

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

BETWEEN

BRIDGING FINANCE INC., as agent for
2665405 ONTARIO INC.

Applicant

-and-

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION UNDER SECTION 243(1) OF THE
***BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED;**
AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*,
R.S.O. 1990, c. C.43, AS AMENDED

BRIEF OF AUTHORITIES
(Returnable July 11, 2019)
(Approval of Vaughan Property and Stouffville Property Transactions)

July 4, 2019

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Lawyers for KSV Kofman Inc.,
in its capacity as Court-appointed Receiver

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LIST OF AUTHORITIES**

Tab	Authority
1.	Receivership Order issued November 19, 2018.
2.	<i>Third Eye Capital v. Resources Dianor Inc.</i> , 2019 ONCA 508 (Ont.C.A.)
3.	<i>Royal Bank of Canada v. Soundair Corp.</i> , (1991), 4 O.R. (3d) 1 (C.A.).
4.	<i>Skyepharma PLC v. Hyal Pharmaceutical Corp.</i> , (1999), 12 C.B.R. (4 th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).
5.	<i>Re Windsor Machine & Stamping Ltd.</i> , 2009 CanLII 39772 (ON SC).
6.	<i>Re Abitibowater Inc.</i> , 2009 QCCS 6461 (CanLII) (QC SC).
7.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , [2002] 2 S.C.R. 522.
8.	<i>Confectionately Yours Inc., Re</i> , 2002 CarswellOnt 3002 (C.A.).
9.	<i>Belyea v. Federal Business Development Bank</i> , 1983 CarswellNB 27 (C.A.).
10.	<i>BT-PR Realty Holdings Inc. v. Coopers & Lybrand</i> , 1997 CarswellOnt 1246 (Sup. Ct. (Commercial List)).
11.	<i>Re Target Canada Co. (Re)</i> , 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]).



TAB1

Construction Company Limited and Bondfield Construction Equipment Ltd. listed on Schedule A hereto (the “**Forma-Con Related Assets**”), and (iii) the real property known municipally as 131 Saramia Crescent in Vaughan, Ontario (“**131 Saramia Crescent**”), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Brian Champ sworn November 15, 2018, and the Exhibits thereto and on hearing the submissions of counsel for the Applicant, the Debtors and their affiliates, Zurich Insurance Company Ltd. and Canada Revenue Agency, no one else appearing although duly served as appears from the affidavit of service of Loren Cohen sworn November 15, 2018, and on reading the consent of KSV to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, KSV is hereby appointed Receiver, without security, of: (i) all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof; (ii) the Forma-Con Related Assets; and (iii) 131 Saramia Crescent, the details of which are specified on Schedule B hereto (collectively, the “**Property**”).

RECEIVER’S POWERS

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

- (a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

- (b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;
- (c) to manage, operate, and carry on the business of any Debtor, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform or disclaim any contracts of a Debtor;
- (d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;
- (e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;
- (f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors or in respect of the Property and to exercise all remedies of a Debtor or the owner of the Property in collecting such monies, including, without limitation, to enforce any security held by a Debtor or in respect of Property;
- (g) to settle, extend or compromise any indebtedness owing to the Debtors;
- (h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of a Debtor, for any purpose pursuant to this Order;
- (i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors (or any one of them), the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or

applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

- (j) to file an assignment in bankruptcy on behalf of any Debtor, or to consent to the making of a bankruptcy order against a Debtor;
- (k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,
 - (i) without the approval of this Court in respect of any transaction not exceeding \$500,000, provided that the aggregate consideration for all such transactions does not exceed \$2,000,000; and
 - (ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;
- (m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;
- (n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

- (o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;
- (p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;
- (q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;
- (r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and
- (s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "Persons" and each being a "Person") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records,

and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "Records") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured

creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days' notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by any of the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or in respect of the Property or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors or in respect of the Property are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on a Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such

amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. **THIS COURT ORDERS that**, pursuant to clause 7(3)(c) of the *Canada Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "Sale"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. **THIS COURT ORDERS that** nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the *Ontario Environmental Protection Act*, the *Ontario Water Resources Act*, or the *Ontario Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be

deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed \$2,000,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, deemed trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule C hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List

website) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL: <http://www.ksvadvisory.com/insolvency-cases/Forma-Con>.

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

CRITICAL PAYMENTS

27. **THIS COURT ORDERS** that the Receiver may, with the written consent of the Applicant, make payments owing by the Debtors to subcontractors and other creditors on account of amounts owing prior to the date of this Order.

GENERAL

28. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

29. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of any Debtor.

30. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make

such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

31. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

32. **THIS COURT ORDERS** that the Applicant shall have its costs of this application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estates with such priority and at such time as this Court may determine.

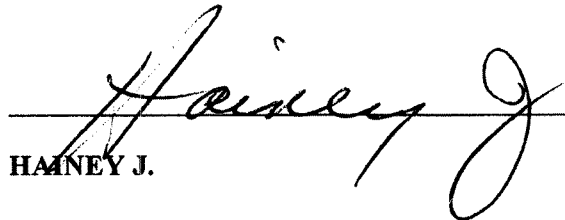
33. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver, the Applicant and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

34. **THIS COURT ORDERS** that the style of cause for this Application be and is hereby amended as set forth in this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

NOV 19 2018

PER / PAR:


HAINEY J.

SCHEDULE A
FORMA-CON RELATED ASSETS
[ATTACHED]

Forma - Con Construction; Crane location log Sep. 10, 2013

MAKE	MODEL	YEAR	SERIAL #	CURRENT LOCATION
Comedil	CTL180-A Luffar	2006	SN-G8705022	WATERWORKS
Comedil	CTL180-A Luffar	2006	SN-G8705040	MASSEY TOWER
Comedil	CTL180-A Luffar	2005	SN-G8705041	CITY LIGHTS
Comedil	CTL180-A Luffar	2007	SN-G8707025	CITY LIGHTS
Comedil	CTL180-A Luffar	2007	SN-G8707050	AXIS CONDO
Comedil	CTL250-A Luffar	2005	SN-G1005004	YC CONDO
Comedil	CTL250-A Luffar	2006	SN-G1005005	21 AVENUE ROAD
Comedil	CTT 331-16-m	2005	SN-G6905001	DTEM CRD
Comedil	CTT 331-16-m	2005	SN-G6905026	WATERLOO SLC-PAC
Comedil	CTT 331-16-m	2005	SN-G6905049	YARD
Comedil	CTT 331-16-m	2005	SN-G6905084	Mills Square
Pecco	PC 1600		SN-0710	EAST UNFED
Pecco	PC 1600/2000	1976	SN-0603	VANGUARD
Pecco	PC 2000		SN-0907	YARD
Pecco	PC 2000		SN-1103	YARD
Pecco	PC 3000		SN-0407	BLUE DIAMOND
Pecco	PC 3600	1980	SN-381	Yard
Peiner	SK-200	1981	SN-0603	YARD
Peiner	SK-140		SN-1915	YARD
Peiner	SK-315	2004	SN-25125	YARD
Peiner	SK-315	2004	SN-25127	RENTED
Peiner	SK-315	1999	SN-105	YARD
Peiner	SK-315	2005	SN-25143	St Josephs Morrow
Peiner	SK-315	2000	SN-050	YARD
Peiner	SK-415	2004	SN-26080	YARD
Peiner	SN 166 Luffing	1999	SN-006	671 Prince Edward
Potain	MR405 Luffing	1999	SN-67089	WATERWORKS
Manitowoc	8000 - CRAWLER	2007	SN-6501037	VISTA CONDO
Manitowoc	8000 - CRAWLER	2011	SN-6501202	ST JOSEPH MORROW
Grove	RT540E MOBILE	2011	SN-221627	ST JOSEPH MORROW
Grove	RT540E MOBILE	2011	SN-227164	Masseys Hall
Grove	RT745 TON		SN-70178	Yard
Quay	QUY80A	2007	SN-1180	Yard

Sold

32 Cranes
32

Michigan Southwestern College Library

Item #	Author	Title	Year	Call Number	Location	Notes
100	Michigan Southwestern College	Library	1978	100.1	Michigan Southwestern College	
101	Michigan Southwestern College	Library	1978	100.2	Michigan Southwestern College	
102	Michigan Southwestern College	Library	1978	100.3	Michigan Southwestern College	
103	Michigan Southwestern College	Library	1978	100.4	Michigan Southwestern College	
104	Michigan Southwestern College	Library	1978	100.5	Michigan Southwestern College	
105	Michigan Southwestern College	Library	1978	100.6	Michigan Southwestern College	
106	Michigan Southwestern College	Library	1978	100.7	Michigan Southwestern College	
107	Michigan Southwestern College	Library	1978	100.8	Michigan Southwestern College	
108	Michigan Southwestern College	Library	1978	100.9	Michigan Southwestern College	
109	Michigan Southwestern College	Library	1978	100.10	Michigan Southwestern College	
110	Michigan Southwestern College	Library	1978	100.11	Michigan Southwestern College	
111	Michigan Southwestern College	Library	1978	100.12	Michigan Southwestern College	
112	Michigan Southwestern College	Library	1978	100.13	Michigan Southwestern College	
113	Michigan Southwestern College	Library	1978	100.14	Michigan Southwestern College	
114	Michigan Southwestern College	Library	1978	100.15	Michigan Southwestern College	
115	Michigan Southwestern College	Library	1978	100.16	Michigan Southwestern College	
116	Michigan Southwestern College	Library	1978	100.17	Michigan Southwestern College	
117	Michigan Southwestern College	Library	1978	100.18	Michigan Southwestern College	
118	Michigan Southwestern College	Library	1978	100.19	Michigan Southwestern College	
119	Michigan Southwestern College	Library	1978	100.20	Michigan Southwestern College	
120	Michigan Southwestern College	Library	1978	100.21	Michigan Southwestern College	

Michigan Southwestern College

Library

RESEARCH GRANTS AND CONTRACTS

Project Number	Title	Start Date	End Date	Amount	Source	Principal Investigator	Co-Investigator
1	Research Contract of the ...	1968					
2	Research Contract of the ...	1968					
3	Research Contract of the ...	1968					
4	Research Contract of the ...	1968					
5	Research Contract of the ...	1968					
6	Research Contract of the ...	1968					
7	Research Contract of the ...	1968					
8	Research Contract of the ...	1968					
9	Research Contract of the ...	1968					
10	Research Contract of the ...	1968					
11	Research Contract of the ...	1968					
12	Research Contract of the ...	1968					
13	Research Contract of the ...	1968					
14	Research Contract of the ...	1968					
15	Research Contract of the ...	1968					
16	Research Contract of the ...	1968					
17	Research Contract of the ...	1968					
18	Research Contract of the ...	1968					
19	Research Contract of the ...	1968					
20	Research Contract of the ...	1968					
21	Research Contract of the ...	1968					
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REVENUE CONTRIBUTIONS - CHRYSLER LIMITED

Year	Amount	Percentage	Total	Number of Contributors	Number of Employees
1973	100,000	100%	100,000	1	1
1974	100,000	100%	100,000	1	1
1975	100,000	100%	100,000	1	1
1976	100,000	100%	100,000	1	1
1977	100,000	100%	100,000	1	1
1978	100,000	100%	100,000	1	1
1979	100,000	100%	100,000	1	1
1980	100,000	100%	100,000	1	1
1981	100,000	100%	100,000	1	1
1982	100,000	100%	100,000	1	1
1983	100,000	100%	100,000	1	1
1984	100,000	100%	100,000	1	1
1985	100,000	100%	100,000	1	1
1986	100,000	100%	100,000	1	1
1987	100,000	100%	100,000	1	1
1988	100,000	100%	100,000	1	1
1989	100,000	100%	100,000	1	1
1990	100,000	100%	100,000	1	1
1991	100,000	100%	100,000	1	1
1992	100,000	100%	100,000	1	1
1993	100,000	100%	100,000	1	1
1994	100,000	100%	100,000	1	1
1995	100,000	100%	100,000	1	1
1996	100,000	100%	100,000	1	1
1997	100,000	100%	100,000	1	1
1998	100,000	100%	100,000	1	1
1999	100,000	100%	100,000	1	1
2000	100,000	100%	100,000	1	1
2001	100,000	100%	100,000	1	1
2002	100,000	100%	100,000	1	1
2003	100,000	100%	100,000	1	1
2004	100,000	100%	100,000	1	1
2005	100,000	100%	100,000	1	1
2006	100,000	100%	100,000	1	1
2007	100,000	100%	100,000	1	1
2008	100,000	100%	100,000	1	1
2009	100,000	100%	100,000	1	1
2010	100,000	100%	100,000	1	1
2011	100,000	100%	100,000	1	1
2012	100,000	100%	100,000	1	1
2013	100,000	100%	100,000	1	1
2014	100,000	100%	100,000	1	1
2015	100,000	100%	100,000	1	1
2016	100,000	100%	100,000	1	1
2017	100,000	100%	100,000	1	1
2018	100,000	100%	100,000	1	1
2019	100,000	100%	100,000	1	1
2020	100,000	100%	100,000	1	1
2021	100,000	100%	100,000	1	1
2022	100,000	100%	100,000	1	1
2023	100,000	100%	100,000	1	1
2024	100,000	100%	100,000	1	1
2025	100,000	100%	100,000	1	1
2026	100,000	100%	100,000	1	1
2027	100,000	100%	100,000	1	1
2028	100,000	100%	100,000	1	1
2029	100,000	100%	100,000	1	1
2030	100,000	100%	100,000	1	1

REVENUE CONTRIBUTION BY LTD
OWNED CONTRIBUTION REQUIREMENT

UNPAID REVENUE
RENTALS

BONDFIELD CONSTRUCTION COMPANY LIMITED
407 BASALTIC ROAD
CONCORD, ONTARIO, CANADA

Department Evaluation Summary

Effective Date: July 23, 2018

Departments:
Cranes - Basaltic Yard
Cranes - Off Site
Concrete Forming & Shoring Equipment



407 BASALTIC ROAD
 CONCORD, ONTARIO, CANADA

Description	
Item #1 crane(1) Comedil Model CTL180-A 16-Ton Luffing Tower Crane, S/N G87D9022, (2006); 56 Meter Radius, 92.6 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #2 crane(1) Comedil Model CTT 331-18-M 16-Ton Tower Crane, S/N G6906031, (2005); 76 Meter Radius, 92.5 Meter Under Hook; with (12) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #3 crane(1) Comedil Model CTT 331-18-M 16-Ton Tower Crane, S/N G6906049, (2005); 76 Meter Radius, 92.5 Meter Under Hook; with (12) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #4 crane(1) Pecco Model PC-2000 22,000-Lb. Tower Crane, S/N 1103; 60 Meter Radius, 48 Meter Under Hook; with (7) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #5 crane(1) Palner Model SK-200 6.25-Ton Tower Crane, S/N 0803, (1981); 56 Meter Radius, 48 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #6 crane(1) Palner Model SK-140 6.25-Ton Tower Crane, S/N 0516; 56 Meter Radius, 48 Meter Under Hook; with (9) Tower Sections; (3) Outer Sections; and Apex Jib Section	
Item #7 crane(1) Palner Model SK-316 16-Ton Tower Crane, S/N 26126, (2004); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	
Item #8 crane(1) Palner Model SK-316 16-Ton Tower Crane, S/N 106, (1999); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams	

COMPANY NAME: Bondfield Construction Company Limited
 REPORT DATE: July 28, 2016
 REPORT DATE: August 14, 2016
 JOB NUMBER: 805266



COMPANY NAME: GOLDEN CONSTRUCTION COMPANY, INC. ADDRESS: 100 W. CENTER ST. SUITE 100, DENVER, CO 80202

Item #	Description
Item #9 Qty(1)	Palmer Model SK-315 16-Ton Tower Crane, S/N 060, (2000); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams
Item #10 Qty(1)	Palmer Model SK-415 20-Ton Tower Crane, S/N 29078, (2004); 76 Meter Radius, 65 Meter Under Hook; with (11) Tower Sections, (5) Top Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams
Item #11 Qty(1)	Grove Model RT745-45-Ton Wheel Rough Terrain Crane, S/N 70173, (1988); with Outriggers; (New Engine 2015)
Item #12 Qty(1)	Lot of Miscellaneous and Large Quantity of Tower Crane Parts and Components, To Include But Not Limited To: Beams; Adaptors; Brackets; Panels; Corner Unlts; Braces; Frames; Jacks; Extensions; Screws; Bases; Decks; Racks; Clips; Tube; Plankers; Stairways; Hooks; Baskets; etc.
Item #13 Qty(1)	Comedil Model CTL160-A 16-Ton Luffing Tower Crane, S/N G8709030, (2006); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected) (Asset Documentation in Photograph Section)
Item #14 Qty(1)	Comedil Model CTL160-A 16-Ton Luffing Tower Crane, S/N G8706011, (2005); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)
Item #15 Qty(1)	Comedil Model CTL160-A 16-Ton Luffing Tower Crane, S/N G8707028, (2007); 55 Meter Radius, 92.5 Meter Under Hook; with (9) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)

COMPANY NAME: Bechtel Construction Company Limited
 EFFECTIVE DATE: July 29, 2016
 REPORT DATE: August 16, 2016
 JOB NUMBER: 500292



NONDESTRUCTIVE TESTING REPORT

Item #	Description
Item #25 Qty(1)	Pecco Model PC-3000 22,000-Lb. Tower Crane, S/N 01071106; 55 Meter Radius, 42 Meter Under Hook; with (6) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)
Item #26 Qty(1)	Peiner Model SK-316 16-Ton Tower Crane, S/N 25127, (2004); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)
Item #27 Qty(1)	Peiner Model SK-316 16-Ton Tower Crane, S/N 26148, (2006); 70 Meter Radius, 72 Meter Under Hook; with (11) Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)
Item #28 Qty(1)	Peiner Model SN168 12-Ton Luffing Tower Crane, S/N 008, (1999); 50 Meter Radius, 98 Meter Under Hook; with (4) Single, (1) Double Tower Sections; Apex & Jib Sections; Heated/AC Enclosed Operator's Cab; Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)
Item #29 Qty(1)	Potain Model MR406 24-Ton Luffing Tower Crane, S/N 87069-M, (1999); 60 Meter Radius, 125 Meter Under Hook; with (11) Tower Sections; Heel & Jib Sections; Heated/AC Enclosed Operator's Cab; (Broken Windrow); Turntable; Hoist Winches; Hook Block; Trolley; Counterweights; and Climbing Beams; (Not Inspected)
Item #30 Qty(1)	Manitowoc Model 8000 80-Ton Crawler Crane, S/N 8501037, (2007); (Not Inspected)
Item #31 Qty(1)	Manitowoc Model 8000 80-Ton Crawler Crane, S/N 8501202, (2011); with Proface Touch Screen Monitor; Counter Weights; Model J50024RTC Hook, S/N 11-7238, 60-Ton Load, 7/8" Rope, 54-41 MT; and 150' Main Luffing Boom; (Not Inspected) (Asset Documentation in Photograph Section)
Item #32 Qty(1)	Grove Model RT540E 40-Ton Rough Terrain Crane, S/N 231627, (2011); with 4-Section 102' Main Telescopic Boom; and 45' Swing Away Jib, with Stinger; (Not Inspected) (Asset Documentation in Photograph Section)
Item #33 Qty(1)	Grove Model RT540E 40-Ton Rough Terrain Crane, S/N 227154, (2011); 12,566 Hours Indicated; with 4-Section 102' Main Telescopic Boom and 45' Swing Away Jib, with Stinger

COMPANY NAME: Bechtel Construction Company Limited
 REPORT DATE: July 26, 2014
 REPORT DATED: August 19, 2015
 JOB NUMBER: 000000



SEONGSUNG CONSTRUCTION COMPANY LIMITED

Description	Item #34	Item #35	Item #36	Item #37	Item #38	Item #39	Item #40	Item #41	Item #42	Item #43	Item #44	Item #45	Item #46	Item #47	Item #48	Item #49	Item #50	Item #51	Item #52
Fushun Yongmao Model QUY80A 80-Ton Crawler Crane, SIN 1126, (2007); with LSI Load System Monitor	QY-1	QY-2	QY-3	QY-4	QY-5	QY-6	QY-7	QY-8	QY-9	QY-10	QY-11	QY-12	QY-13	QY-14	QY-15	QY-16	QY-17	QY-18	QY-19
Grove Model RT95S 95-Ton Rough Terrain Crane, SIN 33378, (1975); 1,683.9 Hours Indicated; with 4-Section Telescopic Boom; (Not Inspected) (Asset Documentation in Photograph Section)	QY-20	QY-21	QY-22	QY-23	QY-24	QY-25	QY-26	QY-27	QY-28	QY-29	QY-30	QY-31	QY-32	QY-33	QY-34	QY-35	QY-36	QY-37	QY-38
Lot of Concrete Forming & Shoring Rental Equipment; (Note: Based On Information Supplied By The Company; Complete Detailed List Located in Appendix)	QY-39	QY-40	QY-41	QY-42	QY-43	QY-44	QY-45	QY-46	QY-47	QY-48	QY-49	QY-50	QY-51	QY-52	QY-53	QY-54	QY-55	QY-56	QY-57

COMPANY NAME: Seonfield Construction Company Limited
REPORT DATE: July 23, 2018
REPORT NUMBER: JWSR-10, 2018
JOB NUMBER: 000000



QTY	Year Make & Model or Equipment Description
20	2014 Ford F150 XLT Pickup truck
1	2013 Kenworth T800B Boom Truck with 30 Tonne Manitex Crane
1	2015 Kenworth T880B Roll-Off Truck
4	Roll-Off Deck for 2015 Kenworth T880B Roll-Off Truck
1	2006 Kenworth T800 Roll-Off truck
4	Roll-Off Deck for 2006 Kenworth Roll-Off
1	2012 Milano 32 Ft Trailer (Accompanies 2013 Kenworth Boom Truck)
1	2015 JC 34 Ft Trailer (Accompanies 2015 Kenworth T880 Roll-Off
2	2015 Doosan C185 Diesel Compressor
3	2012 Cat 100 KW Diesel Generator
1	2010 Cat TH360B 10,000 lb Capacity Telehandler
1	2016 Putzmeister Thom-Katt TK60HP Shotcrete Pump-Trailer Mounted
15	Knaack Job Box 483Q complete with tools : skilsaws, rotary hammers, extension cords, impact guns , hand tools *(ALL USED)
5	20 Ft Storage Container
4	Mobile Office Trailer 8' x 16'

1	Schwing SP500 Concrete Pump Trailer Mounted
40	Used Concrete Buckets
4	Used Office furniture, filing cabinets, digitizer, computers
	Peri Mp480 Aluminum Multiprops for forming
	Peri MP350 Aluminum Multiprops for forming
	Peri Panels and Accessories for forming Value Including Multiprops

① OK.
Schedule C

BONDFIELD CUSTOMER OWNED
Material List at Current List Price
Sep 6 2018

Item Number	Item Description	Quantity
SR10193	ALUMINA ALUM OF TOP PLATE ADAPTER	288
SR11	BEAM ALUMINA 18FT (4.40M)	2751
SR19	SPRINK POST ALUMINUM	200
SR12	BEAM ALUMINA 18R (4.80M)	3279
SR122	STRONGBACK CHANNEL 50K 2650 8'10"	120
SR123	STRONGBACK CHANNEL 50K 2650 12'10"	60
SR124	STRONGBACK CHANNEL 50K 4854 16FT	18
SR127	CHANNEL S/N LINE STEEL	500
SR128	BAR STRONGBACK SPLICE	500
SR130	PLATE TE (SIS)	1600
SR131	BRACKET POLYURETHANE CARBON	200
SR138	SHOE STRONGBACK	200
SR14	BEAM ALUMINA 14FT (4.37M)	2518
SR144	LUG WALL LIFTING ASSEMBLY	200
SR15	BEAM ALUMINA 10FT (3.20M)	2033
SR18	BEAM ALUMINA 12FT (3.60M)	3100
SR16	CHANNEL STRONGBACK 50K 0.88FT (270)	400
SR17	BEAM ALUMINA 21FT (6.40M)	3100
SR1801001	ORINA WALL CORNER BRACKET	21
SR1670020	BEAM CC 2.52	1400
SR1670030	BEAM CC 1.57	650
SR1670040	TRANSVERSAL CC TE 0.75	200
SR1670050	TRANSVERSAL CC TE 1.5	712
SR1670060	TRANSVERSAL CC TE 0.75	200
SR1670070	HEAD CC 1.5	60
SR1670080	PANEL CC 1.5x0.75	3150
SR1670090	PANEL CC 0.75x0.75	100
SR1670100	PANEL CC W 0.5	200
SR1670110	PANEL CC W 0.75	100
SR1670120	PANEL CC 1.5x0.375	130
SR1670130	TRANSVERSAL CC TE 1.5 ALU	1520
SR1670140	TRANSVERSAL CC TE .75 ALUM	70
SR1670150	DROP HEAD SH	1445
SR1670160	EDGE BEAM 2.32	100
SR1670170	EDGE BEAM 1.57	50
SR1670180	UNIVERSAL HEAD CLOSURE (SIAE)	120
SR1670190	SPLY HEAD	60
SR1680010	PANEL 2.7x1.43 (1.80x1.2)	10
SR1680020	PANEL 2.7x1.25 (2.10x1.2)	10
SR1680030	PANEL 2.7x0.9 (1.80x1.2)	10
SR1680040	PANEL 2.7x0.75 (1.80x1.2)	5
SR1680050	PANEL 2.7x0.5 (1.80x1.2)	5
SR1680060	PANEL 2.7x0.375 (1.80x1.2)	5
SR1680070	PANEL 1.2x1.2 (1.44m ²)	16
SR1680080	PANEL 1.2x0.9 (1.08m ²)	16
SR1680090	PANEL 1.2x0.75 (0.90m ²)	16
SR1680100	PANEL 1.2x0.5 (0.60m ²)	5
SR1680110	PANEL 1.2x0.375 (0.45m ²)	10
SR1680120	ORINA INSIDE CORNER 2.7	8
SR1680130	HEAD 30	60

New

SR370	TRUSS CROSS BRACE 10R (3.04M)	250	\$ 105.00	\$ 26,250.00
SR3891	RIVET	3388	\$ 2.00	\$ 6,776.00
SR4045	PIN HITCH	3388	\$ 0.25	\$ 847.00
SR4354	TRUSS JACK RETAINER	600	\$ 6.00	\$ 3,600.00
SR513	SCREWJACK UNIV, ALUMA FRAME	3000	\$ 60.00	\$ 180,000.00
SR5180	J HEAD FOR 1M JACK	60	\$ 25.00	\$ 1,500.00
SR521	SCREWJACK UNIV, ALUMACS FRAME	21364	\$ 70.00	\$ 1,495,480.00
SR60	ALUM DROPHEAD BEAM 10'6"(3.20M)	11	\$ 262.00	\$ 2,882.00
SR6161	HEAVY DUTY GALV. SHORE 6'6" TO 11'	6885	\$ 155.00	\$ 1,067,175.00
SR62	BEAM ALUMA 10FT (3.04M)	1200	\$ 160.00	\$ 192,000.00
SR6406	POST SHORE EXTENSION 2'	1064	\$ 50.00	\$ 53,200.00
SR7436	SCREWJACK 1M W/HANDLE MKII ASSY	188	\$ 80.00	\$ 15,040.00
SR7551	PLATE BASE FOR 1M SCREW	128	\$ 16.00	\$ 2,048.00
SR85	BEAM ALUMA 9FT (2.75M)	1812	\$ 144.00	\$ 260,928.00
SR9310	TRUSS W OUTER 30R (9.14M) #8E	200	\$ 3,098.00	\$ 619,600.00
SR9317	ALUMA DEK RACK	1	\$ 472.00	\$ 472.00
SR9361	4'X5' ALUMACS FRAME	1000	\$ 319.00	\$ 319,000.00
SR9466	1M BASEPLATE SCREWJACK MARK II ASSY	2782	\$ 118.00	\$ 328,278.00
SR9467	1M JHEAD SCREWJACK MARK II ASSY	2860	\$ 119.00	\$ 339,150.00
SRALT16	16' ALUMINUM TUBE	8	\$ 78.30	\$ 626.40
SRALT4	4' ALUMINUM TUBE	185	\$ 19.80	\$ 3,663.00
SRB104	CROSS BRACE 10X4	1800	\$ 42.80	\$ 77,040.00
SRBCSSV	BEAM CLIP SCAF SPEC V C/W BT	11	\$ 6.50	\$ 71.50
SRBP1	BASE PLATE (FIXED)	18	\$ 16.20	\$ 291.60
SRC8R	8" RUBBER WHEEL CASTER	4	\$ 215.00	\$ 860.00
SRK870001	ADJUSTABLE CC HEAD (3 WAY)	10	\$ 151.00	\$ 1,510.00
SRK870002	PANEL PALLET CC4 LARGE (5'X8'X7.25')	30	\$ 1,040.00	\$ 31,200.00
SRLVAC-S	LAYHER ADAPTER SWIVEL	181	\$ 53.80	\$ 9,737.80
SRACW	RIGHT ANGLE WEDGE CLAMP 2" X 2"	11	\$ 21.50	\$ 236.50
SRJOB	SCREWJACK W/BASEPLATE 24"	34	\$ 42.70	\$ 1,451.80
SRSLB10	SURELOCK BRACE 10FT (3.05M)	22	\$ 96.75	\$ 2,128.50
SRSLB7	SURELOCK BRACE 7' (2.13M)	175	\$ 81.38	\$ 14,241.50
SRSLBC	SURELOCK BASE COLLAR	45	\$ 24.83	\$ 1,117.35
SRSLDH10	SURELOCK DBL LEDGER 10FT 3.05M	2	\$ 154.05	\$ 308.10
SRSLH10	SURELOCK LEDGER 10FT (3.05M)	17	\$ 77.83	\$ 1,323.11
SRSLH22	SURELOCK LEDGER 2FT 2 (0.65M)	3	\$ 37.41	\$ 112.23
SRSLH310	SURELOCK LEDGER 3FT 10 (1.15M)	280	\$ 44.72	\$ 12,521.60
SRSLH36	SURLOCK LEDGER STRVY 3FT61.07M	72	\$ 63.32	\$ 4,559.04
SRSLH52	SURELOCK LEDGER 5FT 2IN(1.57M)	10	\$ 51.60	\$ 516.00
SRSLH70	SURELOCK LEDGER 7FT (2.13M)	480	\$ 60.63	\$ 29,102.40
SRSLB2B	SURELOCK SIDE BRKT 21IN(0.65M)	2	\$ 77.08	\$ 154.16
SRSLB3B	SURELOCK SIDE BRKT 3 BRD .81M	1	\$ 150.50	\$ 150.50
SRSLSP70	PLANK STEEL(SPII)7' 2.13M W/HR	89	\$ 109.11	\$ 9,710.79
SRSLSS70	STAIRWAY STRINGER 7FT (2.13M)M	69	\$ 477.84	\$ 32,970.96
SRSLST	TREAD STAIR SCAFD. 8 X 3 MK3	253	\$ 69.88	\$ 17,679.64
SRSLVP33	SURELOCK STANDARD 3FT 3IN(1M)	26	\$ 42.25	\$ 1,098.50
SRSLVP411	SURELOCK STANDARD 4FT 11 1.5M	30	\$ 57.73	\$ 1,731.90
SRSLVP67	SURELOCK STANDARD 6FT 7IN(2M)	58	\$ 71.08	\$ 4,121.48
SRSLVP910	SURELOCK STANDARD 9FT 10IN(3M)	201	\$ 106.32	\$ 21,370.32
SRSSP10	10' STL/PLANK GALV/WHOOKS	12	\$ 138.40	\$ 1,660.80
SRSSP5	5' STL/PLANK GALV.W/HOOKS	5	\$ 86.30	\$ 431.50
SRSSP7	7' STL/PLANK GALV.W/HOOKS	80	\$ 108.00	\$ 8,640.00
SRSSRS	SYSTEM RACK SMALL	5	\$ 411.80	\$ 2,059.00
SRSSX562	GOOSER 10'	6	\$ -	\$ -
SRU043008	METAL BASKET 4'X3'X2'	20	\$ 307.00	\$ 6,140.00

AL 021101016

Summary Report

Formulario Vendor 10682

Material	Description	Quantity
000000	...	10
000001	...	10
000002	...	10
000003	...	10
000004	...	10
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AS 01/01/01

Summary Report

Financial Report

Account	Description	Quantity
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10/20/2017

Summary Report Report

Production Vendor - 10000

Material	Description	Quantity
SP1001	PLANTER	100
SP1002	PLANTER	0
SP1003	PLANTER	0
SP1004	PLANTER	0
SP1005	PLANTER	0
SP1006	PLANTER	0
SP1007	PLANTER	0
SP1008	PLANTER	0
SP1009	PLANTER	0
SP1010	PLANTER	0
SP1011	PLANTER	0
SP1012	PLANTER	0
SP1013	PLANTER	0
SP1014	PLANTER	0
SP1015	PLANTER	0
SP1016	PLANTER	0
SP1017	PLANTER	0
SP1018	PLANTER	0
SP1019	PLANTER	0
SP1020	PLANTER	0
SP1021	PLANTER	0
SP1022	PLANTER	0
SP1023	PLANTER	0
SP1024	PLANTER	0
SP1025	PLANTER	0
SP1026	PLANTER	0
SP1027	PLANTER	0
SP1028	PLANTER	0
SP1029	PLANTER	0
SP1030	PLANTER	0
SP1031	PLANTER	0
SP1032	PLANTER	0
SP1033	PLANTER	0
SP1034	PLANTER	0
SP1035	PLANTER	0
SP1036	PLANTER	0
SP1037	PLANTER	0
SP1038	PLANTER	0
SP1039	PLANTER	0
SP1040	PLANTER	0
SP1041	PLANTER	0
SP1042	PLANTER	0
SP1043	PLANTER	0
SP1044	PLANTER	0
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SP1091	PLANTER	0
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SP1094	PLANTER	0
SP1095	PLANTER	0
SP1096	PLANTER	0
SP1097	PLANTER	0
SP1098	PLANTER	0
SP1099	PLANTER	0
SP1100	PLANTER	0

10/1/2010

Summary Report

Parameter: Vendor

Account	Description	Balance
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1002	1002	1002
1003	1003	1003
1004	1004	1004
1005	1005	1005
1006	1006	1006
1007	1007	1007
1008	1008	1008
1009	1009	1009
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SCHEDULE B

SARAMIA CRESCENT PROPERTY DETAILS

PIN: 03276 - 0174 LT

Description: PCL 11-1 SEC 65M2724; BLK 11 PL 65M2724; S/T LT590331; S/T LT579695
VAUGHAN

Address: 131 Saramia Crescent, Vaughan, Ontario

SCHEDULE C

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT \$ _____

1. THIS IS TO CERTIFY that [RECEIVER'S NAME], the receiver (the "Receiver") of the assets, undertakings and properties [DEBTOR'S NAME] acquired for, or used in relation to a business carried on by the Debtor, including all proceeds thereof (collectively, the "Property") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the ___ day of _____, 20__ (the "Order") made in an action having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "Lender") the principal sum of \$_____, being part of the total principal sum of \$_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 20__.

[RECEIVER'S NAME], solely in its capacity
as Receiver of the Property, and not in its
personal capacity

Per: _____

Name:

Title:

**BRIDGING FINANCE INC., as
agent for 2665405 ONTARIO INC.**

1033803 ONTARIO INC. and 1087507 ONTARIO LIMITED

Court File No.: CV-18-608978-00CL

Respondents

Applicant

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Proceeding commenced at Toronto

**ORDER
(Receivership Application)**

**Goodmans LLP
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, ON M5H 2S7**

**Howard Wise (LSO#: 25190F)
Christopher G. Armstrong (LSO#: 55148B)**

**Tel: 416.979.2211
Fax: 416.979.1234**

Lawyers for the Applicant



TAB2

COURT OF APPEAL FOR ONTARIO

CITATION: Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor
Resources Inc., 2019 ONCA 508
DATE: Signature 20190619
DOCKET: C62925

Pepall, Lauwers and Huscroft JJ.A.

BETWEEN

Third Eye Capital Corporation

Applicant
(Respondent)

and

Ressources Dianor Inc. /Dianor Resources Inc.

Respondent
(Respondent)

and

2350614 Ontario Inc.

Interested Party
(Appellant)

Peter L. Roy and Sean Grayson, for the appellant 2350614 Ontario Inc.

Shara Roy and Nilou Nezhat, for the respondent Third Eye Capital Corporation

Stuart Brotman and Dylan Chochla, for the receiver of the respondent
Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for the monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for the intervener Insolvency Institute of Canada

Heard: September 17, 2018

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice dated October 5, 2016, with reasons reported at 2016 ONSC 6086, 41 C.B.R. (6th) 320.

Pepall J.A.:

Introduction

[1] There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty (“GOR”) be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“BIA”) or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (“CJA”) govern the appeal from the order of the motion judge in this case?

[2] These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./ Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (“First Reasons”). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

Background

[3] The facts underlying this appeal may be briefly outlined.

[4] On August 20, 2015, the court appointed Richter Advisory Group Inc. (“the Receiver”) as receiver of the assets, undertakings and properties of Dianor Resources Inc. (“Dianor”), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the CJA, on the application of Dianor’s secured lender, the respondent Third Eye Capital Corporation (“Third Eye”) who was owed approximately \$5.5 million.

[5] Dianor’s main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. (“381 Co.”) to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor’s properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. (“235 Co.”), another company controlled by John Leadbetter.¹ The mining claims were

¹ The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.

also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. (“Algoma”). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least \$32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

[6] Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. (“177 Co.”), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.²

² The ownership of the surface rights is not in issue in this appeal.

[7] Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

[8] On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

[9] The purchase price consisted of a \$2 million credit bid, the assumption of certain liabilities, and \$400,000 payable in cash, \$250,000 of which was to be distributed to 235 Co. for its GORs and the remaining \$150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the BIA or 30 days under the CJA. Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under

the BIA (pursuant to s. 195 of the BIA) or by applying for a stay under r. 63.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[10] On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

[11] The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

[12] On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the BIA and the CJA to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic ... why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment of \$250,000 and \$150,000 to 235 Co. and Algoma

respectively, their interests were extinguished. The figure of \$250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.³

[13] Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under s. 195 of the BIA would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the BIA appeal provisions.

[14] For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order

³ Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.

as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

[15] On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that “an appeal is under consideration” and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.’s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period “is what it is” but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the \$250,000 and \$150,000 payments.

[16] On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal.

235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

[17] Algoma's Monitor in its *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("CCAA") proceedings received and disbursed the funds allocated to Algoma. The \$250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

Proceedings Before This Court

[18] On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

- (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under s. 100 of the CJA and s. 243 of the BIA, where s. 65.13(7) of the BIA; s. 36(6) of the CCAA; ss. 66(1.1) and 84.1 of the BIA; or s. 11.3 of the CCAA do not apply;
- (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
- (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

[19] The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order

(1) Positions of Parties

[20] The appellant 235 Co. initially took the position that no authority exists under s. 100 of the CJA, s. 243 of BIA, or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under s. 100 of the CJA but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONSC 3648, 75 C.B.R. (5th) 109, at para. 190, rev'd on other grounds, 2011 ONCA 817, 286 O.A.C. 189. It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

[21] In response, the respondent Third Eye states that a broad purposive interpretation of s. 243 of the BIA and s. 100 of the CJA allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the

statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

[22] The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under s. 243 of the BIA and, in the alternative, the court's inherent jurisdiction.

[23] The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

[24] The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including

interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

(2) Analysis

(a) Significance of Vesting Orders

[25] To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order “effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction” (emphasis in original): David Bish & Lee Cassey, “Vesting Orders Part 1: The Origins and Development” (2015) 32:4 Nat’l. Insolv. Rev. 41, at p. 42 (“Vesting Orders Part 1”). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

[26] A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in “Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights” in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

[27] The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in “Vesting Orders Part 1”, at pp. 41-42:

Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement ...

Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern “restructuring” age of corporate asset sales and secured creditor realizations ... The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

[28] The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, “Vesting Orders Part 2: The Scope of Vesting Orders” (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 (“Vesting Orders Part 2”). They write that the statement

describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)⁴ which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: “a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants.”

(b) Potential Roots of Jurisdiction

[29] In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

⁴ To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L§21, said:

A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]

[30] As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: s. 100 of the CJA, s. 243 of the BIA, s. 21 of the CLPA, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

(c) The Hierarchical Approach to Jurisdiction in the Insolvency

Context

[31] Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41.

The authors suggest that in addressing under-inclusive or skeletal legislation, first one “should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority”: at p. 42. Only then should one turn to inherent jurisdiction to fill a possible gap. “By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction”: at p. 44. The authors conclude at p. 94:

On the authors’ reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger’s principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence,

inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

[32] Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

(d) Section 100 of the CJA

[33] This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

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

[34] The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also

had the power to make a vesting order for such property.⁵ In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63, the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

[35] Blair J.A. elaborated on the nature of vesting orders in *Re Regal Constellation Hotel Ltd.* (2004), 71 O.R. (3d) 355 (C.A.), at para. 33:

A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

[36] Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (C.A.), leave to

⁵ Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.

appeal refused, [2006] S.C.C.A. No. 388, involved a family law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the CJA. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the CJA could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In obiter, she observed that s. 100 of the CJA "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

[37] The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be

the purchaser of the assets pursuant to the bid process authorized by the Court.

[38] It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

[39] Based on the obiter in *Trick*, absent an independent basis for jurisdiction, the CJA could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the CJA.

[40] In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

Section 100 of the CJA is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

[41] This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

[42] This leads me to consider whether jurisdiction exists under s. 243 of the BIA both to sell assets and to set the terms of the sale including the granting of a vesting order.

(e) Section 243 of the BIA

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

The Wording and Purpose of s. 243

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

of the inefficiency resulting from this multiplicity of proceedings, the federal government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver”: *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

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

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

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

[46] “Receiver” is defined very broadly in s. 243(2), the relevant portion of which states:

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

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

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

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

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

The History of s. 243

[48] The origins of s. 243 can be traced back to s. 47 of the BIA which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under s. 101 of the CJA and s. 243 was not in existence.

[49] In 1992, s. 47(1) of the BIA provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

(a) take possession of all or part of the debtor's property mentioned in the appointment;

(b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and

(c) take such other action as the court considers advisable.

[50] The language of this subsection is similar to that now found in s. 243(1).

[51] Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

[52] Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs and Northern Development) v. Curragh, Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Ct. (Gen. Div.)), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver ... to ... take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Re Loewen Group Inc.* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.)⁶.

[53] Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

[54] In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was

⁶ This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.

that “in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers.” This was a deviation from the original intention that interim receivers serve as “temporary watchdogs” meant to “protect and preserve” the debtor’s estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Re Big Sky Living Inc.*, 2002 ABQB 659, 318 A.R. 165, at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 (“Senate Committee Report”).⁷

[55] Parliament amended s. 47(2) through the *Insolvency Reform Act 2005* and the *Insolvency Reform Act 2007* which came into force on September 18, 2009.⁸ The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

⁷ This 10 day notice period was introduced following the Supreme Court’s decision in *R.E. Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.

⁸ *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 (“*Insolvency Reform Act 2005*”); *An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 (“*Insolvency Reform Act 2007*”).

[56] Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to “take such other action as the court considers advisable”. At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

243(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. [Emphasis added.]

[57] When Parliament enacted s. 243, it was evident that courts had interpreted the wording “take such other action that the court considers advisable” in s. 47(2)(c) as permitting the court to do what “justice dictates” and “practicality demands”. As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140: “It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law”. Thus, Parliament’s deliberate choice to

import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under s. 243(1) of the BIA.

[58] Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

[59] However, the language in s. 243(1) should also be compared with the language used by Parliament in s. 65.13(7) of the BIA and s. 36 of the CCAA. Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

[60] In s. 65.13(7), the BIA contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[61] The language of s. 36(6) of the CCAA which deals with the sale or disposition of assets of a company under the protection of the CCAA is identical to that of s. 65.13(7) of the BIA.

[62] Section 243 of the BIA does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language “take any other action that the court considers advisable”.

[63] This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under s. 243 of the BIA. Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in 65.13(7) of the BIA and s. 36(6) of the CCAA impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

[64] In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est*

exclusio alterius) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

[65] However, Sullivan notes that the doctrine of implied exclusion “[l]ike the other presumptions relied on in textual analysis ... is merely a presumption and can be rebutted.” The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47, at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721, at paras. 110-111.

[66] The Supreme Court noted in *Turgeon v. Dominion Bank*, [1930] S.C.R. 67, at pp. 70-71, that the maxim *expressio unius est exclusio alterius* “no doubt ... has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context.” In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader

than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

However, the implied exclusion argument is misplaced where it relies exclusively on the text of the ... provisions without regard to their underlying rationale.

[67] Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

[68] In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance “regarding minimum requirements to be met during the sale process”: Senate Committee Report, pp. 146-148.

[69] Commentators have noted that the purpose of the amendments was to provide “the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse”: Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

[70] These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

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

the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

Section 243 – Jurisdiction to Grant a Sales Approval and Vesting Order

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

[73] The purpose of a receivership is to “enhance and facilitate the preservation and realization of the assets for the benefit of creditors”: *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor’s assets: *Wood*, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co. Ltd. and Scouler* (1991), 108 N.S.R. (2d) 198 (N.S.C.A.), at para. 34, “the essence of a receiver’s powers

is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *1117387 Ontario Inc. v. National Trust Company*, 2010 ONCA 340, 262 O.A.C. 118, at para. 77.

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

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

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

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

[78] I should first indicate that the case law on vesting orders in the insolvency context is limited. In *Re New Skeena Forest Products Inc.*, 2005 BCCA 154, 9 C.B.R. (5th) 267, the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Re Loewen Group Inc.*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of

the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

[79] In *Anglo Pacific Group PLC v. Ernst & Young Inc.*, 2013 QCCA 1323, the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

[80] The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that

facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver – which did not hold the title – is legally valid and effective.” As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

[81] The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property “free and clear of any liens or encumbrances”: see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in “Vesting Orders Part 1”, at p. 42, the vesting order is the “holy grail” sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is “a near daily occurrence on the Commercial List”: at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

[82] As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

[83] The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

[84] If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

[85] In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

[86] Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency – it facilitates the maximization of proceeds and realization of the debtor’s assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.

[87] In summary, I conclude that jurisdiction exists under s. 243(1) of the BIA to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the BIA.

[88] This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into

court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word “encumbrance” is not defined in the CLPA.

[89] G. Thomas Johnson in Anne Warner La Forest, ed., *Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at §34:10 states:

The word “encumbrance” is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as “every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee”.

[90] The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

[91] That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

B. Was it Appropriate to Vest out 235 Co’s GORs?

[92] This takes me to the next issue – the scope of the sales approval and vesting order and whether 235 Co.’s GORs should have been extinguished.

[93] Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of “jurisdiction” but rather one

of “appropriateness” as Blair J.A. stated in *Re Canadian Red Cross Society/Société canadienne de la Croix-Rouge* (1998), 5 C.B.R. (4th) 299 (Ont. Ct. (Gen. Div.)), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant’s GORs from title?

[94] In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

(1) Review of the Case Law

[95] As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

[96] In some cases, courts have denied a vesting order on the basis that the debtor’s interest in the property circumscribes a receiver’s sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.), the receiver sought an order authorizing it to sell the debtor’s property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the

receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

[97] Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (S.C.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (S.C.).

[98] An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with

the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

[99] The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

[100] He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-

Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.⁹

[101] As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished

[102] In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

⁹ This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corporation v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189.

[103] First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

[104] For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

[105] Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

[106] Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

[107] The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian, Romspen, and Firm Capital Mortgage Funds Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

[108] The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an

interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

[109] Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

[110] If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

(3) The Nature of the Interest in Land of 235 Co.'s GORs

[111] Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the

property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

[112] While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146, at para. 2 is instructive:

... [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p. 233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [Italics in original; underlining added.]

[113] Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may

be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

[114] The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

[115] Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

[116] Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

C. 235 Co.'s Appeal of the Motion Judge's Order

[117] 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

[118] Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

[119] Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

[120] There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

- (1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;
- (2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and

(3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

(1) The Applicable Appeal Period

[121] The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

[122] Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

[123] In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals. An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value \$10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed \$5,000; and in any other case by leave of a judge of the Court of Appeal: BIA, s. 193. Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the

parties took the position that it was. There is therefore no need to address that issue.

[124] Under r. 31 of the BIA Rules, a notice of appeal must be filed “within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.”

[125] The 10 days runs from the day the order or decision was rendered: *Moss (Bankrupt), Re* (1999), 138 Man. R. (2d) 318 (C.A., in Chambers), at para. 2; *Re Koska*, 2002 ABCA 138, 303 A.R. 230, at para. 16; *CWB Maxium Financial Inc. v. 6934235 Manitoba Ltd. (c.o.b. White Cross Pharmacy Wolseley)*, 2019 MBCA 28 (in Chambers), at para. 49. This is clear from the fact that both r. 31 and s. 193 speak of “order or decision” (emphasis added). If an entered and issued order were required, there would be no need for this distinction.¹⁰ Accordingly, the “[t]ime starts to run on an appeal under the *BIA* from the date of pronouncement of the decision, not from the date the order is signed and entered”: *Re Koska*, at para. 16.

[126] Although there are cases where parties have conceded that the BIA appeal provisions apply in the face of competing provincial statutory provisions

¹⁰ *Ontario Wealth Managements Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Re Smoke* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

(see e.g. *Ontario Wealth Management Corp. v. SICA Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (in Chambers), at para. 36 and *Impact Tool & Mould Inc. v. Impact Tool & Mould Inc. Estate*, 2013 ONCA 697, at para. 1), until recently, no Ontario case had directly addressed this point.

[127] Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, “where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal.” Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway* (1934), [1935] O.R. 37 (C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited.*, 2013 ONCA 769, 118 O.R. (3d) 161, at para. 59, *aff’d* 2015 SCC 52, [2015] 3 S.C.R. 397; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 16.

[128] In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269, Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the

receiver who was stated to have been appointed pursuant to s. 101 of the CJA and s. 243 of the BIA. There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1) of the BIA and federal paramountcy dictated that the BIA appeal provisions apply.

[129] Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within s. 243 of the BIA.

[130] Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the BIA, and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the BIA.

[131] Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) The Receiver's Conduct

[132] The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

[133] Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

[134] 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

[135] Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

[136] The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of \$1 million to \$2 million, with 235 Co.'s GORs having a value of between \$150,000 and \$300,000, and Algoma's royalties having a value of \$70,000 to \$140,000. No evidence of any competing valuation was adduced by 235 Co.

[137] Algoma agreed to a payment of \$150,000 but 235 Co. wanted more than the \$250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of \$250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was “not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights.” In obiter, the motion judge observed that he saw “no reason in logic ... why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land”: at para. 40. Furthermore, the appellant knew of the motion judge’s reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

[138] As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that “[t]hese matters ought not to be determined on the basis that ‘the race is to the swiftest’”. However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

[139] For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge’s decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision.

This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

[140] Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) Remedy is not Merited

[141] As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the \$150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

[142] The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf

(Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time ...

In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

- (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
- (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
- (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
- (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed...;
- (5) The respondent will not be prejudiced by extending the time;
- (6) There is an arguable ground or grounds of appeal;
- (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

[143] These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents;

and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distributions Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (in Chambers), at para. 15.

[144] There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.
2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between \$150,000 and \$300,000. Before the motion judge, 235 Co. acknowledged that the payment of \$250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

[145] I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

[146] While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

Disposition

[147] In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the \$250,000 payment it has already received and that its counsel is holding in escrow.

[148] For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of \$30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

Released: *SP* JUN 19 2019

Dr. Pappal JA

I agree Pham JA

Carina Sur/fmpt JA



TAB3

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 J.J.A.

Heard: June 11, 12, 13 and 14, 1991

Judgment: July 3, 1991

Docket: Doc. CA 318/91

Counsel: *J. B. Berkow* and *S. H. Goldman*, for appellants Canadian Pension Capital Limited and Canadian Insurers' Capital Corporation.

J. T. Morin, Q.C., for Air Canada.

L.A.J. Barnes and *L.E. Ritchie*, for plaintiff/respondent Royal Bank of Canada.

S.F. Dunphy and *G.K. Ketcheson*, for Ernst & Young Inc., receiver of respondent Soundair Corporation.

W.G. Horton, for Ontario Express Limited.

N.J. Spies, for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

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

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

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

Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales. Per Goodman J.A. (dissenting): It was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to the receiver. The offer accepted by the receiver was improvident and unfair insofar as two creditors were concerned.

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- (1) Did the receiver act properly when it entered into an agreement to sell Air Toronto to OEL?
- (2) What effect does the support of the 922 offer by the secured creditors have on the result?

13 I will deal with the two issues separately.

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

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

also assume that the receiver is acting properly unless the contrary is clearly shown. The second observation is that the court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver. The third observation which I wish to make is that the conduct of the receiver should be reviewed in the light of the specific mandate given to him by the court.

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

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

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

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

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

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

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

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

21 When deciding whether a receiver had acted providently, the court should examine the conduct of the receiver in light of the information the receiver had when it agreed to accept an offer. In this case, the court should look at the receiver's conduct in the light of the information it had when it made its decision on March 8, 1991. The court should be very cautious before deciding that the receiver's conduct was improvident based upon information which has come to light after it made its decision. To do so, in my view, would derogate from the mandate to sell given to the receiver by

the order of O'Brien J. I agree with and adopt what was said by Anderson J. in *Crown Trust Co. v. Rosenberg*, supra, at p. 112 [O.R.]:

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account.

While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg*, supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors*, supra, *Re Selkirk* (1987), supra, and (*Cameron*), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

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

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

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

In dealing with the request for approval, the court has to be concerned primarily with protecting the interest of the creditors of the former bankrupt. A secondary but important 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.]:

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

[Emphasis added.]

46 It is my opinion that the court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith,

bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the asset to them.

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

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

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

4. Was there unfairness in the process?

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

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

51 The offering memorandum had not been completed by February 11, 1991. On that date, the receiver entered into the letter of intent to negotiate with OEL. The letter of intent contained a provision that during its currency the receiver would not negotiate with any other party. The letter of intent was renewed from time to time until the OEL offer was received on March 6, 1991.

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

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

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

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

McKinlay J.A. :

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

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

Goodman J.A. (dissenting):

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

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

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

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

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

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

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

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

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

was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of \$18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver "shall not negotiate for the sale ... of Air Toronto with any person except Air Canada," it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April

30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver's option.

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

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

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

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

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

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

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

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

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

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

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions

of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

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

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

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

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

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

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept

an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

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

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

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

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

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

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

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

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

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

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to

be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

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

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

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

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

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

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

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

8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

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

Appeal dismissed.



TAB4

1999 CarswellOnt 3641
Ontario Superior Court of Justice [Commercial List]

Skyepharma PLC v. Hyal Pharmaceutical Corp.

1999 CarswellOnt 3641, [1999] O.J. No. 4300, [2000] B.P.I.R.
531, 12 C.B.R. (4th) 87, 92 A.C.W.S. (3d) 455, 96 O.T.C. 172

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Farley J.

Heard: October 20, 1999
Judgment: October 24, 1999
Docket: 99-CL-3479

Counsel: *Steven Golick* and *Robin Schwill*, for Receivers of Hyal Pharmaceutical Corp., Pricewaterhouse Coopers Incorporation.

Berl Nadler and *James Doris*, for Skyepharma PLC.

S.L. Secord, for Cangene Corporation.

Robert J. Chadwick, for Bioglan Pharma PLC.

Subject: Insolvency; Corporate and Commercial

Headnote

Receivers --- Conduct and liability of receiver — Duties

Receiver obtained order directing process for purchase and sale of assets and shares of debtor, including authorization of exclusive parties permitted to make offers — Receiver accepted offer from one of two exclusive parties — Receiver brought motion for order approving agreement of purchase and sale, for issuance of vesting order to effect closing of transaction, and for grant of authority to take steps necessary to complete transaction — Rejected exclusive party and company not selected as exclusive party raised objections to granting motion — Motion granted — Receiver acted properly in accepting agreement — Receiver took reasonable time to analyse offers — Deadline for making offers to receiver was not also deadline for receiver to sign accepted agreement — Creditors had priority over shareholders in liquidation process and offers made to receiver not obligated to include favourable offer to shareholders — Rejected offer had unacceptable conditions that prevented it from being selected by receiver — Receiver's failure to reveal potential claim for damages to rejected bidder did not materially prejudice bidder — Company not selected as exclusive party voluntarily exited from competition and chose not to attempt to re-enter.

MOTION by receiver for order approving agreement of purchase and sale of debtor's assets and shares.

Farley J.:

Endorsement

I PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to understand that Ground, J. did not have available to him the

Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context — as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

2 Ground J. ordered that the Confidential Supplement to the Receiver's Third Report be distributed forthwith to the service list. It appears this treatment was also accorded the Confidential Supplement to the Fourth Report. These Confidential Supplements contained specific details of the bids, discussions and the analysis of same by the Receiver and were intended to be sealed pending the completion of the sale process at which time such material would be unsealed. If the bid, auction or other sale process were to be reopened, then while from one aspect the potential bidders would all be on an equal footing, knowing what everyone's then present position was as of the Receiver's motion before Ground J., but from a practical point of view, one or more of the bidders would be put at a disadvantage since the Receiver was presenting what had been advanced as "the best offer" (at least to just before the subject motion) whereas now the others would know what they had as a realistic target. The best offer would have to be improved from a procedural point of view. Conceivably, Skye has shot its bolt completely; Bioglan on the other hand, in effect, declined to put its "best intermediate offer" forward, anticipating that it would be favoured with an opportunity to negotiate further with the Receiver and it now appears that it is willing to up the ante. The Receiver's views of the present offers is now known which would hinder its negotiating ability for a future deal in this case. Unfortunately, this engenders the situation of an unruly courthouse auction with some parties having advantages and others disadvantages in varying degrees, something which is the very opposite of what was advocated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as desirable.

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

- (a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the receiver obtained offers; and
- (d) whether the working out of the process was unfair.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Royal Bank v. Soundair* at p.7. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Royal Bank v. Soundair* at pp. 9-10.

5 In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopardize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

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

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

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

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

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

9 It appears to me that on first blush the Receiver here conducted itself appropriately in all regards as to the foregoing concerns. However, before confirming that interim conclusion, I will take into account the objections of Bioglan and Cangene as they have shoehorned into this approval motion. I note that Skye and Cangene are substantial creditors of Hyal and this indebtedness preceded the receivership; Bioglan has acquired by assignment since the receivership a relatively modest debt of approximately \$40,000.

10 On September 28, 1999, I granted an order with respect to the sale process from thereon in. In para. 3 of the order there is reference to October 8, 1999 but it appears to me that this is obviously an error and should be the same October 6, 1999 as in para. 2 as in my endorsement I felt "the deadline should not be 5:00 p.m. Friday, October 8/99 but rather 5:00 p.m. Wednesday, October 6/99." Bioglan had not been as forthcoming as Skye and Cangene and it was the Receiver's considered opinion (which I felt was well grounded and therefore accepted) that the Receiver should negotiate with the Exclusive Parties as identified to the court in the Confidential Supplement to the Third Report (with Skye and Cangene as named in the Confidential Supplement). These negotiations were to be with a view to attempting to finalizing with one of these two parties an agreement which the Receiver could recommend to the court. While perhaps inelegantly phrased,

the deadline of 5:00 p.m. on October 6, 1999 was as to the offerers putting forward their best and irrevocable offer as to one or more of the combinations and permutations available. Both Cangene and Skye submitted their offers (Cangene one deal and Skye three independent alternatives — all four of which were detailed and complex) immediately before the 5:00 p.m. October 6, 1999 time. It would not seem to me that either of them was under a misimpression as to what was to be accomplished by that time. It would be unreasonable from every business angle to expect that the Receiver would have to rather instantly choose in minutes and therefore without the benefit of reflection as to which of the proposals would be the best choice for acceptance subject to court approval; the Receiver was merely stating the obvious in para. 10 of its Confidential Supplement to the Fourth Report. Para. 31 should not be interpreted as completely boxing in the Receiver; the Receiver could reject all three Skye offers if it felt that appropriate. The Receiver must have a reasonable period to do its analysis and it did (with the intervening Thanksgiving weekend) by October 13, 1999. In my view, it is reasonable and obvious in the context of the receivership and the various proceedings before this court that the finalizing of the agreement by 5:00 p.m. October 6, 1999 did not mean that the Receiver had to select its choice and execute (in the sense of "sign") the agreement by that deadline. Rather the reasonable interpretation of that deadline is as set out above. Bioglan, not being one of the selected and authorized Exclusive Parties did not, of course, present any offer. It had not got over the September 21, 1999 hurdle as a result of the Receiver's reasonable analysis of its proposal before that date. The September 28, 1999 order, authorized and directed the Receiver to go with the two parties which looked as if they were the best bets as candidates to come up with the most favourable deal. As for the question of "realizing the superior value inherent in the respective Exclusive Parties' offers", when viewed in context brings into play the aforesaid concerns about creditors having priority over shareholders and that in a liquidation the creditors must be paid in full before any return to the shareholders can be considered. It was possible that the exclusive parties or one of them may have made an offer which would have discharged all debts and in an "attached" share deal offered something to the shareholders, especially in light of the significant tax losses in Hyal. That did not happen. No one could force the Exclusive Parties to make such a favourable offer if they chose not to. The Receiver operated properly in selecting the Skye C Plan as the most appropriate one in light of the short fall in the total debts. I note that a share deal over and above the Skye C Plan has not been ruled out for future negotiations as such would not be in conflict with that recommended deal and if structured appropriately. Bioglan in my view has in essence voluntarily exited the race and notwithstanding that it could have made a further (and better) offer even in light of the September 28, 1999 order, it chose not to attempt to re-enter the race.

11 I would also note that in the fact situation of this case where Skye is such a substantial creditor of Hyal that the \$1 million letter of credit it proposes as a full indemnity as to any applicable clawback appears reasonable in the circumstances as what we are truly looking at is this indemnity to protect the minority creditors. Thus Skye's substantial creditor position in essence supplements the letter of credit amount (or substitutes for a part of the full portion).

12 It is obvious that it would only have been appropriate for the Receiver to have gone back to the well (and canvassed Bioglan) if none of the offers from the Exclusive Parties had been acceptable. However the Skye Plan C one was acceptable and has been recommended by the Receiver for approval by this court.

13 As for Cangene, it has submitted that the Receiver has misunderstood one of its conditions. I note that the Receiver noted that it felt that Cangene may have made an error in too hastily composing its offer. However, the Cangene offer had other unacceptable conditions which would prevent it on the Receiver's analysis from being the Receiver's first choice.

14 Then Cangene submitted that the Receiver erred in not revealing the Nadler letter which threatened a claim for damages in certain circumstances. Clearly it would have been preferable for the Receiver to have made complete disclosure of such a significant contingent liability. However, it seems to me that Cangene can scarcely claim that it was disadvantaged since it was previously directly informed by Mr. Nadler as counsel for Skye of their counterclaim. There being no material prejudice to Cangene, I do not see that this results in the Receiver having blotted its copybook so badly as to taint the process so that it is irretrievably flawed.

15 I therefore see no impediment, and every reason, to approve the Skye Plan C deal and I understand that, notwithstanding the (interim) negative news from the United States FDA process, Skye is prepared to close forthwith. The Receiver's recommendation as to the Skye Plan C is accepted and I approve that transaction.

16 It does not appear that the other aspects of the motion were intended to be dealt with on the Wednesday, October 20, 1999 hearing date. They should be rescheduled at a convenient date.

17 Order to issue accordingly.

Motion granted.

End of Document

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2000 CarswellOnt 466
Ontario Court of Appeal

Skyepharma PLC v. Hyal Pharmaceutical Corp.

2000 CarswellOnt 466, [2000] O.J. No. 467, 130 O.A.C. 273,
15 C.B.R. (4th) 298, 47 O.R. (3d) 234, 95 A.C.W.S. (3d) 90

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Carthy, Goudge, O'Connor J.J.A.

Heard: December 21, 1999
Judgment: February 18, 2000
Docket: CA M25061, C33086

Proceedings: affirmed *Skyepharma PLC v. Hyal Pharmaceutical Corp.* ((1999)), 1999 CarswellOnt 3641, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 ((Ont. S.C.J. [Commercial List]))

Counsel: *James W.E. Doris*, for Skyepharma PLC.

Alan H. Mark, for Appellant/Respondent on the motion, Bioglan Pharma PLC.

Joseph M. Steiner and *Steven G. Golick*, for Price Waterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corp.

Subject: Corporate and Commercial; Insolvency

Headnote

Corporations --- Arrangements and compromises — Under general corporate legislation

Receiver was appointed and authorized to liquidate and realize defendant's assets — In its report, receiver pointed out importance of finalizing sale at early date, as defendant's debt was increasing at rate of \$70,000 per week — Court ordered receiver to negotiate exclusively with two prospective purchasers, including plaintiff company, and gave receiver discretion to negotiate with non-exclusive purchasers if parties could not reach agreement — Receiver recommended approval of sale to plaintiff company, which would not necessarily maximize realization of assets, but would minimize risk of not closing and risk of increasing liabilities — Court approved sale of assets to plaintiff company — Unsuccessful, non-exclusive purchaser brought appeal to have order approving sale set aside — Receiver brought motion to quash appeal — Motion granted — As unsuccessful purchaser did not acquire sufficient interest to be added as party, unsuccessful purchaser did not have right that was finally disposed of by approval order — Unsuccessful purchaser had no legal or proprietary right in property being sold and did not have right or interest that was affected by sale approval order — Involvement of unsuccessful purchaser would create potential for delay and uncertainty, possibly giving unsuccessful purchaser leverage, which would be counterproductive — Ordinary meaning of language in order did not require that unsuccessful purchaser extend its outstanding offer — Fact that receiver had discretion to negotiate with non-exclusive buyers did not create duty or right — Fact that court heard submissions from unsuccessful purchaser did not create standing for appeal, because purchaser was heard as creditor and not as unsuccessful purchaser.

MOTION by receiver to quash appeal by unsuccessful prospective purchaser from judgment, reported at (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), ordering approval of sale of assets.

The judgment of the court was delivered by O'Connor J.A.:

1 This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to

Skyepharma PLC. Bioglan Pharma PLC, a disappointed would be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

2 The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

3 Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding \$100,000) and to hold the proceeds of any sales pending further order of the court.

4 On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

5 The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realisation was likely to result from negotiations with Skyepharma and Cangene.

6 In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were increasing in the amount of approximately \$70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

7 On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable to the receiver and that realised the superior value inherent in the offers made by Skyepharma and Cangene.¹ The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

8 On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hyal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hyal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realisation for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and timeframes contained in other offers. The receiver said that these risks were not immaterial.

9 At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hyal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

10 It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hyal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hyal in the amount of \$40,000.

11 The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hyal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

12 The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

13 This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

14 Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised judicial sale or, alternatively, that the receiver be required to reopen the bidding relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

15 In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy."

Analysis

16 The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

17 Section 6(1)(b) of the *Courts of Justice Act* provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.).

18 The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale approval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

19 First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan maintains, was finally disposed of by the order approving the sale to Skyepharma.

20 A similar issue was considered by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (Ont. H.C.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the *Rules of Civil Procedure*. The relevant portion of that rule, at the time, read as follows:

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

(a) an interest in the subject matter of the proceeding;

(b) that he or she may be adversely affected by a judgment in the proceeding;

... the person may move for leave to intervene as an added party.²

21 Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

22 I adopt both his reasoning and his conclusion. At p. 118, he said:

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

Nor, in my view, can Larco resort successfully to cl. (b) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

23 The British Columbia Supreme Court reached a similar conclusion in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.). In that case the receiver in a debenture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the Court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon ...". Berger J. dismissed this motion. At p. 30, he said:

The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in *Gurtner v. Circuit* [cite omitted] goes so far. No order made in this action will result in any legal liability being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being

added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra*.

26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra; Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

28 In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg*. Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

31 In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (N.S. C.A.). In that case, the receiver invited tenders to purchase lands of the

debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervener. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision reopening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

33 As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court. First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to October 29 1999."

34 Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

35 I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

36 Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

... No party shall be entitled to retract, withdraw, vary or countermand its offer prior to acceptance or rejection thereof by the vendor (receiver). [My emphasis.]

37 The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of clause 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that Bioglan had assumed when it made its offer.

38 Accordingly I would not give effect to this argument.

39 Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharmaceutical agreement.

40 I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

41 Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

42 The motions judge approved the sale based on the recommendation of the receiver that it was in the best interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

43 In the result, I would allow the motion and quash the appeal with costs to the moving party.

Motion granted.

Footnotes

1 These offers were superior in that they were the only two that attempted to provide value for the tax loss positions of Hyal.

2 The rule as presently worded is not.



TAB5

COURT FILE NO.: CV-08-7672-00CL
DATE: 20090728

**SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)**

**RE: IN THE MATTER OF THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C., c. C-36, AS AMENDED**

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF WINDSOR MACHINE & STAMPING
LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD.,
442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION
MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN
WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD.,
TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY
ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD
FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH
INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE
MANUFACTURING INC. AND 383301 ONTARIO LIMITED**

Applicants

BEFORE: MORAWETZ J.

COUNSEL: Tony Reyes and Evan Cobb, for RSM Richter Inc., Monitor

Raong Phalavong, for Saginaw Pattern

**Andrew Hatnay, Andrea McKinnon and D. Youkaris, for U.A.W. Local
251**

Joseph Marin, for Windsor Machine & Stamping Ltd.

D. Dowdall and J. Dietrich, for Bank of Montreal

J. Archibald, for Magna

John D. Leslie, for Ford Motor Company

P. Shea, for Johnson Controls Inc.

Jackie Moher, for Ryder Finance Corporation

**HEARD &
DECIDED: MARCH 11, 2009**

ENDORSEMENT

[1] On March 11, 2009, the motion of RSM Richter Inc. was heard and granted with reasons to follow. These are those reasons.

[2] RSM Richter Inc., in its capacity as Monitor, brought this motion for:

- (a) an Approval and Distribution Order;
- (b) a Vesting Order relating to the sale of personal property assets from WMSL to the Canadian Purchaser;
- (c) a Vesting Order relating to the sale of real property from Lipel Investments Ltd. to the Canadian Purchaser;
- (d) a Vesting Order relating to the sale of real property from 383301 to the Canadian Purchaser;
- (e) an Order approving the fees and disbursements of the Monitor and its counsel.

[3] The motion has the support of the Applicants, Bank of Montreal (the "Bank"), Magna, Ford and Johnson Controls. The Union was not opposed to the sale. An unsecured creditor, Saginaw Pattern, objected. Ryder Finance, an unaffected party did not oppose.

[4] I am satisfied that the record supports the requested relief. During these CCAA proceedings, the Applicants explored a number of restructuring alternatives. The Monitor also ran a sale process to identify a potential buyer or buyers for the business. The Applicants were unable to implement a restructuring within the current corporate entities and were unable to identify an arm's length buyer of the business that would pay an amount greater than the forced liquidation value of the business. The sale process conducted by the Monitor did not result in any offers being submitted to purchase the Applicants' assets.

[5] The Monitor is of the view that the Applicants could not carry on as currently structured. Both the Bank and EDC indicated that they would continue their support for the business and they have had negotiations with the Purchasers and the Applicants, with a view to financing the Purchasers and then working with the Applicants to complete a sale of the business to the Purchasers.

[6] The Monitor is of the view that the proposed transactions result in an outcome that preserves the business. The Monitor supports the approval of the transactions described in the Seventh Report.

[7] With respect to the Approval and Distribution Order and the three Vesting Orders, these transactions notionally result in the Bank's loans being repaid by the Purchasers (who are being financed by the Bank and EDC) and will permit the business to continue. A portion of the secured debt owing by WMSL to WMSL Holdings Ltd. will be paid by way of a promissory note from the Canadian Purchaser to WMSL Holdings Ltd. The Canadian Purchaser will not have the burden of the remaining secured debt owing to WMSL Holdings Inc., nor the burden of substantial unsecured debt.

[8] The Monitor is of the view that the holdbacks described in the Approval and Distribution Order are desirable and appropriate in the circumstances so that goods and services supplied post-filing can be paid, and so that the Union, if it is successful in its claims, can be paid.

[9] In addition to the three transactions for which the Vesting Orders are sought, a fourth transaction is covered by the Approval and Distribution Order. The fourth transaction is with respect to personal property owned by two U.S. companies. These companies operate in the State of Michigan. The Applicants did not seek formal recognition of the CCAA proceedings in the United States. The parties are of the view that the most cost efficient means of completing the transaction with respect to these assets would be for the Bank to take its remedies under the U.S. Uniform Commercial Code, ("UCC") and issue notices of sale under the UCC with respect to the personal property. The Monitor consented to this process and notices were issued by the Bank.

[10] It is specifically noted, that notwithstanding anything in the Approval and Distribution Order, Vesting Orders or purchase agreements referenced therein, the purchase orders or releases issued by Magna Structural Systems Inc. and/or Magna Seating of America, Inc. (collectively, "Magna") or Ford Motor Company ("Ford") to WMSL or any other Applicant will be assigned and vested in and to the purchaser, upon the consent of Magna or Ford, as the case may be, to the assignment of such purchase orders and releases being provided to WMSL and the Purchaser on Closing and the Certificate having been filed.

[11] Further, nothing in the Approval and Distribution Order or the Vesting Orders made in accordance with such Approval and Vesting Order shall, unless JCI consents, impact or terminate the IP licence or option to purchase assets granted to JCI pursuant to the Accommodation Agreement dated October 24, 2008 and approved by the Order dated October 29, 2008, and the vesting of assets pursuant to Approval and Distribution Order or the Vesting Orders shall, unless JCI otherwise consents, be subject to the IP licence and option in favour of JCI.

[12] Finally, it is noted that employee matters are specifically addressed at Article 2.13 of the Agreement of Purchase and Sale.

[13] Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

[14] As previously indicated, the record supports the requested relief in all respects. Orders have been signed and issued in the form requested.

MORAWETZ J.

DATE: Heard and Decided: March 11, 2009

Typed Reasons Released: July 28, 2009



TAB6

2009 QCCS 6461
Quebec Superior Court

AbitibiBowater, (Re)

2009 CarswellQue 14224, 2009 QCCS 6461, 190 A.C.W.S. (3d) 678, EYB 2009-171231

AbitibiBowater Inc., Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc. and The other Petitioners listed on Schedules "A", "B" and "C", Petitioners and Ernst & Young Inc., Monitor

Gascon J.C.S.

Heard: November 9, 2009

Judgment: November 16, 2009

Docket: C.S. Qué. Montréal 500-11-036133-094

Counsel: Me Sean Dunphy, Me Joseph Reynaud, for Petitioners

Me Robert Thornton, for the Monitor

Me Jason Dolman, for the Monitor

Me Alain Riendeau, for Wells Fargo Bank, N.A., Administrative Agent under the Credit and Guarantee Agreement Dated April 1, 2008

Me Marc Duchesne, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders

Me Frederick L. Myers, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

Me Jean-Yves Simard, for the Ad Hoc Committee of Unsecured Noteholders of AbitibiBowater Inc. and certain of its Affiliates

Me Patrice Benoît, for Investissement Québec

Me S. Richard Orzy, for the Official Committee of Unsecured Creditors of AbitibiBowater Inc. & Al.

Me Frédéric Desmarais, for Bank of Montreal

Me Anastasia Flouris, for Alcoa

Subject: Insolvency

Gascon J.C.S.:

CORRECTED JUDGMENT, NOVEMBER 23 ON RE-AMENDED MOTION FOR THE APPROVAL OF A SECOND DIP FINANCING AND FOR DISTRIBUTION OF CERTAIN PROCEEDS OF THE MPCo SALE TRANSACTION TO THE TRUSTEE FOR THE SENIOR SECURED NOTES (#312)

Introduction

1 In the context of their CCAA¹ restructuring, the Abitibi Petitioners² present a Motion³ for 1) the approval of a second DIP financing and 2) the distribution of certain proceeds of the Manicouagan Power Company ("MPCo") sale transaction to the Senior Secured Noteholders ("SSNs").

2 More particularly, the Abitibi Petitioners seek:

- 1) Orders authorizing Abitibi Consolidated Inc. ("ACT") and Abitibi Consolidated Company of Canada Inc. ("ACCC") to enter into a Loan Agreement (the "ULC DIP Agreement") with 3239432 Nova Scotia Company

("ULC"), as lender, providing for a *CDN\$230 million super-priority secured debtor in possession credit facility* (the "*ULC DIP Facility*").

The ULC DIP Facility is to be funded from the ULC reserve of approximately *CDN\$282.3 million* (the "*ULC Reserve*"), with terms that will be substantially in the form of the term sheet (the "*ULC DIP Term Sheet*") attached to the ULC DIP Motion;

2) Orders authorizing the distribution to the SSNs *of up to CDN\$200 million* upon completion of the sale of ACCC's 60% interest in MPCo and Court approval of the ULC DIP Agreement.

The distribution is to be paid from the net proceeds of the MPCo sale transaction after the payments, holdbacks, reserves and deductions provided for in the Implementation Agreement agreed upon in regard to that transaction; and

3) Orders amending the Second Amended Initial Order to increase the super priority charge set out in paragraph 61.3 (the "*ACI DIP Charge*") in respect of the ACI DIP Facility by an amount of *CDN\$230 million* in favour of ULC for all amounts owing in connection with the ULC DIP Facility.

This increase in the ACI DIP Charge is to still be subordinated to any and all subrogated rights in favour of the SSNs, the lenders under the ACCC Term Loan (the "*Term Lenders*") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (the "*Lien Holders*") arising under paragraph 61.10 of the Second Amended Initial Order.

3 The SSNs and the Term Lenders, the only two secured creditor groups of the Abitibi Petitioners, do not, in the end, contest the ULC DIP Motion. Pursuant to intense negotiations and following concessions made by everyone, an acceptable wording to the orders sought was finally agreed upon on the eve of the hearing. The efforts of all parties and Counsel involved are worth mentioning; the help and guidance of the Monitor and its Counsel as well.

4 Of the unsecured creditors and other stakeholders, only the Ad Hoc Unsecured Noteholders Committee (the "*Bondholders*") opposes the ULC DIP Motion, and even there, just in part. At hearing, Counsel for the Official Committee of Unsecured Creditors set up in the corresponding U.S. proceedings pending in the State of Delaware also voiced that his client shared some of the Bondholders' concerns.

5 In short, while not contesting the request for approval of the second DIP financing, the Bondholders contend that the *CDN\$200 million* immediate proposed distribution to the SSNs is inappropriate and uncalled for at this time.

6 Before analyzing the various orders sought, an overview of the MPCo sale transaction and of the ULC DIP Facility that are the subject of the debate is necessary.

The MPCo Sale Transaction

7 The MPCo sale transaction is central to the orders sought in the ULC DIP Motion.

8 Under the terms of an Implementation Agreement signed in that regard, Hydro-Québec ("*HQ*") agreed to pay ACCC *CDN\$615 million* (the "*Purchase Price*") for ACCC's 60% interest in MPCo.

9 Of this amount, it is expected that (i) *CDN\$25 million* will be paid at closing to Alcoa, the owner of the other 40% interest in MPCo, for tax liabilities; (ii) approximately *CDN\$31 million* will be held by HQ for two years to secure various indemnifications (the "*HQ Holdback*"); (iii) certain inter-party accounts will be settled; (iv) the *CDN\$282.3 million* ULC Reserve, set up primarily to guarantee potential contingent pension liabilities and taxes resulting from the Proposed Transactions, will be held by the Monitor in trust for the ULC pending further Order of the Court; and (v) the ACI DIP Facility will be repaid.

10 That said, until the sale, ACCC's 60% interest in MPCo remains subject to the SSN's first ranking security. This first ranking security interest has never been contested by any party. In fact, after their review of same, the Monitor's Counsel concluded that it is valid and enforceable⁴.

11 Accordingly, the proceeds of the sale less adjustments, holdbacks and reserve would normally be paid to the SSNs as holders of valid first ranking security over this asset.

12 To that end, the SSNs' claim of US\$477,545,769.53 (US\$413 million in principal and US\$64,545,769.53 in interest as at October 1st, 2009) is not really contested except for a 0.5% to 2% additional default interest over the 13.75% original loan rate.

13 In that context, on September 29, 2009, the Court issued an Order approving the sale of ACCC's 60% interest in MPCo on certain conditions. Amongst others, the Court:

- a) Approved the terms and conditions of the Implementation Agreement;
- b) Authorized and directed ACI and ACCC to implement and complete the Proposed Transactions with such non-material alterations or amendments as the parties may agree to with the consent of the Monitor;
- c) Declared that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of the ULC, shall constitute and be treated as proceeds of the disposition of ACCC's MPCo shares (collectively, the "*MPCo Share Proceeds*");
- d) Declared that the MPCo Share Proceeds extend to and include (a) ACCC's interest in the HQ Holdback and (b) ACCC's interest in claims arising from the satisfaction of related-party claims;
- e) Declared that the MPCo Share Proceeds will be subject to a replacement charge (the "*MPCo Noteholder Charge*") in favour of the SSNs with the same rank and priority as the security held in respect of the ACCC's MPCo shares;
- f) Declared that the ULC Reserve is subject to a charge in favour of the SSNs which is subordinate to a charge in favour of Alcoa (the "*ULC Reserve Charge*"); and
- g) Ordered that the cash component of the MPCo Share Proceeds and the ULC Reserve be paid to and held by the Monitor in an interest bearing account or investment grade marketable securities pending further Order of the Court.

14 The Proposed Transactions are not expected to close until the latter part of November or early December 2009. ACI has requested and obtained an extension from Investissement Quebec ("*IQ*") to December 15, 2009 for the repayment of the ACI DIP Facility that matured on November 1st, 2009.

15 Based on the amounts of the significant payments, holdbacks, reserves and deductions from the Purchase Price, and considering that the amount drawn under the ACI DIP Facility presently stands at CDN\$54.8 million, the Net Available Proceeds after payment of the ACI DIP Facility would be approximately CDN\$173.9 million.

The Ulc DIP Facility

16 Pursuant to the Implementation Agreement, ULC is required to maintain the ULC Reserve. On the closing of the Proposed Transactions, ULC will hold the ULC Reserve in the amount of approximately CDN\$282.3 million.

17 This amount may be used for a limited number of purposes (the "*Permitted Investments*") that are described in the Implementation Agreement. Such Permitted Investments include making a DIP loan to either ACI or ACCC.

18 Based on that, the ULC DIP Term Sheet provides that the ACI Group will borrow CDN\$230 million from the ULC Reserve as a Permitted Investment.

19 According to the Monitor⁵, the significant terms of the ULC DIP Term Sheet are as follows:

i) *Manner of Borrowing* — Initially, the ULC DIP Facility was to be available by way of an immediate draw of CDN\$230 million. After negotiations with the Term Lenders, it was rather agreed that (i) a first draw of CDN \$130 million will be advanced at closing, (ii) subsequent draws for a maximum total amount of CDN\$50 million in increments of up to CDN\$25 million will be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order, and (iii) the balance of CDN\$50 million shall become available upon further order of the Court.

ii) *Interest Payments* — No interest will be payable on the ULC DIP Facility;

iii) *Fees* — No fees are payable in respect of the ULC DIP Facility;

iv) *Expenses* — The borrowers will pay all reasonable expenses incurred by ULC and Alcoa in connection with the ULC DIP Facility;

v) *Reporting* — Reporting will be similar to that provided under the ACI DIP Facility and copies of all financial information will be placed in the data room. Reporting will include notice of events of default or maturing events of default;

vi) *Use of Proceeds* — The ULC DIP Facility will be used for general corporate purposes in material compliance with the 13-week cash flow forecasts to be provided no less frequently than the first Friday of each month (the "*Budget*");

vii) *Events of Default* — The events of default include the following:

(a) Substantial non-compliance with the Budget;

(b) Termination of the CCAA Stay of Proceedings;

(c) Failure to file a CCAA Plan with the Court by September 30, 2010; and

(d) Withdrawal of the existing Securitization Program unless replaced with a reasonably similar facility;

viii) *Rights of Alcoa* — Alcoa will receive all reporting noted above and notices of events of default. Alcoa's consent is required for any amendments or waivers;

ix) *Rights of Senior Secured Noteholders* — The Senior Secured Noteholders' rights consist of:

(a) Receiving all reporting noted above and any notice of an Event of Default;

(b) Consent of Senior Secured Noteholders holding a majority of the principal amount of the Senior Secured Notes is required for any amendments to the maximum amount of the ULC DIP Facility or any change to the Outside Maturity Date or the interest rate;

(c) Upon an Event of Default, there is no right to accelerate payment or maturity, subject to the right to apply to Court for the termination of the ULC DIP Facility, which right is without prejudice to the right of ACI, ACCC, the ULC or Alcoa to oppose such application;

(d) Entitlement to review draft of documents, but final approval of such documents is in Alcoa's sole discretion; and

(e) Entitlement to request the approval of the Court to amend any monthly cash flow budget which has been filed;

x) *Security* — Security is similar to the existing ACI DIP Facility and ranking immediately after the existing ACI DIP Charge. There are no charges on the assets of the Chapter 11 Debtors (as defined in the existing ACI DIP Facility).

20 The Monitor notes that the ULC DIP Facility will provide the ACI Group with additional net liquidity (after the retirement of the ACI DIP Facility and after the payment of the proposed distribution to the SSNs) in the amount of some CDN\$167 million.

The Questions at Issue

21 In light of this background, the Court must answer the following questions:

1) Should the ULC DIP Facility of CDN\$230 million be approved?

2) Should the proposed distribution of CDN\$200 million to the SSNs be authorized?

3) Is the wording of the orders sought appropriate, notably with regard to the additions proposed by the Bondholders in terms of the future steps to be taken by the Abitibi Petitioners?

Analysis and Discussion

1) The Approval of the DIP Financing

22 In the Court's opinion, the second DIP financing, that is, the ULC DIP Facility of CDN\$230 million, should be approved on the amended terms agreed upon by the numerous parties involved.

23 In this restructuring, the Court has already approved DIP financing in respect of both the Abitibi Petitioners and the Bowater Petitioners.

24 On April 22, 2009, it issued a Recognition Order (U.S. Interim DIP Order) recognizing an Interim Order of the U.S. Bankruptcy Court for a DIP loan of up to US\$206 million to the Bowater Petitioners. On May 6, 2009, it approved the ACI DIP Facility, a US\$100 million loan to the Abitibi Petitioners by Bank of Montreal ("*BMO*"), guaranteed by IQ.

25 The jurisdiction of the Court to approve DIP financing and the requirement of the Abitibi Petitioners for such were canvassed at length in the May 6 Judgment. The requirements of the Abitibi Petitioners for liquidity and the authority of the Court to approve agreements to satisfy those requirements have already been reviewed and ruled upon.

26 There have been no circumstances intervening since the approval of the ACI DIP Facility that can fairly be characterized as negating the requirement of the Abitibi Petitioners for DIP financing.

27 The only issue here is whether this particular ULC DIP Facility proposal, replacing as it does the prior ACI DIP Facility, is one that the Court ought to approve. As indicated earlier, the answer is yes.

28 At this stage in the proceedings where the phase of business stabilization is largely complete, the Court is not required to approach the subject of DIP financing from the perspective of excessive caution or parsimony.

29 On the one hand, as highlighted notably by the Monitor⁶, the Abitibi Petitioners have presented substantial reasons to support their need for liquidity by way of a DIP loan. Suffice it to note to that end that:

a) Without an adequate cushion, in view of potential adverse exchange rate fluctuations and further adverse price declines in the market, the Abitibi Petitioners' liquidity could easily be insufficient to meet the requirements of its Securitization Program (Monitor's 19th Report at paragraphs 49, 50 and chart at paragraph 61);

b) Absent a DIP loan, there is, in fact, a "high risk of default" under the Securitization Program (Monitor's 19th Report at paragraph 32);

c) Despite Abitibi Petitioners' best efforts at forecasting, weekly cash flow forecasts have varied by as much as US \$26 million. Weekly disbursements have varied by 100%. Each 1¢ variation in the foreign exchange rate as against the US dollar could produce a US\$17 million negative cash flow variation. The ultimate cash flow requirements will be highly dependent on variables that the Abitibi Petitioners cannot control (Monitor's 19th Report at paragraphs 54, 60 and 61);

d) The market decline has eroded the Abitibi Petitioners' liquidity, while foreign exchange fluctuations are placing further strain on this liquidity. Even if prices increase, the resulting need for additional working capital to increase production will paradoxically put yet further strain on this liquidity;

e) Without the ULC DIP Facility, the Abitibi Petitioners would lack access to sufficient operating credit to maintain normal operations. They would be significantly impaired in their ability to operate in the ordinary course and they would face an increase in the risk of unexpected interruptions; and

f) The Abitibi Petitioners have yet to complete their business plan and it is premature to predict the length of the proceedings (Monitor's 19th Report at paragraphs 47 and 48).

30 In fact, based upon its sensitivity analysis, the inter-month variability of the cash flows, the minimum liquidity requirements under the Securitization Program, and the requirement to repay the ACI DIP Facility, the Monitor is of the view that the Abitibi Petitioners need the new ULC DIP Facility to ensure that ACI has sufficient liquidity to complete its restructuring.

31 On the other hand, the reasonableness of the amount of the ULC DIP Facility is supported by the following facts:

a) Only about CDN\$168 million of incremental liquidity is being provided and post-transaction, the Abitibi Petitioners will have, at best, about CDN\$335 million of liquidity (Monitor's 19th Report at paragraph 68);

b) The Bowater Petitioners, a group of the same approximate size as the Abitibi Petitioners, enjoy liquidity of approximately US\$400 million (Monitor's 19th Report at paragraph 69) and a DIP facility of approximately US \$200 million;

c) Even with the ULC DIP Facility, the Abitibi Petitioners will be at the low end of average relative to their peers in terms of available liquidity relative to their size;

d) The cash flow of the Abitibi Petitioners is subject to significant intra-month variations and has risks associated with pricing and currency fluctuations which are larger the longer the period examined; and

e) The Abitibi Petitioners are required by the Securitization Facility to maintain liquidity on a rolling basis above US\$100 million.

32 In addition, the Court and the stakeholders have all the means necessary at their disposal to monitor the use of liquidity without, at the same time, having to ration its access at a level far below that enjoyed by the peers with whom the Abitibi Petitioners compete.

33 In this regard, it is important to emphasize that the ULC DIP Facility includes, after all, particularly interesting conditions in terms of interest payments and associated fees. Because ULC is the lender, none are payable.

34 Finally, the provisions of section 11.2 of the amended *CCAA*, and in particular the factors for review listed in subsection 11.2(4), are instructive guidelines to the exercise of the Court's discretion to approve the ULC DIP Facility.

35 Pursuant to subsection 11.2(4) of the amended *CCAA*, for restructurings undertaken after September 18, 2009, the judge is now directed to consider the following factors in determining whether to exercise his or her discretion to make an order such as this one:

- a) The period during which the company is expected to be subject to *CCAA* proceedings;
- b) How the company's business and financial affairs are to be managed during the proceedings;
- c) Whether the company's management has the confidence of its major creditors;
- d) Whether the loan would enhance the prospects of a viable compromise or arrangement being made;
- e) The nature and value of the company's property;
- f) Whether any creditor would be materially prejudiced as a result of the security or charge; and
- g) The Monitor's report.

36 Applying these criteria to this case, it is, first, premature to speculate how long the Abitibi Petitioners will remain subject to proceedings under the *CCAA*.

37 The Monitor's 19th Report has considered cash flow forecasts until December 2010. The Abitibi Petitioners are hopeful of progressing to a plan outline by year-end with a view to emergence in the first or second quarter of 2010.

38 In considering a DIP financing proposal, the Court can take note of the fact that the time and energies ought, at this stage in the proceedings, to be more usefully and profitably devoted to completing the business restructuring, raising the necessary exit financing and negotiating an appropriate restructuring plan with the stakeholders.

39 Second, even if the ULC DIP Facility of CDN\$230 million is a high, albeit reasonable, figure under the circumstances, access to the funds and use of the funds remain closely monitored.

40 Based on the compromise reached with the Term Lenders, access to the funds will be progressive and subject to control. The initial draw is limited to CDN\$130 million. Subsequent additional draws up to CDN\$50 million will be in maximum increments of CDN\$25 million and subject to prior notice. The final CDN\$50 million will only be available with the Court's approval.

41 As well, the use of the funds is subject to considerable safeguards as to the interests of all stakeholders. These include the following:

- a) The Monitor is on site monitoring and reviewing cash flow sources and uses in real time with full access to senior management, stakeholders and the Court;
- b) Stakeholders have very close to real time access to financial information regarding sources and use of cash flow by reason of the weekly cash flow forecasts provided to their financial advisors and the weekly calls with such financial advisors, participated in by senior management;

c) The Monitor provides regular reporting to the Court including as to the tracking of variances in cash use relative to forecast and as to evolution of the business environment in which the Abitibi Petitioners are operating; and

d) All stakeholders have full access to this Court to bring such motions as they see fit should a material adverse change in the business or affairs intervene.

42 Third, there has been no suggestion that the management of the Abitibi Petitioners has lost the confidence of its major creditors. To the contrary:

a) Management has successfully negotiated a settlement of very complex and thorny issues with both the Term Lenders and the SSNs, which has enabled this ULC DIP Motion to be brought forward with their support;

b) While management does not agree with all positions taken by the Bondholders at all times, it has by and large enjoyed the support of that group throughout these proceedings;

c) Management has been attentive to the suggestions and guidance of the Monitor with the result that there have been few if any instances where the Monitor has been publicly obliged to oppose or take issue with steps taken;

d) Management has been proactive in hiring a Chief Restructuring Officer who has provided management with additional depth and strength in navigating through difficult circumstances; and

e) The Abitibi Petitioners' management conducts regular meetings with the financial advisors of their major stakeholders, in addition to having an "open door" policy.

43 The Court is satisfied that, in requesting the approval of the ULC DIP Facility, management is doing so with a broad measure of support and the confidence of its major creditor constituencies.

44 Fourth, with an adequate level of liquidity, the Abitibi Petitioners will be able to run their business as a going concern on as normal a basis as possible, with a view to enhancing and preserving its value while the restructuring process proceeds.

45 By facilitating a level of financial support that is reasonable and adequate and of sufficient duration to enable them to complete the restructuring on most reasonable assumptions, the Abitibi Petitioners will have the benefit of an umbrella of stability around their core business operations.

46 In the Court's opinion, this can only facilitate the prospects of a viable compromise or arrangement being found.

47 Fifth, there are only two secured creditor groups of the Abitibi Petitioners: the SSNs and the Term Lenders. After long and difficult negotiations, they finally agreed to an acceptable wording to the orders sought. No one argues any longer that it is prejudiced in any way by the proposed security or charge.

48 Lastly, sixth, the Monitor has carefully considered the positions of all of the stakeholders as well as the reasonableness of the Abitibi Petitioners' requirements for the proposed ULC DIP Facility. Having reviewed both the impact of the proposed ULC DIP Facility on stakeholders and its beneficial impact upon the Abitibi Petitioners, the Monitor recommends approval of the ULC DIP Facility.

49 On the whole, in approving this ULC DIP Facility, the Court supports the very large consensus reached and the fine balance achieved between the interests of all stakeholders involved.

2) The Distribution to the SSNs

50 The approval of the terms of the ULC DIP Facility by the SSNs is intertwined with the Abitibi Petitioners' agreement to support a distribution in their favor in the amount of CDN\$200 million.

51 The Abitibi Petitioners and the SSNs consider that since the MPCo proceeds were and are subject to the security of the SSNs, this arrangement or compromise is a reasonable one under the circumstances.

52 They submit that the proposed distribution will be of substantial benefit to the Abitibi Petitioners. Savings of at least CDN\$27.4 million per year in accruing interest costs on the CDN\$200 million to be distributed will be realized based on the 13.75% interest rate payable to the SSNs.

53 Needless to say, they maintain that the costs saved will add to the potential surplus value of SSNs' collateral that could be utilized to compensate any creditor whose security may be impaired in the future in repaying the ULC DIP Facility.

54 The Bondholders oppose the CDN\$200 million distribution to the SSNs.

55 In their view, given the Abitibi Petitioners' need for liquidity, the proposed payment of substantial proceeds to one group of creditors raises important issues of both propriety and timing. It also brings into focus the need for the *CCAA* process to move forward efficiently and effectively towards the goal of the timely negotiation and implementation of a plan of arrangement.

56 The Bondholders claim that the proposed distribution violates the *CCAA*. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.

57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.

58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

59 In the interim, they suggest that the Abitibi Petitioners should provide a business plan to their legal and financial advisors by no later than 5:00 p.m. on November 27, 2009. They submit that a restructuring and recapitalization term sheet on terms acceptable to them and their legal and financial advisors should also be provided by no later than 5:00 p.m. on December 11, 2009.

60 With all due respect for the views expressed by the Bondholders, the Court considers that, similarly to the ULC DIP Facility, the proposed distribution should be authorized.

61 To begin with, the position of the Bondholders is, under the circumstances, untenable. While they support the CDN\$230 million ULC DIP Facility, they still contest the CDN\$200 million proposed distribution that is directly linked to the latter.

62 The Court does not have the luxury of picking and choosing here. What is being submitted for approval is a global solution. The compromise reached must be considered as a whole. The access to additional liquidity is possible because of the corresponding distribution to the SSNs. The amounts available for both the ULC DIP Facility and the proposed distribution come from the same MPCo sale transaction.

63 The compromise negotiated in this respect, albeit imperfect, remains the best available and viable solution to deal with the liquidity requirements of the Abitibi Petitioners. It follows a process and negotiations where the views and interests of most interested parties have been canvassed and considered.

64 To get such diverse interest groups as the Abitibi Petitioners, the SSNs, the Term Lenders, BMO and IQ, and ULC and Alcoa to agree on an acceptable outcome is certainly not an easy task to achieve. Without surprise, it comes with certain concessions.

65 It would be very dangerous, if not reckless, for the Court to put in jeopardy the ULC DIP Facility agreed upon by most stakeholders on the basis that, perhaps, a better arrangement could eventually be reached in terms of distribution of proceeds that, on their face, appear to belong to the SSNs.

66 The Court is satisfied that both aspects of the ULC DIP Motion are closely connected and should be approved together. To conclude otherwise would potentially put everything at risk, at a time where stability is most required.

67 Secondly, it remains that ACCC's interest in MPCo is subject to the SSNs' security. As such, all proceeds of the sale less adjustments, holdbacks and reserves should normally be paid to the SSNs. Despite this, provided they receive the CDN\$200 million proposed distribution, the SSNs have consented to the sale proceeds being used by the Abitibi Petitioners to pay the existing ACI DIP Facility and to the ULC Reserve being used up to CDN\$230M for the ULC DIP Facility funding.

68 It is thus fair to say that the SSNs are not depriving the Abitibi Petitioners of liquidity; they are funding part of the restructuring with their collateral and, in the end, enhancing this liquidity.

69 The net proceeds of the MPCo transaction after payment of the ACI DIP Facility are expected to be CDN\$173.9 million. Accordingly, out of a CDN\$200 million distribution to the SSNs, only CDN\$26.1 million could technically be said to come from the ULC DIP Facility. Contrary to what the Bondholders alluded to, if minor aspects of the claims of the SSNs are disputed by the Abitibi Petitioners, they do not concern the CDN\$200 million at issue.

70 Thirdly, the ULC DIP Facility bears no interest and is not subject to drawdown fees, while a distribution of CDN\$200 million to the SSNs will create at the same time interest savings of approximately CDN\$27 million per year for the ACI Group. There is, as a result, a definite economic benefit to the contemplated distribution for the global restructuring process.

71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada⁷.

72 While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present CCAA reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

73 In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN\$200 million.

74 In *Windsor Machine & Stamping Ltd. (Re)*,⁸ Morawetz J. dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.

75 Finally, even though the Monitor makes no recommendation in respect of the proposed distribution to the SSNs, this can hardly be viewed as an objection on its part. In the first place, this is not an issue upon which the Monitor is expected to opine. Besides, in its 19th report, the Monitor notes the following in that regard:

- a) According to its Counsel, the SSNs security on the ACCC's 60% interest in MPCo is valid and enforceable;
- b) The amounts owed to the SSNs far exceed the contemplated distribution while the SSNs' collateral is sufficient for the SSNs' claim to be most likely paid in full;
- c) The proposed distribution entails an economy of CDN\$27 million per year in interest savings; and
- d) Even taking into consideration the CDN\$200 million proposed distribution, the ULC DIP Facility provides the Abitibi Petitioners with the liquidity they require for most of the coming year.

76 All things considered, the Court disagrees with the Bondholders' assertion that the proposed distribution is against the goals and objectives of the *CCAA*. For some, it may only be a small step. However, it is a definite step in the right direction.

77 Securing the most needed liquidity at issue here and reducing substantially the extent of the liabilities towards a key secured creditor group no doubt enhances the chances of a successful restructuring while bringing stability to the on-going business.

78 This benefits a large community of interests that goes beyond the sole SSNs.

79 From that standpoint, the Court is satisfied that the restructuring is moving forward properly, with reasonable diligence and in accordance with the *CCAA* ultimate goals.

80 Abitibi Petitioners' firm intention, reiterated at the hearing, to shortly provide their stakeholders with a business plan and a restructuring and recapitalization term sheet confirms it as well.

3) *The Orders Sought*

81 In closing, the precise wording of the orders sought has been negotiated at length between Counsel. It is the result of a difficult compromise reached between many different parties, each trying to protect distinct interests.

82 Nonetheless, despite their best efforts, this wording certainly appears quite convoluted in some cases, to say the least. The proposed amendment to the subrogation provision of the Second Amended Initial Order is a vivid example. Still, the mechanism agreed upon, however complicated it might appear to some, remains acceptable to all affected creditors.

83 The delicate consensus reached in this respect must not be discarded lightly. In view of the role of the Court in *CCAA* proceedings, that is, one of judicial oversight, the orders sought will thus be granted as amended, save for limited exceptions. To avoid potential misunderstandings, the Court felt necessary to slightly correct the specific wording of some conclusions. The orders granted reflect this.

84 Turning to the conclusions proposed by the Bondholders at paragraphs 8 to 11 of the draft amended order (now paragraphs 6 to 9 of this Order), the Court considers them useful and appropriate. They assist somehow in bringing into focus the need for this *CCAA* process to continue to move forward efficiently.

85 Minor adjustments to some of the wording are, however, required in order to give the Abitibi Petitioners some flexibility in terms of compliance with the ULC DIP documents and cash flow forecast.

86 For the expected upcoming filing by the Abitibi Petitioners of their business plan and restructuring and recapitalization term sheet, the Court concludes that simply giving act to their stated intention is sufficient at this stage.

The deadlines indicated correspond to the date agreed upon by the parties for the business plan and to the expected renewal date of the Initial Order for the restructuring and recapitalization term sheet.

FOR THESE REASONS, THE COURT:

ORDERS the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

ULC DIP Financing

1 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to enter into, obtain and borrow under a credit facility provided pursuant to a loan agreement (the "*ULC DIP Agreement*") among ACI, as borrower, and 3239432 Nova Scotia Company, an unlimited liability company ("*ULC*"), as lender (the "*ULC DIP Lender*"), to be approved by Alcoa acting reasonably, which terms will be consistent with the ULC DIP Term Sheet communicated as *Exhibit R-1* in support of the ULC DIP Motion, subject to such non-material amendments and modifications as the parties may agree with a copy thereof being provided in advance to the Monitor and to modifications required by Alcoa, acting reasonably, which credit facility shall be in an aggregate principal amount outstanding at any time not exceeding \$230 million.

2 *ORDERS* that the credit facility provided pursuant to the ULC DIP Agreement (the "*ULC DIP*") will be subject to the following draw conditions:

- a) a first draw of \$130 million to be advanced at closing;
- b) subsequent draws for a maximum total amount of \$50 million in increments of up to \$25 million to be advanced upon a five (5) business day notice and in accordance with paragraph 61.11 of the Second Amended Initial Order which shall apply mutatis mutandis to advances under the ULC DIP; and
- c) the balance of \$50 million shall become available upon further order of the Court.

At the request of the Borrower, all undrawn amounts under the ULC DIP shall either (i) be transferred to the Monitor to be held in an interest bearing account for the benefit of the Borrower providing that any requests for advances thereafter shall continue to be made and processed in accordance herewith as if the transfer had not occurred, or (ii) be invested by ULC in an interest bearing account with all interest earned thereon being for the benefit of and remitted to the Borrower forthwith following receipt thereof.

3 *ORDERS* the Petitioners to communicate a draft of the substantially final ULC DIP Agreement (the "*Draft ULC DIP Agreement*") to the Monitor and to any party listed on the Service List which requests a copy of same (an "*Interested Party*") no later than five (5) days prior to the anticipated closing of the MPCo Transaction, as said term is defined in the ULC DIP Motion.

4 *ORDERS* that any Interested Party who objects to any provisions of the Draft ULC DIP Agreement as not being substantially in accordance with the terms of the ULC DIP Term Sheet, Exhibit R-1, or objectionable for any other reason, shall, before the close of business of the day following delivery of the Draft ULC DIP Agreement, make a request for a hearing before this Court stating the grounds upon which such objection is based, failing which the Draft ULC DIP Agreement shall be considered to conform to the ULC DIP Term Sheet and shall be deemed to constitute the ULC DIP Agreement for the purposes of this Order.

5 *ORDERS* that the Abitibi Petitioners are hereby authorized and empowered to execute and deliver the ULC DIP Agreement, subject to the terms of this Order and the approval of Alcoa, acting reasonably, as well as such commitment letters, fee letters, credit agreements, mortgages, charges, hypothecs and security documents, guarantees, mandate and other definitive documents (collectively with the ULC DIP Agreement, the "*ULC DIP Documents*"), as are contemplated by the ULC DIP Agreement or as may be reasonably required by the ULC DIP Lender pursuant to the terms thereof, and the Abitibi Petitioners are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees,

liabilities and obligations to the ULC DIP Lender under and pursuant to the ULC DIP Documents as and when same become due and are to be performed, notwithstanding any other provision of this Order.

6 *ORDERS* that the Abitibi Petitioners shall substantially comply with the terms and conditions set forth in the ULC DIP Documents and the 13-week cash flow forecast (the "Budget") provided to the financial advisors of the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party.

7 *ORDERS* that, in accordance with the terms and conditions of the ULC DIP Documents, the Abitibi Petitioners shall use the proceeds of the ULC DIP substantially in compliance with the Budget, that the Monitor shall monitor the ongoing disbursements of the Abitibi Petitioners under the Budget, and that the Monitor shall forthwith advise the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party of the Monitor's understanding of any pending or anticipated substantial non-compliance with the Budget and/or any other pending or anticipated event of default or termination event under any of the ULC DIP Documents.

8 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a business plan to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on November 27, 2009.

9 *GIVES ACT* to the Abitibi Petitioners of their stated intention to provide a restructuring and recapitalization term sheet (the "Recapitalization Term Sheet") to the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party by no later than 5:00 p.m. on December 15, 2009.

10 *ORDERS* that, notwithstanding any other provision of this Order, the Abitibi Petitioners shall pay to the ULC DIP Lender when due all amounts owing (including principal, interest, fees and expenses, including without limitation, all fees and disbursements of counsel and all other advisers to or agents of the ULC DIP Lender on a full indemnity basis (the "*ULC DIP Expenses*") under the ULC DIP Documents and shall perform all of their other obligations to the ULC DIP Lender pursuant to the ULC DIP Documents and this Order.

11 *ORDERS* that the claims of the ULC DIP Lender pursuant to the ULC DIP Documents shall not be compromised or arranged pursuant to the Plan or these proceedings and the ULC DIP Lender, in such capacity, shall be treated as an unaffected creditor in these proceedings and in any Plan or any proposal filed by any Abitibi Petitioner under the *BIA*.

12 *ORDERS* that the ULC DIP Lender may, notwithstanding any other provision of this Order or the Initial Order:

a) take such steps from time to time as it may deem necessary or appropriate to register, record or perfect the ACI DIP Charge and the ULC DIP Documents in all jurisdictions where it deems it to be appropriate; and

b) upon the occurrence of a Termination Event (as each such term is defined in the ULC DIP Documents), refuse to make any advance to the Abitibi Petitioners and terminate, reduce or restrict any further commitment to the Abitibi Petitioners to the extent any such commitment remains, set off or consolidate any amounts owing by the ULC DIP Lender to the Abitibi Petitioners against any obligation of the Abitibi Petitioners to the ULC DIP Lender, make demand, accelerate payment or give other similar notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Abitibi Petitioners and for the appointment of a trustee in bankruptcy of the Abitibi Petitioners, and upon the occurrence of an event of default under the terms of the ULC DIP Documents, the ULC DIP Lender shall be entitled to apply to the Court to seize and retain proceeds from the sale of any of the Property of the Abitibi Petitioners and the cash flow of the Abitibi Petitioners to repay amounts owing to the ULC DIP Lender in accordance with the ULC DIP Documents and the ACI DIP Charge.

13 *ORDERS* that the foregoing rights and remedies of the ULC DIP Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Abitibi Petitioners or the Property of the Abitibi Petitioners, the whole in accordance with and to the extent provided in the ULC DIP Documents.

14 *ORDERS* that the ULC DIP Lender shall not take any enforcement steps under the ULC DIP Documents or the ACI DIP Charge without providing five (5) business day (the "*Notice Period*") written enforcement notice of a default thereunder to the Abitibi Petitioners, the Monitor, the Senior Secured Noteholders, Alcoa, the Notice Parties (as defined in the Second Amended Initial Order) and any Interested Party. Upon expiry of such Notice Period, and notwithstanding any stay of proceedings provided herein, the ULC DIP Lender shall be entitled to take any and all steps and exercise all rights and remedies provided for under the ULC DIP Documents and the ACI DIP Charge and otherwise permitted at law, the whole in accordance with applicable provincial laws, but without having to send any notices under Section 244 of the *BIA*. For greater certainty, the ULC DIP Lender may issue a prior notice pursuant to Article 2757 *CCQ* concurrently with the written enforcement notice of a default mentioned above.

15 *ORDERS* that, subject to further order of this Court, no order shall be made varying, rescinding, or otherwise affecting paragraphs 61.1 to 61.9 of the Initial Order, the approval of the ULC DIP Documents or the ACI DIP Charge unless either (a) notice of a motion for such order is served on the Petitioners, the Monitor, Alcoa, the Senior Secured Noteholders and the ULC DIP Lender by the moving party and returnable within seven (7) days after the party was provided with notice of this Order in accordance with paragraph 70(a) hereof or (b) each of the ULC DIP Lender and Alcoa applies for or consents to such order.

16 *ORDERS* that 3239432 Nova Scotia Company is authorized to assign its interest in the ULC DIP to Alcoa pursuant to the security agreements and guarantees to be granted pursuant to the Implementation Agreement and this Court's Order dated September 29, 2009.

17 *AMENDS* the Initial Order issued by this Court on April 17, 2009 (as amended and restated) by adding the following at the end of paragraph 61.3:

ORDERS further, that from and after the date of closing of the MPCo Transaction (as said term is defined in the Petitioners' ULC DIP Motion dated November 9, 2009) and provided the principal, interest and costs under the ACI DIP Agreement (as defined in the Order of this Court dated May 6, 2009), are concurrently paid in full, the ACI DIP Charge shall be increased by the aggregate amount of \$230 million (subject to the same limitations provided in the first sentence hereof in relation to the Replacement Securitization Facility) and shall be extended by a movable and immovable hypothec, mortgage, lien and security interest on all property of the Abitibi Petitioners (other than the property of Abitibi Consolidated (U.K.) Inc.) in favour of the ULC DIP Lender for all amounts owing, including principal, interest and ULC DIP Expenses and all obligations required to be performed under or in connection with the ULC DIP Documents. The ACI DIP Charge as so increased shall continue to have the priority established by paragraphs 89 and 91 hereof provided such increased ACI DIP Charge (being the portion of the ACI DIP Charge in favour of the ULC DIP Lender) shall in all respects be subordinate (i) to the subrogation rights in favour of the Senior Secured Noteholders arising from the repayment of the ACI DIP Lender from the proceeds of the sale of the MPCo transaction as approved by this Court in its Order of September 29, 2009 and as confirmed by paragraph 11 of that Order, notwithstanding the amendment of paragraph 61.10 of this Order by the subsequent Order dated November 16, 2009, as well as the further subrogation rights, if any, in favour of the Term Lenders; and (ii) rights in favour of the Term Lenders arising from the use of cash for the payment of interest fees and accessories as determined by the Monitor. No order shall have the effect of varying or amending the priority of the ACI DIP Charge and the interest of the ULC DIP Lender therein without the consent of the Senior Secured Noteholders and Alcoa. The terms "ULC DIP Lender", "ULC DIP Documents", "ULC DIP Expenses", "Senior Secured Noteholders" and "Alcoa" shall be as defined in the Order of this Court dated November 16, 2009. Notwithstanding the subrogation rights created or confirmed herein, in no event shall the ULC DIP Lender be subordinated to more than approximately \$40 million, being the aggregate of the proceeds of the MPCo Transaction paid to the ACI DIP Lender plus the interest, fees and expenses paid to the ACI DIP Lender as determined by the Monitor.

ACI DIP Agreement

18 *ORDERS* that the Abitibi Petitioners are hereby authorized to make, execute and deliver one or more amendment agreements in connection with the ACI DIP Agreement providing for (i) an extension of the period during which any undrawn portion of the credit facility provided pursuant to the ACI DIP Agreement shall be available and (ii) the modification of the date upon which such credit facility must be repaid from November 1, 2009 to the earlier of the closing of the MPCo Transaction and December 15, 2009, subject to the terms and conditions set forth in the ACI DIP Agreement, save and except for non-material amendments.

Senior Secured Notes Distribution

19 *ORDERS* that the Abitibi Petitioners are authorized and directed to make a distribution to the Trustee of the Senior Secured Notes in the amount of \$200 million upon completion of the MPCo Transaction (as said term is defined in the ULC DIP Motion) from the proceeds of such sale and of the ULC DIP Facility, providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction.

20 *ORDERS* that, subject to completion of the ULC DIP (including the initial draw of \$130 million thereunder) and providing always that the ACI DIP is repaid in full upon completion of the MPCo Transaction, the distribution referred to in the preceding paragraph and the flow of funds upon completion of the MPCo Transaction and the ULC DIP shall be arranged in accordance with the following principles: (a) MPCo Proceeds shall be used, first, to fund the distribution to the Senior Secured Notes referenced in the previous paragraph and, secondly, to fund the repayment of the ACI DIP; (b) the initial draw of \$130 million made under the ULC DIP shall fund any remaining balance due to repay in full the ACI DIP and this, upon completion of the MPCo Transaction. The Monitor shall be authorized to review the completion of the MPCo Transaction, the ULC DIP and the repayment of the ACI DIP and shall report to the Court regarding compliance with this provision as it deems necessary.

Amendment to the Subrogation Provision

21 *ORDERS* that Subsection 61.10 of the Initial Order, as amended and restated, is replaced by the following:

Subrogation to ACI DIP Charge

[61.10] *ORDERS* that the holders of Secured Notes, the Lenders under the Term Loan Facility (collectively, the "**Secured Creditors**") and McBurney Corporation, McBurney Power Limited and MBB Power Services Inc. (collectively, the "**Lien Holder**") that hold security over assets that are subject to the ACI DIP Charge and that, as of the Effective Time, was opposable to third parties (including a trustee in bankruptcy) in accordance with the law applicable to such security (an "**Impaired Secured Creditor**" and "**Existing Security**", respectively) shall be subrogated to the ACI DIP Charge to the extent of the lesser of (i) any net proceeds from the Existing Security including from the sale or other disposition of assets, resulting from the collection of accounts receivable or other claims (other than Property subject to the Securitization Program Agreements and for greater certainty, but without limiting the generality of the foregoing, the ACI DIP Charge shall in no circumstances extend to any assets sold pursuant to the Securitization Program Agreements, any Replacement Securitization Facility or any assets of ACUSFC, the term "Replacement Securitization Facility" having the meaning ascribed to same in Schedule A of the ACI DIP Agreement) and/or cash that is subject to the Existing Security of such Impaired Secured Creditor that is used directly to pay (a) the ACI DIP Lender or (b) another Impaired Secured Creditor (including by any means of realization) on account of principal, interest or costs, in whole or in part, as determined by the Monitor (subject to adjudication by the Court in the event of any dispute) and (ii) the unpaid amounts due and/or becoming due and/or owing to such Impaired Secured Creditor that are secured by its Existing Security. For this purpose "**ACI DIP Lender**" shall be read to include Bank of Montreal, IQ, the ULC DIP Lender and their successors and assigns, including any lender or lenders providing replacement DIP financing should same be approved by subsequent order of this Court. No Impaired Secured Creditor shall be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the ACI DIP

Lender have been paid in full and providing that all rights of subrogation hereunder shall be postponed to the right of subrogation of IQ under the IQ Guarantee Offer, and, for greater certainty, no subrogee shall have any rights over or in respect of the IQ Guarantee Offer. In the event that, following the repayment in full of the ACI DIP Lender in circumstances where that payment is made, wholly or in part, from net proceeds of the Existing Security of an Impaired Secured Creditor (the "**First Impaired Secured Creditor**"), such Impaired Secured Creditor enforces its right of subrogation to the ACI DIP Charge and realizes net proceeds from the Existing Security of another Impaired Secured Creditor (the "**Second Impaired Secured Creditor**"), the Second Impaired Secured Creditor shall not be able to enforce its right of subrogation to the ACI DIP Charge until all obligations to the First Impaired Secured Creditor have been paid in full. In the event that more than one Impaired Secured Creditor is subrogated to the ACI DIP Charge as a result of a payment to the ACI DIP Lender, such Impaired Secured Creditors shall rank *pari passu* as subrogees, rateably in accordance with the extent to which each of them is subrogated to the ACI DIP Charge. The allocation of the burden of the ACI DIP Charge amongst the assets and creditors shall be determined by subsequent application to the Court if necessary.

[21.1] **DECLARES** that for the purposes of paragraphs 1, 5, 10, 12, 13, 17 and 18 of the present Order, the term "Abitibi Petitioners" shall not include Abitibi-Consolidated (U.K.) Inc. added to the schedule of Abitibi Petitioners by Order of this Court on November 10, 2009;

22 **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.

23 **WITHOUT COSTS.**

Schedule "A" — Abitibi Petitioners

1. *ABITIBI-CONSOLIDATED INC.*
2. *ABITIBI-CONSOLIDATED COMPANY OF CANADA*
3. *3224112 NOVA SCOTIA LIMITED*
4. *MARKETING DONOHUE INC.*
5. *ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.*
6. *3834328 CANADA INC.*
7. *6169678 CANADA INC.*
8. *4042140 CANADA INC.*
9. *DONOHUE RECYCLING INC.*
10. *1508756 ONTARIO INC.*
11. *3217925 NOVA SCOTIA COMPANY*
12. *LA TUQUE FOREST PRODUCTS INC.*
13. *ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED*
14. *SAGUENAY FOREST PRODUCTS INC.*

15. *TERRA NOVA EXPLORATIONS LTD.*
16. *THE JONQUIERE PULP COMPANY*
17. *THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY*
18. *SCRAMBLE MINING LTD.*
19. *9150-3383 QUÉBEC INC.*
20. *ABITIBI-CONSOLIDATED (U.K.) INC.*

Schedule "B" — Bowater Petitioners

1. *BOWATER CANADIAN HOLDINGS INC.*
2. *BOWATER CANADA FINANCE CORPORATION*
3. *BOWATER CANADIAN LIMITED*
4. *3231378 NOVA SCOTIA COMPANY*
5. *ABITIBIBOWATER CANADA INC.*
6. *BOWATER CANADA TREASURY CORPORATION*
7. *BOWATER CANADIAN FOREST PRODUCTS INC.*
8. *BOWATER SHELBURNE CORPORATION*
9. *BOWATER LAHAVE CORPORATION*
10. *ST-MAURICE RIVER DRIVE COMPANY LIMITED*
11. *BOWATER TREATED WOOD INC.*
12. *CANEXEL HARDBOARD INC.*
13. *9068-9050 QUÉBEC INC.*
14. *ALLIANCE FOREST PRODUCTS (2001) INC.*
15. *BOWATER BELLEDUNE SAWMILL INC.*
16. *BOWATER MARITIMES INC.*
17. *BOWATER MITIS INC.*
18. *BOWATER GUÉRETTE INC.*
19. *BOWATER COUTURIER INC.*

Schedule "C" — 18.6 CCAA Petitioners

1. *ABITIBIBOWATER INC.*

2. *ABITIBIBOWATER US HOLDING I CORP.*
3. *BOWATER VENTURES INC.*
4. *BOWATER INCORPORATED*
5. *BOWATER NUWAY INC.*
6. *BOWATER NUWAY MID-STATES INC.*
7. *CATAWBA PROPERTY HOLDINGS LLC*
8. *BOWATER FINANCE COMPANY INC.*
9. *BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED*
10. *BOWATER AMERICA INC.*
11. *LAKE SUPERIOR FOREST PRODUCTS INC.*
12. *BOWATER NEWSPRINT SOUTH LLC*
13. *BOWATER NEWSPRINT SOUTH OPERATIONS LLC*
14. *BOWATER FINANCE II, LLC*
15. *BOWATER ALABAMA LLC*
16. *COOSA PINES GOLF CLUB HOLDINGS LLC*

Footnotes

- 1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA").
- 2 In this Judgment, all capitalized terms not otherwise defined have the meaning ascribed thereto in either: 1) the *Second Amended Initial Order* issued by the Court on May 6, 2009; 2) the *Motion for the Distribution by the Monitor of Certain Proceeds of the MPCo Sale Transaction to U.S. Bank National Association, Indenture and Collateral Trustee for the Senior Secured Noteholders* (the "*Distribution Motion*") of the Ad Hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes (respectively, the "*Committee*" and "*Trustee*", collectively the "*SSNs*") dated October 6, 2009; or 3) the *Abitibi Petitioners' Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes (the 'ULC DIP Motion')* dated November 9, 2009.
- 3 *Re-Amended Motion for the Approval of a Second DIP Financing in Respect of the Abitibi Petitioners and for the Distribution of Certain Proceeds of the MPCo Sale Transaction to the Trustee for the Senior Secured Notes* dated November 9, 2009 (the "*ULC DIP Motion*").
- 4 See Monitor's 19th Report dated October 27, 2009.
- 5 See Monitor's 19th Report dated October 27, 2009.
- 6 See Monitor's 19th Report dated October 27, 2009.

- 7 See *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.); *Re Rol-Land Farms Limited* (October 5, 2009), Toronto 08-CL-7889 (Ont. Sup. Ct.); and *Re Pangeo Pharma Inc.*, (August 14, 2003), Montreal 500-11-021037-037 (Que. Sup. Ct.).
- 8 *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Ont. Sup. Ct.).

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TAB7

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° 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 minimale 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 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

JACOBUCCI 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. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. 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. c. 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(1b), 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 JACOBUCCI —

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

issues of when, and under what circumstances, a confidentiality order should be granted.

For the following reasons, I would issue the confidentiality order sought and accordingly would allow the appeal.

II. Facts

The appellant, Atomic Energy of Canada Limited ("AECL") is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

In the course of the application by Sierra Club to set aside the funding arrangements, the appellant

pourvoi soulève les importantes questions de savoir à quel moment et dans quelles circonstances il y a lieu de rendre une ordonnance de confidentialité.

Pour les motifs qui suivent, je suis d'avis de rendre l'ordonnance de confidentialité demandée et par conséquent d'accueillir le pourvoi.

II. Les faits

L'appelante, Énergie atomique du Canada Limitée (« ÉACL »), société d'État propriétaire et vendeuse de la technologie nucléaire CANDU, est une intervenante ayant reçu les droits de partie dans la demande de contrôle judiciaire présentée par l'intimé, Sierra Club du Canada (« Sierra Club »), un organisme environnemental. Sierra Club demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière, sous forme de garantie d'emprunt de 1,5 milliard de dollars, pour la construction et la vente à la Chine de deux réacteurs nucléaires CANDU par l'appelante. Les réacteurs sont actuellement en construction en Chine, où l'appelante est entrepreneur principal et gestionnaire de projet.

L'intimé soutient que l'autorisation d'aide financière du gouvernement déclenche l'application de l'al. 5(1)(b) de la *Loi canadienne sur l'évaluation environnementale*, L.C. 1992, ch. 37 (« LCÉE »), qui exige une évaluation environnementale avant qu'une autorité fédérale puisse fournir une aide financière à un projet. Le défaut d'évaluation entraîne l'annulation des ententes financières.

Selon l'appelante et les ministres intimés, la LCÉE ne s'applique pas à la convention de prêt et si elle s'y applique, ils peuvent invoquer les défenses prévues aux art. 8 et 54 de cette loi. L'article 8 prévoit les circonstances dans lesquelles les sociétés d'État sont tenues de procéder à des évaluations environnementales. Le paragraphe 54(2) reconnaît la validité des évaluations environnementales effectuées par des autorités étrangères pourvu qu'elles soient compatibles avec les dispositions de la LCÉE.

Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l'appelante a

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filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Mr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under Rule 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

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Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

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The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

déposé un affidavit de M. Simon Pang, un de ses cadres supérieurs. Dans l'affidavit, M. Pang mentionne et résume certains documents (les « documents confidentiels ») qui sont également mentionnés dans un affidavit de M. Feng, un expert d'ÉACL. Avant de contre-interroger M. Pang sur son affidavit, Sierra Club a demandé par requête la production des documents confidentiels, au motif qu'il ne pouvait vérifier la validité de sa déposition sans consulter les documents de base. L'appelante s'oppose pour plusieurs raisons à la production des documents, dont le fait qu'ils sont la propriété des autorités chinoises et qu'elle n'est pas autorisée à les divulguer. Après avoir obtenu des autorités chinoises l'autorisation de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, l'appelante a cherché à les produire en invoquant la règle 312 des *Règles de la Cour fédérale (1998)*, DORS/98-106, et a demandé une ordonnance de confidentialité à leur égard.

Aux termes de l'ordonnance demandée, seules les parties et la cour auraient accès aux documents confidentiels. Aucune restriction ne serait imposée à l'accès du public aux débats. On demande essentiellement d'empêcher la diffusion des documents confidentiels au public.

Les documents confidentiels comprennent deux Rapports d'impact environnemental (« RIE ») sur le site et la construction, un Rapport préliminaire d'analyse sur la sécurité (« RPAS ») ainsi que l'affidavit supplémentaire de M. Pang qui résume le contenu des RIE et du RPAS. S'ils étaient admis, les rapports seraient joints en annexe de l'affidavit supplémentaire de M. Pang. Les RIE ont été préparés en chinois par les autorités chinoises, et le RPAS a été préparé par l'appelante en collaboration avec les responsables chinois du projet. Les documents contiennent une quantité considérable de renseignements techniques et comprennent des milliers de pages. Ils décrivent l'évaluation environnementale du site de construction qui est faite par les autorités chinoises en vertu des lois chinoises.

As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order, otherwise it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Mr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

The Federal Court of Canada, Trial Division refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

III. Relevant Statutory Provisions

Federal Court Rules, 1998, SOR/98-106

151. (1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

IV. Judgments Below

A. *Federal Court, Trial Division, [2000] 2 F.C. 400*

Pelletier J. first considered whether leave should be granted pursuant to Rule 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondent would be prejudiced by delay, but since both parties had brought

Comme je le note plus haut, l'appelante prétend ne pas pouvoir produire les documents confidentiels en preuve sans qu'ils soient protégés par une ordonnance de confidentialité, parce que ce serait un manquement à ses obligations envers les autorités chinoises. L'intimé soutient pour sa part que son droit de contre-interroger M. Pang et M. Feng sur leurs affidavits serait pratiquement futile en l'absence des documents auxquels ils se réfèrent. Sierra Club entend soutenir que le juge saisi de la demande de contrôle judiciaire devrait donc leur accorder peu de poids.

La Section de première instance de la Cour fédérale du Canada a rejeté la demande d'ordonnance de confidentialité et la Cour d'appel fédérale, à la majorité, a rejeté l'appel. Le juge Robertson, dissident, était d'avis d'accorder l'ordonnance.

III. Dispositions législatives

Règles de la Cour fédérale (1998), DORS/98-106

151. (1) La Cour peut, sur requête, ordonner que des documents ou éléments matériels qui seront déposés soient considérés comme confidentiels.

(2) Avant de rendre une ordonnance en application du paragraphe (1), la Cour doit être convaincue de la nécessité de considérer les documents ou éléments matériels comme confidentiels, étant donné l'intérêt du public à la publicité des débats judiciaires.

IV. Les décisions antérieures

A. *Cour fédérale, Section de première instance, [2000] 2 C.F. 400*

Le juge Pelletier examine d'abord s'il y a lieu, en vertu de la règle 312, d'autoriser la production de l'affidavit supplémentaire de M. Pang auquel sont annexés les documents confidentiels. À son avis, il s'agit d'une question de pertinence et il conclut que les documents se rapportent à la question de la réparation. En l'absence de préjudice pour l'intimé, il y a donc lieu d'autoriser la signification et le dépôt de l'affidavit. Il note que des retards seraient préjudiciables à l'intimé mais que, puisque les deux parties ont présenté des requêtes

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interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the

interlocutoires qui ont entraîné les délais; les avantages de soumettre le dossier au complet à la cour compensent l'inconvénient du retard causé par la présentation de ces documents.

Sur la confidentialité, le juge Pelletier conclut qu'il doit être convaincu que la nécessité de protéger la confidentialité l'emporte sur l'intérêt du public à la publicité des débats judiciaires. Il note que les arguments en faveur de la publicité des débats judiciaires en l'espèce sont importants vu l'intérêt du public envers le rôle du Canada comme vendeur de technologie nucléaire. Il fait aussi remarquer que les ordonnances de confidentialité sont une exception au principe de la publicité des débats judiciaires et ne devraient être accordées que dans des cas de nécessité absolue.

Le juge Pelletier applique le même critère que pour une ordonnance conservatoire en matière de brevets, qui est essentiellement une ordonnance de confidentialité. Pour obtenir l'ordonnance, le requérant doit démontrer qu'il croit subjectivement que les renseignements sont confidentiels et que leur divulgation nuirait à ses intérêts. De plus, si l'ordonnance est contestée, le requérant doit démontrer objectivement qu'elle est nécessaire. Cet élément objectif l'oblige à démontrer que les renseignements ont toujours été traités comme étant confidentiels et qu'il est raisonnable de croire que leur divulgation risque de compromettre ses droits exclusifs, commerciaux et scientifiques.

Ayant conclu qu'il est satisfait à l'élément subjectif et aux deux volets de l'élément objectif du critère, il ajoute : « J'estime toutefois aussi que, dans les affaires de droit public, le critère objectif comporte, ou devrait comporter, un troisième volet, en l'occurrence la question de savoir si l'intérêt du public à l'égard de la divulgation l'emporte sur le préjudice que la divulgation risque de causer à une personne » (par. 23).

Il estime très important le fait qu'il ne s'agit pas en l'espèce de production obligatoire de documents. Le fait que la demande vise le dépôt volontaire de documents en vue d'étayer la thèse de l'appelante,

appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

par opposition à une production obligatoire, joue contre l'ordonnance de confidentialité.

En soupesant l'intérêt du public dans la divulgation et le préjudice que la divulgation risque de causer à ÉACL, le juge Pelletier note que les documents que l'appelante veut soumettre à la cour ont été rédigés par d'autres personnes à d'autres fins, et il reconnaît que l'appelante est tenue de protéger la confidentialité des renseignements. À cette étape, il examine de nouveau la question de la pertinence. Si on réussit à démontrer que les documents sont très importants sur une question cruciale, « les exigences de la justice militent en faveur du prononcé d'une ordonnance de confidentialité. Si les documents ne sont pertinents que d'une façon accessoire, le caractère facultatif de la production milite contre le prononcé de l'ordonnance de confidentialité » (par. 29). Il conclut alors que les documents sont importants pour résoudre la question de la réparation à accorder, elle-même un point important si l'appelante échoue sur la question principale.

Le juge Pelletier considère aussi le contexte de l'affaire et conclut que, puisque la question du rôle du Canada comme vendeur de technologies nucléaires est une importante question d'intérêt public, la charge de justifier une ordonnance de confidentialité est très onéreuse. Il conclut qu'ÉACL pourrait retrancher les éléments délicats des documents ou soumettre à la cour la même preuve sous une autre forme, et maintenir ainsi son droit à une défense complète tout en préservant la publicité des débats judiciaires.

Le juge Pelletier signale qu'il prononce l'ordonnance sans avoir examiné les documents confidentiels puisqu'ils n'ont pas été portés à sa connaissance. Bien qu'il mentionne la jurisprudence indiquant qu'un juge ne devrait pas se prononcer sur une demande d'ordonnance de confidentialité sans avoir examiné les documents eux-mêmes, il estime qu'il n'aurait pas été utile d'examiner les documents, vu leur volume et leur caractère technique, et sans savoir quelle part d'information était déjà dans le domaine public.

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20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

B. *Federal Court of Appeal*, [2000] 4 F.C. 426

(1) Evans J.A. (Sharlow J.A. concurring)

21 At the Federal Court of Appeal, AECL appealed the ruling under Rule 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under Rule 312.

22 With respect to Rule 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b) which the appellant proposed to raise if s. 5(1)(b) of the *CEAA* was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the *CEAA*. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under Rule 312.

23 On the issue of the confidentiality order, Evans J.A. considered Rule 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in

Dans son ordonnance, le juge Pelletier autorise l'appelante à déposer les documents sous leur forme actuelle ou sous une version révisée, à son gré. Il autorise aussi l'appelante à déposer des documents concernant le processus réglementaire chinois en général et son application au projet, à condition qu'elle le fasse sous 60 jours.

B. *Cour d'appel fédérale*, [2000] 4 C.F. 426

(1) Le juge Evans (avec l'appui du juge Sharlow)

ÉACL fait appel en Cour d'appel fédérale, en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*, et Sierra Club forme un appel incident en vertu de la règle 312.

Sur la règle 312, le juge Evans conclut que les documents en cause sont clairement pertinents dans une défense que l'appelante a l'intention d'invoquer en vertu du par. 54(2) si la cour conclut que l'al. 5(1)(b) de la *LCÉE* doit s'appliquer, et pourraient l'être aussi pour l'exercice du pouvoir discrétionnaire de la cour de refuser d'accorder une réparation dans le cas où les ministres auraient enfreint la *LCÉE*. Comme le juge Pelletier, le juge Evans est d'avis que l'avantage pour l'appelante et pour la cour d'une autorisation de déposer les documents l'emporte sur tout préjudice que le retard pourrait causer à l'intimé, et conclut par conséquent que le juge des requêtes a eu raison d'accorder l'autorisation en vertu de la règle 312.

Sur l'ordonnance de confidentialité, le juge Evans examine la règle 151 et tous les facteurs que le juge des requêtes a appréciés, y compris le secret commercial attaché aux documents, le fait que l'appelante les a reçus à titre confidentiel des autorités chinoises, et l'argument de l'appelante selon lequel, sans les documents, elle ne pourrait assurer effectivement sa défense. Ces facteurs doivent être pondérés avec le principe de la publicité des documents soumis aux tribunaux. Le juge Evans convient avec le juge Pelletier que le poids à accorder à l'intérêt du public à la publicité des débats varie selon le contexte, et il conclut que lorsqu'une affaire soulève des questions de grande importance pour le public, le principe de la publicité des débats a plus de poids

the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health and Welfare)*, [2000] 3 F.C. 360 (C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Ct. (Gen. Div.)), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEAA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without

comme facteur à prendre en compte dans le processus de pondération. Le juge Evans note l'intérêt du public à l'égard de la question en litige ainsi que la couverture médiatique considérable qu'elle a suscitée.

À l'appui de sa conclusion que le poids accordé au principe de la publicité des débats peut varier selon le contexte, le juge Evans invoque les décisions *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [2000] 3 C.F. 360 (C.A.), où la cour a tenu compte du peu d'intérêt du public, et *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (C. Ont. (Div. gén.)), p. 283, où la cour a ordonné la divulgation après avoir déterminé qu'il s'agissait d'une affaire constitutionnelle importante et qu'il importait que le public comprenne ce qui était en cause. Le juge Evans fait remarquer que la transparence du processus d'évaluation et la participation du public ont une importance fondamentale pour la LCÉE, et il conclut qu'on ne peut prétendre que le juge des requêtes a accordé trop de poids au principe de la publicité des débats, même si la confidentialité n'est demandée que pour un nombre relativement restreint de documents hautement techniques.

Le juge Evans conclut que le juge des requêtes a donné trop de poids au fait que la production des documents était volontaire mais qu'il ne s'ensuit pas que sa décision au sujet de la confidentialité doit être écartée. Le juge Evans est d'avis que l'erreur n'entâche pas sa conclusion finale, pour trois motifs. Premièrement, comme le juge des requêtes, il attache une grande importance à la publicité du débat judiciaire. Deuxièmement, il conclut que l'inclusion dans les affidavits d'un résumé des rapports peut, dans une large mesure, compenser l'absence des rapports, si l'appelante décide de ne pas les déposer sans ordonnance de confidentialité. Enfin, si ÉACL déposait une version modifiée des documents, la demande de confidentialité reposerait sur un facteur relativement peu important, savoir l'argument que l'appelante perdrait des occasions d'affaires si elle violait son engagement envers les autorités chinoises.

Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

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reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus the appeal and cross-appeal were both dismissed.

(2) Robertson J.A. (dissenting)

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence, or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

sans avoir examiné les documents réels, affirmant que cela n'était pas nécessaire puisqu'il y avait des précis et que la documentation était hautement technique et partiellement traduite. L'appel et l'appel incident sont donc rejetés.

(2) Le juge Robertson (dissident)

Le juge Robertson se dissocie de la majorité pour trois raisons. En premier lieu, il estime que le degré d'intérêt du public dans une affaire, l'importance de la couverture médiatique et l'identité des parties ne devraient pas être pris en considération pour statuer sur une demande d'ordonnance de confidentialité. Selon lui, il faut plutôt examiner la nature de la preuve que protégerait l'ordonnance de confidentialité.

Il estime aussi qu'à défaut d'ordonnance de confidentialité, l'appelante doit choisir entre deux options inacceptables : subir un préjudice financier irréparable si les renseignements confidentiels sont produits en preuve, ou être privée de son droit à un procès équitable parce qu'elle ne peut se défendre pleinement si la preuve n'est pas produite.

Finalement, il dit que le cadre analytique utilisé par les juges majoritaires pour arriver à leur décision est fondamentalement défectueux en ce qu'il est fondé en grande partie sur le point de vue subjectif du juge des requêtes. Il rejette l'approche contextuelle sur la question de l'ordonnance de confidentialité, soulignant la nécessité d'un cadre d'analyse objectif pour combattre la perception que la justice est un concept relatif et pour promouvoir la cohérence et la certitude en droit.

Pour établir ce cadre plus objectif appelé à régir la délivrance d'ordonnances de confidentialité en matière de renseignements commerciaux et scientifiques, il examine le fondement juridique du principe de la publicité du processus judiciaire, en citant l'arrêt de notre Cour, *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, qui conclut que la publicité des débats favorise la recherche de la vérité et témoigne de l'importance de soumettre le travail des tribunaux à l'examen public.

Robertson J.A. stated that although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets", this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

(1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

Selon le juge Robertson, même si le principe de la publicité du processus judiciaire reflète la valeur fondamentale que constitue dans une démocratie l'imputabilité dans l'exercice du pouvoir judiciaire, le principe selon lequel il faut que justice soit faite doit, à son avis, l'emporter. Il conclut que la justice vue comme principe universel signifie que les règles ou les principes doivent parfois souffrir des exceptions.

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Il fait observer qu'en droit commercial, lorsque les renseignements qu'on cherche à protéger ont trait à des « secrets industriels », ils ne sont pas divulgués au procès lorsque cela aurait pour effet d'annihiler les droits du propriétaire et l'exposerait à un préjudice financier irréparable. Il conclut que, même si l'espèce ne porte pas sur des secrets industriels, on peut traiter de la même façon des renseignements commerciaux et scientifiques acquis sur une base confidentielle, et il établit les critères suivants comme conditions à la délivrance d'une ordonnance de confidentialité (au par. 13) :

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1) les renseignements sont de nature confidentielle et non seulement des faits qu'une personne désire ne pas divulguer; 2) les renseignements qu'on veut protéger ne sont pas du domaine public; 3) selon la prépondérance des probabilités, la partie qui veut obtenir une ordonnance de confidentialité subirait un préjudice irréparable si les renseignements étaient rendus publics; 4) les renseignements sont pertinents dans le cadre de la résolution des questions juridiques soulevées dans le litige; 5) en même temps, les renseignements sont « nécessaires » à la résolution de ces questions; 6) l'octroi d'une ordonnance de confidentialité ne cause pas un préjudice grave à la partie adverse; 7) l'intérêt du public à la publicité des débats judiciaires ne prime pas les intérêts privés de la partie qui sollicite l'ordonnance de confidentialité. Le fardeau de démontrer que les critères un à six sont respectés incombe à la partie qui cherche à obtenir l'ordonnance de confidentialité. Pour le septième critère, c'est la partie adverse qui doit démontrer que le droit *prima facie* à une ordonnance de non-divulgaration doit céder le pas au besoin de maintenir la publicité des débats judiciaires. En utilisant ces critères, il y a lieu de tenir compte de deux des fils conducteurs qui sous-tendent le principe de la publicité des débats judiciaires : la recherche de la vérité et la sauvegarde de la primauté du droit. Comme je l'ai dit au tout début, je ne crois pas que le degré d'importance qu'on croit que le public accorde à une affaire soit une considération pertinente.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site plans for nuclear installations were not, for example, posted on a Web site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35 A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under Rule 151 of the *Federal Court Rules, 1998*?

B. Should the confidentiality order be granted in this case?

VI. Analysis

A. *The Analytical Approach to the Granting of a Confidentiality Order*

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23, La Forest J. expressed the relationship as follows:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the

Applicant ces critères aux circonstances de l'espèce, le juge Robertson conclut qu'il y a lieu de rendre l'ordonnance de confidentialité. Selon lui, l'intérêt du public dans la publicité des débats judiciaires ne prime pas l'intérêt de ÉACL à préserver le caractère confidentiel de ces documents hautement techniques.

Le juge Robertson traite aussi de l'intérêt du public à ce qu'il soit garanti que les plans de site d'installations nucléaires ne seront pas, par exemple, affichés sur un site Web. Il conclut qu'une ordonnance de confidentialité n'aurait aucun impact négatif sur les deux objectifs primordiaux du principe de la publicité des débats judiciaires, savoir la vérité et la primauté du droit. Il aurait par conséquent accueilli l'appel et rejeté l'appel incident.

V. Questions en litige

A. Quelle méthode d'analyse faut-il appliquer à l'exercice du pouvoir judiciaire discrétionnaire lorsqu'une partie demande une ordonnance de confidentialité en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*?

B. Y a-t-il lieu d'accorder l'ordonnance de confidentialité en l'espèce?

VI. Analyse

A. *Méthode d'analyse applicable aux ordonnances de confidentialité*

(1) Le cadre général : les principes de l'arrêt Dagenais

Le lien entre la publicité des procédures judiciaires et la liberté d'expression est solidement établi dans *Société Radio-Canada c. Nouveau-Brunswick (Procureur général)*, [1996] 3 R.C.S. 480. Le juge La Forest l'exprime en ces termes au par. 23 :

Le principe de la publicité des débats en justice est inextricablement lié aux droits garantis à l'al. 2b). Grâce à ce principe, le public a accès à l'information concernant les tribunaux, ce qui lui permet ensuite de discuter des pratiques des tribunaux et des procédures qui s'y déroulent, et d'émettre des opinions et des critiques à cet égard. La liberté d'exprimer des idées et des opinions sur

freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under Rule 151 should echo the underlying principles laid out in *Dagenais*, although it must be tailored to the specific rights and interests engaged in this case.

Dagenais dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at

le fonctionnement des tribunaux relève clairement de la liberté garantie à l'al. 2b), mais en relève également le droit du public d'obtenir au préalable de l'information sur les tribunaux.

L'ordonnance sollicitée aurait pour effet de limiter l'accès du public aux documents confidentiels et leur examen public; cela porterait clairement atteinte à la garantie de la liberté d'expression du public.

L'examen de la méthode générale à suivre dans l'exercice du pouvoir discrétionnaire d'accorder une ordonnance de confidentialité devrait commencer par les principes établis par la Cour dans *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Cette affaire portait sur le pouvoir discrétionnaire judiciaire, issu de la common law, de rendre des ordonnances de non-publication dans le cadre de procédures criminelles, mais il y a de fortes ressemblances entre les interdictions de publication et les ordonnances de confidentialité dans le contexte des procédures judiciaires. Dans les deux cas, on cherche à restreindre la liberté d'expression afin de préserver ou de promouvoir un intérêt en jeu dans les procédures. En ce sens, la question fondamentale que doit résoudre le tribunal auquel on demande une interdiction de publication ou une ordonnance de confidentialité est de savoir si, dans les circonstances, il y a lieu de restreindre le droit à la liberté d'expression.

Même si, dans chaque cas, la liberté d'expression entre en jeu dans un contexte différent, le cadre établi dans *Dagenais* fait appel aux principes déterminants de la *Charte canadienne des droits et libertés* afin de pondérer la liberté d'expression avec d'autres droits et intérêts, et peut donc être adapté et appliqué à diverses circonstances. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la règle 151 devrait par conséquent refléter les principes sous-jacents établis par *Dagenais*, même s'il faut pour cela l'ajuster aux droits et intérêts précis qui sont en jeu en l'espèce.

L'affaire *Dagenais* porte sur une requête par laquelle quatre accusés demandaient à la cour de rendre, en vertu de sa compétence de common law, une ordonnance interdisant la diffusion d'une émission de télévision décrivant des abus physiques et

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religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accused's right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. At p. 878 of *Dagenais*, Lamer C.J. set out his reformulated test:

A publication ban should only be ordered when:

(a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and

(b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick, supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, at para. 33;

sexuels infligés à de jeunes garçons dans des établissements religieux. Les requérants soutenaient que l'interdiction était nécessaire pour préserver leur droit à un procès équitable, parce que les faits racontés dans l'émission ressemblaient beaucoup aux faits en cause dans leurs procès.

Le juge en chef Lamer conclut que le pouvoir discrétionnaire de common law d'ordonner l'interdiction de publication doit être exercé dans les limites prescrites par les principes de la *Charte*. Puisque les ordonnances de non-publication restreignent nécessairement la liberté d'expression de tiers, il adapte la règle de common law qui s'appliquait avant l'entrée en vigueur de la *Charte* de façon à établir un juste équilibre entre le droit à la liberté d'expression et le droit de l'accusé à un procès équitable, d'une façon qui reflète l'essence du critère énoncé dans *R. c. Oakes*, [1986] 1 R.C.S. 103. À la page 878 de *Dagenais*, le juge en chef Lamer énonce le critère reformulé :

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

a) elle est nécessaire pour écarter le risque réel et important que le procès soit inéquitable, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;

b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur la libre expression de ceux qui sont touchés par l'ordonnance. [Souligné dans l'original.]

Dans *Nouveau-Brunswick*, précité, la Cour modifie le critère de l'arrêt *Dagenais* dans le contexte de la question voisine de l'exercice du pouvoir discrétionnaire d'ordonner l'exclusion du public d'un procès en vertu du par. 486(1) du *Code criminel*, L.R.C. 1985, ch. C-46. Il s'agissait d'un appel d'une décision du juge du procès d'ordonner l'exclusion du public de la partie des procédures de détermination de la peine pour agression sexuelle et contacts sexuels portant sur les actes précis commis par l'accusé, au motif que cela éviterait un « préjudice indu » aux victimes et à l'accusé.

Le juge La Forest conclut que le par. 486(1) limite la liberté d'expression garantie à l'al. 2b) en créant un « pouvoir discrétionnaire permettant d'interdire au public et aux médias l'accès aux

however he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

(a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;

(b) the judge must consider whether the order is limited as much as possible; and

(c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, [2001] 3 S.C.R. 442, 2001 SCC 76, and its companion case *R. v. O.N.E.*, [2001] 3 S.C.R. 478, 2001 SCC 77. In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the

tribunaux » (*Nouveau-Brunswick*, par. 33). Il considère toutefois que l'atteinte peut être justifiée en vertu de l'article premier pourvu que le pouvoir discrétionnaire soit exercé conformément à la *Charte*. Donc l'analyse de l'exercice du pouvoir discrétionnaire en vertu du par. 486(1) du *Code criminel*, décrite par le juge La Forest au par. 69, concorde étroitement avec le critère de common law établi par *Dagenais* :

a) le juge doit envisager les solutions disponibles et se demander s'il existe d'autres mesures de rechange raisonnables et efficaces;

b) il doit se demander si l'ordonnance a une portée aussi limitée que possible; et

c) il doit comparer l'importance des objectifs de l'ordonnance et de ses effets probables avec l'importance de la publicité des procédures et l'activité d'expression qui sera restreinte, afin de veiller à ce que les effets positifs et négatifs de l'ordonnance soient proportionnels.

Appliquant cette analyse aux faits de l'espèce, le juge La Forest conclut que la preuve du risque de préjudice indu consiste principalement en la prétention de l'avocat du ministère public quant à la « nature délicate » des faits relatifs aux infractions et que cela ne suffit pas pour justifier l'atteinte à la liberté d'expression.

La Cour a récemment réexaminé la question des interdictions de publication prononcées par un tribunal en vertu de sa compétence de common law dans *R. c. Mentuck*, [2001] 3 R.C.S. 442, 2001 CSC 76, et l'arrêt connexe *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77. Dans *Mentuck*, le ministère public demandait l'interdiction de publication en vue de protéger l'identité de policiers banalisés et leurs méthodes d'enquête. L'accusé s'opposait à la demande en soutenant que l'interdiction porterait atteinte à son droit à un procès public et équitable protégé par l'al. 11d) de la *Charte*. Deux journaux intervenants s'opposaient aussi à la requête, en faisant valoir qu'elle porterait atteinte à leur droit à la liberté d'expression.

La Cour fait remarquer que *Dagenais* traite de la pondération de la liberté d'expression, d'une part, et du droit de l'accusé à un procès équitable, d'autre part, tandis que dans l'affaire dont elle est saisie, 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

allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflec[t] the substance of the *Oakes* test", we cannot require that *Charter* rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the *Charter* be justified exclusively by the pursuit of another *Charter* right. [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

Mentuck is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles.

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [. . .] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

Mentuck illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

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However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

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Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the *CEAA*, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) Les droits et les intérêts des parties

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe

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.

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.

54 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.

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.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *F.N. (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).

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. Et toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgence, 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 *F.N. (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).

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest". It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second

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

branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly and Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (F.C.T.D.), at p. 439.

Finally, the phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

B. *Application of the Test to this Appeal*

(1) Necessity

At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself, or to its terms.

The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the Confidential Documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health and Welfare)* (1998), 83 C.P.R. (3d) 428 (F.C.T.D.), at p. 434. To this I would add the requirement proposed

de l'analyse, les tribunaux doivent avoir pleinement conscience de l'importance fondamentale de la règle de la publicité des débats judiciaires. Voir généralement *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (C.F. 1^{re} inst.), p. 439, le juge Muldoon.

Enfin, l'expression « autres options raisonnables » oblige le juge non seulement à se demander s'il existe des mesures raisonnables autres que l'ordonnance de confidentialité, mais aussi à restreindre l'ordonnance autant qu'il est raisonnablement possible de le faire tout en préservant l'intérêt commercial en question.

B. *Application de l'analyse en l'espèce*

(1) Nécessité

À cette étape, il faut déterminer si la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et s'il existe d'autres solutions raisonnables que l'ordonnance elle-même, ou ses modalités.

L'intérêt commercial en jeu en l'espèce a trait à la préservation d'obligations contractuelles de confidentialité. L'appelante fait valoir qu'un préjudice irréparable sera causé à ses intérêts commerciaux si les documents confidentiels sont divulgués. À mon avis, la préservation de renseignements confidentiels est un intérêt commercial suffisamment important pour satisfaire au premier volet de l'analyse dès lors que certaines conditions relatives aux renseignements sont réunies.

Le juge Pelletier souligne que l'ordonnance sollicitée en l'espèce s'apparente à une ordonnance conservatoire en matière de brevets. Pour l'obtenir, le requérant doit démontrer que les renseignements en question ont toujours été traités comme des renseignements confidentiels et que, selon la prépondérance des probabilités, il est raisonnable de penser que leur divulgation risquerait de compromettre ses droits exclusifs, commerciaux et scientifiques : *AB Hassle c. Canada (Ministre de la Santé nationale et du Bien-être social)*, [1998] A.C.F. n° 1850 (QL) (C.F. 1^{re} inst.), par. 29-30. J'ajouterais à cela

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by Robertson J.A. that the information in question must be of a "confidential nature" in that it has been "accumulated with a reasonable expectation of it being kept confidential" as opposed to "facts which a litigant would like to keep confidential by having the courtroom doors closed" (para. 14).

l'exigence proposée par le juge Robertson que les renseignements soient « de nature confidentielle » en ce qu'ils ont été « recueillis dans l'expectative raisonnable qu'ils resteront confidentiels », par opposition à « des faits qu'une partie à un litige voudrait garder confidentiels en obtenant le huis clos » (par. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

Le juge Pelletier constate que le critère établi dans *AB Hassle* est respecté puisque tant l'appelante que les autorités chinoises ont toujours considéré les renseignements comme confidentiels et que, selon la prépondérance des probabilités, leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23). Le juge Robertson conclut lui aussi que les renseignements en question sont clairement confidentiels puisqu'il s'agit de renseignements commerciaux, uniformément reconnus comme étant confidentiels, qui présentent un intérêt pour les concurrents d'ÉACL (par. 16). Par conséquent, l'ordonnance est demandée afin de prévenir un risque sérieux de préjudice à un intérêt commercial important.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the *CEAA* and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (at para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

Le premier volet de l'analyse exige aussi l'examen d'options raisonnables autres que l'ordonnance de confidentialité, et de la portée de l'ordonnance pour s'assurer qu'elle n'est pas trop vaste. Les deux jugements antérieurs en l'espèce concluent que les renseignements figurant dans les documents confidentiels sont pertinents pour les moyens de défense offerts à l'appelante en vertu de la *LCÉE*, et cette conclusion n'est pas portée en appel devant notre Cour. De plus, je suis d'accord avec la Cour d'appel lorsqu'elle affirme (au par. 99) que vu l'importance des documents pour le droit de présenter une défense pleine et entière, l'appelante est pratiquement forcée de les produire. Comme les renseignements sont nécessaires à la cause de l'appelante, il ne reste qu'à déterminer s'il existe d'autres options raisonnables pour communiquer les renseignements nécessaires sans divulguer de renseignements confidentiels.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be

Deux options autres que l'ordonnance de confidentialité sont mentionnées dans les décisions antérieures. Le juge des requêtes suggère de retrancher des documents les passages commercialement délicats et de produire les versions ainsi modifiées.

filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

There are two possible options with respect to expungement, and in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal, in the sense that, at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese

La majorité en Cour d'appel estime que, outre cette possibilité d'épuration des documents, l'inclusion dans les affidavits d'un résumé des documents confidentiels pourrait, dans une large mesure, compenser l'absence des originaux. Si l'une ou l'autre de ces deux options peut raisonnablement se substituer au dépôt des documents confidentiels aux termes d'une ordonnance de confidentialité, alors l'ordonnance n'est pas nécessaire et la requête ne franchit pas la première étape de l'analyse.

Il existe deux possibilités pour l'épuration des documents et, selon moi, elles comportent toutes deux des problèmes. La première serait que ÉACL retranche les renseignements confidentiels sans divulguer les éléments retranchés ni aux parties ni au tribunal. Toutefois, dans cette situation, la documentation déposée serait encore différente de celle utilisée pour les affidavits. Il ne faut pas perdre de vue que la requête découle de l'argument de Sierra Club selon lequel le tribunal ne devrait accorder que peu ou pas de poids aux résumés sans la présence des documents de base. Même si on pouvait totalement séparer les renseignements pertinents et les renseignements confidentiels, ce qui permettrait la divulgation de tous les renseignements sur lesquels se fondent les affidavits, l'appréciation de leur pertinence ne pourrait pas être mise à l'épreuve en contre-interrogatoire puisque la documentation retranchée ne serait pas disponible. Par conséquent, même dans le meilleur cas de figure, où l'on n'aurait qu'à retrancher les renseignements non pertinents, les parties se retrouveraient essentiellement dans la même situation que celle qui a donné lieu au pourvoi, en ce sens qu'au moins une partie des documents ayant servi à la préparation des affidavits en question ne serait pas mise à la disposition de Sierra Club.

De plus, je partage l'opinion du juge Robertson que ce meilleur cas de figure, où les renseignements pertinents et les renseignements confidentiels ne se recoupent pas, est une hypothèse non confirmée (par. 28). Même si les documents eux-mêmes n'ont pas été produits devant les tribunaux dans le cadre de la présente requête, parce qu'ils comprennent des milliers de pages de renseignements détaillés, cette hypothèse est au mieux optimiste. L'option de

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authorities require prior approval for any request by AECL to disclose information.

l'épuration serait en outre compliquée par le fait que les autorités chinoises exigent l'approbation préalable de toute demande de divulgation de renseignements de la part d'ÉACL.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

La deuxième possibilité serait de mettre les documents supprimés à la disposition du tribunal et des parties en vertu d'une ordonnance de confidentialité plus restreinte. Bien que cela permettrait un accès public un peu plus large que ne le ferait l'ordonnance de confidentialité sollicitée, selon moi, cette restriction mineure à la requête n'est pas une option viable étant donné les difficultés liées à l'épuration dans les circonstances. Il s'agit de savoir s'il y a d'autres options raisonnables et non d'adopter l'option qui soit absolument la moins restrictive. Avec égards, j'estime que l'épuration des documents confidentiels serait une solution virtuellement impraticable et inefficace qui n'est pas raisonnable dans les circonstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

Une deuxième option autre que l'ordonnance de confidentialité serait, selon le juge Evans, l'inclusion dans les affidavits d'un résumé des documents confidentiels pour « dans une large mesure, compenser [leur] absence » (par. 103). Il ne semble toutefois envisager ce fait qu'à titre de facteur à considérer dans la pondération des divers intérêts en cause. Je conviens qu'à cette étape liminaire, se fonder uniquement sur les résumés en connaissant l'intention de Sierra Club de plaider leur faiblesse ou l'absence de valeur probante, ne semble pas être une « autre option raisonnable » à la communication aux parties des documents de base.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

Vu les facteurs susmentionnés, je conclus que l'ordonnance de confidentialité est nécessaire en ce que la divulgation des documents confidentiels ferait courir un risque sérieux à un intérêt commercial important de l'appelante, et qu'il n'existe pas d'autres options raisonnables.

(2) The Proportionality Stage

(2) L'étape de la proportionnalité

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

Comme on le mentionne plus haut, à cette étape, les effets bénéfiques de l'ordonnance de confidentialité, y compris ses effets sur le droit de l'appelante à un procès équitable, doivent être pondérés avec ses effets préjudiciables, y compris ses effets sur le droit

expression, which in turn is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

(a) *Salutary Effects of the Confidentiality Order*

As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case, or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the *CEAA* is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and

à la liberté d'expression, qui à son tour est lié au principe de la publicité des débats judiciaires. Cette pondération déterminera finalement s'il y a lieu d'accorder l'ordonnance de confidentialité.

a) *Les effets bénéfiques de l'ordonnance de confidentialité*

Comme nous l'avons vu, le principal intérêt qui serait promu par l'ordonnance de confidentialité est l'intérêt du public à la protection du droit du justiciable civil de faire valoir sa cause ou, de façon plus générale, du droit à un procès équitable. Puisque l'appelante l'invoque en l'espèce pour protéger ses intérêts commerciaux et non son droit à la liberté, le droit à un procès équitable dans ce contexte n'est pas un droit visé par la *Charte*; toutefois, le droit à un procès équitable pour tous les justiciables a été reconnu comme un principe de justice fondamentale : *Ryan*, précité, par. 84. Il y a lieu de rappeler qu'il y a des circonstances où, en l'absence de violation d'un droit garanti par la *Charte*, la bonne administration de la justice exige une ordonnance de confidentialité : *Mentuck*, précité, par. 31. En l'espèce, les effets bénéfiques d'une telle ordonnance sur l'administration de la justice tiennent à la capacité de l'appelante de soutenir sa cause, dans le cadre du droit plus large à un procès équitable.

Les documents confidentiels ont été jugés pertinents en ce qui a trait aux moyens de défense que l'appelante pourrait invoquer s'il est jugé que la *LCÉE* s'applique à l'opération attaquée et, comme nous l'avons vu, l'appelante ne peut communiquer les documents sans risque sérieux pour ses intérêts commerciaux. De ce fait, il existe un risque bien réel que, sans l'ordonnance de confidentialité, la capacité de l'appelante à mener à bien sa défense soit gravement réduite. Je conclus par conséquent que l'ordonnance de confidentialité aurait d'importants effets bénéfiques pour le droit de l'appelante à un procès équitable.

En plus des effets bénéfiques pour le droit à un procès équitable, l'ordonnance de confidentialité aurait aussi des incidences favorables sur d'autres droits et intérêts importants. En premier lieu, comme je l'exposerai plus en détail ci-après, l'ordonnance de confidentialité permettrait aux parties ainsi qu'au

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permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

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Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) *Deleterious Effects of the Confidentiality Order*

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Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

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Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R.

tribunal d'avoir accès aux documents confidentiels, et permettrait la tenue d'un contre-interrogatoire fondé sur leur contenu. En facilitant l'accès aux documents pertinents dans une procédure judiciaire, l'ordonnance sollicitée favoriserait la recherche de la vérité, qui est une valeur fondamentale sous-tendant la liberté d'expression.

En deuxième lieu, je suis d'accord avec l'observation du juge Robertson selon laquelle puisque les documents confidentiels contiennent des renseignements techniques détaillés touchant la construction et la conception d'une installation nucléaire, il peut être nécessaire, dans l'intérêt public, d'empêcher que ces renseignements tombent dans le domaine public (par. 44). Même si le contenu exact des documents demeure un mystère, il est évident qu'ils comprennent des détails techniques d'une installation nucléaire et il peut bien y avoir un important intérêt de sécurité publique à préserver la confidentialité de ces renseignements.

b) *Les effets préjudiciables de l'ordonnance de confidentialité*

Une ordonnance de confidentialité aurait un effet préjudiciable sur le principe de la publicité des débats judiciaires, puisqu'elle priverait le public de l'accès au contenu des documents confidentiels. Comme on le dit plus haut, le principe de la publicité des débats judiciaires est inextricablement lié au droit à la liberté d'expression protégé par l'al. 2b) de la *Charte*, et la vigilance du public envers les tribunaux est un aspect fondamental de l'administration de la justice : *Nouveau-Brunswick*, précité, par. 22-23. Même si, à titre de principe général, l'importance de la publicité des débats judiciaires ne peut être sous-estimée, il faut examiner, dans le contexte de l'espèce, les effets préjudiciables particuliers que l'ordonnance de confidentialité aurait sur la liberté d'expression.

Les valeurs fondamentales qui sous-tendent la liberté d'expression 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 : *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, p. 976; *R. c. Keegstra*, [1990]

927, at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, *per* Dickson C.J. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra*, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal*, *supra*, at pp. 1357-58, *per* Wilson J. Clearly the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

However, as mentioned above, to some extent the search for truth may actually be promoted by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or

3 R.C.S. 697, p. 762-764, le juge en chef Dickson. La jurisprudence de la *Charte* établit que plus l'expression en cause est au cœur de ces valeurs fondamentales, plus il est difficile de justifier, en vertu de l'article premier de la *Charte*, une atteinte à l'al. 2b) à son égard : *Keegstra*, p. 760-761. Comme l'objectif principal en l'espèce est d'exercer un pouvoir discrétionnaire dans le respect des principes de la *Charte*, l'examen des effets préjudiciables de l'ordonnance de confidentialité sur la liberté d'expression devrait comprendre une appréciation des effets qu'elle aurait sur les trois valeurs fondamentales. Plus l'ordonnance de confidentialité porte préjudice à ces valeurs, plus il est difficile de la justifier. Inversement, des effets mineurs sur les valeurs fondamentales rendent l'ordonnance de confidentialité plus facile à justifier.

La recherche de la vérité est non seulement au cœur de la liberté d'expression, elle est aussi reconnue comme un objectif fondamental de la règle de la publicité des débats judiciaires, puisque l'examen public des témoins favorise l'efficacité du processus de présentation de la preuve : *Edmonton Journal*, précité, p. 1357-1358, le juge Wilson. À l'évidence, en enlevant au public et aux médias l'accès aux documents invoqués dans les procédures, l'ordonnance de confidentialité nuirait jusqu'à un certain point à la recherche de la vérité. L'ordonnance n'exclurait pas le public de la salle d'audience, mais le public et les médias n'auraient pas accès aux documents pertinents quant à la présentation de la preuve.

Toutefois, comme nous l'avons vu plus haut, la recherche de la vérité peut jusqu'à un certain point être favorisée par l'ordonnance de confidentialité. La présente requête résulte de l'argument de Sierra Club selon lequel il doit avoir accès aux documents confidentiels pour vérifier l'exactitude de la déposition de M. Pang. Si l'ordonnance est refusée, le scénario le plus probable est que l'appelante s'abstiendra de déposer les documents, avec la conséquence fâcheuse que des preuves qui peuvent être pertinentes ne seront pas portées à la connaissance de Sierra Club ou du tribunal. Par conséquent, Sierra Club ne sera pas en mesure de vérifier complètement l'exactitude de la preuve de M. Pang en contre-

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documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would in turn assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focusses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would

interrogatoire. De plus, le tribunal ne bénéficiera pas du contre-interrogatoire ou de cette preuve documentaire, et il lui faudra tirer des conclusions fondées sur un dossier de preuve incomplet. Cela nuira manifestement à la recherche de la vérité en l'espèce.

De plus, il importe de rappeler que l'ordonnance de confidentialité ne restreindrait l'accès qu'à un nombre relativement peu élevé de documents hautement techniques. La nature de ces documents est telle que le public en général est peu susceptible d'en comprendre le contenu, de sorte qu'ils contribueraient peu à l'intérêt du public à la recherche de la vérité en l'espèce. Toutefois, dans les mains des parties et de leurs experts respectifs, les documents peuvent être très utiles pour apprécier la conformité du processus d'évaluation environnementale chinois, ce qui devrait aussi aider le tribunal à tirer des conclusions de fait exactes. À mon avis, compte tenu de leur nature, la production des documents confidentiels en vertu de l'ordonnance de confidentialité sollicitée favoriserait mieux l'importante valeur de la recherche de la vérité, qui sous-tend à la fois la liberté d'expression et la publicité des débats judiciaires, que ne le ferait le rejet de la demande qui aurait pour effet d'empêcher les parties et le tribunal de se fonder sur les documents au cours de l'instance.

De plus, aux termes de l'ordonnance demandée, les seules restrictions imposées à l'égard de ces documents ont trait à leur distribution publique. Les documents confidentiels seraient mis à la disposition du tribunal et des parties, et il n'y aurait pas d'entrave à l'accès du public aux procédures. À ce titre, l'ordonnance représente une atteinte relativement minime à la règle de la publicité des débats judiciaires et elle n'aurait donc pas d'effets préjudiciables importants sur ce principe.

La deuxième valeur fondamentale sous-jacente à la liberté d'expression, la promotion de l'épanouissement personnel par le libre développement de la pensée et des idées, est centrée sur l'expression individuelle et n'est donc pas étroitement liée au principe de la publicité des débats judiciaires qui concerne l'expression institutionnelle. Même

restrict individual access to certain information which may be of interest to that individual. I find that this value would not be significantly affected by the confidentiality order.

The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will always be engaged where the open court

si l'ordonnance de confidentialité devait restreindre l'accès individuel à certains renseignements susceptibles d'intéresser quelqu'un, j'estime que cette valeur ne serait pas touchée de manière significative.

La troisième valeur fondamentale, la libre participation au processus politique, joue un rôle primordial dans le pourvoi puisque la publicité des débats judiciaires est un aspect fondamental de la société démocratique. Ce lien est souligné par le juge Cory dans *Edmonton Journal*, précité, p. 1339 :

On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamentalement pour la primauté du droit que la transparence du fonctionnement des tribunaux soit perçue comme telle. La presse doit être libre de commenter les procédures judiciaires pour que, dans les faits, chacun puisse constater que les tribunaux fonctionnent publiquement sous les regards pénétrants du public.

Même si on ne peut douter de l'importance de la publicité des débats judiciaires dans une société démocratique, les décisions antérieures divergent sur la question de savoir si le poids à accorder au principe de la publicité des débats judiciaires devrait varier en fonction de la nature de la procédure.

Sur ce point, le juge Robertson estime que la nature de l'affaire et le degré d'intérêt des médias sont des considérations dénuées de pertinence. Le juge Evans estime quant à lui que le juge des requêtes a eu raison de tenir compte du fait que la demande de contrôle judiciaire suscite beaucoup d'intérêt de la part du public et des médias. À mon avis, même si la nature publique de l'affaire peut être un facteur susceptible de renforcer l'importance de la publicité des débats judiciaires dans une espèce particulière, le degré d'intérêt des médias ne devrait pas être considéré comme facteur indépendant.

Puisque les affaires concernant des institutions publiques ont généralement un lien plus étroit avec la valeur fondamentale de la participation du public au processus politique, la nature publique d'une instance devrait être prise en considération dans l'évaluation du bien-fondé d'une ordonnance de confidentialité. Il importe de noter que cette valeur

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principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

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This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

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However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

fondamentale sera toujours engagée lorsque sera mis en cause le principe de la publicité des débats judiciaires, vu l'importance de la transparence judiciaire dans une société démocratique. Toutefois, le lien entre la publicité des débats judiciaires et la participation du public dans le processus politique s'accroît lorsque le processus politique est également engagé par la substance de la procédure. Sous ce rapport, je suis d'accord avec ce que dit le juge Evans (au par. 87) :

Bien que tous les litiges soient importants pour les parties, et qu'il en va de l'intérêt du public que les affaires soumises aux tribunaux soient traitées de façon équitable et appropriée, certaines affaires soulèvent des questions qui transcendent les intérêts immédiats des parties ainsi que l'intérêt du public en général dans la bonne administration de la justice, et qui ont une signification beaucoup plus grande pour le public.

La requête est liée à une demande de contrôle judiciaire d'une décision du gouvernement de financer un projet d'énergie nucléaire. La demande est clairement de nature publique, puisqu'elle a trait à la distribution de fonds publics en rapport avec une question dont l'intérêt public a été démontré. De plus, comme le souligne le juge Evans, la transparence du processus et la participation du public ont une importance fondamentale sous le régime de la *LCÉE*. En effet, 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. À cet égard, je suis d'accord avec le juge Evans pour conclure 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.

J'estime toutefois avec égards que, dans la mesure où il se fonde sur l'intérêt des médias comme indice de l'intérêt du public, le juge Evans fait erreur. À mon avis, il est important d'établir une distinction entre l'intérêt du public et l'intérêt des médias et, comme le juge Robertson, je note que la couverture médiatique ne peut être considérée comme une mesure impartiale de l'intérêt public. C'est la nature publique de l'instance qui accentue le besoin de transparence, et cette nature publique ne se reflète

I reiterate the caution given by Dickson C.J. in *Keegstra*, *supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, “we must guard carefully against judging expression according to its popularity”.

Although the public interest in open access to the judicial review application as a whole is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal*, *supra*, at pp. 1353-54:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

pas nécessairement dans le désir des médias d'examiner les faits de l'affaire. Je réitère l'avertissement donné par le juge en chef Dickson dans *Keegstra*, précité, p. 760, où il dit que même si l'expression en cause doit être examinée dans ses rapports avec les valeurs fondamentales, « nous devons veiller à ne pas juger l'expression en fonction de sa popularité ».

Même si l'intérêt du public à la publicité de la demande de contrôle judiciaire dans son ensemble est important, à mon avis, il importe tout autant de prendre en compte la nature et la portée des renseignements visés par l'ordonnance demandée, lorsqu'il s'agit d'apprécier le poids de l'intérêt public. Avec égards, le juge des requêtes a commis une erreur en ne tenant pas compte de la portée limitée de l'ordonnance dans son appréciation de l'intérêt du public à la communication et en accordant donc un poids excessif à ce facteur. Sous ce rapport, je ne partage pas la conclusion suivante du juge Evans (au par. 97) :

Par conséquent, on ne peut dire qu'après que le juge des requêtes eut examiné la nature de ce litige et évalué l'importance de l'intérêt du public à la publicité des procédures, il aurait dans les circonstances accordé trop d'importance à ce facteur, même si la confidentialité n'est demandée que pour trois documents parmi la montagne de documents déposés en l'instance et que leur contenu dépasse probablement les connaissances de ceux qui n'ont pas l'expertise technique nécessaire.

La publicité des débats judiciaires est un principe fondamentalement important, surtout lorsque la substance de la procédure est de nature publique. Cela ne libère toutefois aucunement de l'obligation d'apprécier le poids à accorder à ce principe en fonction des limites particulières qu'imposerait l'ordonnance de confidentialité à la publicité des débats. Comme le dit le juge Wilson dans *Edmonton Journal*, précité, p. 1353-1354 :

Une chose semble claire et c'est qu'il ne faut pas évaluer une valeur selon la méthode générale et l'autre valeur en conflit avec elle selon la méthode contextuelle. Agir ainsi pourrait fort bien revenir à préjuger de l'issue du litige en donnant à la valeur examinée de manière générale plus d'importance que ne l'exige le contexte de l'affaire.

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In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

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In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the *CEAA*, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the *CEAA*, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the *CEAA* are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

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In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the *CEAA*, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

À mon avis, il importe de reconnaître que, malgré l'intérêt significatif que porte le public à ces procédures, l'ordonnance demandée n'entraverait que légèrement la publicité de la demande de contrôle judiciaire. 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.

Pour traiter des effets qu'aurait l'ordonnance de confidentialité sur la liberté d'expression, il faut aussi se rappeler qu'il se peut que l'appelante n'ait pas à soulever de moyens de défense visés par la *LCÉE*, auquel cas les documents confidentiels perdraient leur pertinence et la liberté d'expression ne serait pas touchée par l'ordonnance. Toutefois, puisque l'utilité des documents confidentiels ne sera pas déterminée avant un certain temps, l'appelante n'aurait plus, en l'absence d'ordonnance de confidentialité, que le choix entre soit produire les documents en violation de ses obligations, soit les retenir dans l'espoir de ne pas avoir à présenter de défense en vertu de la *LCÉE* ou de pouvoir assurer effectivement sa défense sans les documents pertinents. Si elle opte pour le premier choix et que le tribunal conclut par la suite que les moyens de défense visés par la *LCÉE* ne sont pas applicables, l'appelante aura subi le préjudice de voir ses renseignements confidentiels et délicats tomber dans le domaine public sans que le public n'en tire d'avantage correspondant. Même si sa réalisation est loin d'être certaine, la possibilité d'un tel scénario milite également en faveur de l'ordonnance sollicitée.

En arrivant à cette conclusion, je note que si l'appelante n'a pas à invoquer les moyens de défense pertinents en vertu de la *LCÉE*, il est également vrai que son droit à un procès équitable ne sera pas entravé même en cas de refus de l'ordonnance de confidentialité. Je ne retiens toutefois pas cela comme facteur militant contre l'ordonnance parce que, si elle est accordée et que les documents confidentiels ne sont pas nécessaires, il n'y aura alors aucun effet préjudiciable ni sur l'intérêt du public à la liberté d'expression ni sur les droits commerciaux ou le droit de l'appelante à un procès

scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

VII. Conclusion

In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the *CEAA*, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under Rule 151 of the *Federal Court Rules, 1998*.

équitable. Cette issue neutre contraste avec le scénario susmentionné où il y a refus de l'ordonnance et possibilité d'atteinte aux droits commerciaux de l'appelante sans avantage correspondant pour le public. Par conséquent, le fait que les documents confidentiels puissent ne pas être nécessaires est un facteur en faveur de l'ordonnance de confidentialité.

En résumé, 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, dans le contexte en l'espèce, l'ordonnance de confidentialité n'entraverait que légèrement la poursuite de ces valeurs, et pourrait même les favoriser à certains égards. À ce titre, l'ordonnance n'aurait pas d'effets préjudiciables importants sur la liberté d'expression.

VII. Conclusion

Dans la pondération des divers droits et intérêts en jeu, je note que l'ordonnance de confidentialité aurait des effets bénéfiques importants sur le droit de l'appelante à un procès équitable et sur la liberté d'expression. D'autre part, les effets préjudiciables de l'ordonnance de confidentialité sur le principe de la publicité des débats judiciaires et la liberté d'expression seraient minimes. En outre, si l'ordonnance est refusée et qu'au cours du contrôle judiciaire l'appelante n'est pas amenée à invoquer les moyens de défense prévus dans la *LCÉE*, il se peut qu'elle subisse le préjudice d'avoir communiqué des renseignements confidentiels en violation de ses obligations sans avantage correspondant pour le droit du public à la liberté d'expression. Je conclus donc que les effets bénéfiques de l'ordonnance l'emportent sur ses effets préjudiciables, et qu'il y a lieu d'accorder l'ordonnance.

Je suis donc d'avis d'accueillir le pourvoi avec dépens devant toutes les cours, d'annuler l'arrêt de la Cour d'appel fédérale, et d'accorder l'ordonnance de confidentialité selon les modalités demandées par l'appelante en vertu de la règle 151 des *Règles de la Cour fédérale (1998)*.

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Appeal allowed with costs.

Solicitors for the appellant: Osler, Hoskin & Harcourt, Toronto.

Solicitors for the respondent Sierra Club of Canada: Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Solicitor 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 Deputy Attorney General of Canada, Ottawa.

Pourvoi accueilli avec dépens.

Procureurs de l'appelante : Osler, Hoskin & Harcourt, Toronto.

Procureurs de l'intimé Sierra Club du Canada : Timothy J. Howard, Vancouver; Franklin S. Gertler, Montréal.

Procureur des 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 : Le sous-procureur général du Canada, Ottawa.



TAB8

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164
O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

**IN THE MATTER OF THE PROPOSALS OF CONFECTIONATELY YOURS,
INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC.,
CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.**

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002
Judgment: September 19, 2002
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano
Benjamin Zarnett, *David Lederman*, for Respondent, KPMG Inc.
Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

APPEAL by shareholders of debtor companies from judgment reported at 2001 CarswellOnt 1784, 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

Borins J.A.:

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook,

consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately \$24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

THIS COURT ORDERS that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately \$6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from \$175 to \$550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

- receiver's fees and disbursements of \$1,080,874.93, inclusive of GST.

- legal fees of Goodmans of \$209,803.46, inclusive of GST.
- legal fees of Goodman and Carr of \$92,292.32, inclusive of GST.
- legal fees of Kavinoky & Cook of \$2,583.23.

7 The Parravanos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

- (1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;
- (2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and
- (3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

Perhaps it is the height — or depth — of audacity for counsel for the Parravanos to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

- (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.
- (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.
- (3) The receivership was difficult and "rather unique".
- (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".
- (5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.
- (6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.
- (7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he emphasized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

[An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.
- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.
- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".
- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.
- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without

deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

... the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. . . . Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by

those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).¹ I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."² In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, e.g., *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle, supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This

standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, e.g., *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bkcty.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, e.g., *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) *Bias*

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) *Cross-examination of the receiver*

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and

respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . ."

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice

to do so. See, e.g., *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded from any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- Mr. Pape was given a full opportunity to make submissions.

(3) *The remuneration claimed by the receiver and its solicitor*

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

Catzman J.A.:

I agree.

Doherty J.A.:

I agree.

Appeal allowed in part.

Footnotes

- 1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.
- 2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter. *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.



TAB9

1983 CarswellNB 27
New Brunswick Court of Appeal

Belyea v. Federal Business Development Bank

1983 CarswellNB 27, [1983] N.B.J. No. 41, 116 A.P.R. 248, 18
A.C.W.S. (2d) 19, 44 N.B.R. (2d) 248, 46 C.B.R. (N.S.) 244

BELYEA and FOWLER v. FEDERAL BUSINESS DEVELOPMENT BANK

Hughes C.J.N.B., Ryan and Stratton J.J.A

Judgment: January 18, 1983

Docket: No. 31/82/CA

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Appointment — Application for appointment — Person entitled to make application — General

Receivers --- Remuneration of receiver — Remuneration

Secured creditors — Receiver appointed by document — Remuneration — Factors to be considered.

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and, while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous. The considerations applicable in determining the reasonable remuneration to be paid to a receiver should include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts and the costs of comparable services when performed in a prudent and economical manner. Whether an account for services is fair and reasonable is a matter of some difficulty. In many cases, attempts have been made to establish this fact by calling as witnesses persons who engage in the same profession or calling to testify that the charges made are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. Even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, the courts will impose an underlying or implied limit or maximum on the professional fees it will allow, based on what is reasonable in relation to the dollar amount involved in the particular case. Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case.

Action by secured creditors against debtor for deficiency owing under guarantee; claim that receiver's remuneration excessive.

Stratton J.A. (Hughes C.J.N.B. concurring):

1 I have had the benefit of reading the judgment prepared by my brother Ryan and regret that I am unable to agree in all respects with his proposed disposition of this appeal [from 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162, 100 A.P.R. 162].

2 In his factum counsel for Messrs. Belyea and Fowler raises two grounds of appeal, namely, the reasonableness of the refusal by the Federal Business Development Bank to accept an offer made by Mr. Sam Gamblin to purchase the inventory of Chase Camera & Supply Limited for \$40,000, and the reasonableness of the receiver's account of \$11,730. I agree with Ryan J.A. that the refusal by the bank to accept the Gamblin offer was not, in the circumstances, unreasonable. However, I do not agree that the receiver satisfactorily established that its account for services was fair and reasonable.

3 There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

4 The principles applicable in fixing the remuneration to be allowed a receiver have been discussed in a number of decisions. In the frequently quoted case of *Campbell v. Arndt* (1915), 8 Sask. L.R. 320, 9 W.W.R. 57, 24 D.L.R. 699 (S.C.), it was pointed out that a receiver is generally paid by a commission on the gross amount of his receipts, the rate of which varies from 2 to 5 per cent in proportion to the care and trouble involved. The court in that case concluded that, although the receiver must have spent considerable time and experienced a good deal of trouble, there did not appear to have been any very exceptional difficulties entitling him to exceptionally larger fees and, accordingly, he was awarded as a fair remuneration a commission of 5 per cent of the funds coming into his hands.

5 A lump sum was awarded to receivers by the Nova Scotia Court of Appeal in *Eastern Trust Co. v. N.S. Steel & Coal Co. Ltd.* (1938), 13 M.P.R. 237. In making their award, the court said at p. 240:

As we view it, we are entitled, in order to fix the remuneration of both receivers and liquidators, to survey the entire operations under their charge since their appointment, to take into consideration the time each of them gave to the work and the responsibilities resting on them as receivers and liquidators, and to determine what the work necessarily done should cost, if conducted prudently and economically.

6 A lump sum was also awarded a receiver as fair compensation for his services in *Indust. Dev. Bank v. Garden Tractor & Equipment Co. Ltd.*, [1951] O.W.N. 47 (H.C.). In that case, Marriott, Master, said at p. 48:

In fixing the compensation of a receiver, the Court always has had complete jurisdiction to allow what is fair and reasonable under all the circumstances, but a receiver has no *prima facie* right to any fixed rate as a trustee in bankruptcy has under The Bankruptcy Act. In *Kerr on Receivers*, 11th ed. 1946, at p. 279, it is stated: "In the case of receivers and managers there is no fixed scale. They are sometimes allowed 5 per cent on the receipts: in other cases their remuneration is fixed at a lump sum or regulated by the time employed by the receiver, his partners and clerks." In *Re Fleming* (1886), 11 P.R. 426, Chancellor Boyd stated: "Five per cent commission may be a reasonable allowance in many cases, but where the estate is large and the services rendered are of short duration and involving no very serious responsibility, such a rate may be excessive."

7 In fixing a lump sum rather than a percentage fee for a receiver's compensation in *Ibar Devs. Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. S.C.), Saunders, Master, concluded that remuneration on a 5 per cent basis was just too high. He held that the receiver was entitled to a fair fee on the basis of a quantum meruit according to the time, trouble and degree of responsibility involved.

8 It should perhaps be noted that there is American authority for the proposition that where the duties of the receiver consist in liquidating assets, a commission on the fund is a more appropriate method of compensation than that based on

a fair price for the labour and time employed, and is the one commonly used. Where the compensation is so computed, 5 per cent is the usual and customary rate in ordinary cases. However, the rate varies according to the degree of difficulty or facility in the collection of different receipts: see 75 C.J.S. 1067.

9 The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

10 Experienced counsel know that it can be a matter of some difficulty to prove that an account for services is fair and reasonable. In many cases, counsel attempt to establish this fact by calling as witnesses persons who are engaged in the same profession or calling to testify that the charges made by the plaintiff are the usual and normal charges for similar services made by members of that particular profession or calling in their locality. In the present case, where the receiver was a chartered accountant, no evidence was tendered by any member of the accounting profession as to the usual and normal charges made for services similar to those performed by the receiver nor, indeed, was any evidence called other than that of the receiver, to establish the reasonableness of the charges which he unilaterally made for his services.

11 One of the compelling factors referred to in *Williston on Contracts*, 3rd ed. (1967), vol. 10, pp. 928-29 as a determinant of the reasonable value of services performed by lawyers is the amount involved. To state this proposition another way, even though a professional is entitled to a fair, just and reasonable compensation measured by the reasonable value of the services rendered, the fees charged must bear some reasonable proportion to the amount of money or the value affected by the controversy or involved in the employment. Thus, in cases where a professional is aware of the amount at issue, courts will impose an underlying or implied limit or maximum on the professional fees it will allow based on what is reasonable in relation to the dollar amount involved in the particular case: see *J.W. Cowie Enrg. Ltd. v. Allen* (1982), 26 C.P.C. 241, 52 N.S.R. (2d) 321 (C.A.).

12 Generally speaking, courts have been reluctant to award remuneration based solely upon the time spent by the appointee in performing his duties: see *Re Amalg. Syndicates*, [1901] 2 Ch. 181, 17 T.L.R. 486. They have preferred to award either a lump sum or a commission upon the amount collected or realized by the receiver. However, whether the commission or lump sum method is used in computing the compensation to be paid to a receiver, the compensation awarded must be fair and reasonable having regard to all of the material facts and circumstances of the particular case. In determining the fairness and reasonableness of a receiver's remuneration it is, I think, well to keep in mind what was said by Barker J. on this subject as long ago as 1894 in *Hall v. Slipp*, 1 N.B. Eq. 37 -39:

... while it is important that a remuneration consistent with the responsibility of the position should be allowed, it is of equal importance that the position should not be made a means simply of absorbing the moneys of creditors and others whose interests it is the duty of this Court to protect.

... while, as a general rule, a commission of five per cent. on receipts is allowable, exceptions are made in special cases, both in the way of increasing the amount where unusual work is required, or diminishing it where the amounts are large or the trouble is insignificant.

... It is evident, if the necessary expenses of administering estates in this Court bear so large a proportion to the amount involved as this, the practical result is simply to enrich the Court's officers at the expense of the suitors. In my opinion, however, the practice of the Court warrants no such result; and I think it only right to point out that it is a mistake to support that those who act as receivers are entitled to charge, or will be allowed, a remuneration made up on a scale of fees applicable to leading counsel.

13 In the present case, there was no evidence tendered of any express agreement regarding the remuneration to be paid to the receiver. Nor do I think that this is an appropriate case in which to limit the compensation payable to the receiver

to a reasonable percentage of the assets handled. On the other hand, were I to uphold the finding of the trial judge, I would in effect be allowing the receiver a fee equivalent to 35 per cent of the amount realized on the sale of the assets.

14 The record discloses that the receiver sold the inventory of Chase Camera & Supply Limited for \$30,075 and that the total receipts from all sources were \$36,566. The receiver charged a fee for its services of \$11,730 which it deducted from the funds in its hands, remitting the balance to the bank. There was no evidence that this receivership was in any way complex. Indeed, the evidence was that the officers of Chase Camera & Supply Limited provided a good deal of assistance to the receiver in the disposition of the assets. In all of the circumstances, it is my opinion that the fee deducted by the receiver, categorized by one of the employees of the bank as "high", was unreasonable in relation to the dollar amount realized on the sale of the inventory and ought to have been reduced. In failing to make that reduction, I think the trial judge erred in principle.

15 Counsel for the Federal Business Development Bank did not call as witnesses the persons who actually performed the work in this receivership, other than Mr. Fowler who supervised it, nor did he tender in evidence any "record or entry of an act, condition or event made in the regular course of" the business of the receiver. In the absence of such evidence, it is difficult to see how s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, can be of any assistance to the receiver in establishing its account. Moreover, the only evidence, other than that of Mr. Fowler, as to the reasonableness of the receiver's account was that of the in-house solicitor for the bank who testified that in a case such as this present one he "would have expected a receiver's bill of approximately \$5,000.00, say in the range of \$4,000.00 to \$6,000.00, which would be something which we would reasonably anticipate". In view of this evidence, it is my opinion that a reasonable remuneration to the receiver in this case would be \$6,000.

16 As my brother Ryan points out, the reasonableness of a demand for payment given on the same day that the bank was informed of a potential sale of the company's inventory was not in issue before us nor, for that matter, was it made clear what act of default by the company was relied upon by the bank as entitling it to crystallize its debenture. Therefore, these matters were not considered on this appeal.

17 I would allow the appeal and reduce the judgment at trial to \$4,591.03. The defendants are entitled to the costs of this appeal which I would fix at the sum of \$750.

Ryan J.A. (dissenting):

18 This is an appeal by the defendants from a decision of a judge of the Court of Queen's Bench, wherein he directed judgment for the plaintiff against the defendants, jointly and severally, in the sum of \$10,249.03 together with costs. In its action the plaintiff claimed against the defendants for a deficiency which it alleged was owing to it under a guarantee given by the defendants to secure a loan of \$40,000 advanced by the plaintiff to Chase Camera & Supply Ltd.

19 The following facts are set out in the decision of the trial judge reported in (1982), 40 C.B.R. (N.S.) 157, 38 N.B.R. (2d) 162 at 163-64, 100 A.P.R. 162 :

In the summer of 1978 the plaintiff lent \$40,000.00 to the company. To secure the loan the plaintiff took a debenture which gave it the right to appoint a receiver. The defendants guaranteed the loan. Both the debenture and guarantee were received in evidence.

Relations between the company and the plaintiff were uneventful until August 27, 1979 when events started happening quickly. That morning Mr. Belyea visited Donald O'Leary, a senior credit officer of the plaintiff, and informed him that the company was in poor financial shape and that Mr. Sam Gamblin, of Gem Photo, was accompanied Mr. Belyea to the meeting, was prepared to pay \$40,000.00 for the company's inventory. Mr. Belyea pointed out that this amount would more than satisfy the company's indebtedness to the plaintiff which then stood at approximately \$34,000.00. Mr. Belyea requested the plaintiff's permission for this transaction.

By the afternoon of the same day the plaintiff had concluded that it could not consent to the transaction and instead appointed H.R. Doane Ltd. as receiver and requested them to take steps to liquidate the inventory. A partner of the Doane firm, Mr. Bev Fowler, was the Doane representative responsible for this task.

Mr. Fowler described the various options open to him at that time and described his efforts in arranging a sale, which took place after tender, to a Bridgewater, N.S. company for \$30,000.00. In addition the plaintiff realized \$4,925.24 apart from the receiver's efforts. A balance of \$7,749.03 remained owing on the \$34,231.85 due at the date of demand. Mr. O'Leary made mention of a balance of \$8,279.30 as of November 10, 1981 but gave no details of this higher figure.

20 At a pre-trial conference the parties agreed that the issues to be determined by the trial judge were:

- a) Did the plaintiff act reasonably in its refusal to accept the Gamblin offer? and
- b) Was the receiver's fee of \$11,730 reasonable?

The same issues were raised on this appeal.

21 As to the first issue the trial judge held the plaintiff was justified in refusing to accept the Gamblin offer of \$40,000 for the inventory of Chase Camera & Supply Ltd. because a substantial amount was owing to the plaintiff, the value of the inventory on which it held its security was unknown to it and because the defendant Belyea disclosed to the plaintiff the company's poor financial situation. These factors no doubt appeared to the plaintiff to jeopardize its position as a creditor. In my opinion, the refusal to accept the Gamblin offer was a business judgment which I cannot say was unreasonable.

22 In his submission counsel for the defendants contended that, not only was the receiver's account unreasonable, but that the receiver had failed to prove that the work charged for was in fact performed. Mr. Fowler, a chartered accountant and licensed trustee, was an audit partner with H.R. Doane Limited specializing in insolvency work. He explained that each of Doane's employees is required to keep a time card upon which the employee enters the hours which he had spent each day on whatever accounts he works on. Mr. Fowler stated that at the end of each week the cards are "extended" and the information thereon is entered in each client's ledger account. He produced photocopies of all time cards and ledger sheets of the Chase Camera account which, by agreement of counsel, were used to establish the time spent by each employee who worked on the account.

23 In seeking to prove the reasonableness of the receiver's account, counsel for the plaintiff did not enter in evidence the employees' time cards or the client's ledger sheets, nor did he avail himself of s. 49 of the Evidence Act, R.S.N.B. 1973, c. E-11, which provides that:

A record or entry of an act, condition or event made in the regular course of a business is, insofar as relevant, admissible as evidence of the matters stated therein if the court is satisfied as to its identity and that it was made at or near the time of the act, condition or event.

24 Notwithstanding the fact the photocopies of the time cards and the client's ledger sheets were not entered in evidence, counsel for the defendants cross-examined Mr. Fowler at length on their contents as though they had been entered in evidence. For this reason and because counsel for the parties agreed at a pre-trial conference that the issue to be decided by the trial judge with respect to the account was whether or not it was reasonable and fair, I am satisfied that the trial judge was entitled to rely on the entries made in the cards as well as the viva voce testimony of Mr. Fowler in determining whether the account was reasonable and fair. The trial judge's finding that the receiver's account was fair and reasonable is a finding of fact supported by the evidence. Moreover, no evidence was tendered by the defendants to prove that the charges were unreasonable, or that the work was not actually performed. As there was no palpable or overriding error in his finding this court will not interfere with it.

25 This appeal did not raise the issue of the requirement of reasonable notice to which a debtor is entitled when a debt is payable on demand. This requirement was illustrated by the decision of the Supreme Court of Canada in *Ronald Elwyn Lister Ltd. v. Dunlop Can. Ltd.*, [1982] 1 S.C.R. 726, 41 C.B.R. (N.S.) 272, 18 B.L.R. 1, 135 D.L.R. (3d) 1, 65 C.P.R. (2d) 1, 42 N.R. 181 delivered 31st May 1982 after the present appeal had been argued. The question whether or not the circumstances of the instant case give rise to a cause of action against the plaintiff is one which we need not consider on this appeal.

26 In the result, I would dismiss the appeal with costs to be taxed in accordance with the schedule of costs in force at the time the action was commenced.

Directions given.



TAB10

1997 CarswellOnt 1246
Ontario Court of Justice (General Division) [Commercial List]

BT-PR Realty Holdings Inc. v. Coopers & Lybrand

1997 CarswellOnt 1246, [1997] O.J. No. 1097, 29 O.T.C. 354, 69 A.C.W.S. (3d) 1003

BT-PR Realty Holdings Inc., Applicant v. Coopers & Lybrand, Respondent

Farley J.

Judgment: February 26, 1997

Docket: B249/96

Counsel: *Kirk Baert*, for the applicant.
Jonathan Lisus, for the respondent.

Subject: Corporate and Commercial

Farley J.:

- 1 The application was dismissed at the end of the hearing and these are the promised reasons.
- 2 Section 248(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3, as amended ("*BIA*") provides as follows:

s.248(2) On the application of the Superintendent, the insolvent person, the trustee (in case of a bankrupt) or a creditor, made within 6 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.
- 3 Both counsel wished to proceed today on the basis of the record before me - i.e. without *viva voce* evidence.
- 4 BT-PR Realty Holdings Inc. ("BT") brought this s.248(2) application seeking a reduction of the fees and charges of Coopers & Lybrand Ltd. ("C&L") in its capacity as receiver of the property of three companies involved in the baking and distribution business (the "Debtors"). The Toronto-Dominion Bank ("Bank") held a prior charge over the property. Each of the Bank and BT privately appointed C&L as receiver/manager over the property of the Debtors on January 25, 1996. Prior to that time BT and the Bank had had a discussion with C&L as to the nature of the receivership being in essence a liquidation. At that time C&L advised as to the three major participants from its side - namely a partner, a manager/principal and a senior associate/specialist with their hourly rates - as to which BT takes no objection. However it appears that Seleena Miller ("Miller") being the person in charge for BT of this receivership wished for C&L to minimize its involvement as she desired her consultant Roland Nimmo ("Nimmo"), BT's law firm and the personnel at the Debtors to do a great deal of the liquidation. The indemnity agreement for C&L provided that BT undertook to:

Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

This is not a license to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the Courthouse to the Royal York Hotel via Oakville.

5 The debt of the Debtors to the Bank was approximately \$525,000 and to BT approximately \$3.5 million. Until discharged in mid April 1996 after the Bank had been paid out, C&L collected \$911,421.83 and disbursed \$169,636.53 yielding a surplus of \$741,785.30 before fees to distribute to the Bank in a priority position and the residue to BT.

6 Nimmo was the eyes and ears of Miller on site. He attended the Debtors premises daily during the first ten days during which time C&L raked up \$40,450 in charges or about 60% of their total charges of \$68,482.50.

7 At the same time as Miller was engaged in this receivership (apparently calling Nimmo some 10 to 15 times a day as well as frequently discussing the matters with C&L personnel) Miller was also engaged in supervising as well for other receiverships relating to loans of approximately \$10 million each. I am of the view that this type of distanced "supervision" and the splitting of functions off is not truly conducive to minimizing the expenses of a receivership but probably will increase them to a fair degree. While Miller takes pride in the collection of accounts receivable - the actual collection of which is acknowledged by C&L as not involving them, it should be noted that only approximately \$356,000 was collected by the persons designated by Miller including Nimmo's involvement notwithstanding the due diligence of BT through Miller and Nimmo prior to acquiring this loan in January 1996. BT estimated the value of accounts receivable at \$500,000 to \$600,000. This due diligence also valued the equipment at \$450,000 based on Nimmo's estimate without an appraisal. The estimate was a fortunate one as the equipment was sold for \$338,000 U.S. which is the equivalent to approximately \$450,000 Cnd. I think this realization to be quite fortunate as the appraisal obtained valued the equipment at \$200,000 Cnd. However through a connection made by C&L (as verified by the buyer) the bakery equipment was sold to a specialized buyer. I think it a reasonable inference that this connection allowed for an enhancement over the general appraisal. The connection was not however one made by BT notwithstanding its claim that according to Miller that BT: "obtained the buyer and negotiated a sale with little or no involvement from Coopers". On cross examination Miller conceded that when she swore her affidavit that the C&L affidavit was misleading. She was not relying upon any information other than an assumption that Fox responded to an advertisement for the sale of the equipment.

8 I think it unfortunate that Miller would take such great umbrage with C&L (and its account) when notwithstanding her definitive assertions in her affidavits she had to retreat on cross examination to advise that she made assumptions - assumptions that would seem without checking as to the reasonableness of same.

9 BT took issue with the fact that C&L charged about \$5,000 for personnel designated as "Estate Administrators" at the rate of \$80 per hour. I do not think that any one should be surprised that more routine or minor matters were handed off to C&L personnel who were charged out at substantially lower rates than that charged by the three identified personnel. If that were not done, then I would be of the view that Miller would complain that work was being done by over qualified persons (at higher than needed rates) and she would have been correct in that. That observation is subject to one qualification - for small intermittent matters, it may be more expensive to have a senior person instruct a junior with the junior doing the work than for the senior person to do it.

10 On February 8, Miller, on finding out the charges incurred to date, erupted indicating that it was outrageous and ridiculous. She wanted a daily time analysis and on being advised that that would cost extra, she advised that was fine. She also required draft invoices and forecasts of future work for her review on a periodic basis. I think it unfortunate that C&L somewhat down played Miller's concern over the size of their fees in their material. In any event, in accordance with its statutory duty, C&L did not draw any of its fees from the receivership account until specific approval was given by Miller in mid April. On April 12, 1996 Miller agreed with the C&L fees and was sent a confirmatory letter to that effect by C&L:

This letter confirms the matters discussed in two telephone conversations of April 12, 1996 between the writer and your Miss Seleena Miller ... will approve Coopers' fees as receiver of the companies for the period from January 25, 1996 to the date we are formally discharged as receiver, and will authorize payment of same from the receiver's account.

Miller was fully aware of the magnitude of the accounts at this time. It is puzzling why Miller did not disclose this approval in her original affidavit. However when C&L responded with it, Miller swore in her supplementary affidavit that she did not approve of the payment and that she had been informed by C&L that it would withhold the file if payment were not forthcoming. In cross-examination Miller testified that she "did not have a choice in the matter" and that C&L "put a gun to my head" and further that C&L had acted in bad faith and unprofessionally. Then in another previously undisclosed revelation Miller further testified that a Mr. Page of the replacement receiver attended a meeting at C&L's office in which C&L made this threat (which would not apparently be at the same time as Miller alleges she was threatened since that was over the telephone). No evidence was tendered from Mr. Page. Notwithstanding this alleged outrageous behaviour, Miller took no action and made no complaint about this to anyone. There does not seem to be an air of reality to this late breaking news.

11 Miller complains about C&L misleading her as to the size of the surplus. However C&L has provided material which was sent to Miller after being shown to her at a meeting wherein the surplus was accurately predicted. Puzzling enough, again Miller did not mention this confirmatory calculation being sent to her in her first affidavit.

12 C&L in its material provides a detailed account of the steps taken throughout the receivership including particularized invoices. It is unfortunate that C&L did not immediately tender its dockets. They were not offered until the cross-examinations. However BT did not wish them at that time but only advised they should be sent to counsel. This unfortunately again was not done until a few days before this hearing. This is a rather casual attitude toward crucial information. However on the other hand, it speaks volumes that BT had no particular interest in them at any time, not even to the extent of complaining that they had not been sent over after her cross-examination. It appears that Miller was content to complain in generalities but did not wish to examine the specifics, notwithstanding that her position was that the bill be slashed by 75%.

13 Miller was aware of the long hours that the receivership field staff worked in the initial ten days. In fact Miller was insistent that all of the Debtors' inventory be sold at the earliest opportunity and she was aware that C&L devoted extensive time to negotiating for the sale of the inventory. Miller asserted that this could have been done by Nimmo with some help from one C&L representative. However in cross-examination she had to advise that it was merely an assumption that one C&L person would be able to count and liquidate the inventory.

14 Miller asserted that the steps taken by C&L were excessive and unreasonable, but her knowledge was indirect:

Q. It is fair to say that the extent of your knowledge of what went on at the premises in the first nine days of the ... receivership is based entirely on what Mr. Nimmo might have provided to you and the information provided to you by the representative of Coopers. Correct?

A. That is correct.

Miller advised that Nimmo was on site for approximately ten days for 10-12 hours a day. On the one hand she asserted that much of the work for which C&L billed BT was in fact performed by Nimmo. However on cross-examination she testified that Nimmo did not report to her about the steps which C&L was taking in the administration of the receivership and that he did not involve himself in the work being undertaken by C&L. One may well question then how Miller can be so certain that C&L was wasting time and doing inappropriate work if she had no direct knowledge and no indirect knowledge and did not care to review the dockets. It is of no assistance for her to assert that Nimmo advised her that C&L was duplicating his work. Not only is this hearsay but no explanation was given as to why Nimmo could not have given his evidence directly.

15 Miller swore that her group handled the sale of all the goods in the first five days and that the accounting and sale of inventory was performed by Nimmo not C&L. But on cross-examination she had to concede that she had no direct knowledge on this point and she did not know the extent of the inventory and the 30 day goods.

16 While Miller denied the legitimacy of Coopers fee for responding to creditors demands she does not have any direct knowledge in this area. She testified that Nimmo could have done this with the assistance of one C&L person. She indicated that she was relying on her lawyers and Nimmo for this. However her lawyers were not on site either to meet with any creditors. Miller deposed that her side "analyzed the claims of" and corresponded with and negotiated settlement with each of the 400 creditors, but she refused to provide any evidence in support of this statement.

17 C&L personnel (the partner and the principal/manager) testified as to the fees incurred. This included the organizing and updating of the accounts receivable sub ledger, a necessary step before accounts receivable could be pursued with certainty. Miller deposed that "Coopers never did this work". On cross examination she indicated that she had no direct knowledge and was only making an assumption.

18 She similarly swore that C&L never did the work of reviewing the Debtors' records for undisclosed assets. She did not rely on Nimmo for this conclusion and had to advise that she merely assumed they had not done the work.

19 Miller alleged C&L continued to bill time to the receivership after the termination of its appointment. Again this appears to have been another assumption.

20 It seems to me that Miller's assertions that C&L did not do the work, or were wasting time or otherwise acting inappropriately vis a vis its charges are merely that. They are not grounded in fact but are merely her unsubstantiated opinion, relying on assumptions in part and otherwise upon Nimmo's advice which clearly gets into contentious hearsay. This should be contrasted with the rather four square direct evidence given by the two C&L senior persons with backup detail and the (unfortunately late appearing) offered dockets.

21 It also seems to me that Miller overlooks that C&L was the receiver of the Bank, which Bank had priority. She could not reasonably expect the Bank to accede to her usurping C&L and in effect her side (she, Nimmo, her lawyers, etc.) becoming the Bank's receiver. Miller complained that C&L was spending most of its time (80%) reporting to the Bank. She makes this bald assertion without checking the dockets. I would also note that Miller had no hesitation in being in constant communication with Nimmo and C&L so she can scarcely complain about reasonable amount of reporting to the Bank by C&L. Of course if she was so certain that the liquidation would pay out the Bank with no problem, she could have had an easy way out of avoiding tolerating the Bank's receiver (if notwithstanding BT's appointment of C&L, C&L is so characterized as the "Bank's" receiver") by purchasing the Bank's position. Then she could have put in any receiver she liked and negotiated any terms with that receiver.

22 The issue on a s.248(2) hearing is whether the fees charged by the receiver are fair and reasonable in the circumstances as they existed - that with the benefit of the receivership going on, not with the benefit of hindsight. I would also note that it would be an unusual receivership and an unusual receiver where a receiver was able to be up to full speed instantaneously upon its appointment. There is a learning curve for the particular case and probably a suspicion equation to solve. The receiver must demonstrate that it acted in good faith and in the best interests of the creditor as opposed to its own interest or some third party's interests. The receiver must also demonstrate that it exercised the reasonable care, supervision and control that an ordinary man would give to the business if it were his own: see *Re Ursel Investments Ltd.* (1992), 10 C.B.R. (3d) 61 (Sask.C.A.). The receiver is not required to act with perfection but it must demonstrate that it acted with a reasonable degree of confidence: see *Ontario Development Corp. v. I.C. Suatac Construction Ltd.* (1978), 26 C.B.R. (N.S.) 55 (Ont.S.C.).

23 While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as *reasonably* possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). *Reasonably* is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

24 I do not particularly quarrel with the list of factors set out in the *Bank of Montreal v. Nicar Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C.C.A.):

- (a) The nature extent and value of the cases;
- (b) the complications and difficulties encountered;
- (c) The degree of assistance provided by the parties;
- (d) time spent by the receiver;
- (e) The receiver's knowledge, experience and skill;
- (f) diligence and thoroughness;
- (g) responsibilities assumed;
- (h) results achieved; and
- (i) the cost of comparable services.

However I would add (j) other material considerations - for example in this case: (i) the April 12 agreement to the fees; (ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price). I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

25 I would say that I found it inappropriate for Miller to give so much hearsay evidence without in any way justifying it. The argument that she was acknowledged as being involved in the situation (since this was by remote through information from Nimmo and C&L personnel) as overcoming this deficiency, especially when she appears to rely on Nimmo (or bald assumptions) and does not appear to rely on anything positive to C&L as to anything said to her by C&L or others.

26 Rules 4 and 21 of the *BIA* Rules state:

4. The practice of the court in civil actions or matters, including the practice in chambers, shall, in cases not provided for in the act or these rules, and so far as it is applicable and not inconsistent with the Act or the Rules, apply to all proceedings under the Act or these Rules.

21. An affidavit on behalf of a corporation may be made by an officer or employee thereof *who has personal knowledge of the facts and deposes to that knowledge in the affidavit.* (emphasis added)

Rule 39.01(5) of the Rules of Civil Procedure states:

39.01(5) An affidavit for use in an application may contain statements of the deponent information and belief with respect to facts that are not contentious, if the source of the information and the fact of the belief are specified in the affidavit.

Miller's affidavits are highly contentious and largely based upon hearsay information and assumptions. It would be inappropriate to rely on any such offending parts of her affidavits: see *Saskatchewan Economic Development Corp. v. Michalyca Management Limited* (1991), 12 C.B.R. (3d) 277 (Sask. Q.B.); *539618 Ontario Inc. v. Olympic Foods (Thunder Bay) Ltd.* (1987), 22 C.P.C. (2d) 195 (Ont. Master); *York Condominium Corp No. 335 v. Cadillac Fairview Corp Ltd.* (1983) 42 O.R. (2d) 219 (Master); *Ontario (Attorney General) v. Paul Magder Furs Ltd.* (1989), 71 O.R. (2d) 513 (H.C.J.); *York Condominium Corp. No. 63 v. Barrington-Rockwood Investment Corp.*, [1991] O.J. No. 2673 (Gen.Div.); *Smith v. Adams*, [1986] O.J. No. 2064 (Dist.Ct.); *D'Amore v. Russ*, [1991] O.J. No. 749 (Gen.Div.). No explanation was offered as to why Nimmo or any of the others referred to by Miller did not provide direct affidavit evidence: see *Air Canada v. McDonnell Douglas Corp.* (1994), 19 O.R. (3d) 537 (Master).

27 Miller's allegations against C&L are serious accusations of bad faith and misconduct. It is therefore particularly unfortunate that virtually all of her allegations are based on hearsay and assumptions. Even if such were admissible, it is inherently unreliable and does not come close to satisfying the special scrutiny that such evidence deserves where there is an allegation in a civil case of serious misconduct (even though the test remains at the balance of probabilities). See also *Re H. Flagal (Holdings) Ltd.*, [1965] O.R. 33 (H.C.J.).

28 It may be that BT was annoyed at C&L and the Bank for withholding the net surplus thought to be attributable to BT. BT sued both C&L and the Bank. This was settled apparently on terms favourable to BT. While one may appreciate the natural human reaction of wanting to get back at the other side, one must appreciate that the settlement wipes the slate clean in law as to the issue in litigation. Thus *if* that were a part of BT's s.248(2) proceedings against C&L, it would be an inappropriate basis or consideration.

29 The application is dismissed. Given the flimsy basis on which BT founded its case and the serious misconduct allegations, such is deserving of a sanction in costs. I would not however award full solicitor and client costs in this situation because of the failure of C&L to provide the dockets right off the bat in the case. BT is to pay \$9,000 to C&L forthwith.



TAB11

CITATION: Target Canada Co. (Re), 2015 ONSC 7574
COURT FILE NO.: CV-15-10832-00CL
DATE: 2015-12-11

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TARGET CANADA CO., TARGET CANADA HEALTH CO., TARGET CANADA MOBILE GP CO., TARGET CANADA PHARMACY (BC) CORP., TARGET CANADA PHARMACY (ONTARIO) CORP., TARGET CANADA PHARMACY CORP., TARGET CANADA PHARMACY (SK) CORP. AND TARGET CANADA PROPERTY LLC.

BEFORE: Regional Senior Justice Morawetz

COUNSEL: *J. Swartz and Dina Milivojevic*, for the Target Corporation

Jeremy Dacks, for the Target Canada Entities

Susan Philpott, for the Employees

Richard Swan and S. Richard Orzy, for Rio Can Management Inc. and KingSett Capital Inc.

Jay Carfagnini and Alan Mark, for Alvarez & Marsal, Monitor

Jeff Carhart, for Ginsey Industries

Lauren Epstein, for the Trustee of the Employee Trust

Lou Brzezinski and Alexandra Teodescu, for Nintendo of Canada Limited, Universal Studios, Thyssenkrupp Elevator (Canada) Limited, United Cleaning Services, RPJ Consulting Inc., Blue Vista, Farmer Brothers, East End Project, Trans Source, E One Entertainment, Foxy Originals

Linda Galessiere, for Various Landlords

ENDORSEMENT

[1] Alvarez & Marsal Canada Inc., in its capacity as Monitor of the Applicants (the "Monitor") seeks approval of Monitor's Reports 3-18, together with the Monitor's activities set out in each of those Reports.

[2] Such a request is not unusual. A practice has developed in proceedings under the Companies' Creditors Arrangement Act ("CCAA") whereby the Monitor will routinely bring a

motion for such approval. In most cases, there is no opposition to such requests, and the relief is routinely granted.

[3] Such is not the case in this matter.

[4] The requested relief is opposed by Rio Can Management Inc. (“Rio Can”) and KingSett Capital Inc. (“KingSett”), two landlords of the Applicants (the “Target Canada Estates”). The position of these landlords was supported by Mr. Brzezinski on behalf of his client group and as agent for Mr. Solmon, who acts for ISSI Inc., as well as Ms. Galessiere, acting on behalf of another group of landlords.

[5] The essence of the opposition is that the request of the Monitor to obtain approval of its activities – particularly in these liquidation proceedings – is both premature and unnecessary and that providing such approval, in the absence of full and complete disclosure of all of the underlying facts, would be unfair to the creditors, especially if doing so might in future be asserted and relied upon by the Applicants, or any other party, seeking to limit or prejudice the rights of creditors or any steps they may wish to take.

[6] Further, the objecting parties submit that the requested relief is unnecessary, as the Monitor has the full protections provided to it in the Initial Order and subsequent orders, and under the CCAA.

[7] Alternatively, the objecting parties submit that if such approval is to be granted, it should be specifically limited by the following words:

“provided, however, that only the Monitor, in its personal capacity and only with respect to its own personal liability, shall be entitled to rely upon or utilize in any way such approval.”

[8] The CCAA mandates the appointment of a monitor to monitor the business and financial affairs of the company (section 11.7).

[9] The duties and functions of the monitor are set forth in Section 23(1). Section 23(2) provides a degree of protection to the monitor. The section reads as follows:

(2) Monitor not liable – if the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(b) to (d.1), the monitor is not liable for loss or damage to any person resulting from that person’s reliance on the report.

[10] Paragraphs 1(b) to (d.1) primarily relate to review and reporting issues on specific business and financial affairs of the debtor.

[11] In addition, paragraph 51 of the Amended and Restated Order provides that:

... in addition to the rights, and protections afforded the Monitor under the CCAA or as an officer of the Court, the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, including for great certainty in the Monitor's capacity as Administrator of the Employee Trust, save and except for any gross negligence or wilful misconduct on its part.

[12] The Monitor sets out a number of reasons why it believes that the requested relief is appropriate in these circumstances. Such approval

- (a) allows the monitor and stakeholders to move forward confidently with the next step in the proceeding by fostering the orderly building-block nature of CCAA proceedings;
- (b) brings the monitor's activities in issue before the court, allowing an opportunity for the concerns of the court or stakeholders to be addressed, and any problems to be rectified in a timely way;
- (c) provides certainty and finality to processes in the CCAA proceedings and activities undertaken (eg., asset sales), all parties having been given an opportunity to raise specific objections and concerns;
- (d) enables the court, tasked with supervising the CCAA process, to satisfy itself that the monitor's court-mandated activities have been conducted in a prudent and diligent manner;
- (e) provides protection for the monitor, not otherwise provided by the CCAA; and
- (f) protects creditors from the delay in distribution that would be caused by:
 - a. re-litigation of steps taken to date; and
 - b. potential indemnity claims by the monitor.

[13] Counsel to the Monitor also submits that the doctrine of issue estoppel applies (as do related doctrines of collateral attack and abuse of process) in respect of approval of the Monitor's activities as described in its reports. Counsel submits that given the functions that court approval serves, the availability of the doctrine (and related doctrines) is important to the CCAA process. Counsel submits that actions mandated and authorized by the court, and the activities taken by the Monitor to carry them out, are not interim measure that ought to remain open for second guessing or re-litigating down the road and there is a need for finality in a CCAA process for the benefit of all stakeholders.

[14] Prior to consideration of these arguments, it is helpful to review certain aspects of the doctrine of *res judicata* and its relationship to both issue estoppel and cause of action estoppel.

The issue was recently considered in *Forrest v. Vriend*, 2015 Carswell BC 2979, where Ehrcke J. stated:

25. “TD and Vriend point out that the doctrine of *res judicata* is not limited to issue estoppel, but includes cause of action estoppel as well. The distinction between these two related components of *res judicata* was concisely explained by Cromwell J.A., as he then was, in *Hoque v. Montreal Trust Co. of Canada* (1997), 162 N.S.R. (2d) 321 (C.A.) at para. 21:

21 *Res judicata* is mainly concerned with two principles. First, there is a principle that “... prevents the contradiction of that which was determined in the previous litigation, by prohibiting the relitigation of issues already actually addressed.”: see Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (1991) at p. 997. The second principle is that parties must bring forward all of the claims and defences with respect to the cause of action at issue in the first proceeding and that, if they fail to do so, they will be barred from asserting them in a subsequent action. This “... prevents fragmentation of litigation by prohibiting the litigation of matters that were never actually addressed in the previous litigation, but which properly belonged to it.”: *ibid* at 998. Cause of action estoppel is usually concerned with the application of this second principle because its operation bars all of the issues properly belonging to the earlier litigation.

...

30. It is salutary to keep in mind Mr. Justice Cromwell’s caution against an overly broad application of cause of action estoppel. In *Hoque* at paras. 25, 30 and 37, he wrote:

25. The appellants submit, relying on these and similar statements, that cause of action estoppel is broad in scope and inflexible in application. With respect, I think this overstates the true position. In my view, this very broad language which suggests an inflexible application of cause of action estoppel to all matters that “could” have been raised does not fully reflect the present law.

....

30. The submission that all claims that could have been dealt with in the main action are barred is not borne out by the Canadian cases. With respect to matter not actually raised and decided, the

test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.

...

37. Although many of these authorities cite with approval the broad language of *Henderson v. Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on “new” evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[15] In this case, I accept the submission of counsel to the Monitor to the effect that the Monitor plays an integral part in balancing and protecting the various interests in the CCAA environment.

[16] Further, in this particular case, the court has specifically mandated the Monitor to undertake a number of activities, including in connection with the sale of the debtors assets. The Monitor has also, in its various Reports, provided helpful commentary to the court and to Stakeholders on the progress of the CCAA proceedings.

[17] Turning to the issue as to whether these Reports should be approved, it is important to consider how Monitor’s Reports are in fact relied upon and used by the court in arriving at certain determinations.

[18] For example, if the issue before the court is to approve a sales process or to approve a sale of assets, certain findings of fact must be made before making a determination that the sale process or the sale of assets should be approved. Evidence is generally provided by way of affidavit from a representative of the applicant and supported by commentary from the monitor in its report. The approval issue is put squarely before the court and the court must, among other things conclude that the sales process or the sale of assets is, among other things, fair and reasonable in the circumstances.

[19] On motions of the type, where the evidence is considered and findings of fact are made, the resulting decision affects the rights of all stakeholders. This is recognized in the jurisprudence with the acknowledgment that *res judicata* and related doctrines apply to approval

of a Monitor's report in these circumstances. (See: *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, [2006] O.J. No. 1834 (SCJ Comm. List); *Toronto Dominion Bank v. Preston Spring Gardens Inc.*, 2007 ONCA 145 and *Bank of America Canada v. Willann Investments Limited*, [1993] O.J. No. 3039 (SCJ Gen. Div.)).

[20] The foregoing must be contrasted with the current scenario, where the Monitor seeks a general approval of its Reports. The Monitor has in its various reports provided commentary, some based on its own observations and work product and some based on information provided to it by the Applicant or other stakeholders. Certain aspects of the information provided by the Monitor has not been scrutinized or challenged in any formal sense. In addition, for the most part, no fact-finding process has been undertaken by the court.

[21] In circumstances where the Monitor is requesting approval of its reports and activities in a general sense, it seems to me that caution should be exercised so as to avoid a broad application of *res judicata* and related doctrines. The benefit of any such approval of the Monitor's reports and its activities should be limited to the Monitor itself. To the extent that approvals are provided, the effect of such approvals should not extend to the Applicant or other third parties.

[22] I recognized there are good policy and practical reasons for the court to approve of Monitor's activities and providing a level of protection for Monitors during the CCAA process. These reasons are set out in paragraph [12] above. However, in my view, the protection should be limited to the Monitor in the manner suggested by counsel to Rio Can and KingSett.

[23] By proceeding in this manner, Court approval serves the purposes set out by the Monitor above. Specifically, Court approval:

- (a) allows the Monitor to move forward with the next steps in the CCAA proceedings;
- (b) brings the Monitor's activities before the Court;
- (c) allows an opportunity for the concerns of the stakeholders to be addressed, and any problems to be rectified,
- (d) enables the Court to satisfy itself that the Monitor's activities have been conducted in prudent and diligent manners;
- (e) provides protection for the Monitor not otherwise provided by the CCAA; and
- (f) protects the creditors from the delay and distribution that would be caused by:
 - (i) re-litigation of steps taken to date, and
 - (ii) potential indemnity claims by the Monitor.

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval is limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

**BRIDGING FINANCE INC.,
as agent for 2665405 ONTARIO INC.**

Applicant

**1033803 ONTARIO INC. and
1087507 ONTARIO LIMITED**

Respondents

Court File No. CV-18-608978-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

Proceedings commenced in Toronto

**BRIEF OF AUTHORITIES
(Returnable July 11, 2019)
(Approval Vaughan Property and
Stouffville Property Transactions)**

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