross-Appellants
(Applicant)

- and -

1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd.

Appellants/Cross-Respondents
(Respondents)

- and -

Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd.
and Fancy Doors & Mouldings Ltd.

Respondents
(Interested Parties)

The Court:

The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Dawn Pentelchuk
The Honourable Madam Justice Jolaine Antonio

2019 ABCA 433 (CanLII)

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 21st day of May, 2019
Filed on the 22nd day of May, 2019
(Docket: 1803 13229)

2019 ABCA 433 (CanLII)

Memorandum of Judgment

The Court:

[1] The appellants appeal an Approval and Vesting Order granted on May 21, 2019 which approved a sale proposed in the May 3, 2019 Asset Purchase Agreement between the Receiver, PriceWaterhouseCoopers, and the respondent, Ducor Properties Ltd (“Ducor”). The assets consist primarily of lands and buildings in Grande Prairie, Alberta described as a partially constructed 169 room full service hotel not currently open for business (the “Development Hotel”) and a 63 room extended stay hotel (“Extended Stay Hotel”) currently operating on the same parcel of land (collectively the “Hotels”). The Hotels are owned by the appellant, 1905393 Alberta Ltd. (“190”) whose shareholder is the appellant, Stellar One Holdings Ltd, and whose president and sole director is the appellant, David Podollan.

[2] The respondent, Servus Credit Union Ltd (“Servus”), is 190’s largest secured creditor. Servus provided financing to 190 for construction of the Hotels. On May 16, 2018, Servus issued a demand for payment of its outstanding debt. As of June 29, 2018, 190 owed Servus approximately \$23.9 million. That debt remains outstanding and, in fact, continues to increase because of interest, property taxes and ongoing carrying costs for the Hotels incurred by the Receiver.

[3] On July 20, 2018, the Receiver was appointed over all of 190’s current and future assets, undertakings and properties. The appellants opposed the Receiver’s appointment primarily on the basis that 190 was seeking to re-finance the Hotels. That re-financing has never materialized.

[4] As a result, the Receiver sought in October 2018 to liquidate the Hotels. In typical fashion, the Receiver obtained an appraisal of the Hotels, as did the respondents. After consulting with three national real estate brokers, the Receiver engaged the services of Colliers International (“Colliers”), which recommended a structured sales process with no listing price and a fixed bid submission date. While the sales process contemplated an exposure period of approximately six weeks between market launch and offer submission deadline, Colliers had contacted over 1,290 prospective purchasers and agents using a variety of mediums in the months prior to market launch, exposing the Hotels to national hotel groups and individuals in the industry, and conducted site visits and answered inquiries posed by prospective buyers. Prospective purchasers provided feedback to Colliers but that included concerns about the quality of construction on the Development Hotel.

[5] The Receiver also engaged the services of an independent construction consultant, Entuitive Corporation, to provide an estimate of the cost to complete construction on the Development Hotel and to assist in decision-making on whether to complete the Development Hotel. In addition, the Receiver contacted a major international hotel franchise brand to obtain input on prospective franchisees’ views of the design and fixturing of the Development Hotel. The ability to brand the Hotels is a significant factor affecting their marketability. Moreover, some of

the feedback confirmed that energy exploration and development in Grande Prairie is down, resulting in downward pressure on hotel-room demand.

[6] Parties that requested further information in response to the listing were asked to execute a confidentiality agreement whereupon they were granted access to a “data-room” containing information on the Hotels and offering related documents and photos. Colliers provided confidential information regarding 190’s assets to 27 interested parties.

[7] The deadline for offer submission yielded only four offers, each of which was far below the appraised value of the Hotels. Three of the four offers were extremely close in respect of their stated price; the fourth offer was significantly lower than the others. As a result, the Receiver went back to the three prospective purchasers that had similar offers and asked them to re-submit better offers. None, however, varied their respective purchase prices in a meaningful manner when invited to do so. The Receiver ultimately accepted and obtained approval for Ducor’s offer to purchase which, as the appellants correctly point out, is substantially less than the appraised value of the Hotels.

[8] The primary thrust of the appellants’ argument is that an abbreviated sale process resulted in an offer which is unreasonably low having regard to the appraisals. They argue that the Receiver was improvident in accepting such an offer and the chambers judge erred by approving it. Approving the sale, they argue, would eliminate the substantial equity in the property evidenced by the appraised value and that the “massive prejudice” caused to them as a result materially outweighs any further time and cost associated with requiring the Receiver to re-market the Hotels with a longer exposure time. Mr. Podollan joins in this argument as he is potentially liable for any shortfall under personal guarantees to Servus for all amounts owed to Servus by 190. The other respondents, Fancy Doors & Mouldings Ltd and Northern Electric Ltd, similarly echo the appellants’ arguments as the shortfall may deprive them both from collecting on their builders’ liens which, collectively, total approximately \$340,000.

[9] The appellants obtained both a stay of the Approval and Vesting Order and leave to appeal pursuant to s 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3: *1905393 Alberta Ltd v 1905393 Alberta Ltd (Receiver of)*, [2019] AJ No 895, 2019 ABCA 269. The issues around which leave was granted generally coalesce around two questions. First, whether the chambers judge applied the correct test in deciding whether to approve of the Receiver recommended sale; and second, whether the chambers judge erred in her application of the legal test to the facts in deciding whether to approve the sale and, in particular, erred in her exercise of discretion by failing to consider or provide sufficient weight to a relevant factor. The standard of review is correctness on the first question and palpable and overriding error on the second: *Northstone Power Corp v RJK Power Systems Ltd*, 2002 ABCA 201 at para 4, 317 AR 192.

2019 ABCA 433 (CanLII)

[10] As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in *Royal Bank of Canada v Soundair Corporation*, [1991] OJ No 1137 at para 16, 46 OAC 321 (“*Soundair*”). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

[11] The appellants suggest that *Soundair* has been modified by our Court in *Bank of Montreal v River Rentals Group Ltd*, 2010 ABCA 16 at para 13, 469 AR 333, to require an additional four factors in assessing whether a receiver has complied with its duties: (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic; (b) whether the circumstances indicate that insufficient time was allowed for the making of bids; (c) whether inadequate notice of sale by bid was given; and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner. The appellants argue that, although the chambers judge considered the *Soundair* factors, she erred by failing to consider the additional *River Rentals* factors and, in so doing, in effect applied the “wrong law”.

[12] We disagree. The chambers judge expressly referred to the *River Rentals* case. *River Rentals*, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the *Soundair* test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: *Salima Investments Ltd v Bank of Montreal* (1985), 65 AR 372 at paras 12-13. At its core, *River Rentals* highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the *Soundair* test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

[13] At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court’s function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver’s duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: *Skyepharma PLC v Hyal Pharmaceutical Corp* (1999), 12 CBR (4th) 84 at para 4, [1999] OJ No 4300, aff’d on appeal 15 CBR (4th) 298 (ONCA).

[14] Nor is it the Court’s function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not

2019 ABCA 463 (CanLII)

the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: *Soundair* at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": *Soundair* at para 22.

[15] The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers – of which there is absolutely none – the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 at para 13.

[16] Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": *Romspen Mortgage Corp v Lantzville Foothills Estates Inc*, 2013 BCSC 222 at para 20.

[17] The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.

[18] We see no reviewable error. This ground of appeal is also dismissed.

[19] Finally, leave to appeal was also granted on whether s 193 of the *Bankruptcy and Insolvency Act*, and specifically s 193(a) or (c) of the Act, creates a leave to appeal as of right in these circumstances or whether leave to appeal is required pursuant to s 193(e). As the appeal was also authorized under s 193(c), we find it unnecessary to address whether this case meets the criteria for leave as of right in s 193(a)-(d) of the Act.

Appeal heard on September 3, 2019

Memorandum filed at Edmonton, Alberta
this 14th day of November, 2019

Wakeling J.A.

Pentelechuk J.A.

Authorized to sign for Antonio J.A.

Appearances:

D.M. Nowak/J.M. Lee, Q.C.
for the Respondent, Pricewaterhousecoopers Inc. in its capacity as receiver of 1905393
Alberta Ltd.

D.R. Peskett/C.M. Young
for the Appellants

C.P. Russell, Q.C./R.T. Trainer
for the Respondent, Servus Credit Union Ltd.

S.A. Wanke
for the Respondent, Ducor Properties Ltd.

S.T. Fitzgerald (no appearance)
for the Respondent, Northern Electric Ltd.

H.S. Kandola
for the Respondent, Fancy Doors & Mouldings Ltd.

TAB 5

In the Court of Appeal of Alberta

Citation: 1705221 Alberta Ltd v Three M Mortgages Inc, 2021 ABCA 144

Date: 20210421
Docket: 2003-0076AC;
2003-0077AC
Registry: Edmonton

Appeal No. 2003-0076AC

Between:

1705221 Alberta Ltd

Appellant
(Plaintiff)

- and -

Three M Mortgages Inc and Avatex Land Corporation

Respondents
(Plaintiffs)

- and -

**Todd Oeming, Todd Oeming as the Personal Representative of the
Estate of Albert Oeming and the Estate of Albert Oeming**

(Defendants)

- and -

BDO Canada Limited

Interested Party

- and -

Shelby Fehr

Interested Party

Appeal No. 2003-0077AC

And Between:

Three M Mortgages Inc and Avatex Land Corporation

Respondents
(Plaintiffs)

- and -

**Todd Oeming, Todd Oeming as the Personal Representative of the
Estate of Albert Oeming and the Estate of Albert Oeming**

Appellants
(Defendants)

- and -

BDO Canada Limited

Interested Party

- and -

Shelby Fehr

Interested Party

Restriction on Publication

By Restricted Court Access Order dated February 27 and 28, 2020, by The Honourable Mr. Justice D.R. Mah, there shall be a temporary sealing and no publication of any information relating, without limitation, to the valuations and offers to purchase the subject lands, as contained in (a) either of the two unfiled affidavits, dated February 26 and 27, 2020 or (b) the first and/or second Confidential Supplement, until the sale of the subject lands has been completed in accordance with the Sale Agreement and the filing of a letter with the Clerk of the Court from the Receiver confirming the sale of same, or until such further Order of the Court.

The Court:

**The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Dawn Pentelchuk
The Honourable Mr. Justice Kevin Feehan**

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D.R. Mah
Dated the 28th day of February, 2020
Filed on the 2nd day of March, 2020

(Docket: 1603 02314)

the order approving the sale process. He also observed that there was no certainty the bylaw would be passed or when the lands would ever be permissibly developed.

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

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

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

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

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

The *Soundair* Test

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

- i. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
- ii. Whether the interests of all parties have been considered, not just the interests of the creditors of the debtor;

- iii. The efficacy and integrity of the sale process by which offers are obtained; and
- iv. Whether there has been unfairness in the working out of the process.

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

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

i. Sufficient Efforts to Sell

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

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

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

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

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

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

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

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

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

ii. Whether the Interests of All Parties Have Been Considered

[36] This segues to the question of whether 170 has any standing to appeal. The Receiver raised this issue in its factum, but did not strenuously pursue it at the appeal hearing. We understand the Receiver's position is grounded by the fact the Receiver had invited 170 to participate in the

TAB 6



ALBERTA

RULES OF COURT

Effective November 1, 2010

AR 124/2010
Includes changes from AR 139/2021

VOLUME ONE

Published June, 2021

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

Application of this Division

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

- (a) to ban publication of court proceedings,
- (b) to seal or partially seal a court file,
- (c) permitting a person to give evidence in a way that prevents that person or another person from being identified,
- (d) for a hearing from which the public is excluded, or
- (e) for use of a pseudonym.

Restricted court access applications and orders

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

When restricted court access application may be filed

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

AR 124/2010 s6.30;194/2020

Timing of application and service

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

- (a) file the application in Form 32, and
- (b) unless the Court otherwise orders, serve every party and any other person named or described by the Court.

Notice to media

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

- (a) the electronic and print media identified or described by the Chief Justice, and
- (b) any other person named by the Court.

AR 124/2010 s6.32;163/2010

Judge or master assigned to application

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

- (a) the judge or master assigned to hear the application, trial or other proceeding in respect of which the restricted court access order is sought,
- (b) if the assigned judge or master is not available or no judge or master has been assigned, the case management judge for the action, or
- (c) if there is no judge or master available to hear the application as set out in clause (a) or (b), the Chief Justice or a judge designated for the purpose by the Chief Justice.

AR 124/2010 s6.33;194/2020

Application to seal or unseal court files

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

- (2) The application must be made to
 - (a) the Chief Justice, or
 - (b) a judge designated to hear applications under subrule (1) by the Chief Justice.
- (3) The Court may direct
 - (a) on whom the application must be served and when,
 - (b) how the application is to be served, and
 - (c) any other matter that the circumstances require.

Persons having standing at application

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

- (a) a person who was served or given notice of the application;
- (b) any other person recognized by the Court who claims to have an interest in the application, trial or proceeding and whom the Court permits to be heard.

No publication pending application

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

AR 124/2010 s6.36;143/2011

TAB 7

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*

INDEXED AS: SIERRA CLUB OF CANADA v. CANADA
(MINISTER OF FINANCE)

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

Present: McLachlin C.J. and Gonthier, Iacobucci,
Bastarache, Binnie, Arbour and LeBel JJ.

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

Practice — Federal Court of Canada — Filing of confidential material — Environmental organization seeking judicial review of federal government's decision to provide financial assistance to Crown corporation for construction and sale of nuclear reactors — Crown corporation requesting confidentiality order in respect of certain documents — Proper analytical approach to be applied to exercise of judicial discretion where litigant seeks confidentiality order — Whether confidentiality order should be granted — Federal Court Rules, 1998, SOR/98-106, r. 151.

Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance to Atomic Energy of Canada Ltd. ("AECL"), a Crown corporation, for the construction and sale to China of two CANDU reactors. The reactors are currently under construction in China, where AECL is the main contractor and project manager. Sierra Club maintains that the authorization of financial assistance

Énergie atomique du Canada
Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

Le ministre des Finances du Canada, le
ministre des Affaires étrangères du Canada,
le ministre du Commerce international
du Canada et le procureur général du
Canada *Intimés*

RÉPERTORIÉ : SIERRA CLUB DU CANADA c. CANADA
(MINISTRE DES FINANCES)

Référence neutre : 2002 CSC 41.

N^o du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

Présents : Le juge en chef McLachlin et les juges
Gonthier, Iacobucci, Bastarache, Binnie, Arbour et
LeBel.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Pratique — Cour fédérale du Canada — Production de documents confidentiels — Contrôle judiciaire demandé par un organisme environnemental de la décision du gouvernement fédéral de donner une aide financière à une société d'État pour la construction et la vente de réacteurs nucléaires — Ordonnance de confidentialité demandée par la société d'État pour certains documents — Analyse applicable à l'exercice du pouvoir discrétionnaire judiciaire sur une demande d'ordonnance de confidentialité — Faut-il accorder l'ordonnance? — Règles de la Cour fédérale (1998), DORS/98-106, règle 151.

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que

by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act* ("CEAA"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed and the confidentiality order granted on the terms requested by AECL.

In light of the established link between open courts and freedom of expression, the fundamental question for a court to consider in an application for a confidentiality order is whether the right to freedom of expression should be compromised in the circumstances. The court must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles because a confidentiality order will have a negative effect on the s. 2(b) right to freedom of expression. A confidentiality order should only be granted when (1) such an order is necessary 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 (2) 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. Three important elements are subsumed under the first branch of the test. First, the risk must be real and substantial, well grounded in evidence, posing a serious threat to the commercial interest in question. Second, the important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principle at stake. Finally, the judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

L'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)(b) de la *Loi canadienne sur l'évaluation environnementale* (« LCÉE ») exigeant une évaluation environnementale comme condition de l'aide financière, et que le défaut d'évaluation entraîne l'annulation des ententes financières. ÉACL dépose un affidavit qui résume des documents confidentiels contenant des milliers de pages d'information technique concernant l'évaluation environnementale du site de construction qui est faite par les autorités chinoises. ÉACL s'oppose à la communication des documents demandée par Sierra Club pour la raison notamment qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Les autorités chinoises donnent l'autorisation de les communiquer à la condition qu'ils soient protégés par une ordonnance de confidentialité n'y donnant accès qu'aux parties et à la cour, mais n'imposant aucune restriction à l'accès du public aux débats. La demande d'ordonnance de confidentialité est rejetée par la Section de première instance de la Cour fédérale. La Cour d'appel fédérale confirme cette décision.

Arrêt : L'appel est accueilli et l'ordonnance demandée par ÉACL est accordée.

Vu le lien existant entre la publicité des débats judiciaires et la liberté d'expression, la question fondamentale pour la cour saisie d'une demande d'ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression. La cour doit s'assurer que l'exercice du pouvoir discrétionnaire de l'accorder est conforme aux principes de la *Charte* parce qu'une ordonnance de confidentialité a des effets préjudiciables sur la liberté d'expression garantie à l'al. 2b). On ne doit l'accorder que (1) lorsqu'elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque, et (2) lorsque ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires. Trois éléments importants sont subsumés sous le premier volet de l'analyse. Premièrement, le risque en cause doit être réel et important, être bien étayé par la preuve et menacer gravement l'intérêt commercial en question. Deuxièmement, l'intérêt doit pouvoir se définir en termes d'intérêt public à la confidentialité, mettant en jeu un principe général. Enfin le juge doit non seulement déterminer s'il existe d'autres options raisonnables, il doit aussi restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

Applying the test to the present circumstances, the commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality, which is sufficiently important to pass the first branch of the test as long as certain criteria relating to the information are met. The information must have been treated as confidential at all relevant times; on a balance of probabilities, proprietary, commercial and scientific interests could reasonably be harmed by disclosure of the information; and the information must have been accumulated with a reasonable expectation of it being kept confidential. These requirements have been met in this case. Disclosure of the confidential documents would impose a serious risk on an important commercial interest of AECL, and there are no reasonably alternative measures to granting the order.

Under the second branch of the test, the confidentiality order would have significant salutary effects on AECL's right to a fair trial. Disclosure of the confidential documents would cause AECL to breach its contractual obligations and suffer a risk of harm to its competitive position. If a confidentiality order is denied, AECL will be forced to withhold the documents in order to protect its commercial interests, and since that information is relevant to defences available under the *CEAA*, the inability to present this information hinders AECL's capacity to make full answer and defence. Although in the context of a civil proceeding, this does not engage a *Charter* right, the right to a fair trial is a fundamental principle of justice. Further, the confidentiality order would allow all parties and the court access to the confidential documents, and permit cross-examination based on their contents, assisting in the search for truth, a core value underlying freedom of expression. Finally, given the technical nature of the information, there may be a substantial public security interest in maintaining the confidentiality of such information.

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to 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, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

En l'espèce, l'intérêt commercial en jeu, la préservation d'obligations contractuelles de confidentialité, est suffisamment important pour satisfaire au premier volet de l'analyse, pourvu que certaines conditions soient remplies : les renseignements ont toujours été traités comme des renseignements confidentiels; il est raisonnable de penser que, selon la prépondérance des probabilités, leur divulgation compromettrait des droits exclusifs, commerciaux et scientifiques; et les renseignements ont été recueillis dans l'expectative raisonnable qu'ils resteraient confidentiels. Ces conditions sont réunies en l'espèce. La divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de ÉACL et il n'existe pas d'options raisonnables autres que l'ordonnance de confidentialité.

À la deuxième étape de l'analyse, l'ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de ÉACL à un procès équitable. Si ÉACL divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Le refus de l'ordonnance obligerait ÉACL à retenir les documents pour protéger ses intérêts commerciaux et comme ils sont pertinents pour l'exercice des moyens de défense prévus par la *LCÉE*, l'impossibilité de les produire empêcherait ÉACL de présenter une défense pleine et entière. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable est un principe de justice fondamentale. L'ordonnance permettrait aux parties et au tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu, favorisant ainsi la recherche de la vérité, une valeur fondamentale sous-tendant la liberté d'expression. Il peut enfin y avoir un important intérêt de sécurité publique à préserver la confidentialité de ce type de renseignements techniques.

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires et donc sur la liberté d'expression. Plus l'ordonnance porte atteinte aux valeurs fondamentales que sont (1) la recherche de la vérité et du bien commun, (2) l'épanouissement personnel par le libre développement des pensées et des idées et (3) la participation de tous au processus politique, plus il est difficile de justifier l'ordonnance. Dans les mains des parties et de leurs experts, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, et donc pour aider la cour à parvenir à des conclusions de fait exactes. Compte tenu de leur nature hautement technique, la production des documents confidentiels en vertu de l'ordonnance demandée favoriserait mieux l'importante valeur de la recherche de la vérité, qui

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.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. 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, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, 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. 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. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

Applied: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76; *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; referred to: *AB Hassle v. Canada (Minister of National Health and*

sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le refus de l'ordonnance.

Aux termes de l'ordonnance demandée, les seules restrictions ont trait à la distribution publique des documents, une atteinte relativement minime à la règle de la publicité des débats judiciaires. Même si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, la deuxième valeur fondamentale, l'épanouissement personnel, ne serait pas touchée de manière significative. La troisième valeur joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Par leur nature même, les questions environnementales ont une portée publique considérable, et la transparence des débats judiciaires sur les questions environnementales mérite généralement un degré élevé de protection, de sorte que l'intérêt public est en l'espèce plus engagé que s'il s'agissait d'un litige entre personnes privées à l'égard d'intérêts purement privés. Toutefois la portée étroite de l'ordonnance associée à la nature hautement technique des documents confidentiels tempère considérablement les effets préjudiciables que l'ordonnance de confidentialité pourrait avoir sur l'intérêt du public à la publicité des débats judiciaires. Les valeurs centrales de la liberté d'expression que sont la recherche de la vérité et la promotion d'un processus politique ouvert sont très étroitement liées au principe de la publicité des débats judiciaires, et sont les plus touchées par une ordonnance limitant cette publicité. Toutefois, en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. Ses effets bénéfiques l'emportent sur ses effets préjudiciables, et il y a lieu de l'accorder. Selon la pondération des divers droits et intérêts en jeu, l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'ÉACL à un procès équitable et à la liberté d'expression, et ses effets préjudiciables sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes.

Jurisprudence

Arrêts appliqués : *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480; *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835; *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76; *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *R. c. Keegstra*, [1990] 3 R.C.S. 697; arrêts mentionnés : *AB Hassle c.*

Welfare, [2000] 3 F.C. 360, aff'g (1998), 83 C.P.R. (3d) 428; *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77; *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b).
Canadian Environmental Assessment Act, S.C. 1992, c. 37, ss. 5(1)(b), 8, 54, 54(2)(b).
Federal Court Rules, 1998, SOR/98-106, rr. 151, 312.

APPEAL from a judgment of the Federal Court of Appeal, [2000] 4 F.C. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] F.C.J. No. 732 (QL), affirming a decision of the Trial Division, [2000] 2 F.C. 400, 178 F.T.R. 283, [1999] F.C.J. No. 1633 (QL). Appeal allowed.

J. Brett Ledger and Peter Chapin, for the appellant.

Timothy J. Howard and Franklin S. Gertler, for the respondent Sierra Club of Canada.

Graham Garton, Q.C., and *J. Sanderson Graham*, for the respondents 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.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

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

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. n° 1850 (QL); *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. v. Oakes*, [1986] 1 R.C.S. 103; *R. v. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2b).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)b), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. n° 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. n° 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et Peter Chapin, pour l'appelant.

Timothy J. Howard et Franklin S. Gertler, pour l'intimé Sierra Club du Canada.

Graham Garton, c.r., et *J. Sanderson Graham*, pour les intimés le ministre des Finances du Canada, le ministre des Affaires étrangères du Canada, le ministre du Commerce international du Canada et le procureur général du Canada.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le

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.

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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.

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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

droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

Malgré cette distinction, la Cour note que la méthode retenue dans *Dagenais* et *Nouveau-Brunswick* a pour objectif de garantir que le pouvoir discrétionnaire des tribunaux d'ordonner des interdictions de publication n'est pas assujéti à une norme de conformité à la *Charte* moins exigeante que la norme applicable aux dispositions législatives. Elle vise cet objectif en incorporant l'essence de l'article premier de la *Charte* et le critère *Oakes* dans l'analyse applicable aux interdictions de publication. Comme le même objectif s'applique à l'affaire dont elle est saisie, la Cour adopte une méthode semblable à celle de *Dagenais*, mais en élargissant le critère énoncé dans cet arrêt (qui portait spécifiquement sur le droit de l'accusé à un procès équitable) de manière à fournir un guide à l'exercice du pouvoir discrétionnaire des tribunaux dans les requêtes en interdiction de publication, afin de protéger tout aspect important de la bonne administration de la justice. La Cour reformule le critère en ces termes (au par. 32) :

Une ordonnance de non-publication ne doit être rendue que si :

a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression « bonne administration de la justice » doit être interprétée

demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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.

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*, at para. 22.

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

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 Rule 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

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils.

Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2b) de la *Charte : Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit perçue comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22.

(3) Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties

Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce :

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

- a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

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(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.

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As in *Mentuck*, 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.

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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 *FN. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields “where the public interest in confidentiality outweighs the public interest in openness” (emphasis added).

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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

b) ses effets bénéfiques, y compris ses effets sur le droit des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris ses effets sur la liberté d'expression qui, dans ce contexte, comprend l'intérêt du public dans la publicité des débats judiciaires.

Comme dans *Mentuck*, j'ajouterais que trois éléments importants sont subsumés sous le premier volet de l'analyse. En premier lieu, le risque en cause doit être réel et important, en ce qu'il est bien étayé par la preuve et menace gravement l'intérêt commercial en question.

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgateion, on peut alors parler plus largement de l'intérêt commercial général dans la protection des renseignements confidentiels. Simplement, si aucun principe général n'entre en jeu, il ne peut y avoir d'« intérêt commercial important » pour les besoins de l'analyse. Ou, pour citer le juge Binnie dans *FN. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35, par. 10, la règle de la publicité des débats judiciaires ne cède le pas que « dans les cas où le droit du public à la confidentialité l'emporte sur le droit du public à l'accessibilité » (je souligne).

Outre l'exigence susmentionnée, les tribunaux doivent déterminer avec prudence ce qui constitue un « intérêt commercial important ». Il faut rappeler qu'une ordonnance de confidentialité implique une atteinte à la liberté d'expression. Même si la pondération de l'intérêt commercial et de la liberté d'expression intervient à la deuxième étape

TAB 8



SUPREME COURT OF CANADA

CITATION: Sherman Estate v.
Donovan, 2021 SCC 25

APPEAL HEARD:
October 6, 2020
JUDGMENT RENDERED:
June 11, 2021
DOCKET: 38695

BETWEEN:

**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**

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

REASONS FOR JUDGMENT: Kasirer J. (Wagner C.J. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring)

(paras. 1 to 108)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

SHERMAN ESTATE v. DONOVAN

Estate of Bernard Sherman and Trustees of the Estate and
Estate of Honey Sherman and Trustees of the Estate

Appellants

v.

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

Indexed as: Sherman Estate v. Donovan

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public interest — Privacy — Dignity — Physical safety — Unexplained deaths of prominent couple generating intense public scrutiny and prompting trustees of estates to apply for sealing of probate files — Whether privacy and physical safety concerns advanced by estate trustees amount to important public interests at such serious risk to justify issuance of sealing orders.

A prominent couple was found dead in their home. Their deaths had no apparent explanation and generated intense public interest. To this day, the identity and motive of those responsible remain unknown, and the deaths are being investigated as homicides. The estate trustees sought to stem the intense press scrutiny prompted by the events by seeking sealing orders of the probate files. Initially granted, the sealing orders were challenged by a journalist who had reported on the couple's deaths, and by the newspaper for which he wrote. The application judge sealed the probate files, concluding that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on privacy and physical safety interests. The Court of Appeal unanimously allowed the appeal and lifted the sealing orders. It concluded that the privacy interest advanced lacked a public interest quality, and that there was no evidence of a real risk to anyone's physical safety.

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, 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 and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. 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 engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. 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.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category 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. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. 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. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

Privacy has been championed as a fundamental consideration in a free society, and its public importance has been recognized in various settings. Though an individual's privacy will be pre-eminently important to that individual, the protection of privacy is also in the interest of society as a whole. Privacy therefore cannot be rejected as a mere personal concern: some personal concerns relating to privacy overlap with public interests.

However, cast too broadly, the recognition of a public interest in privacy could threaten the strong presumption of openness. The privacy of individuals will be at risk in many court proceedings. Furthermore, privacy is a complex and contextual concept, making it difficult for courts to measure. Recognizing an important interest in privacy generally would accordingly be unworkable.

Instead, the public character of the privacy interest involves protecting individuals from the threat to their dignity. Dignity in this sense involves the right to present core aspects of oneself to others in a considered and controlled manner; it is an expression of an individual's unique personality or personhood. This interest is consistent with the Court's emphasis on the importance of privacy, but is tailored to preserve the strong presumption of openness.

Privacy as predicated on dignity will be at serious risk in limited circumstances. 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. Dignity will be at serious risk only

where the information that would be disseminated as a result of court openness is sufficiently sensitive or private such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. The question is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

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. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. 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. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown 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. 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.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate 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 deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

Even if the estate trustees had succeeded in showing a serious risk to privacy, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. As a

final barrier, the estate 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.

Cases Cited

By Kasirer J.

Applied: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522; referred to: *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332; *Khuja v. Times Newspapers Ltd.*, [2017] UKSC 49, [2019] A.C. 161; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5; *Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567; *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188; *Re Southam Inc. and The Queen (No. 1)* (1983), 41 O.R. (2d) 11; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Otis v. Otis* (2004), 7 E.T.R. (3d) 221; *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321; *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880; *R. v. Dyment*, [1988] 2 S.C.R. 417; *Alberta (Information and Privacy Commissioner) v. United Food and Commercial*

Workers, Local 401, 2013 SCC 62, [2013] 3 S.C.R. 733; *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751; *R. v. Paterson* (1998), 102 B.C.A.C. 200; *S. v. Lamontagne*, 2020 QCCA 663; *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357; *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629; *R. v. Pickton*, 2010 BCSC 1198; *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743; 3834310 *Canada inc. v. Chamberland*, 2004 CanLII 4122; *R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166; *Goulet v. Transamerica Life Insurance Co. of Canada*, 2002 SCC 21, [2002] 1 S.C.R. 719; *Godbout v. Longueuil (Ville de)*, [1995] R.J.Q. 2561, aff'd [1997] 3 S.C.R. 844; *A. v. B.*, 1990 CanLII 3132; *R. v. Plant*, [1993] 3 S.C.R. 281; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34; *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100; *Fedeli v. Brown*, 2020 ONSC 994; *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608; *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390; *R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584; *R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121; *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410; *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455.

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APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rouleau and Hourigan JJ.A.), 2019 ONCA 376, 47 E.T.R. (4th) 1, [2019] O.J. No. 2373 (QL), 2019 CarswellOnt 6867 (WL Can.), setting aside a decision of Dunphy J., 2018 ONSC 4706, 417 C.R.R. (2d) 321, 41 E.T.R. (4th) 126, 28 C.P.C. (8th) 102, [2018] O.J. No. 4121 (QL), 2018 CarswellOnt 13017 (WL Can.). Appeal dismissed.

Chantelle Cseh and Timothy Youdan, for the appellants.

Iris Fischer and Skye A. Sepp, for the respondents.

Peter Scrutton, for the intervener the Attorney General of Ontario.

Jacqueline Hughes, for the intervener the Attorney General of British Columbia.

Ryder Gilliland, for the intervener the Canadian Civil Liberties Association.

Ewa Krajewska, for the intervener the Income Security Advocacy Centre.

Robert S. Anderson, Q.C., for the 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 the intervener the British Columbia Civil Liberties Association.

Khalid Jannohamed, for the interveners the HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee.

The judgment of the Court was delivered by

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

TAB 9

Court of Queen's Bench of Alberta

Citation: Romspen Investment Corporation v. Hargate Properties Inc., 2012 ABQB 412

Date: 20120625
Docket: 1103 17749
Registry: Edmonton

Romspen Investment Corporation

Plaintiff

- and -

Hargate Properties Inc., 1410973 Alberta Ltd., Voipus Canada Ltd.,
1333183 Alberta Ltd., Bellavera Green Condominium Corp. and
Kevyn Ronald Frederick Also Known As Kevyn Frederick, Kevin Frederic,
Kevyn Sheldon Frederick or Kevin Frederick and
Chateau Lacombe Capital Partners Ltd.

Defendants

Reasons for Judgment
of the
Honourable Mr. Justice Donald Lee

I. Background

[1] This is an application by the Receiver, D. Manning & Associates Inc. for a sealing order with respect to the Receiver's report dated June 4, 2012; as well as for directions with respect to the disbursement of certain funds recovered by the Receiver from the accounts of Chateau Lacombe Capital Partners Ltd. ["CLCPL"]. There is also an application by the primary creditor for a one day redemption order in a related foreclosure application.

[2] The Receiver's report dated June 4, 2012 provides details with respect to the ongoing sale process of the Chateau Lacombe Hotel in downtown Edmonton, including the realtors marketing reports and appraisal of the hotel. The Receiver submits that the protection of the commercial interest herein forms a proper basis for the issuance of a sealing order as there is an ongoing sales process. In the absence of the sealing order with respect to the appraisal and

2012 ABQB 412 (CanLII)

marketing reports, it is submitted that there is a serious risk that the integrity of the sales process will be adversely affected and that all parties involved in this matter will suffer financially.

[3] The primary creditor in this matter, Romspen Investment Corporation ("Romspen"), supports the Receiver's application for a sealing order. Romspen is owed approximately 35 million dollars presently, and submits that the sealing order is required to protect the confidentiality of the sales process. The second mortgagee, Allied Hospitality Services Inc., ["Allied"] also supports the sealing order application.

[4] Opposing the sealing order, however, are counsel for Dr. Singh who has claimed a first mortgage on properties known as the "Church lands." The priority of Dr. Singh's claim as first mortgagee on the Church lands is in dispute as Romspen received an apparent postponement in its favor from Dr. Singh when it financed the hotel purchase in 2010. These lands consist of 20 acres on Ellerslie Road located in a rapidly developing residential suburban area of Edmonton which the principal of CLCPL, Kevin Frederick, had purchased from the Victory Christian Church in August 2008, for 18 million dollars.

[5] Counsel for the Victory Christian Church also opposes the sealing order request, arguing that concept of "Marshalling" could be applicable with respect to the Church lands given that the Church has now received an assignment of the 12 million dollar vendor take-back mortgage given by Kevin Frederick in its favor at the time of the 2008 purchase by his numbered company. The Victory Christian Church advises that at the present time as a result of the current developments in the case, the 20 acres of prime Edmonton real estate sold for 18 million dollars has resulted in no realisable funds to the Church. The Church is now also the subject of a potential removal proceeding from the lands that it uses for its worship services because of Romspen's present foreclosure application.

[6] Counsel for Dr. Singh, a retired dentist, and the Church submit that they must have access to the marketing and appraisal reports that the Receiver, Romspen, and Allied Properties already have with respect to the Chateau Lacombe Hotel site. Counsel for Dr. Singh and the Church submit that it is only through their receipt of these marketing reports and appraisal that they will be able to determine that the best price is being obtained for the Chateau Lacombe Hotel site.

[7] The present appraisal comes in at a price well below that which is owed to the creditors, so all counsel supporting the granting of the sealing order argue that no useful purpose would be served in disclosing this information any further. They further submit that it is inevitable, and in fact, they wish the Court to direct as part of another application presently before me that a redemption order for the Church property be issued setting the redemption period at one day.

[8] Counsel for Dr. Singh, the first mortgagee on the Church lands, points out that the City of Edmonton's current valuation of the Chateau Lacombe Hotel for municipal tax purposes is approximately 32 million dollars, and at the time the hotel was purchased in 2010 it was 38 million dollars. Based on three appraisals done in 2010, the Chateau Lacombe Hotel property

was worth between 57 to 70 million dollars. The property was purchased in October 2010 for 47.8 million dollars by Mr. Frederick's company, Hargate Properties Inc. ["Hargate"], with Romspen advancing 32 million dollars, a take-back second mortgage by Allied of 11+ million dollars, and Kevin Frederick's 6 million dollar contribution. The 6 million dollars appears to have come from Dr. Singh's first mortgage loan secured on the Church lands. The Church's 12 million dollar vendor take-back mortgage on its lands from Mr. Frederick has been defaulted on and it has been assigned back to the Church, although curiously, the purchase price for the Church lands was listed at Land Titles as 10 million dollars. The Marshalling concept as I understand it involves certain other Leduc properties owned by Kevin Frederick that are also under foreclosure currently.

[9] The argument then of counsel for Dr. Singh and for the Church is that the Chateau Lacombe Hotel property could or should have a value far greater than intimated by the Receiver presently, and if there are proper marketing efforts, all creditors and primarily Romspen would benefit. However, in order to ascertain the validity of the present appraisal and marketing efforts, counsel for Dr. Singh and for the Church need access to the most current reports, which to date has been refused by the Receiver

II. Conclusion

[10] All parties agree that the relevant case law is found in the Supreme Court of Canada's decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] S.C.J. 42; [2002] 2 S.C.R. 522 at paragraph 53 which reads as follows:

A confidentiality order under Rule 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 effect of the confidentiality order, including the effect 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.

[11] The commercial interest as stated in *Sierra Club* is presumed in the present case, but as the Supreme Court of Canada also stated at paragraph 57 "reasonably alternative measures" requires the judge to consider whether reasonable alternatives to the confidentiality order are available as well as to restrict the order as much as reasonably possible while preserving the commercial interest in question. Counsel for the Receiver is not prepared to release the marketing and appraisals even to counsel for Dr. Singh and for the church on any basis.

[12] I conclude that the Receiver has already released the marketing reports and the appraisal to counsel for Rompsen, the primary creditor, and to counsel for the second mortgagee, Allied, with no adverse consequences, to the sales process as they are entitled to receive that information on a confidential basis. I conclude that counsel for Dr. Singh and for the Church should also be allowed to see those reports on the same confidential basis, and I am satisfied that there will be no adverse consequences as a result notwithstanding the objections of counsel for the Receiver, Rompsen and Allied Properties. It is in everyone's financial interest amongst this group including Dr. Singh and the Church to see that the Chateau Lacombe Hotel property is sold for the most monies. The release of the requested sales process and appraisal reports is no reflection that there is anything deficient in the present sales efforts which appear to have been conducted quite efficiently. It is only a recognition of the legitimate financial interest in this process of Dr. Singh and the Church.

[13] The application to Seal is granted with the exception that the documents sealed, and future related documents, will be released to counsel for Dr. Singh and for the Church confidentially, in addition to them being released to Rompsen and Allied. Pending the receipt of these reports and appraisal, including the results of the current final June 22 bidding round, the application for a one day redemption period on the Church lands pursuant to the foreclosure application presently before me, will be adjourned to July 5, 2012, at which point it will be considered.

III. The CLCPL Application

[14] With respect to counsel for BDO Canada's issues regarding the Receiver's request to distribute all of the remaining funds in that company, I understand BDO's objection to be that the Canada Revenue Agency ["CRA"] has a secured priority claims under the Wage Earning Protection Program ("WEPP"), and with respect to certain unremitted employee source deductions.

[15] Hargate Properties Inc. purchased the hotel from the previous owner, Chateau Lacombe Limited Partnership in October 2010, financing the purchase in part by a 32 million dollar loan from Rompsen. The assets purchased by Hargate formed a substantial part of the security taken by Rompsen for the loan. Additional security came from the allegedly improper/fraudulent postponement of the first mortgage on the Church lands that Dr. Singh had advanced to a numbered company controlled by Kevin Frederick. Concurrent with Hargate's acquisition of the assets of the Chateau Lacombe Hotel, unbeknownst to Rompsen even at the time I granted the original receivership order to Rompsen, in apparent contradiction in the terms of Rompsen's security documentation, CLCPL began operating the Chateau Lacombe Hotel.

[16] There were no formal agreements between Hargate and CLCPL with respect to the buyers use of Hargate's assets. CLCPL did not render any payments to Hargate for the use of the assets. CLCPL did not appear to have had any assets of its own, yet it received and retained all the revenues generated through the operation of the hotel (with the exception of some of the

revenues generated under a lease between Hargate and ImPark in relationship to the hotel's parkade.) Kevin Frederick was the principal and operating mind of both Hargate and CLCPL at all material times, and it is alleged that Mr. Frederick converted at least some of the revenues generated by the hotel to his own use.

[17] I have considered the concerns of the bankruptcy trustee of CLCPL BDO Canada Ltd. and I am satisfied that the CRA has properly been notified with respect to any priorities it may have in this matter. From the funds held by the Receiver of \$632,110.26, there will be a \$120,000 hold-back with respect to any potential WEPP claim made by the employees of CLCPL, although non-union employees were terminated by the Receiver upon his appointment. The Receiver has paid all outstanding wages since the date of their appointment, and has continued to pay vacation pay as it becomes due, payable to non-union and union employees. The hold back will also cover any costs of the Receiver-Manager prior to discharge. The Receiver shall pay \$5,985.57 to the CRA in satisfaction of its secured claim for unremitted source deductions.

[18] Additionally, the CRA shall provide the Receiver with notice of any opposition to the payout described above within 14 days of service of these directions.

[19] If the CRA does not provide notice to the Receiver within 14 days of service of these directions, then it shall be deemed forever barred from making or enforcing any claim, interest or right of any nature or kind whatsoever, whether arising by statute, at law or in equity (a "Claim") to the Funds, as well as any Claim(s) arising out of or relating to the Funds or the source of the Funds, and all such Claim(s) shall be forever extinguished, barred and released.

Heard on the 14th day of June, 2012.

Dated at the City of Edmonton, Alberta this 22nd day of June, 2012.

Donald Lee
J.C.Q.B.A.

Appearances:

Schuyler V. Wensel, Q.C.
Witten LLP
for the Plaintiff

Lindsay Miller
Field LLP
for the Second Mortgagee, Allied Hospitalities Services Inc.

Scott Stevens
Owen Bird Law Corporation
for the Receiver, D. Manning & Associates Inc.

Russel A. Rimer
Duncan & Craig LLP
for BDO Canada Ltd.

Atul Omkar
Reynolds Mirth Richards & Farmer LLP
for Dr. Singh

Lyle Brookes
Fraser Milner Casgrain LLP
for the Victory Christian Centre Inc.

2012 ABQB 412 (CanLI)

TAB 10

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v Elaborate Homes Ltd, 2014 ABQB 350

Date: 20140611
Docket: 1103 02937
Registry: Edmonton

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

Between:

Alberta Treasury Branches

Plaintiff

- and -

Elaborate Homes Ltd., Elaborate Developments Inc.,
Manjit (John) Nagra, Jaswinder Nagra

Defendants

Corrected judgment: A corrigendum was issued on June 23, 2014; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice K.G. Nielsen

I. Introduction

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

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

2014 ABQB 350 (CanLII)

[48] Further, the Sale Order makes it clear that service of the Application was declared to be good and sufficient and that service of the Sale Order could be effected upon all affected persons by way of facsimile or electronic mail, and such service was constituted to be good and sufficient. Therefore, it appears that Belzil J. considered the matter of both service of the Application and the Sale Order. Again, Alco could have either appealed the Sale Order, or sought to set it aside on the basis of a lack of notice. It took neither of these steps.

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

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

B. Sale Transaction

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

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

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

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

17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no

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

[55] Alco alleges that PWC and its counsel ignored Alco, hid the Bid Summary and cloaked their activities in the receivership with secrecy. However, there is nothing in the material before the Court to suggest that PWC's preference to keep the Bid Summary confidential until the sale transaction had been approved and closed was for any purpose other than to ensure the integrity of the marketing process, and to avoid misuse of the information in the Bid Summary by a subsequent bidder to obtain an unfair advantage in the event it was necessary to remarket Elaborate's assets. Further, there is nothing to suggest that Belzil J. granted the Sealing Order for any other reason.

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

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

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

30 What those cases show is that the prices in other offers have relevance only if they show that the price contained in the offer accepted by the receiver was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. I am of the opinion, therefore, that if they do not tend to show that the receiver was improvident, they should not be considered upon a motion to

TAB 11

COURT FILE NO.: 08-CL-7877
DATE: 20091218

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: IN THE MATTER OF LOOK COMMUNICATIONS INC.

Applicant

LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P.

Respondent

AND IN THE MATTER OF AN APPLICATION BY LOOK
COMMUNICATIONS INC. UNDER SECTION 192 OF *THE BUSINESS
CORPORATIONS ACT*, R.S.C. 1985, c. C.44, AS AMENDED

BEFORE: Justice Newbould

COUNSEL: *John T. Porter*, for Look Communications Inc.

Aubrey E. Kauffman, for Inukshuk Wireless Partnership

DATE HEARD: December 17, 2009

ENDORSEMENT

[1] Look Communications Inc.(Look) moves for an order extending a sealing order under which bids made in a court approved sales process were sealed. The order is opposed by Inukshuk Wireless Partnership which is a joint venture between Rogers Communications Inc. and Bell Canada.

2009 CanLII 71005 (ON SC)

[16] Look points out that it is not a private company. It is a public company with stakeholders, being public shareholders. It is not the kind of private corporation that Jacobucci J. was discussing in *Sierra*.

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

[18] This case is a little different from the ordinary. Some of the assets that were bid on during the sales process were not sold. However, because the assets that were sold constituted substantially all of the assets of Look, the arrangement under section 192 of the CBCA was completed. Those assets that were not sold remained, however, to be sold and it is in the context of that process that Rogers has been discussing purchasing one or more of these assets from Look.

[19] In this case, had the closing of the sale of the Spectrum and the License been drawn out to the maximum three year period provided for in the sale agreement, these remaining assets in all likelihood would have been sold before the maximum period ran out and during a period of time in which the Receiver's First Report remaining sealed. In those circumstances the effect of the sealing order would have been to protect the later sale process, a process which originally involved a sale of all of the assets of Look. While the remaining sales will not take place under