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

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 December 13, 2018)
(Approval of Brampton Stalking Horse Agreement and Bidding Procedures)
(Sale Approval – Forma-Con Business)

December 11, 2018

TORYS LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2 Canada

Fax: 416.865.7380

Scott A. Bomhof (LSO#: 37006F)
Tel: 416.865.7370
Email: sbomhof@torys.com

Adam M. Slavens (LSO#: 54433J)
Tel: 416.865.7333
Email: aslavens@torys.com

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

INDEX

INDEX
LIST OF AUTHORITIES

Tab	Authority
1.	Houlden, Lloyd W. et al, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell, 2018), L20.
2.	*Nortel Networks Corp.*, (2009), 56 C.B.R. (5th) 224, 2009 CarswellOnt 4838 (Ont. S.C.J. [Comm. List]).
3.	*Timminco and Bécancour Silicon Inc.*, Endorsement dated March 9, 2012, Court File No. CV-12-9539-00CL.
4.	*Target Canada Co. (Re)*, 2015 ONSC 7574 (Ont. S.C.J. [Comm. List]).
5.	*Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.).
6.	*Skyepharma PLC v. Hyal Pharmaceutical Corp.*, (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J., appeal quashed, (2000), 47 O.R. (3d) 234 (C.A.)).
7.	*Integrated Building Corp. v. Bank of Nova Scotia* (1989), 75 C.B.R. (N.S.) 158 (Alta. C.A.).
8.	*Battery Plus Inc. (Re.)*, [2002] O.J. No. 731.
9.	*Tool-Plas Systems Inc. (Re)*, 2008 CanLII 54791 (Ont. S.C.J. [Comm. List]).
10.	*Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522.

TAB1

HMANALY L§20
Houlden & Morawetz Analysis L§20

Houlden and Morawetz Bankruptcy and Insolvency Analysis

THE BANKRUPTCY AND INSOLVENCY ACT

Part XI (ss. 243-252)
L.W. Houlden and Geoffrey B. Morawetz

L§20 — Sale of Assets by a Receiver and Manager

L§20 — Sale of Assets by a Receiver and Manager

See ss. 243, 244, 245, 246, 247, 248, 249, 250, 251, 252

Section 247(b) provides that a receiver shall deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.

The duties of the court in reviewing a proposed sale of assets by a receiver that is opposed by other interested parties are as follows:

(i) it should consider whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;

(ii) it should consider the interests of all parties;

(iii) it should consider the efficacy and integrity of the process by which offers have been obtained; and

(iv) it should consider whether there has been unfairness in the working out of the process: *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.); *National Bank of Canada v. Global Fasteners & Clamps Ltd.* (2001), 24 C.B.R. (4th) 228, 2001 CarswellOnt 945 (Ont. S.C.J. [Commercial List]); *Royal Bank v. Fracmaster Ltd.* (1999), 1999 CarswellAlta 475, 1999 ABQB 425, 245 A.R. 138, 11 C.B.R. (4th) 217 (Alta. Q.B.); *Canadian Imperial Bank of Commerce v. Tux & Tails Ltd.* (2006), 2006 CarswellSask 126, 2006 SKQB 118, 20 C.B.R. (5th) 316 (Sask. Q.B.); *Bank of Montreal v. River Rentals Group Ltd.* (2010), 2010 CarswellAlta 57, 18 Alta. L.R. (5th) 201, 63 C.B.R. (5th) 26, 470 W.A.C. 333, 469 A.R. 333, 2010 ABCA 16 (Alta. C.A.).

For a discussion of the requirements for a sale of assets of a debtor in a commercially reasonable manner, see *Sullivan v. Letnik* (2002), 38 C.B.R. (4th) 284, 2002 CarswellOnt 3454 (Ont. S.C.J. [Commercial List]).

The receiver's duty is not to obtain the best price, but to do everything reasonably possible in the circumstances to obtain the best price: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]), affirmed (2000), 47 O.R. (3d) 234, 15 C.B.R. (4th) 298, 130 O.A.C. 273, 2000 CarswellOnt 466 (C.A.).

The Ontario Superior Court of Justice held that, when considering the recommendations of a court-appointed receiver with respect to the sale of assets, a court should be conscious of the need to preserve the integrity of the sales process regime for sales of assets by officers of the court; and follow the principles set out in *Royal Bank v. Soundair Corp.* (1991), [1991] O.J. No. 1137, 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.). The court also held that its jurisdiction to vary a court order pursuant to s. 187(5) of the *BIA* should be exercised

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

sparingly and by analogy to the provincial law regarding variation of orders: *Re Hunjan International Inc.* (2005), 2005 CarswellOnt 6658, 18 C.B.R. (5th) 89 (Ont. S.C.J.).

The Ontario Superior Court of Justice, on a motion by a court-appointed receiver to approve a sale of assets, held that it will show considerable deference to the receiver and will be disinclined to second-guess the various decisions of the receiver in connection with the sales process and the adequacy of the receiver's efforts; the tests set out in *Soundair, supra* had been met. The court also held that a receiver's insistence on compliance with a deadline for the submission of offers in accordance with the sales process does not detract from the inherent fairness of the sales process and ensures that all interested parties will be governed by the same ground rules and the same deadlines: *Denison Environmental Services v. Cantera Mining Ltd.* (2005), 2005 CarswellOnt 1846, 11 C.B.R. (5th) 207 (Ont. S.C.J.), additional reasons at (2005), 2005 CarswellOnt 243 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that a trustee in bankruptcy can sell its right, title and interest in an action commenced by a bankrupt to purchasers who are defendants in the action as part of a tender process commenced by the trustee and authorized by the non-conflicted inspectors of the bankrupt's estate where: (a) the estate of the bankrupt has no material resources to conduct the litigation and no creditors of the estate are interested in taking an assignment of the action pursuant to s. 38 of the *BIA;* (b) the tender process is conducted in a reasonable and competent manner; (c) the bankrupt did not object to the tender process and participated therein; and (d) the bankrupt had the opportunity to demonstrate to third parties the merits and strengths of the action and seek outside support for a bid. In such circumstances, the court held that it will show deference to the business decision of the trustee and the non-conflicted inspectors of the bankrupt's estate to sell the action to the defendant purchasers: *Re Krzysztof Stanislaw Geler* (2005), 2005 CarswellOnt 2094, 12 C.B.R. (5th) 15 (Ont. S.C.J.).

Unlike a privately appointed receiver and manager, where a court-appointed receiver and manager is selling assets, a secured creditor loses the power to dictate the terms of the sale; in these circumstances, the court has the discretion and power to determine the terms and conditions of the sale: *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93, 1993 CarswellAlta 539 (C.A.).

The court must not, however, enter into the marketplace; it must not sit as if it were hearing an appeal from the decision of the receiver, reviewing in detail every element of the process by which the receiver has arrived at its recommendation that the offer should be accepted: *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.); *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 1991 CarswellOnt 205 (C.A.); *Northwest Territories (Commissioner) v. Simpson Air (1981) Ltd.* (1994), 27 C.B.R. (3d) 190, 1994 CarswellNWT 3 (N.W.T. S.C.); *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 217, 245 A.R. 138, 1999 CarswellAlta 475 (Q.B.), affirmed (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93, 1999 CarswellAlta 539 (C.A.).

The court should not lightly withhold the approval of a sale by a court-appointed receiver. If the receiver acted fairly and reasonably and has made sufficient efforts to obtain the best price, the court will not interfere unless there has been some unfairness or the sale is improvident: *Re Selkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.); *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (Ont. H.C.); *National Trust Co. v. Massey Combines Corp.* (1988), 69 C.B.R. (N.S.) 171, 39 B.L.R. 245 (Ont. S.C.); *Can. Commercial Bank v. Pilum Invt. Ltd.* (1987), 62 C.B.R. (N.S.) 319 (Ont. H.C.); *Royal Bank v. Soundair Corp., supra; Integrated Building Corp. v. Bank of N.S.* (1989), 75 C.B.R. (N.S.) 158, 71 Alta. L.R. (2d) 320 (C.A.); *CCFL Subordinated Debt Fund & Co. v. Med-Chem Health Care Ltd.* (1999), 8 C.B.R. (4th) 171, 1991 CarswellOnt 1361 (Ont. Gen. Div.).

In deciding whether to accept an offer recommended by a receiver, the court should consider the interests of all parties: *Royal Bank v. Soundair Corp., supra; Alma College v. United Church of Canada* (1996), 40 C.B.R. (3d) 78, 1996 CarswellOnt 1176 (Ont. Gen. Div.); further reasons 43 C.B.R. (3d) 8; the decision in 43 C.B.R. (3d) 8 was affirmed 43 C.B.R. (3d) 19 (Ont. C.A.); *Re Regal Constellation Hotel Ltd.* (2004), 2004 CarswellOnt 2653, 23 R.P.R. (4th) 64, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, (*sub nom. HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of)*)

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

242 D.L.R. (4th) 689, (*sub nom. Regal Constellation Hotel Ltd. (Receivership), Re*) 188 O.A.C. 97 (Ont. C.A.), affirming (2004), 2004 CarswellOnt 428, 37 C.L.R. (3d) 207, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]). Creditors' interests are an important consideration but they are not the only consideration: *Royal Bank v. Fracmaster Ltd.* (1999), 11 C.B.R. (4th) 217, 245 A.R. 138, 1999 CarswellAlta 475 (Q.B.), affirmed (1999), 11 C.B.R. (4th) 230, 244 A.R. 93, 209 W.A.C. 93, 1999 CarswellAlta 539 (C.A.).

In *Re Hoque* (1996), 38 C.B.R. (3d) 133, (*sub nom. Hoque (Bankrupt), Re*) 148 N.S.R. (2d) 142, 429 A.P.R. 142, 1996 CarswellNS 51, the Nova Scotia Court of Appeal stated the test in these words: was the receiver in selling the assets acting with integrity in a reasonable and competent manner? If the answer is in the affirmative, then the court will not interfere. It is only in exceptional circumstances that the court will intervene and proceed contrary to the recommendation of the receiver: *Crown Trust Co. v. Rosenberg, supra; Chimo Structures Ltd. v. Chimo Industries Ltd.* (1976), 23 C.B.R. (N.S.) 250 (B.C. S.C.); *Skyepharma PLC. v. Hyal Pharmaceutical Corp., supra.*

Where the court found that the process adopted by the receiver in selling the assets of the debtor was a reasonable and prudent one, designed to sell the assets in an orderly manner so as to obtain the highest return for creditors, it approved the sale: *Re 230 Travel Plaza Inc.* (2002), 38 C.B.R. (4th) 291, 2002 CarswellOnt 4454 (Ont. S.C.J.).

The Ontario Superior Court of Justice held that where a court has approved a sale process proposed by a receiver; authorized the receiver to complete a sale transaction; and determined that the receiver has discharged its responsibilities in good faith and in a commercially reasonable manner, then absent a strong *prima facie* case against the receiver, a court should not grant leave to creditors seeking to sue the receiver for negligence or breach of fiduciary duty in completing the sale transaction, particularly where the court has previously considered and rejected such creditors' allegations: *Toronto Dominion Bank v. Preston Springs Gardens Inc.* (2006), 2006 CarswellOnt 2835, 19 C.B.R. (5th) 165 (Ont. S.C.J. [Commercial List]).

On an application for approval of the sale of assets, the receiver-manager has a duty to bring to the attention of the court any reason it perceives might lead the court to conclude that the sale should not be approved. The receiver-manager does not have to recommend approval of the sale: *Bank of Montreal v. On-Stream National Gas Ltd. Partnership* (1994), 29 C.B.R. (3d) 203, 1994 CarswellBC 633 (B.C.S.C.).

The court will not approve a sale of assets by a receiver-manager where the court is of the opinion that the money being used to purchase the assets is, in fact, the property of the debtor company: *Polar Bear Water Distiller Manufacturing. Co. (Receiver of) v. 590863 Alberta Ltd.* (2001), 26 C.B.R. (4th) 77, 2001 ABQB 501, 2001 CarswellAlta 781 (Alta. Q.B.).

In deciding whether the receiver has acted providently in accepting an offer for the sale of assets, the court should examine the conduct of the receiver in light of the information that the receiver possessed when it accepted the offer. The court must be very cautious in deciding that the receiver's conduct was improvident on the basis of information that has come to light after the receiver agreed to accept the offer: *Royal Bank v. Soundair Corp., supra; Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership* (1995), 30 C.B.R. (3d) 285, 1995 CarswellBC 75 (B.C. S.C.); *Alma College v. United Church of Canada* (1996), 40 C.B.R. (3d) 78, 1996 CarswellOnt 1176 (Ont. Gen. Div.). However, in rare circumstances, on the basis of what has occurred since the acceptance of an offer by a receiver-manager, the court may find that the sale is imprudent and should not be approved: *Bank of Montreal v. On-Stream Natural Gas Ltd. Partnership, supra.* In the *On-Stream* case, six years had elapsed since the acceptance of the offer, and by reason of the actions of the creditor in defending the title of the property being sold, the property increased in value to the great potential benefit of the purchaser without additional cost to the purchaser.

Where, after calling for tenders, a better offer is received from a person who did not respond to the public invitation for tenders, the receiver is not obligated to make a new call for tenders: *Integrated Building Corp. v. Bank of N.S., supra.* If, however, the court has serious concerns whether the receiver has made sufficient efforts to obtain the best offer, the receipt of a significantly larger offer after the close of tenders may indicate that the receiver's conduct has been improvident:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Toronto Dominion Bank v. Crosswinds Golf & Country Club Ltd. (2002), 34 C.B.R. (4th) 170, 2002 CarswellOnt 1149, 59 O.R. (3d) 376 (Ont. S.C.J. [Commercial List]).

A call for tenders does not constitute an offer the acceptance of which will create a legally binding contract: *Arctic Co-operatives Ltd. v. Sigyamiut Ltd. (Receiver of)* (1991), 5 C.B.R. (3d) 271, 1991 CarswellNWT 2 (N.W.T. S.C.). If the call for tenders provides that the highest of any tender will not necessarily be accepted, the receiver-manager is not bound to sell to one of the tenderers: *Arctic Co-operatives Ltd. v. Sigyamiut Ltd. (Receiver of), supra.*

If a sale is made subject to court approval (and this is the usual order), the court is not bound by the contract of sale made by the receiver but must consider if the contract is for the benefit of the creditors as a whole. If there is evidence that there has been confusion about the bidding and that a higher price may be available, the court can refuse to approve the contract of sale and direct the receiver to call for new tenders: *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. S.C.).

Where a receiver solicited offers based on a proposed sale agreement, which required the purchaser to assume substantial environmental cleanup costs for a property in a deplorable condition, the requirement of the assumption of cleanup costs was neither unreasonable nor improvident. The court noted that the receiver considered offers that did not contain the cleanup obligation. The court will be loathe to interfere with the business judgment of a receiver and will ordinarily approve a transaction recommended by a receiver acting properly: *Morganite Canada Corp. v. Wolfhollow Properties Inc.* (2003), 47 C.B.R. (4th) 89, 2003 CarswellOnt 4083 (Ont. S.C.J.).

Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another bidder, since 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 by the sale: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]), affirmed (2000), 47 O.R. (3d) 234, 15 C.B.R. (4th) 298, 130 O.A.C. 273, 2000 CarswellOnt 466 (C.A.); *Re 230 Travel Plaza Inc.* (2002), 38 C.B.R. (4th) 291, 2002 CarswellOnt 4454 (Ont. S.C.J.).

In limited circumstances, a prospective purchaser may become entitled to participate in an 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, however, sufficient: *Skyepharma PLC v. Hyal Pharmaceutical Corp., supra.*

If the court has approved the terms for the sale of assets, and it is desired to amend them, the proper course is to return to court to obtain a variation: *Cleansteel Products Ltd. v. Can. Permanent Trust Co.* (1978), 26 C.B.R. (N.S.) 253 (B.C. S.C.).

The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer, may decide to recommend to the court the acceptance of an unconditional offer rather than a higher offer that contains conditions. If there are conditions in the offer, the receiver must analyze them to determine whether they are within the receiver's control or if they appear, in the circumstances, to be minor and very likely to be fulfilled. The alternatives should be gridded with a view to maximizing the return and minimizing the risk: *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87, 1999 CarswellOnt 3641 (Ont. S.C.J. [Commercial List]), set aside/quashed (2000), 2000 CarswellOnt 466, [2000] O.J. No. 467, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.).

If there are prior and subsequent encumbrancers, they must be made parties to the sale proceedings when the action is commenced so that their right to redeem the debenture is preserved: *Roynat Ltd. v. Canawa Holdings Ltd.* (1978), 28 C.B.R. (N.S.) 285 (Sask. C.A.).

The receiver should ordinarily obtain an appraisal of the property to be sold: *Jeannette B.B.Q. Ltée v. Caisse Populaire de Tracadie Ltée* (1989), 77 C.B.R. (N.S.) 319 (N.B. Q.B.). The property should be properly advertised for sale and, if necessary, the receiver should engage trained professionals to assist in the sale: *Jeannette B.B.Q. Ltée v. Caisse Populaire de Tracadie Ltée, supra.*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

If the court is not satisfied with the way in which the receiver has appraised the property and advertised it for sale, it can refuse to approve the sale and extend the time for offers: *Toronto Dominion Bank v. Agriborealis Ltd.* (1988), 68 C.B.R. (N.S.) 313 (N.W.T. S.C.); *Salima Investments Ltd. v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242 (Alta. C.A.).

The court will not permit a person who has obtained full information about the amount of tenders, at the last moment, to make a slightly higher tender and thus obtain the debtor's property: *Bank of Montreal v. Maitland Seafoods Ltd.* (1983), 46 C.B.R. (N.S.) 75 (N.S. T.D.).

Where a receiver has made a confidential report to the court analyzing the bids received by the receiver, the report should not be disclosed to the bidders, since if the court decides not to accept any bid but to call for new offers, it could hinder the receiver in future negotiations with bidders: *Skyepharma PLC v. Hyal Pharmaceutical Corp., supra.*

If it should be apparent to the receiver that a person bidding for the assets is proceeding on an erroneous assumption in making the bid (e.g., what encumbrances are to be paid by the receiver), the court may relieve the bidder of its bid and order the return of its deposit. The receiver is under a duty to proceed in a commercially reasonable manner, and when beset by a misgiving concerning the bidder's real intention with respect to the purchase, the receiver should take steps to confirm the true state of affairs before accepting the bid: *Re Kenmark Litho Inc.* (1988), 70 C.B.R. (N.S.) 171 (N.S. T.D.).

Where a debtor's directors had spent 15 months trying to market the company and the only purchaser was for an asset sale where the secured creditor would be paid, but little would remain for other creditors and shareholders, the secured creditor sent notice under s. 244 and sought appointment of a receiver under s. 47 of the *BIA* for the limited purpose of approving and effecting the sale of assets. The court held that it had been necessary to appoint the receiver to effect the sale in order to protect the secured creditor's interests, sufficient effort was made to get the best price, and there was no unfairness in the marketing or sale process. The court held that although it was not technically a receiver's sale, it was appropriate to apply the *Soundair* principles in determining the reasonableness of the sale: *Fund 321 Ltd. Partnership v. Samsys Technologies Inc.* (2006), 2006 CarswellOnt 2541, 21 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]).

Where sealed bids have been called for by a receiver, the highest bid should be accepted, even if after the close of bidding, a substantially higher bid is received from one of the bidders. The fact that secured creditors may be affected by the refusal to accept the higher bid is not sufficient reason to justify its acceptance. There are well-established rules governing tendering and, save in exceptional circumstances, they should be followed: *Gene Drennan Ltd. v. Med Grill Ltd.* (2001), 23 C.B.R. (4th) 135, 2001 BCSC 117, 2001 CarswellBC 471 (B.C. S.C. [In Chambers].

While a receiver should not shop against tenders, if a substantially higher offer is received before the receiver applies to the court for approval of an offer, it is proper practice for the court to refuse to approve the offer and to order that interested parties submit sealed bids: *Westcoast Savings Credit Union v. Wachal* (1988), 71 C.B.R. (N.S.) 270, 32 B.C.L.R. (2d) 390 (C.A.). To justify re-opening the bidding, a new offer must be a firm, unconditional offer; if it contains too many conditions, the court will not re-open the bidding: *Babecky v. Macedon Resources Ltd. (Receiver of)* (1991), 6 C.B.R. (3d) 94, 1991 CarswellSask 39 (Sask. C.A.). Where the offer was substantially higher and permitted something to be realized for unsecured creditors, the court refused to approve the highest tender and directed the receiver to call for sealed bids: *Re Modatech Systems Inc.* (1995), 37 C.B.R. (3d) 274, 1995 CarswellBC 1140, 15 B.C.L.R. (3d) 302 (S.C.).

Where a receiver calls for tenders and accepts the highest tender but for some reason the transaction does not close, although the receiver can retender, it is not essential that it does so. In these circumstances, there is nothing unfair or improper in the receiver negotiating with the second highest tenderer to see if an agreement of purchase and sale is possible on the same terms as contained in its original tender or better terms: *Engrais Chaleur Ltée-Chaleur Fertilizers Ltd. v. Mega Bleu Inc. / Mega Blue Inc. (Receiver of)* (2003), 42 C.B.R. (4th) 194, 2003 CarswellNB 257, 2003 NBQB 227, 34 B.L.R. (3d) 40 (N.B. Q.B.).

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Prices in other offers submitted after the receiver has accepted an offer are only relevant 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: *Royal Bank v. Soundair Corp., supra.*

If a fixed charge forms part of debenture security, the court, under its equitable jurisdiction, can refuse to permit a sale until the expiry of the normal redemption period of six months, where it is of the opinion that the delay is necessary to protect the mortgagor's equity of redemption: *Toronto Dominion Bank v. Agriborealis Ltd.* (1988), 68 C.B.R. (N.S.) 313 (N.W.T. S.C.). This situation does not mean that the usual order relating to foreclosure of land applies to all debentures containing a fixed charge; there may be special circumstances that would warrant shortening the period of redemption: *Royal Bank v. Astor Hotel Ltd.* (1986), 62 C.B.R. (N.S.) 257, 3 B.C.L.R. (2d) 252 (C.A.).

If, under its security documents, a creditor has the right to sell, the court will not grant a court-appointed receiver under such security documents the right to sell. In these circumstances, the creditor should exercise the power of sale conferred by its security documents: *Toronto-Dominion Bank v. E. Goldberger Holdings Ltd.* (1993), 12 O.R. (3d) 759, 1993 CarswellOnt 599 (Gen. Div.).

In appropriate circumstances, the court may permit the receiver to sell by private sale: *Genelcan Realty Ltd. v. Wiseman* (1986), 59 C.B.R. (N.S.) 284 (Ont. H.C.).

Where the debtor's assets are sold by a receiver, the proceeds of the realization take the place of the assets that were sold and remain subject to the interests of secured creditors. If there is a dispute about entitlement to the proceeds, this will be decided by the court: *Adelaide Capital Corp. v. St. Raphael's Nursing Homes Ltd.* (1995), 42 C.B.R. (3d) 17, 1995 CarswellOnt 1379 (Ont. Gen. Div.).

Where a receiver is selling assets, the receiver is not bound by contractual terms regarding the assets entered into between the debtor and the person who supplied the assets to the debtor: *Bank of Montreal v. Scaffold Connection Corp.* (2002), 36 C.B.R. (4th) 13, 2002 CarswellAlta 932, 2002 ABQB 706 (Alta. Q.B.).

The Ontario Superior Court of Justice held that it was appropriate to re-open a sales process for a very short timeframe to consider further offers for a debtor company's assets under the *CCAA* where there was at least the potential that a new offer would lead to a much-improved return for the unsecured creditors than an existing firm offer, and where the creditors who will bear the risk of further costs and time delays were prepared to assume such risks: *Re 1587930 Ontario Ltd.* (2006), 2006 CarswellOnt 6419, 25 C.B.R. (5th) 260 (Ont. S.C.J. [Commercial List]).

Where a receiver is authorized to sell assets, it is reasonable and appropriate for the receiver to refuse to participate in litigation involving an asset of a debtor and to assign the debtor's interest in such litigation where it is likely that there will be little or no benefit to the creditors even if the litigation were successful, particularly where the assignment of the debtor's interest in the litigation does not preclude a contingent benefit that may stand to the credit of the receivership in the event that the litigation is successful. The court held that the issue is be decided by reference to the following considerations: a court-appointed receiver (a) is a court officer and has a general duty to deal with the property of the debtor in accordance with the powers provided by the court in its order; (b) has a fiduciary relationship to the debtor and the creditors, with a duty to exercise such reasonable care, supervision and control of the property as an ordinary person would give to his or her own; and (c) must diligently exercise its power to defend, institute or continue proceedings for the benefit of all creditors and debtors: *Astra Credit Union Ltd. v. Protos International Inc.* (2006), 2006 CarswellMan 266, 25 C.B.R. (5th) 83, 2006 MBQB 174 (Man. Q.B.).

The Ontario Superior Court of Justice reviewed the factors to be considered on an application to approve a sale of substantial assets on an expedited basis. In this case the proposed sale was opposed by the Union, which objected on the basis that the proposed transaction was a "quick flip" that would greatly reduce the prospect of recovery for the severance and termination claims of its members. The court held that considerable efforts had been made to achieve a resolution on terms acceptable to the union, the purchaser and the secured creditors, whose funds were at risk. The court

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

applied the four-part test in *Soundair,* finding that its duty was to consider: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; whether the interests of all parties have been considered; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. The court also noted that although the union was given little time to attempt to bring forward other options, it was acknowledged that no concrete proposals had been brought forward. While a going concern sale of the company would undeniably be in the best interests of the employees, a secured creditor is not required to continue to fund a business to satisfy the union's need for an employer and the court placed a great deal of confidence in the receiver's expert business judgment: *Textron Financial Canada Ltd. v. Beta Ltée / Beta Brands Ltd.* (2007), 2007 CarswellOnt 89, 27 C.B.R. (5th) 1 (Ont. S.C.J.).

The Yukon Territory Supreme Court considered a receiver's report that included a request for authorization to sell certain shares held by the debtor in another company. The sale was contested by a non-arm's-length party who claimed second creditor status. The non-arm's-length party also moved to set aside the receivership order some 2-1/2 years after it was made; however, the court found that it was an unreasonable period to bring an application to set aside a court order, given that it had participated in hearings throughout. The recommendations of the receiver were accepted by the court. In addition, the court granted leave to the Government of Canada to commence an oppression action against the non-arm's-length group, given its status of creditor as a result of environmental mismanagement: *Yukon v. B.Y.G. Natural Resources Inc.* (2007), 2007 CarswellYukon 1, 2007 YKSC 2, 31 C.B.R. (5th) 100 (Y.T. S.C.).

In an ongoing *CCAA* proceeding and interim receivership, two parties had been negotiating the terms of an asset purchase. An extension had been previously agreed to by the parties. The memorandum of agreement ("MOA") expired without being formally extended and a third party expressed interest in the assets. The Ontario Superior Court of Justice reviewed the conduct of the parties and the MOA and concluded that no further extension of time had been provided and there was no factual basis on which to apply the principles of promissory estoppel. The debtor could proceed to accept the new offer: *Re Hemosol Corp.* (2007), 2007 CarswellOnt 487, 27 C.B.R. (5th) 311 (Ont. S.C.J. [Commercial List]), motion for leave to appeal dismissed (2007), 2007 CarswellOnt 1083, 31 C.B.R. (5th) 83 (Ont. C.A.), additional reasons at (2007), 2007 CarswellOnt 6690, 34 B.L.R. (4th) 113, 36 C.B.R. (5th) 286 (Ont. S.C.J. [Commercial List]).

Where the wording of a subrogation clause is clear and unambiguous on its face, as well as when read in light of other related documents, the court held that a receiver was entitled to the net sale proceeds of assets being held in trust together with accrued interest: *QK Investments Inc. v. Crocus Investment Fund* (2006), 2006 CarswellMan 254, [2006] 9 W.W.R. 736, 206 Man. R. (2d) 129, 2006 MBQB 172, 27 C.B.R. (5th) 152 (Man. Q.B.), additional reasons at (2007), 2007 CarswellMan 5, 2007 MBQB 4, [2007] 2 W.W.R. 530 (Man. Q.B.).

The Ontario Superior Court of Justice [Commercial List] considered the issue of when a party should be entitled to a success fee in the context of a sale of assets in a receivership. An accounting firm sought a determination of its entitlement to recovery of a success fee for its services as investment advisor for the marketing process undertaken by the receiver of two corporations. After consultation with and approval from major creditors, the firm was engaged to assist in the marketing process. The engagement letter provided for a success fee based on the consideration paid by a third party on completion of a transaction. The minimum success fee payable under the engagement letter was US$400,000. The engagement letter also had a specific definition of "transaction". A potential plan had been put forward under the *CCAA,* which contemplated the sale of the assets, and a key asset central to the sale transaction was a license. A creditor purchased the secured indebtedness held by another creditor and after some litigation became the senior secured creditor. In these circumstances, an assignment by way of a vesting order of substantially all of the debtor's assets was sanctioned by the court because of creditor's senior secured debt. The creditor asserted that the success fee was not payable since the assets acquired by its subsidiary represented a purchase of the existing debt position and that the engagement letter contemplated a transaction in which consideration is paid by a third party and that the purchase of pre-existing security held by its subsidiary was not such a third party transaction. After reviewing the documentation and the submissions, Campbell, J. concluded that the success fee was payable on the basis that the marketing process was pursuant to court direction, which included the involvement of the investment advisor. The engagement letter was entered

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

into with the knowledge and support of the creditors that it would be a binding and enforceable contract. The definition of "transaction" is a broad one and the purchaser is properly regarded as a third party since it received information under a confidentiality agreement. The investment advisor did the work that was contemplated to be entitled for the success fee. The vesting order in effect represents a sale of the debtor's assets and closed as contemplated. Both the receiver and the investment advisor had the reasonable expectation that they would be paid. The fact that the term of the transaction involved assumption of debt rather than sale of assets should not defeat those reasonable expectations. The reasonable expectations include the payment of the success fee out of the receiver's administration charge. In the circumstances, the receiver should not be at risk for the success fee: *Re Hemosol Corp.* (2007), 2007 CarswellOnt 6511, 37 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice held that a contractual licence confers no interest or property in the thing and thus the presence of an exclusive licence did not preclude the receiver from selling the underlying property. Morawetz J. held that the process by which the property was transferred was conducted in accordance with the provisions of s. 47(1) of the *BIA* and s. 101 of the *Courts of Justice Act* and at best, the applicant had an exclusive licence to use the technology. However, even if established, a licence agreement only creates a contractual agreement as between the parties, and even if the grant to market and sell were construed as a traditional licence, it did not acquire a property interest in such a right. The remedy, if any, was contractual in nature and the exercise of that remedy had been impacted by the approval and vesting order, which was a final judicial determination of the rights of the parties represented in that proceeding in respect of the assets that were the subject of the sale. The objective of providing a mechanism for the efficient restructuring of corporations that encounter financial difficulty would be seriously undermined if parties who failed to assert or protect their rights at the time of the restructuring were permitted subsequently to return to court to undo past transactions. Here, the applicant took no steps after becoming aware of the approval and vesting order to set aside or vary the order and did not appeal the order: *Royal Bank v. Body Blue Inc.* (2008), 2008 CarswellOnt 2445, 42 C.B.R. (5th) 125 (Ont. S.C.J. [Commercial List]).

The British Columbia Supreme Court held that a receiver was not bound by an agreement of purchase and sale entered into by the debtor in a court approved sales process that was part of a Chapter 11 and *CCAA* proceeding. Brenner C.J.B.C. was of the view that prior to appointment of the receiver, the contract was not capable of specific performance as the parties continued to exchange drafts of documents and were still trying to reach agreement on the terms of critical documents. No consensus had been reached prior to the appointment of the receiver, and after its appointment, the receiver made its position clear that it was expressly disclaiming or terminating the agreement, and the receiver notified the purchaser that it was not obliged to close the transaction: *Re Pope & Talbot Ltd.* (2008), 2008 CarswellBC 1726, 46 C.B.R. (5th) 34 (B.C. S.C. [In Chambers]).

In considering whether to approve a receiver's motion to approve a "quick flip" transaction, the Ontario Superior Court of Justice considered the impact on various parties and assessed whether their respective positions and the proposed treatment that they would receive in the transaction would realistically be any different if an extended sales process were followed. Morawetz J. was satisfied that there was no realistic scenario under which the employees and suppliers in one division of the debtor would have any prospect of recovery. Morawetz J. was also satisfied that the proposed sale transaction was reasonable and that there was a risk to the business if there was a delay in the process. Under the terms of the proposed offer, the purchaser would acquire substantially all of the assets of the debtor; the purchase price consisted of the assumption or notional repayment of the outstanding obligations to the secured lenders; the purchaser would hire all current employees and assume employee liabilities, and would assume the obligations of the debtor company to trade creditors related to the mould business. The receiver was of the view that the transaction would enable the purchaser to carry on the business, with a successful outcome for customers, secured lenders, suppliers, employees, and other stakeholders. The court approved the transaction and issued a vesting order: *Re Tool-Plas Systems Inc.* (2008), 2008 CarswellOnt 6257 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice granted the motion of a receiver for the approval of a sale of property together with the settlement of a pre-receivership claim of the debtor against the proposed purchaser notwithstanding the objections

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of the debtor and the guarantor. The original receivership order specifically provided that the receiver was to investigate and report on the environmental condition of the property and the status of any proceedings relating thereto; however, the receiver was not to interfere with any proceedings or negotiations of the respondent regarding the environmental condition of the property. Brennan J. concluded that the sale process was reasonable and prudent. He noted that he was not deciding the merits of the owner's claims that the receiver failed to win all of the benefits the owner believed he could have won from the environmental issues; and granted leave to the debtor and the guarantor to commence proceedings against the receiver on account of actions arising out of its administration of the receivership property: *National Trust Co. v. James* (2008), 2008 CarswellOnt 6350, 48 C.B.R. (5th) 95 (Ont. S.C.J.).

The Manitoba Court of Queen's Bench approved a motion brought by the receiver to approve a sale of assets. In so doing, the court concluded that an unsuccessful purchaser did not have standing to challenge a proposed sale. Relying on *Skyepharma PLC v. Hyal Pharmaceutical Corp.* (2000), 2000 CarswellOnt 466, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.), the court held that an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order as it has no legal or proprietary right in the property being sold. The fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of sale, namely the creditors. In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion, where it acquired a legal right or interest from the circumstances of a particular sale process and the nature of the right or interest is such that it could be adversely affected by the approval motion. A commercial interest is not sufficient. Although the court considered the unsuccessful prospective purchasers' evidence in assessing the integrity of the sale process, they were not interested parties merely due to their status as unsuccessful purchasers. There are two principles for a court to consider in reviewing a sale of property. The first is that a court should place a great deal of confidence in the actions taken by the receiver-manager and unless the contrary is clearly shown, the court should assume that the receiver-manager is acting properly. The second principle is that a court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions of the receiver-manager: *Re Shape Foods Inc. (Receiver of)* (2009), 2009 CarswellMan 312 (Man. Q.B.).

The Alberta Provincial Court allowed an appeal of the decision of a master who had denied a receiver's motion to approve a sale of assets. The appeal from the master was *de novo*. The Provincial Court applied the principles enunciated in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) and approved the sale to the bidder recommended by the receiver. The court held that 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. Here, there was no basis for concluding that the receiver's efforts to secure offers were deficient and the evidence supported the opposite conclusion: *Lee v. Geolyn Inc.* (2009), 2009 CarswellAlta 631, 2009 ABQB 261 (Alta. Prov. Ct.).

See article I. Bert Nadler and Karine De Champlain, "Upholding the Discretion of Receivers — The Sale of Hyal Pharmaceuticals Corporation", 13 Comm. Insol. R. 61.

A receiver moved for approval of an agreement of purchase and sale of real and personal property in the face of opposition from four parties. The receiver was appointed over the assets of the debtor companies, specifically, a banquet hall and related chattels. The receiver concluded that the purchaser's terms and price represented the best offer in the circumstances and that acceptance of the offer avoided the downside risk of accepting a slightly higher conditional offer and/or engaging in a longer sales process. Pepall J. of the Ontario Superior Court of Justice held that the court order empowered the receiver to market the property; that the receiver was authorized and empowered to take each step it did in the sale process; and that notices under the *PPSA* and the *Mortgages Act* were not required. The order also provided that proceedings against the debtor or its property were stayed. The court held that it would be inappropriate to permit redemption by a mortgagee at this stage of the proceedings, as a receiver would spend time and money securing an agreement to purchase and sale, subject to court approval, only for there to be a redemption by a mortgagee at the last minute. The court reaffirmed that an unsuccessful purchaser did not have standing and that the *Royal Bank v. Soundair*

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Corp. (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 (Ont. C.A.) tests should be applied; specifically, whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. In this case, while it would have been preferable to have had the receiver advertise in the Indian and South Indian newspapers, given the parties interested in the banquet hall, Pepall J. was of the view that the receiver had not acted improvidently and had made sufficient effort to get the best price. The property was shown 97 times and the property was sold for more than the appraised value and the listing price. The appraisal used a direct sales approach and a cursory income approach, as the debtors had not provided the necessary financial information. Justice Pepall was satisfied that the receiver considered the interests of all parties. The court held that if the receiver's decision 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, it should not be set aside simply because a later and higher bid is made. Here, there was nothing in the evidence that caused the court to question the efficacy and integrity of the process; and there was no unfairness in the process. The motion of the receiver was granted: *Ron Handelman Investments Ltd. v. Mass Properties Inc.* (2009), 2009 CarswellOnt 4257, 55 C.B.R. (5th) 271 (Ont. S.C.J. [Commercial List]).

Where a party submitted a higher bid for assets after the deadline for offers had passed and after the terms of the offer were accepted by the receiver had been made public, the higher bid was not accepted. Justice Cumming of the Ontario Superior Court of Justice was satisfied that the principles applicable to the sale of assets in receivership set forth by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 were met. The receiver had properly and diligently considered the interests of all stakeholders, including the creditors and prospective purchasers, in recommending approval of the agreement. There was no real evidence of any unfairness or lack of integrity in the working out and approval of the sales process. Cumming J. held that the court should not foster uncertainty in the bid process, which would only discourage bids from prospective purchasers and lessen the objective of obtaining the highest possible price in the marketplace. Cumming J. held that it was unfair and objectionable for a party to wait until another bid was made and accepted by the receiver, and then to make a bid that was marginally higher and ask the Court to not approve the agreement of purchase and sale resulting from the accepted bid. The motion of the receiver was granted and the sale approved: *Re 1730960 Ontario Ltd.* (2009), 2009 CarswellOnt 4235, 55 C.B.R. (5th) 265 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice declined to approve a proposed sale by a receiver on the basis that the bidding procedure had been flawed. The motion was brought by a prospective purchaser who sought to set aside an order approving a sale of a kiln to a party related to the applicant and to approve a sale to a party related to the respondent. The receivership had been acrimonious. The secured creditor applicant was owed more than $1 million with little prospect of recovery. The process for the sale was disputed, including its valuation. The court was unaware of the position taken by the moving party that it believed it had an approved bid accepted by the receiver because it was not given proper notice. Campbell J. held that the flaw in the process was that there was never a precise agreement between the parties as to the bidding terms, nor was there a court order that mandated precise terms. The previous endorsement of another judge was clear that counsel to the applicant was to have input on the terms and for reasons that are unclear, this did not take place. The process was flawed as soon as there was no agreement as contemplated by the previous endorsement. Campbell J. concluded that it was appropriate to set aside the sale order approving the applicant's bid. Had all the facts, including the lack of notice to the moving party, been brought to his attention, Campbell J. would not have made the order without the opportunity for submissions. Campbell J. did not agree that the relief sought in part in the applicant's cross motion be accepted, namely that it be permitted by lifting the stay to realize on its security, on the basis that the applicant did not seek to bid earlier, did not advise the moving party of its position before the earlier hearing, and did not file any opposition to the relief sought by the receiver. In the circumstances, the court ordered that it was appropriate to reopen the bidding process on specified terms: *CTJI LLC v. Ship Shape Refinishing Ltd.* (2009), 2009 CarswellOnt 4450, 55 C.B.R. (5th) 261 (Ont. S.C.J. [Commercial List]).

The Ontario Court of Appeal held that a licensee under a Master Licence Agreement with the debtor licensor did not have an interest that was sufficiently connected with the sale process so as to warrant standing in the sale proceedings:

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

BDC Venture Capital Inc. v. Natural Convergence Inc. (2009), 2009 CarswellOnt 5535, 57 C.B.R. (5th) 186, 2009 ONCA 665 (Ont. C.A.).

The Ontario Superior Court of Justice permitted a receiver to reopen a sales process. The court held that giving consideration to a new offer submitted after the terms of the agreement recommended by the receiver had become a matter of public record would discourage parties from bidding in the sales process. However, in this situation, the successful bidder in the initial sale process agreed on terms to reopening the sales process and all parties agreed to the reopening on those terms, on the basis that the initial successful bidder's offer would be converted to a "stalking horse" offer, there would be a further week given for new offers, with a break fee being paid to the bidder subject to certain conditions. Cumming J. was of the view that this approach of a short extension to the sales process was a "win-win" situation for all concerned and was met by agreement of all the parties. The court held that the receiver had properly and diligently followed the court-approved sales process; had not acted improvidently; and had considered the interests of all stakeholders, including the creditors and prospective purchasers in recommending approval of the bid in the first instance and of a different bidder through the reconstituted sales process: *ICICI Bank Canada v. 1539304 Ontario Ltd.* (2009), 2009 CarswellOnt 6114, 57 C.B.R. (5th) 300 (Ont. S.C.J.).

The Ontario Superior Court of Justice granted a receiver's application for an order approving the sale of two properties. The court held that it was clear from the receiver's reports and the information received from the broker who had the listing that the receiver took sufficient steps to obtain the pulse of the market. The approved sales process was followed and while as many offers as were wanted may not have been received, there were offers received. There was no evidence that a further listing would have resulted in any further offers being obtained. The court held that the receiver had made sufficient effort to obtain the best price possible for these properties and had not acted improvidently; had considered the interests of all parties; there was no evidence that the process lacked integrity or efficacy; and there had been no unfairness in the process. The court approved the agreement of purchase and sale and the vesting order as requested. The receiver also requested an order approving its actions and activities as set out in various reports. The actions and activities of the receiver were approved; however, the court pointed out that at least one of the reports contained legal arguments justifying the actions of the receiver and held that a report made by the receiver to the court should not contain legal argument justifying the receiver's actions. Therefore, while approving the actions and activities of the receiver as described in the reports, it did not include approval of the legal argument made by the receiver in the reports: *Re 1730960 Ontario Ltd.* (2009), 2009 CarswellOnt 6178, 60 C.B.R. (5th) 318 (Ont. S.C.J.).

The Ontario Superior Court of Justice considered whether, in a receivership, a vendor must be registered under the Ontario *New Home Warranties Plan Act* to sell a new home. A creditor applied for the appointment of a receiver pursuant to s. 47(1) of the *BIA*, s. 101 of the *Courts of Justice Act* and s. 68(1) of the *Construction Lien Act*. Both of the creditor's mortgages had matured and were in default. The creditor made demands, sent s. 244(1) notices, and proceeded with notices of sale under mortgage. When the notices of sale were issued, 17 of the 25 condominium units were subject to agreements of purchase and sale. Most of the purchasers had terminated their agreements and had sought the return of their deposits from the debtor's lawyers who were holding them in trust. After the notices of sale redemption periods had expired, the creditor sought to be registered as a vendor pursuant to the provisions of the Ontario *New Home Warranties Plan Act*, which creates warranty protection for purchasers of new condominium units in Ontario and requires vendor registration. A vendor is deemed by the statute to give certain warranties against construction defects. The creditor was prepared to finance the completion of the project under a receiver's certificate and have the receiver market and sell the units; and was prepared to undertake to do all the work necessary to obtain registration of the condominium. The court held that it had to examine the role of a court-appointed receiver and the provisions of the *New Home Warranties Plan Act* to ascertain how they interact. Unlike a trustee in bankruptcy, a receiver does not obtain the debtor's proprietary interest in the collateral. A court-appointed receiver derives its powers from an order of the court. The receiver is an administrator accountable to the court and to all the stakeholders in the receivership. The *New Home Warranties Plan Act* defines a vendor as "a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under contract with the owner." Section 6 provides that no person shall act as a vendor or a builder unless the person is registered under the Act. In the case of a condominium project, unit owners

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

are the beneficiaries of the statutory warranties with respect to their individual units and the condominium corporation is the deemed beneficiary of the statutory warranties with respect to the common elements. The court held it was bound by the Court of Appeal decision in *Bloor Street East,* which held that neither a court-appointed receiver nor secured creditor was a vendor within the meaning of the *New Home Warranties Plan Act* as a receiver is not acting as principal or agent in any ordinary sense. The court concluded that any sale to purchasers of units would be effected by court order and that the definition of vendor contained in the *New Home Warranties Plan Act* does not extend to such a sale. An order was made granting appointment of a receiver on the basis that it was necessary for protection of the interests of creditors and that it was just and convenient to do so: *Romspen v. 6176666 Canada Ltée.* (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice reviewed the validity of referential bids in the context of a receivership and held that the receiver was correct in rejecting the referential bid as being invalid in the circumstances. The essence of sealed competitive bidding is the submission of independent, self-contained bids, the fair compliance with which all bidders are entitled. To allow referential bids would frustrate sealed competitive bidding processes, as the process would be unfair because the successful party could introduce into the sealed bid system elements of a public auction without any risk of being outbid by any other party. Here, no one intended or contemplated an auction, which by its nature enables a bid to be adjusted by reference to another bid. Rather, the parties intended a fixed bid process. In the result, the court was satisfied that the receiver's rejection of a referential bid in favour of another bid was commercially fair and reasonable in the circumstances and should be accepted: *Fifth Third Bank v. MPI Packaging Inc.* (2010), 2010 CarswellOnt 29, 62 C.B.R. (5th) 215 (Ont. S.C.J. [Commercial List]).

The appellant owned property on which contamination had earlier been discovered. The owner of the adjoining land admitted responsibility and the parties entered into a remediation agreement under which the responsible party would pay for the remediation and for other losses that the debtor company suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce the obligations under the remediation agreement and for damages. The mortgage fell into arrears and the court ordered the appointment of a receiver, who was given authority to try to resolve the matter directly with the responsible party. They negotiated a settlement whereby the damage claim was settled, the property sold to the responsible party and the debtor company's mortgage debt partially recovered and partially forgiven. The receiver sought and received court approval for the sale and settlement. On appeal of that judgment, the Court of Appeal held that a court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the property. As an officer of the court, the receiver is obliged to make full and fair disclosure in all of its applications. The court should rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown. In this case, where the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances. The receiver must act "with meticulous correctness, but not to a standard of perfection". The Court held that the orders appealed from were more discretionary in nature. The Court of Appeal will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations. The Court held that the same factors identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) could be applied in considering the providence of this settlement, where the values of both a property and claim for damages are in issue: (a) whether the receiver has made a sufficient effort to get the best price and has not acted improperly; (b) the interests of all parties; (c) the efficacy and integrity of the process by which offers are obtained; and (d) whether there has been unfairness in the sale process. Here, the receiver's appraisal and actions and the motion judge's review of the receiver's recommendations based on that appraisal were, in the circumstances, perfectly sound. The receiver's primary task was to ensure that the highest value was received for the assets so as to maximize the return to creditors; and its duty of fairness required that it maximize the return to the debtors, but such a return is not always commercially feasible. Without the sale, it would have been impossible for the senior lender to otherwise recover any significant portion of the debt: *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 CarswellOnt 2869, 67 C.B.R. (5th) 204, additional reasons at (2010), 2010 CarswellOnt 4839 (Ont. C.A.).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Where a receiver and manager was appointed and the estate included four pieces of equipment secured by a PMSI and the bank sought to sell the equipment, the court approved the bank's sale of three pieces of the equipment, but not the fourth, which was a skid office that was attached to a building and would result in damage to the value of the rest of the property if removed. The court held that the receiver should have the opportunity to market the property, including the skid office, and the receiver was to devise a process that would ensure that the bank received its fair share of the proceeds of the sale process: *Royal Bank v. Ramco Sales Inc.* (2010), 2010 CarswellAlta 102, 64 C.B.R. (5th) 48, 2010 ABQB 1, 16 P.P.S.A.C. (3d) 81 (Alta. Q.B.).

In a case relating to the sale of the debtor's assets, the New Brunswick Court of Appeal granted standing to certain parties in an appeal, noting that this case was not one of a "bitter bidder", but rather, a case in which a prospective purchaser had acquired a legal right or interest that could be adversely affected by a court order. The Court of Appeal also granted standing to certain secured note holders, notwithstanding the language in the trust indenture that provided that the trustee could only act on the authorization of a fixed percentage of the secured creditors. The Court of Appeal then denied leave to appeal as the issues on appeal were not of significance to the practice and were not *prima facie* meritorious: *Re Blue Note Caribou Mines Inc.* (2010), 2010 CarswellNB 388, 2010 CarswellNB 389, 69 C.B.R. (5th) 298 (N.B. C.A.).

The Ontario Superior Court of Justice authorized a receiver to take steps to sell two properties and to borrow money to expand the premises on a property leased by Canada Post. The order was granted over the objections of the second mortgagee. In a subsequent decision, in the face of an appeal of the first decision, the court ordered that the first decision was subject to provisional execution: *Computershare Trust Co. of Canada v. Beachfront Developments Inc.* (2010), 2010 ONSC 4615 [Note: August 20, 2010 judgment is not available at this time]; *Computershare Trust Co. of Canada v. Beachfront Developments Inc.* (2010), 2010 CarswellOnt 6813, 2010 ONSC 4833 (Ont. S.C.J. [Commercial List]). For a discussion of this case, see L§18 "Duties and Powers of the Receiver".

In litigation proceedings where one party entered into receivership, a bidding process to buy the debtor's interest in the litigation was challenged. The court held that the receiver had acted reasonably in conducting the sale and in finding a referential bid to be invalid. The parties had been aware that they were to submit final and best offer bids by a specified date and it was open to the motion judge to find that an auction was not contemplated: *Fifth Third Bank v. MPI Packaging Inc.* (2010), 2010 CarswellOnt 3884, 68 C.B.R. (5th) 110, 2010 ONCA 431 (Ont. C.A.).

The Ontario Superior Court of Justice dismissed a receiver's motion to approve an asset purchase agreement with two parties under which the purchasers would acquire, by a credit bid, the assets of the respondents. The assets of the debtor were fixed assets, largely comprised of computer technology, intellectual property, proprietary software applications, trademarks, supply contracts and an investment in shares of a wholly-owned subsidiary. Justice Newbould observed this bid was a credit bid, in which no cash was being paid to the receiver. Without an indication of the value of the assets that had been sold, it was not possible to consider whether the payment by way of a reduction of debt was satisfactory. Without this information, there was no basis for the court to conclude that a sale in the circumstances should be approved. Justice Newbould was of the view that the agreement should not be approved. He considered the material to be completely inadequate to enable the court to properly understand the circumstances to consider whether the sale was in the best interests of the stakeholders. Moreover, valuations or opinions as to the value of assets, including the intellectual property of the debtor, had not been obtained by the receiver and the unusual terms regarding the sale of intellectual property appeared to have been inserted in the agreement on the demand of the purchasers without any analysis or consideration as to the effect of the terms. Newbould J. also had considerable concern as to some aspects of the process, including that the time frame provided to sell the assets was too short and concern that there had not been sufficient exposure of the assets to the market place. Justice Newbould observed that a receiver appointed by the court is an officer of the court. The court is entitled to, and expects, a balanced report from the receiver without containing arguments as to why the receiver acted properly. If there is a factual dispute, it is open to a receiver to describe for the court what the factual dispute is, but leave it to the parties to file proper affidavit evidence relating to the dispute. While the receiver is required to take into account the interests of that secured creditor along with the interests of all

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

other creditors, its job is not just to do the bidding of that secured creditor. In this case, the receiver's second report was replete with argument and rationalization of its actions and gave the appearance that the receiver was not a disinterested neutral observer, but rather an advocate. Justice Newbould was of the view that the receiver should retain new counsel, and any further material provided by the receiver should be done in a manner that would give comfort that the receiver has given due consideration to all important aspects of the receivership and is acting as a neutral, non-interested court officer providing balanced reports. The principles set out in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1 (Ont. C.A.) had not been met: *Canrock Ventures LLC v. Ambercore Software Inc.* (2011), 2011 CarswellOnt 1069, 76 C.B.R. (5th) 298, 2011 ONSC 1138 (Ont. S.C.J. [Commercial List]).

Section 247 of the *BIA* specifies that a receiver must act honestly and in good faith and deal with the property of the insolvent company in a commercially reasonable manner. The court observed that a receiver had concluded that more could be realized for the estate by putting the cause of action up for bidding than by pursuing the cause of action itself at the expense of the estate. The court held that there are many ways that a receiver can go about selling an asset. Where, as here, the asset is an unusual one, the court should be open to creative processes to maximize recovery for the estate. In ascertaining whether a suggested process is appropriate, the court's concern should be whether the process is reliable, transparent, efficient, fair and one that guards the parties' interests: *Bank of Montreal v. Calgary West Hospitality Inc.* (2011), 2011 CarswellAlta 698, 78 C.B.R. (5th) 287, 2011 ABQB 293 (Alta. Q.B.). For a discussion of this judgment, see C§86(2) "Who May bring an Application?".

The Nova Scotia Supreme Court denied the motion of a purchase money security interest holder to lift the stay in a receivership. The receiver was of the opinion that the best realization of the debtor's assets would come from a sale of the assets en bloc and it was concerned that enforcement proceedings would negatively impact an en bloc sale. In deciding whether a stay contained in a receivership order ought to be lifted, the court will consider the totality of the circumstances and the relative prejudice to both sides; and while not strictly applicable, guidance may be drawn from s. 69.4 of the *BIA* where material prejudice has been found to be objective prejudice as opposed to a subjective one. Justice Hood stated that the case law is clear that mere supposition or speculation was not sufficient to warrant lifting of the stay. The receiver's duty is to act in the interests of the general body of creditors, to consider the interests of all creditors, and then act for the benefit of the general body of creditors. The court must weigh the benefits and disadvantages to each against the general good and consider the totality of the circumstances. Here, the court could not conclude that the possible prejudice of the security holder outweighed the benefit to the creditors of an en bloc sale: *Re Scanwood Canada Ltd.* (2011), 2011 CarswellNS 564, 84 C.B.R. (5th) 57 (N.S.S.C.).

The Ontario Court of Appeal held that a receiver acted prudently and reasonably in its efforts to secure sale of some of the debtor company's assets, and the sale process and proposed sale and technology licence agreements satisfied the criteria for approval. Sale of all the assets en bloc was not realistic in the circumstances; the debtors lacked the cash to fund an extensive round of marketing; the receiver had used sufficient efforts to pursue the sale of assets; and the price was reasonable when measured against the valuations. The appeal was dismissed: *Canrock Ventures LLC v. Ambercore Software Inc.* (2011), 2011 CarswellOnt 4170, 78 C.B.R. (5th) 97 (Ont. C.A.).

In determining whether a receiver acted properly in conducting a sale, the court will consider whether sufficient effort has been made to obtain the best price; the interests of all parties; the efficacy and integrity of the process by which the receiver obtained offers; and whether there was any unfairness in the process: *Bank of Montreal v. Dedicated National Pharmacies Inc.* (2011), 2011 CarswellOnt 7972, 83 C.B.R. (5th) 155 (Ont. S.C.J. (Commercial List)).

The Ontario Superior Court of Justice approved a sale of assets by a receiver to a party related to the debtor. In such circumstances, the court emphasized that it is incumbent on the receiver to review and report on the activities of the debtor. The receiver, in conducting a sales process, was expected to follow the *Soundair* principles and the process should be transparent and should enable the court to make an informed decision as to whether the sale could be considered fair and reasonable in the circumstances. Justice Morawetz was not satisfied that the first report of the receiver provided sufficient detail to allow him to make an informed decision. The circumstances involved a related party as landlord and a directly related party as purchaser; and thus the receiver must provide sufficient detail in order to satisfy the court that

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the best result was being achieved. It was not sufficient to accept information provided by the debtor, where a related party is purchaser, without taking steps to verify the information. Justice Morawetz observed that a sale approval order, if granted, provides a degree of comfort to a receiver and other parties that the court has considered the issues and has concluded that circumstances are such that the sale can be said to be fair and reasonable. The receiver provided a supplemental report that addressed the above referenced concerns and Morawetz J. was satisfied that the sale was reasonable in the circumstances: *Toronto Dominion Bank v. Canadian Starter Drives Inc.* (2011), 2011 CarswellOnt 15140, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice approved a sales/auction process and priority of receiver's charges. In approving the priority of receiver's charges, the court reviewed *CCAA* cases and adopted the principles for receivership cases. Justice Brown held that the reasonableness and adequacy of a sales process proposed by a receiver must be assessed in light of factors that the Ontario Court of Appeal identified in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.), specifically, when reviewing a sales and marketing process proposed by a receiver, a court should assess: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets up for sale. The use of stalking horse bids to set a baseline for the bidding process, including credit bid stalking horses, has been recognized by Canadian courts as a reasonable and useful element of a sales process. The court must balance the need to move quickly to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process. In light of the financial circumstances of the debtor and the lack of funding available to support operations during a sales process, Brown J. accepted the receiver's recommendation that a quick sales process was required in order to optimize the prospects of securing the best price for the assets. The court approved the stalking horse agreement for the purposes requested by the receiver. Justice Brown was of the view that the need for certainty about the priority of charges for professional fees or borrowings apply to priority charges sought by a receiver pursuant to s. 243(6) of the *BIA*. Here, reasonable notice had been provided to affected persons and the requested relief was granted. The court did not regard the presence of a "come-back clause" in the appointment order as leaving the door open for some subsequent challenge to the priorities granted by this order: *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.* (2012), 2012 CarswellOnt 3158, 90 C.B.R. (5th) 74 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice dismissed an application to appoint a receiver and manager and to approve a "quick flip" to a related party. The distinctive feature of the application was that the applicant secured creditor, debtor and purchaser were related entities, sharing common ownership. Brown J. was of the view that the circumstances typically necessitating the appointment of a receiver were not present in this case and the applicant did not lead evidence identifying the need for a court order in order to ensure that the receiver could do its job. Justice Brown inferred from the materials that the reason the applicant sought a court appointment of a receiver had more to do with the terms of the approval of the proposed sale, *i.e.*, effectively dispensing with the requirement to comply with Part V of the Ontario *PPSA*, which would apply in the case of an appointment of a private receiver, than with the need of the secured creditor for the assistance of the court in enforcing its rights. A court will consider (i) whether the receiver has made a sufficient effort to get the best price and has not act improvidently, (ii) the interests of all parties, (iii) the efficacy and integrity of the process by which offers are obtained, and (iv) whether there has been unfairness in the working out of the process. The duty of a receiver is to place before the court sufficient evidence to enable the court to understand the implications for all parties of any proposed sale and, in the case of a sale to related party, the overall fairness of the proposed related-party transaction. Brown J. was not satisfied that there was evidence demonstrating that close scrutiny had been made by the proposed receiver of the validity of the security. The lack of such evidence was particularly troublesome because a proposal under the *BIA* was reported as not a viable option because that creditor was unwilling to compromise its secured debt. Finally, the court was concerned that no valuation of the assets was filed, and concluded that there was a lack of evidence to assess whether the proposed receiver acted to get the best price and did not act improvidently. The dismissal was on a without prejudice basis to the ability of the applicant to reapply on better evidence: *9-Ball Interests Inc. v. Traditional Life Sciences Inc.* (2012), 2012 CarswellOnt 5829, 89 C.B.R. (5th) 78, 2012 ONSC 2788 (Ont. S.C.J. [Commercial List]).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The British Columbia Supreme Court adjourned the application of a secured creditor to provide the receiver manager with the immediate ability to sell real property charged by the security. The secured party could re-apply once the six-month redemption period set by the court expired. In arriving at its decision, the court considered the question of whether the setting of a redemption period where the security is a debenture is different than where the security is a mortgage charging land or where the security is an agreement for sale. Burnyeat J. held that in the interests of commercial certainty and in order that the procedures relating to the enforcement of agreements for sale, mortgages and debentures can be dealt with in a consistent manner, the court will be called on in enforcement proceedings to set a redemption period in accordance with the equities existing relating to the value of the property and to the debt owing under the security that is being enforced. If the position of the party enforcing the security is secured by the value of the property charged, then the usual redemption period of six months will apply. If not, a shorter redemption period will be ordered rather than the "usual" six months: *IMOR Capital Corp. v. Bullet Enterprises Ltd.* (2012), 2012 CarswellBC 1832, 2012 BCSC 899 (B.C.S.C. [In Chambers]).

The Ontario Superior Court of Justice approved a sale of assets, notwithstanding a late superior offer that materialized after the deadline established in the court approved sales process. The objecting creditor held a beneficial interest in the subordinated secured plan notes and was the fourth largest trade creditor of the debtor. The creditor submitted that it expected to receive less than 6% recovery on its holdings under the notes and no recovery on its trade debt; but if the late offer were accepted, it expected to receive full recovery under the notes, and possibly a distribution with respect to its trade debt. The court held that s. 36 of the *CCAA* sets out a non-exhaustive list of factors for the court to consider in determining whether to approve a sale transaction, including (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances; (b) whether the monitor approved the process leading to the proposed sale or disposition; (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; (d) the extent to which the creditors were consulted; (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Justice Morawetz held that the list of factors set out in s. 36(3) of the *CCAA* largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.* (1991), 1991 CarswellOnt 205, 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1 (Ont. C.A.), which specifies that when assessing whether to approve a transaction to sell assets, the court should consider: whether the court-appointed officer has made sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. Morawetz J. held that that at the time the offer was accepted, the late offer was higher but was non-binding. The court held that the test is not whether another bidder was aware of the opportunity to participate in a sales process, but rather, whether the officer has made sufficient effort to get the best price and has not acted improvidently. Justice Morawetz concluded that the efforts to market the assets were reasonable in the circumstances. Although the late offer was higher than the purchaser's offer, Morawetz J. was of the view that the increase was not such that he would consider the accept transaction to be improvident in the circumstances. In all respects, Morawetz J. was satisfied that there had been no unfairness of the working out of the process. In the result, Morawetz J. determined that the approval and vesting order should be granted: *Re Terrace Bay Pulp Inc.* (2012), 2012 CarswellOnt 9470, 92 C.B.R. (5th) 40, 2012 ONSC 4247 (Ont. S.C.J. [Commercial List]).

The Québec Superior Court reviewed the law relating to the sale of assets in a *CCAA* proceeding. The court issued an order approving a divestiture process to be followed by the debtor company for the sale of some of its assets. The debtor, with the help of its chief restructuring officer (CRO) and the monitor, followed the procedure provided for in the divestiture process to find qualified bidders for the assignment of the contract. Two qualified bidders were named, and one of those bids was accepted. A creditor that held first ranking security on the assets involved in the contract and on the proceeds supported the debtor. Another party opposed arguing lack of transparency and unfairness. Justice Gouin held that a crucial aspect of the proceedings was that the divestiture process followed by the debtor for the assignment of the contract had already been approved and authorized by the court. Further, participating bidders had reviewed and accepted the full terms and conditions of the divestiture process under the order, thus the process, including all

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

its steps and phases, could not be challenged at this point in time. Justice Gouin observed that the divestiture process was structured so as to maximize the debtor's' chances of getting as much value as possible for its assets; however, the process still had to be implemented transparently, fairly and with integrity. The monitor was of the view that the whole bidding process was reasonable, had been conducted in accordance with the rules, and was fair and transparent. Justice Gouin held that s. 36(3) of the *CCAA* lists some of the factors that the court considers before authorizing a sale of assets: whether the process leading to the proposed sale or disposition was reasonable in the circumstances; whether the monitor approved the process leading to the proposed sale or disposition; whether the monitor filed with the court a report stating that, in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy; the extent to which the creditors were consulted; the effects of the proposed sale or disposition on the creditors and other interested parties; and whether the consideration to be received for the assets is reasonable and fair, taking into account their market value. Gouin J. held that once a process has been put in place by court order for the sale of assets of a failing business, that process should be honoured, except in extraordinary circumstances. The court will not lightly interfere with the exercise of the commercial and business judgment properly exercised by the applicant and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient. Here the court was satisfied that the process was implemented with transparency, integrity, efficacy, and fairness: *Re Aveos Fleet Performance Inc./Aveos performance aéronautique inc.*, 2012 CarswellQue 8620, 2012 QCCS 4074 (Que. S.C.).

The Saskatchewan Court of Queen's Bench reviewed the case law relating to receivership sales after a bid deadline. The court confirmed the bid submitted prior to the deadline. The court observed that if the decision of a receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances, it should not be set aside simply because a later and higher bid is made. To do so would create chaos in the commercial world and purchasers would never be sure they had a binding agreement. The court and the administration of justice have an abiding interest in maintaining commercial probity and reasonableness in any sale directed by the court. Here, Smith J. held that if the higher bid were to prevail, any reasonable observer would not regard the process as fair and reasonable or one characterized by integrity. The bidder through a court application for disclosure placed itself in a situation where it knew precisely the bid it had to better, and to allow it to defeat the successful bidder by reason of a court ordered disclosure process would not yield a principled result: *MNP Ltd. v. Mustard Capital Inc.*, 2012 CarswellSask 593, 97 C.B.R. (5th) 165, 2012 SKQB 325 (Sask. Q.B.).

The Ontario Superior Court of Justice analyzed the basis for approval of a "pre-pack" credit bid sale in a proposed receivership of debtors that operated four retirement residences. Justice Brown noted that "quick flip" or pre-pack transactions are becoming more common in the distress marketplace. In certain circumstances, a quick flip involving the appointment of a receiver and then immediately seeking court approval of a pre-packaged sale transaction may well represent the best, or only, commercial alternative to a liquidation, citing *Re Tool-Plas Systems Inc.*, 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]). The court will still assess the need for a receiver and the reasonableness of the proposed sale and will scrutinize with care the adequacy and the fairness of the sales and marketing process in quick flip transactions. The court will assess the impact on various parties and whether their respective positions and the proposed treatment that they will receive in the quick flip transaction would realistically be any different if an extended sales process were followed. Justice Brown noted that the need for such a robust and transparent record is heightened where the proposed purchase involves a credit bid by one of the debtor's secured creditors, the practical effect of which usually is to foreclose on all subordinate creditors. On the evidence, Brown J. was satisfied that the appointment of a receiver was necessary to preserve the opportunity to continue to operate the retirement residences as going concerns, thus ensuring a place to live for the residents and maintaining current levels of employment. The record confirmed a professional and prolonged effort to elicit interest in the properties from third party purchasers; but it appeared that market conditions were such that interest could not be generated at a level that would cover the senior secured indebtedness. Brown J. was satisfied that the appraisals provided the independent evidence necessary to conclude that the proposed sale price was reasonable in the circumstances and that the proposed sale agreement gave proper treatment to claims: *Montrose Mortgage Corp. v. Kingsway Arms Ottawa Inc.*, 2013 CarswellOnt 15278, 2013 ONSC 6905 (Ont. S.C.J. [Commercial List]).

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

The Ontario Superior Court of Justice declined to approve a proposed transaction for the sale of a house. Following an auction approval order, the receiver entered into an auction services agreement. Subsequently, the receiver was presented with an offer for the property; the receiver's report did not explain how the offer had come about. The receiver met with the offerors, as a result of which the receiver was sent an enhanced offer. The receiver recommended approval of the transaction on the basis that (i) the offer price was at the high end of the valuation range; (ii) the offer was unconditional; (iii) a significant deposit accompanied the offer; and (iv) the auction services stated that while a higher price is possible at a "live" auction, it is not a likely outcome. Justice Brown referenced the Court of Appeal decision in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.), where the court held that while the primary concern of a receiver is the protection of the interests of creditors, a secondary and "very important consideration" is the integrity of the process by which the sale is effected. In this case, the receiver sought and obtained approval to conduct a sales auction process because of the inability to attract adequate offers for the property through a listing process. The auctioneer had put in place the infrastructure necessary to conduct an auction and had conducted 131 tours of the property. The auction was only four business days away. While Brown J. acknowledged that the inclination of the receiver to take the "bird in the hand" was understandable, given the poor marketing history for the property, he concluded that deviating from the court-approved auction process of this stage would damage the integrity of the sales process. Whether the auction resulted in a better bid than that contained in the proposed transaction was a matter for the market to decide. It could be that the successful bid at the auction would fall short of the proposed transaction, but that risk naturally attaches to any auction process. Brown J. also noted that an auction process had been recommended by the receiver to the court not more than two months prior as the most appropriate way by which to sell the property and the court had accepted that recommendation. The integrity of the sales process required that the auction proceed: *HSBC Bank Canada v. Lechcier-Kimel*, 2013 CarswellOnt 15938, 2013 ONSC 7241 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice appointed a receiver and approved a sale of assets, reviewing the test for approval of a "quick flip" transaction. The receiver and the three related purchaser entities ("purchasers") had negotiated asset purchase agreements ("APA"), under which the aggregate of the purchase prices was less than the amount of the obligations owed by the debtor under credit agreements and related guarantees. The receiver was of the view that the transactions were the best available option as it would stabilize the debtor's Canada's operations, provide for additional working capital, facilitate the employment of substantially all of the employees, continue the occupation of up to three leased premises, provide new business to existing suppliers, allow for uninterrupted service, and preserve the goodwill and overall enterprise value of the companies. Justice Morawetz noted that it is settled law that where a court is asked to approve a sales process and transaction in a receivership context, the court is to consider the "Soundair principles"; specifically, whether the party made a sufficient effort to obtain the best price and to not act improvidently; the interests of all parties; the efficacy and integrity of the process by which the party obtained offers; and whether the working of the process was unfair. Justice Morawetz was satisfied on the evidence that each of the Soundair principles had been satisfied, and that the economic realities of the business vulnerability and financial position of the debtor militated in favour of approval of the issuance of the requested orders. Justice Morawetz held that where court approval is being sought for a so-called "quick flip" or immediate sale, which involves, as in this case, an already negotiated purchase agreement sought to be approved on or immediately after the appointment of a receiver without any further marketing process, the court is still to consider the Soundair principles, but with specific consideration to the economic realities of the business and specific transactions in question. He noted that courts had approved the sales where: (a) an immediate sale is the only realistic way to provide maximum recovery for a creditor who stands in a clear priority of economic interest to all others; and (b) delay of the transaction will erode the realization of the security of the creditor having the sole economic interest. Morawetz J. also referenced *Re Tool-Plas Systems Inc.*, 2008 CarswellOnt 6258, 48 C.B.R. (5th) 91, [2008] O.J. No. 4218 (Ont. S.C.J. [Commercial List]) where he stated: "A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed." In this case, Morawetz J. was satisfied that the APA were the culmination of an exhaustive marketing process and that there was no realistic indication that another sales process would produce a

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

more favourable outcome. Morawetz J. found that the sales process, in this case, was fair and reasonable, and that the transactions were the only means of providing the maximum realization under the current circumstances. Morawetz J. was satisfied that no party was prejudiced by the form of the transaction. Morawetz J. noted that even if the purchasers and the debtor were to be considered, out of an abundance of caution, related parties, it did not in itself preclude approval of the transaction. Where a receiver seeks approval of a sale to a party related to the debtor, the receiver is required to review and report on the activities of the debtor and the transparency of the process to provide sufficient detail to satisfy the court that the best result is being achieved. A sale to a party related to the debtor is not precluded, but will subject the proposed sale to greater scrutiny to ensure transparency and integrity in the marketing and sales process and require that the receiver verify information provided to it to ensure the process was performed in good faith. Morawetz J. accepted the recommendations of the receiver that the market for the assets had been sufficiently canvassed through the sales and marketing processes and that the purchase prices under the APA were fair and reasonable in the current circumstances: *Elleway Acquisitions Ltd. v. 4358376 Canada Inc.*, 2013 CarswellOnt 16849, 7 C.B.R. (6th) 25, 2013 ONSC 7009 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court approved a sale of property by a receiver over the objections of the debtor. The Court reviewed the *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) tests: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers are obtained; and whether there has been unfairness in the working out of the process. The Court also noted that although it had some concerns with the sale process, no complaints had been received from other bidders or prospective purchasers. Justice Duncan held that when a property is put on the market in a forced sale, it is not unreasonable to expect that the marketplace may see an opportunity to get a bargain and pressure the price down. Justice Duncan also observed that a further factor that impacts on sale price is the value and length of leases already in place. In this case, the primary tenant had a lease for three more years, which a prospective purchaser had to value as part of its overall assessment of the possible return from investment. Potential buyers have to make a business calculation as to the value of the income stream in whether to offer on the property, and if so, at what price. The receiver had to assess whether the resulting offer was commercially reasonable. There remained the question of whether the process of sale that was employed by the receiver fulfilled the duties set out in *Soundair*. Justice Duncan observed that there was no evidence to suggest that prospective purchasers had come forward to express an interest in the property in the last two months since the offer period closed. Justice Duncan did, however, express concern that the advertisements characterized the offer process as a tender. The effect of the advertisements when read together with the language in the information package would lead potential bidders to believe that there was no opportunity to bid on the property after the closing date. The receiver did not accept the offer submitted by the purchaser; there was a period of negotiation that culminated a month later in the increased offer. No notice had been provided to those potential purchasers who had requested the information package that the offer had not been accepted or that further offers would be considered. Justice Duncan considered the authorities and was satisfied that the process followed did not negatively impact on the assessment of the receiver's exercise of judgment. The process adopted for sale of the property was akin to a tender, which requires that the receiver, among other duties, fulfill a duty of fairness to bidders. Justice Duncan was satisfied that the receiver had made a sufficient effort to get the best price for the property and had not acted improvidently, observing that the courts place a high degree of reliance on the business judgment of the receiver: *Business Development Bank of Canada v. Devine Brokers & Appraisal Ltd.*, 2013 CarswellNS 1058, 9 C.B.R. (6th) 163, 2013 NSSC 435 (N.S. S.C.).

The Ontario Superior Court of Justice declined a debtor's request for disclosure of commercially sensitive information in a motion to approve a sale of real property. The receiver filed, on a confidential basis, charts summarizing the material terms of the offers received, as well as an un-redacted copy of the agreement of purchase and sale ("APA"). The offer was superior in terms of price, not conditional on financing, environmental site assessments, property conditions reports or other investigations, and provided for a reasonably quick closing date. In order to disclose that information to the debtor, the receiver asked the debtor to sign a confidentiality agreement. A dispute arose between the receiver and the debtor about the terms of that proposed agreement. The receiver took the position that the economic terms of the agreement, including the purchase price, were commercially sensitive. In order to maintain the integrity of the sale process, the

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

receiver was not in a position to disclose the information. The receiver's motion record contained a full copy of the APA, save that the receiver had redacted the references to the purchase price. Justice Brown noted that in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 CarswellNat 822, 2002 CarswellNat 823, [2002] 2 S.C.R. 522, the Supreme Court of Canada sanctioned the making of a sealing order in respect to material filed with a court when: (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk, and (ii) the salutary effects of the order outweighed its deleterious effects. Justice Brown noted that, as applied in the insolvency context, that principle had led the Ontario Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer — receiver, monitor or trustee — filed in support of a motion to approve a sale of assets that disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought. Justice Brown held that the purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids. To achieve that purpose, a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, the need for confidentiality disappears and the materials can become part of the public court file. If the transaction does not close, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lack access to such information. In this case, Brown J. concluded that the receiver had acted in a reasonable fashion in requesting the debtor to sign the confidentiality agreement before disclosing information about the transaction price and the other bids received; and he was satisfied that the provisions of the confidentiality agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale: *GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.*, 2014 CarswellOnt 2113, 2014 ONSC 1173 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench approved the receiver's application to sell the debtor's assets over the objection of a party who had expressed an interest in the assets. Justice Veit found that the receiver had met its obligations under the *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1 (Ont. C.A.) tests; the receiver had made sufficient efforts to get the best price and had not acted improvidently; the receiver's proposal considered the interests of all parties; all interested parties supported the proposal; and the offers were obtained by a process that was efficient and had integrity: *Royal Bank of Canada v. Wapiti Waste Management Inc.*, 2014 CarswellAlta 1007, 20 C.B.R. (6th) 24, 2014 ABQB 361 (Alta. Q.B.).

The British Columbia Supreme Court dismissed the receiver's application for a bidding procedures order approving a stalking horse bid. The court cited a lack of evidence to support the application. Justice Weatherill noted that the use of stalking horse bids to set a baseline for a bidding process in receivership proceedings has been recognized by Canadian courts as a legitimate means of maximizing recovery in a bankruptcy or receivership sales process. The factors to be considered when determining the reasonableness of a stalking horse bid are those used by the court when determining whether a proposed sale should be approved: whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; the efficacy and integrity of the sale process by which offers were obtained; whether there has been unfairness in the working out of the process; and the interests of all parties. Justice Weatherill noted that there were many stakeholders in the matter, including the bond holders and the lien claimants who would likely end up with nothing if significantly better bids were not received. In order for the process to be effective, the sale process must allow sufficient opportunity for potential purchasers to come forward with offers, recognizing that a timetable for the sale of the project required that interested parties must move relatively quickly in order that the value of the project was preserved and not be allowed to deteriorate. Justice Weatherill held that no course of action other than a stalking horse bidding process appeared to have been considered, including the traditional tendering process. There was no evidence that the receiver had attempted to market the development beyond discussions with three developers. There was no evidence

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

from which the court could assess whether the economic incentives behind the agreement were fair and reasonable. While Weatherill J. accepted the concept of the termination fee, the mere fact that the proposed termination fee was within the "range of reasonableness" as determined in other cases did not mean that it was reasonable in this case. The court has a gatekeeping function to ensure that the fee is reasonable in each case. In this case, there was no evidence regarding how the termination fee was arrived at or how the $1.5 million fee compared with the expenses incurred in respect of its due diligence. Weatherill J. was of the view that such evidence was required: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.*, 2014 CarswellBC 2916, 17 C.B.R. (6th) 41, 2014 BCSC 1855 (B.C. S.C.).

The Court of Appeal for Ontario dismissed a receiver's appeal of a partial denial of its requested fees. The receiver brought a motion seeking approval of its fees and its legal expenses, including fees incurred in negotiating the sale that was not approved by the court and in bringing the unsuccessful motion to abandon the auction process. The motion judge was critical of the receiver for seeking to abort the auction process almost immediately after seeking court approval on the basis that an auction represented the best realization strategy for the property. The motion judge noted that had there been an offer 50 to 60 per cent higher than the reserve price, it would have justified abandoning the auction, but an offer 20 per cent above the reserve price did not justify a change in the sale process. He concluded that the motion should not have been brought, and thus, the fees incurred by the receiver and its counsel should be denied. The Court of Appeal stated that while courts will show deference regarding the business decisions of receivers, the procedure for reviewing a receiver's conduct of a receivership is not the same as that for reviewing the reasonableness of its fees. While the objecting party bears the burden of showing that a receiver's business decisions are unreasonable, the receiver bears the burden of proving that its fees are fair and reasonable. Thus the deference to which the receiver's business decisions are owed does not insulate its accounts from review to determine if they are fair and reasonable. The Court of Appeal also noted that there was nothing in the motion judge's reasons indicating he was not cognizant of, and did not take into account, the factual context in which the receiver was operating. The motion judge had been involved in the receivership from the outset, and receiver reports had been filed detailing the activities of the receiver. Finally, the Court of Appeal rejected the submission that the motion judge overemphasized the integrity of the auction process and failed to give sufficient consideration to the need for flexibility. The Court noted that a number of circumstances led the motion judge to conclude that safeguarding the integrity of the sale process was paramount, including: the receiver's representations that an auction was the best method to sell the property; the receiver's deviation from the approved sale format almost immediately after the court order was issued and undertaking significant work without seeking court approval; the proposed sale price was only 20 per cent above the reserve price; and the receiver's pursuit of a course of action that would likely only benefit the first mortgagee. In the result, the appeal was dismissed with costs payable by the receiver, and not from the estate: *HSBC Bank Canada v. Lechier-Kimel*, 2014 CarswellOnt 14539, 2014 ONCA 721 (Ont. C.A.).

The Ontario Superior Court of Justice approved the receiver's motion for approval to sell a residential property. The order was made over the objections of the mortgagor. The court must consider the following questions before it can approve the sale, citing *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, 46 O.A.C. 321 (Ont. C.A.): 1. Did the receiver make a sufficient effort to get the best price and did it act providentially? 2. Did it consider the interests of all the parties? 3. Was the process by which the offer was obtained done with efficacy and with integrity? 4. Was there unfairness in the process? Justice Tzimas was of the view that in the face of the evidence and in consideration of the first legal question, there is no evidence before the court to question or doubt the sufficiency of the receiver's efforts to sell the property. Justice Tzimas was also satisfied that the receiver had considered the interests of all the parties, had consulted with the mortgagees on the identification of a particular listing agent, had listed the price above the appraised value to reflect the wishes of the mortgagees, and had given the applicants the opportunity to bring forward their own buyer. Tzimas J. concluded that the receiver's proposal was reasonable and legally sound, that the receiver had acted in a provident manner, that it had considered all of the parties' interests, and that it had done so with integrity and with fairness. The proposed sale was approved: *Stanbarr Services Ltd. v. Reichert*, 2014 CarswellOnt 15507, 20 C.B.R. (6th) 99, 2014 ONSC 6435 (Ont. S.C.J.).

A receivership order was amended so that proceeds from sale of receivership properties would be applied first to the total amounts secured by the receiver's charges and borrowing charges in respect property sold; second to the total

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

amounts secured by any first mortgage related to the receivership property sold; third to total amounts secured by the receiver's borrowing charges in respect of other receivership properties; fourth to total amounts secured by the mortgage held that was cross-collateralized across all the receivership properties; and last to the monitor in the concurrent *CCAA* proceeding for application in that proceeding. The court noted the importance of finality of orders; however, new facts may justify varying or setting aside an order where the evidence may have altered the judgment and could not with reasonable diligence been discovered sooner: *Romspen Investments Corp. v. Edgeworth Properties*, 2014 CarswellOnt 9980, 16 C.B.R. (6th) 81, 2014 ONSC 4340 (Ont. S.C.J.).

The Nova Scotia Supreme Court approved a receiver's sale of assets but declined to grant a vesting order, which would transfer the debtor's interest from the receiver to the purchaser without the necessity of any conveyancing documents, such as deeds or bills of sale. In doing so, the court considered the question of whether it had the jurisdiction to grant such an order; however, this point was not determined as the court did not consider it to be appropriate to grant the order in the circumstances. Justice Wood held that the material filed by the receiver did not satisfy him that a vesting order was necessary. If the purpose was to simplify the transfer of assets and avoid the necessity of obtaining releases from the encumbrancers, he had no evidence that they had been requested to provide releases and refused to do so. The court held that a more important circumstance justifying refusal was that the tender documents and asset purchase agreement said that the receiver would provide a deed and bill of sale, which is what the purchaser contracted to receive. Wood J. observed that the effect of a vesting order would be that the purchaser would assume no risk with respect to title and the court would discharge all encumbrances; however, the receiver had not explained why the court should provide this assurance and override the terms of the agreement: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 2014 NSSC 420 (N.S. S.C.).

See Stuart Brotman and Dylan Chochla, "What's the ``Deference"? Sale of Assets by Receivers 2014 in Review", in Janis Sarra and Barbara Romaine, eds., *Annual Review of Insolvency Law 2014* (Toronto: Carswell, 2015) at 447-468.

The Ontario Superior Court of Justice approved an agreement of purchase and sale from a stalking horse bid process that included an auction for all of the assets of the companies save and except certain excluded assets, over the objections of subordinate secured creditors. The stalking horse offer contained no break fee or payment for the purchaser's expenses. Justice Pattillo noted that a stalking horse offer combined with a court-approved bidding procedure is commonly used in insolvency situations to facilitate the sale of businesses and assets. The court relied on *Re Brainhunter Inc.*, 2009 CarswellOnt 8207, 62 C.B.R. (5th) 41 (Ont. S.C.J. [Commercial List]), applying four factors that the court should consider in exercising its discretion to authorize a stalking horse process, observing that the same considerations applied in a receivership: Is the sale transaction warranted at this time? Will the sale benefit the economic community? Do any of the creditors have a *bona fide* reason to object to the sale of the business? Is there a better viable alternative? Justice Pattillo found that the receiver's report made it clear that the sale was warranted; the best realization of the assets would be achieved by the sale of an operating business; and the proposed sale would benefit the "economic community", including the preservation of jobs, contracts and business relationships. The court also noted that in reaching its conclusion that the interests of the creditors and stakeholders were best served by accepting the stalking horse offer, the receiver had considered the fact that the allocated purchase price for the properties would likely provide for less value than the charges registered against them by the objecting creditors. Justice Pattillo approved the sales process, the offer and authorized the receiver to enter into the agreement of purchase and sale. The process was transparent and the proposed timeline was fair and reasonable in the circumstances: *Re Crate Marine Sales Ltd.*, 2015 CarswellOnt 2248, 23 C.B.R. (6th) 202, 2015 ONSC 1062 (Ont. S.C.J. [Commercial List]).

The Nova Scotia Supreme Court dismissed the claim of a former employee of a company that had been placed into receivership and then went bankrupt. The former employee had argued that the entity that purchased the assets of the bankrupt had assumed the obligations relating to a retirement settlement agreement with the former employee. The plaintiff also argued liability under the common/successor employer doctrines. Justice Wright held that the plaintiff's contract of employment ended when she chose to retire from the company, which brought the employment relationship to a close, relying on *Kerr v. 2463103 Nova Scotia Ltd.*, 2015 CarswellNS 71, 2015 NSCA 7, [2015] N.S.J. No. 22 (N.S.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

C.A.). By agreeing to accept deferred severance payments spread over a three-year period, the plaintiff thereby became an unsecured creditor. Justice Wright further noted that the company was placed in receivership by a private appointment, immediately followed by a bankruptcy, and thereby lost possession and control of its assets and the powers and duties of its directors and officers over its property were suspended. The receiver's duty is to take possession of the charged property for the express purpose of recouping the loan to the security holder, together with the duty to manage the operations of the debtor for the protection of the security. Insofar as existing contracts are concerned, Wright J. noted that the receiver may complete those that are beneficial to the security holder. Overall, the receiver seeks to exercise its power of sale in the security instrument to recoup the secured loan. In this case, the settlement agreement was of no benefit whatsoever to the security holder. Wright J. further held that the purchaser company could not be held to be either a common or successor employer as it was newly incorporated and not created through a merger or acquisition, nor did it assume responsibility for the indebtedness, and it was not a situation where the plaintiff had been terminated; rather, she had accepted a retirement package. The plaintiff's action was dismissed in its entirety: *Hibbs v. Murphy*, 2015 CarswellNS 112, 24 C.B.R. (6th) 317, 2015 NSSC 48 (N.S. S.C.).

The Ontario Superior Court of Justice granted a receiver's motion to approve the sale of a golf course. The approval motion was opposed by the respondent, the first mortgagee of the property, who wanted to redeem the first mortgage. The order appointing the receiver authorized it to market the property, and the receiver determined that if it marketed the property quickly, it might be able to complete a sale of the assets by early June, allowing a purchaser to operate the course during the busiest summer months. Newbould J. was satisfied that the receiver conducted a reasonable sales process and that the property was sufficiently exposed to the market for a reasonable period of time to enable prospective bidders to assess the property and bid for it. Justice Newbould held that the sales process in the circumstances was reasonable and appropriate and met the test of the *Soundair* principles in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.). Newbould J. further held that the sale agreement and appraisals had been filed under seal, as is usual in the Commercial List, in case any approved sale failed to close and the property must be again exposed to the market place. He added that the integrity of any future sales process would be jeopardized if the documents were available to any future bidders. The respondent had no special right to these documents. Justice Newbould also noted that while the primary concern of a receiver is protecting the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. Newbould J. declined to permit the first mortgage to be redeemed, stating that the essential reason was that it would upset the integrity of the sales process undertaken by the receiver: *Business Development Bank of Canada v. Marlwood Golf & Country Club Inc.*, 2015 CarswellOnt 9453, 27 C.B.R. (6th) 166, 2015 ONSC 3909 (Ont. S.C.J. [Commercial List]).

The Alberta Court of Queen's Bench dismissed the application of a receiver and secured creditor, who had sought an order directing a pharmacy to pay to the receiver the fair value of prescriptions conveyed to the pharmacy on the eve of insolvency of another pharmacy (the "debtor"). Justice Romaine held that it was clear that the physical medical records of patients belong to the physician, citing *McInerney v. MacDonald*, 1992 CarswellNB 63, 1992 CarswellNB 247, [1992] 2 S.C.R. 138 (S.C.C.); and the principles with respect to this issue apply likewise to other health care professionals, including, in this case, pharmacists. She referenced *Re Axelrod*, 1994 CarswellOnt 319, 20 O.R. (3d) 133, 29 C.B.R. (3d) 74 (Ont. C.A.), which held that a healthcare provider may use records to pursue his or her self-interest, so long as it does not conflict with the duty to act in the patient's best interests. Justice Romaine concluded that the debtor company and its pharmacist/principal held an interest in patient files and records that they were able to pledge as long as a pledge could be accomplished in a manner compatible with the pharmacist/principal's professional responsibilities. The secured creditor's interest in the pledged assets could be no greater than that of the debtor and its principal, and thus must be subject to the same limitations with respect to the professional responsibilities of a pharmacist when the practice closes. The Court held that given the regulatory regime as described by the College, and the interests of patients involved in the transfer of records and prescriptions, the application to transfer patient records and prescriptions to the receiver or the secured creditor was not feasible. The secured creditor submitted that the pharmacy receiving the records and prescriptions should be liable to pay the receiver an amount equal to the fair value of the prescriptions because it was unjustly enriched by the wrongful transfer of the prescriptions. Justice Romaine observed that a cause of action of unjust enrichment has three elements: (1) an enrichment of the respondent; (2) a corresponding deprivation

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

of the applicant; and (3) an absence of juristic reason for the enrichment; and in this case, the most difficult issue was whether there was an absence of juristic reason for the enrichment. Justice Romaine held that the approach to the juristic reason analysis has two parts. The applicant must show that no juristic reason exists in any established category of such reasons that would deny recovery. The established categories include contract, a disposition of law, a donative intent and other valid common law, equitable or statutory obligations. If there is no juristic reason that can be identified from an established category, the applicant has made out a *prima facie* case. This *prima facie* case is rebuttable, however, where the respondent can show that there is another reason to deny recovery. At this point, the court should have regard to two factors: the reasonable expectations of the parties and public policy considerations. Justice Romaine found that the receiving pharmacy's acceptance of the transfer of patient records and files in order to facilitate compliance with the debtor's statutory and regulatory obligations and to ensure continuity of care for the patients involved fell within one of the established categories of juristic reasons to deny recovery in unjust enrichment. Justice Romaine also rejected arguments with respect to constructive trust and disgorgement. Finally, Romaine J. considered the issue of a fraudulent preference. She found that the undisputed evidence of the pharmacist/principal of the debtor as to why he transferred the records to the receiving pharmacy without any discussion of payment, at a time when he had given up on the prospect of a sale, satisfied the court that there was no intention to defeat, hinder, delay or prejudice his creditors, but merely to ensure the well-being of patients and their continuous care. The application to find this transaction to be a fraudulent transfer failed: *Maximum Financial Services Inc. v. 1144517 Alberta Ltd.*, 2015 CarswellAlta 1934, 31 C.B.R. (6th) 146, 2015 ABQB 646 (Alta. Q.B.).

The Court of Appeal for Ontario upheld the decision of a motion judge who granted summary judgment in favour of the plaintiff on a claim of fraudulent misrepresentation relating to a purchase of property from a court-appointed receiver. Justice LaForme held that there was sufficient evidence to prove the elements to find the appellant personally liable: the record disclosed that the appellant had engaged in actions that amounted to misrepresentations; the appellant had some level of knowledge about the misrepresentations; the representations had caused the receiver to seek court approval and to transfer title, and but for the false representations, the receiver would likely have acted differently and to the detriment of the appellant; and as a result of the misrepresentations, the receiver had lost an opportunity to negotiate a higher price with the appellant or another party. Justice LaForme then considered the interveners' right to be heard. LaForme J.A. noted that the interveners were witnesses in the summary judgment motion. No relief was sought from them, and none was granted. Justice LaForme stated that non-parties should not be able to lurk in the shadows and then spring up to challenge a decision whenever the outcome or findings of fact may affect them in some manner they do not like. The Court held that the statement of claim in the appellant's action was the only notice to which the interveners were entitled. Once they were served with the claim, they knew about this action and had an option to intervene as a party. LaForme J.A. concluded that the interveners were not denied natural justice: *Meridian Credit Union Ltd. v. Baig*, 2016 CarswellOnt 2664, 63 R.P.R. (5th) 179, 2016 ONCA 150 (Ont. C.A.), additional reasons 2016 CarswellOnt 5414, 2016 ONCA 265 (Ont. C.A.).

The Ontario Superior Court of Justice approved a sale of assets by the receiver over the objections of the debtor. Justice Shaw addressed the principles set out in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.). In this case, Justice Shaw was satisfied that the receiver had acted reasonably and not improvidently in accepting the only offer it had received after months of marketing. Shaw J. noted that although the receiver owes a duty to all stakeholders, its primary duty in this case was to maximize the return for the secured creditors. Even with the sale, the secured creditors stood to incur a shortfall on their security. Shaw J. was of the view that they were the only parties with a real economic interest in the sale and they supported the sale. The receiver had negotiated in good faith and had acted reasonably, prudently and fairly and not arbitrarily. The Court also held that the principal of a corporation that had submitted a late proposal to purchase the assets had no standing to appear: *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 CarswellOnt 2673, 34 C.B.R. (6th) 125, 2016 ONSC 199 (Ont. S.C.J.). On the debtor's motion for leave to appeal this judgment, the Court of Appeal for Ontario denied the debtor's motion for leave to appeal the approval and vesting order. The Court of Appeal reviewed the test for leave to appeal and also reviewed the duty of the Crown to consult with Aboriginal peoples and communities: *2403177 Ontario Inc. v. Bending*

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Lake Iron Group Ltd., 2016 CarswellOnt 9527, 37 C.B.R. (6th) 173, 2016 ONCA 485 (Ont. C.A.). For a discussion of this appellate judgment, see I§62 "Appeals by Leave of a Judge of the Court of Appeal".

In a receivership proceeding, the Alberta Court of Queen's Bench was asked to approve the sale of property at a price far below the price at which the property had been originally listed for sale. The motion was opposed by the largest unsecured creditor who had raised a number of questions. Justice Veit noted that not approving the proposed sale may turn out to be costly to the unsecured creditors. An adjournment could cause the loss of the offer that, at the time of the application, was on the table, the market could continue to deteriorate, and a potentially relevant insurance policy, when it is able to be assessed, may not provide any answer to the need for remediation. However, Veit J. went on to note that when the largest by far of the unsecured creditors indicated that he was willing to take this risk, and when the policy itself had not been studied, the unsecured creditor's position had to be taken seriously. The receiver's application was denied at this time. The receiver could reapply when the queries of the unsecured creditor were answered: *Royal Bank of Canada v. Wapiti Waste Management Inc.*, 2016 CarswellAlta 441, 2016 ABQB 145 (Alta. Q.B.).

The Manitoba Court of Appeal dismissed an appeal from the decision of a judge who had approved the receiver's motion for a sale of assets. With respect to the standard of review, the motion judge owed the decision of the receiver significant deference. While it is the duty of the court to ensure the integrity of the process, the court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather, to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. Justice Steel noted that the decision of the motion judge was an exercise in judicial discretion and was entitled to deference in the Court of Appeal. The Court of Appeal would intervene only if the motion judge erred in law, misapprehended the evidence in a material way or was clearly wrong. Justice Steel noted that when reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. The interests of all parties should be taken into account, including the interests of the unsecured creditors. However, in this case, the offer to pay unsecured creditors over time out of future profits was not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. As result, the secured creditors were the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the receiver not to take into account the portion of the offer dealing with unsecured creditors: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 CarswellMan 147, 39 C.B.R. (6th) 219, 2016 MBCA 46 (Man. C.A.).

The Manitoba Court of Queen's Bench granted authority to the receiver to sell the land, buildings and related equipment of the debtor. In doing so, the court also commented on the appropriate disclosure of confidential reports. Justice Chartier made the decision in light of the decision of *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*, [2002] 2 S.C.R. 522 (S.C.C.), as well as other authorities. Chartier J. found that the remaining redacted portions contained sensitive commercial information that would put the receiver at a disadvantage should the present sale not close. It followed that such disclosure could affect the interests of the creditors whose interests were central in these proceedings. Chartier J. further found that the salutary effects of non-disclosure of the redacted material outweighed the deleterious effects on the rights and interests of the applicants to have access to that material. In analyzing the law pertaining to offers, Chartier J. referenced *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.), and held that the receiver had made a sufficient effort to get the best price and had not acted improvidently. Justice Chartier also noted that the court should consider the interests of all parties, and here, concluded that there had been no unfairness in the working out of the process. In the result, Chartier J. was satisfied that the sales process conducted by the receiver and the agreement that had been submitted for court approval satisfied the principles set out in the *Soundair* decision. Chartier J. found that the receiver had acted reasonably, prudently and fairly; the sale agreement was approved and the requested vesting order was granted: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 CarswellMan 346, 39 C.B.R. (6th) 29, 2016 MBQB 77 (Man. Q.B.). In dismissing an appeal from this judgment, the Manitoba Court of Appeal held that when reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured creditors. There is no question that it is the responsibility of

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. In this case, however, the offer to pay unsecured creditors over time out of future profits was not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. Given the outstanding amounts owing to the secured creditors, and the amounts that would be generated from the sale of assets, there was inevitably a significant shortfall, and as a result, the secured creditors are the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the receiver not to take into account the portion of the offer dealing with unsecured creditors: *Royal Bank of Canada v. Keller & Sons Farming Ltd.*, 2016 CarswellMan 147, 39 C.B.R. (6th) 219, 2016 MBCA 46 (Man. C.A.).

The Saskatchewan Court of Queen's Bench held that a receiver was entitled to sell the assets of the debtor free and clear of any claim of the licensor pursuant to its licence with the debtor. The claim of the licensor, if any, was against the sale proceeds: *Golden Opportunities Fund Inc. v. Phenomenome Discoveries Inc.*, 2016 CarswellSask 607, 41 C.B.R. (6th) 141, 2016 SKQB 306 (Sask. Q.B.).

The Court of Appeal for Ontario reversed the decision of the motion judge and held that "gross operating royalties" ("GOR") constituted an interest in land. The Court required additional submissions on whether the motion judge had jurisdiction to vest out the GOR in a sale by a court-appointed receiver: *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 CarswellOnt 3694, 57 C.B.R. (6th) 171, 2018 ONCA 253 (Ont. C.A.). For a discussion of this judgment, L§21 "Vesting Orders in Receivership with Respect to Real Estate".

The Ontario Superior Court of Justice dismissed a cross-motion brought by a prospective purchaser of land. The prospective purchaser opposed the receiver's motion to disclaim the agreement of purchase and sale. The prospective purchaser wanted to examine certain individuals in aid of its position. The Court denied the motion on the basis that the examinations were not directed to a matter of relevance on the disclaimer motion: *Romspen Investment Corp. v. Horseshoe Valley Lands Ltd.*, 2017 CarswellOnt 2671, 45 C.B.R. (6th) 309, 2017 ONSC 426 (Ont. S.C.J.).

The receiver moved for approval of a sale of a five-acre property and a warehouse. The receivership and power of sale were to enforce security for bank debts. The only known encumbrancer, besides the plaintiff, a builder's lienholder, had been joined as a party. The priority between the bank's security and the builder's lien was in dispute. The proposed order provided for proceeds of sale to be paid into court and for the proceeds to stand in the place of the property pending determination of the priorities. Moir J. noted that an appointment of a receiver to enforce security is now usually made under both the national receivership provisions and provincial law (both statutory and common law). Given the amount of secured debt and the appraisals, the purchase price was disappointing. However, the property had been exposed to the market for over twenty months while it was the subject of a professional marketing effort. Moir J. found the sale was commercially reasonable. Potential purchasers need to understand that a contract with the receiver will be approved if it is commercially reasonable. However, the draft order specified, in addition to the usual receiver's deed and certificate that would foreclose "all of the right, title and interest" of the debtor, went further to add: "including all property interests, security interests (whether contractual, statutory or otherwise), mortgages, trusts or deemed trusts (whether contractual, statutory or otherwise), liens, executions, levies, charges or other financial or monetary claims whether or not they have attached or been perfected, registered or filed or whether secured, unsecured or otherwise (collectively the ''claims"), including without limiting the generality of the foregoing (i) any encumbrances or charges created by orders of the Court in this proceeding; (ii) all mortgages and charges held by the applicant; and (iii) all recorded interests showing in the parcel register for the property (collectively, the ''Encumbrances")." Justice Moir noted that the *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 CarswellNS 877, 20 C.B.R. (6th) 145, 2014 NSSC 420 (N.S. S.C.) decision suggests that the Nova Scotia court may not have broad authority to grant vesting orders on unlimited grounds. Justice Moir adopted the reasons in *Crown Jewel*, and held that there is no statutory authority in Nova Scotia giving the court unbounded authority to vest property. A power to sell a stranger's interests without notice cannot be found in "take any other action that the Court considers advisable", the words of para. 242(1)(c) of the *BIA*. In Nova Scotia, a receiver appointed to enforce securities sells the right, title, interest, property, and demand of the debtor at the time of the security or afterwards and the interests of those claiming by, through, or under the debtor. A court does not take away rights

WestlawNext. CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

from people without giving them a chance to be heard. So, the foreclosure-based receivership sale requires subsequent encumbrancers to be parties. There are several ways in which a subsequent encumbrancer may be bound by an order for a receivers' sale that enforces security. They can be joined as defendants without naming them in the style of cause or claiming anything against them besides foreclosure. The court commonly orders a sale with the proceeds standing in the place of the property, preserving the value of the property while allowing time for a resolution or determination of the dispute. In the result, an order was granted approving the sale agreed to by the receiver. The court order provided for payment into court and specified that the terms concerning foreclosure had to be amended so that they did not include an order that appeared to end unascertained or unknown rights: *Royal Bank of Canada v. 2M Farms Ltd.*, 2017 CarswellNS 272, 47 C.B.R. (6th) 157, 2017 NSSC 105 (N.S. S.C.).

A single judge of the Court of Appeal for Ontario, in chambers, granted the receiver's motion to defeat an appeal from an order approving an asset sale and thereby securing that sale. Justice Tulloch observed that the notice of appeal relied solely on s. 193(c) of the *BIA* in support of the Court of Appeal's jurisdiction to hear the appeal. The appellant explicitly disclaimed reliance on s. 193(e), the provision for leave to appeal. Rule 31 of the *Bankruptcy and Insolvency General Rules* precludes reliance by an appellant on s. 193(e) of the *BIA* when that appellant's notice of appeal does not include the relevant application for leave to appeal. Therefore, Tulloch J.A. stated that jurisdiction pursuant to s. 193(e) was unavailable in this case. Tulloch J.A. held that the appellant had not demonstrated that there was an arguable case that the receiver could have obtained a better deal. Section 193(c) did not grant a right of appeal because the impugned order did not "result in a loss or gain" in the relevant sense: *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 CarswellOnt 11087, 49 C.B.R. (6th) 173, 2017 ONCA 611 (Ont. C.A.).

The Superior Court of Québec approved the allocation method developed by the monitor to allocate the proceeds of realization from asset sale transactions and the costs of the *CCAA* proceedings. The net proceeds held by the monitor on behalf of the creditors was more than $160 million, pending further order of the court. One secured creditor opposed the allocation methodology, arguing that the result was inequitable when applied to the assets over which it claimed priority. Hamilton J. noted that it was important to recognize that a general methodology may not work in all circumstances and that the parties have the right to challenge the general methodology if it produces an inequitable result in particular circumstances. Here, Hamilton J. was of the view that the contractual allocation of the purchase price was a reasonable starting point, on the assumption that it is an allocation done by an arm's length third party who had no interest in the allocation of the proceeds. The contractual allocation will not be given the same weight if the creditor can demonstrate that: (1) the purchaser is not at arm's length, (2) the purchaser has an interest in the allocation of the proceeds, either because it or a related party is a creditor or because it made a deal with a creditor, or (3) the *CCAA* parties negotiated the allocation. Justice Hamilton noted that typically, there are two ways to demonstrate that the purchaser's contractual allocation of the price is not reasonable: the purchaser had a reason to allocate the purchase price in a way that does not reflect its assessment of the relative value of the assets, or the purchaser's assessment of the relative value of the assets is clearly wrong. Hamilton J. stated that creditor will have to demonstrate a significant departure from the relative value of the assets. Here, there was no suggestion that purchaser was not at arm's length or that the purchaser had any interest in the allocation of the proceeds. As a result, the court would presume that the contractual allocation was reasonable and burden was on objecting creditor to prove that it was not. The creditor did not meet the burden here: *Arrangement relatif à Bloom Lake*, 2017 CarswellQue 6700, EYB 2017-282980, 2017 QCCS 3529 (C.S. Que.); appeal dismissed 2018 CarswellQue 2686, 2018 QCCA 551, EYB 2018-292887 (C.A. Que.). For a discussion of the appellate decision, see N§196 "Court Approval of Sale of Assets".

The plaintiff bank was granted summary judgment against the guarantor of a corporate debt; the Ontario Superior Court of Justice reviewing the law relating to an improvident sale: *The Bank of Nova Scotia v. Scholaert*, 2017 CarswellOnt 15516, 52 C.B.R. (6th) 285, 2017 ONSC 5960 (Ont. S.C.J.). For a discussion of this judgment, see F§63(58) "*Personal Property Security Act* — Rights and Remedies on Default".

Justice Romaine of the Alberta Court of Queen's Bench approved a sale of assets by a receiver, including include specific provisions sought by the receiver in the order, given the conduct of the Alberta Energy Regulator ("AER") leading up

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

to the sale application. Justice Romaine held that s. 11(d) of the *Redwater* order (*Re Redwater Energy Corporation*, 2016 CarswellAlta 994, 37 C.B.R. (6th) 88, 2016 ABQB 278 (Alta. Q.B.) and *Orphan Well Assn. v Grant Thornton Ltd.*, 2017 CarswellAlta 695, 47 C.B.R. (6th) 171, 2017 ABCA 124 (Alta. C.A.), leave to appeal to SCC granted 2017 CarswellAlta 2352, 2017 CarswellAlta 2353, [2017] SCCA No 231 (S.C.C.)) and s. 19(d) of the proposed order, did not give the AER the authority to consider the compliance record of the debtor, its officers or security holders in determining their eligibility for future license grants or transfers if such compliance record refers to debts discharged or assets renounced through bankruptcy. She held that Directive 006, which appears to allow the AER to do so is inoperative by reason of the decisions in *Redwater* and *Alberta (Attorney General) v. Moloney*, 2015 CarswellAlta 2091, 2015 CarswellAlta 2092, [2015] 3 S.C.R. 327, 29 C.B.R. (6th) 173, 2015 SCC 51 (S.C.C.). The AER's discretion to review transfer applications must be exercised in accordance with the law in force in Alberta. Justice Romaine observed that the current environmental regulatory regime in Alberta allows oil and gas companies to defer financial consequences of addressing environmental liabilities relating to individual wells as long as their portfolio of assets is able to achieve a positive liability management rating. AER objected to the proposed sales process; it wanted a condition that the successful bidder be at arm's length to the debtor and have a zero non-compliance record; stating that purchasers "might be in store for an ugly surprise" when they come to the AER for approval of related licenses. The receiver was concerned that it would improperly fetter its ability to conduct a sales process in a commercially reasonable manner for the benefit of all creditors and stakeholders. Five parties submitted bids, and a related company was selected, as the consideration was higher, it was in the best interests of stakeholders, a higher proportion of tax arears would be assumed, many more assets were being purchased, with significantly less impact on the Orphan Well Fund. The original purchaser encountered lengthy delay in consideration of its application for a BA Code, which is necessary for a corporation to hold AER issued licences to operate wells, facilities and pipelines. Meetings with staff were confrontational and the conditions attached to the approval of the application prevented it from completing the sale. In approving the new sale agreement, the Court applied the *Soundair* factors (*Royal Bank v Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.)): the receiver made a sufficient effort to get the best price and did not act improvidently; the receiver acted with integrity in the interests of all parties; and there was unfairness in the working out of the process. Romaine J. found that it both reasonable and prudent for the receiver to seek to include the specific declarations set out in the *Redwater* order in this approval and vesting order. The relationship between the AER, the receiver and the new bidder had also been fraught with conflict and uncertainty over the AER's position and its stated intentions. The claims of the AER at issue in this proceeding are all claims provable in bankruptcy. Thus, they could not be revived and enforced against a third party, even if that third party is non-arm's length to the debtor. What the AER was attempting to do by considering the compliance record of officers, directors, shareholders and agents of insolvent companies before granting them, or corporations associated with them, new licences was to seek to enforce the claims against third parties, rather than the debtor. It was contrary to the polluter-pay principle and the rehabilitative objectives of the *BIA*: *Re Sydco Energy Inc.*, 2018 CarswellAlta 157, 57 C.B.R. (6th) 73, 2018 ABQB 75 (Alta. Q.B.).

The Ontario Superior Court of Justice granted a receivership order and authorized the receiver to sell the property, but did not approve the stalking horse agreement with its break fee and overbid provisions. The applicant had demanded payment and provided each of the companies with notice of intention to enforce its security in accordance with s. 244 of the *Bankruptcy and Insolvency Act* ("*BIA*"). The purpose of the application to appoint a receiver is to facilitate a sale to itself of the interests in two properties on which it had security. The stalking horse bid was comprised of cash and credit, and the terms included a "break fee" plus a minimum overbid. The proposed sale process also sought vesting orders that vest the interests in the two properties "free and clear of any claims" in light of separate ongoing litigation. Justice Pattillo noted that the court's authority to issue a vesting order is contained in s. 100 of the *Courts of Justice Act* (*CJA*). That authority, however, does not extend to extinguishing third party proprietary rights, the Court citing *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 CarswellOnt 3694, 57 C.B.R. (6th) 171, 2018 ONCA 253 (Ont. C.A.). A question for determination was whether the creditor's contingent claim for a constructive trust in the action gave it a proprietary interest in the two properties. Justice Pattillo noted that a constructive trust is an equitable remedial remedy for certain forms of unjust enrichment. In order for a constructive trust to be found, monetary compensation must be inadequate and there must be a link between the plaintiff's contributions and the property in which it claims an interest. Further, the extent of the constructive trust interest is proportionate to the claimant's contributions.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Justice Pattillo held that merely claiming a constructive trust does not create a proprietary interest. In his view, given the proposal that the receiver hold the net sale proceeds pending the determination of the creditor's claims coupled with the fact that the defendant continued to own the other one-half interest in the properties, he did not consider an award of monetary compensation to be inadequate. Further, there was no evidence of a link between the monies allegedly stolen and the properties. Justice Pattillo was satisfied that since the receiver would hold the net sale proceeds from the properties, vesting orders could issue on the sale of both properties, and to the extent the creditor had any rights in the properties, those rights were protected. With respect to the stalking horse bid, Pattillo J. considered the amount for the break fee of $500,000 and the minimum overbid amount of $150,000 to be excessive. A break fee, in the context of a receivership sale with a credit bid, is an amount intended to compensate the unsuccessful credit bidder for the costs it has incurred in carrying out the due diligence necessary to enter into the credit bid agreement in the event that another offer to purchase becomes the successful purchaser. Pattillo J. noted that where break fees and overbid fees are reasonable, such that they do not jeopardize the ability of the competing bidder to make a bid, they have been approved, citing *Re Parlay Entertainment Inc.*, 2011 CarswellOnt 5929, 81 C.B.R. (5th) 58, 2011 ONSC 3492 (Ont. S.C.J.) and *Re MPH Graphics Inc.*, 2014 CarswellOnt 18942, 23 C.B.R. (6th) 224, 2014 ONSC 947 (Ont. S.C.J.). Here, the debtor had provided no evidence to justify the break fee apart from a section of the agreement that referenced due diligence and liquidated damages. Justice Pattillo was not satisfied that the proposed break fee and the overbid fee were reasonable based on the material before him. There was no evidence of what costs were in undertaking due diligence in respect of the transaction. Given that the applicant had been a 50% owner of the properties for several years, Pattillo J. suspected that it must be intimately familiar with the debtors. Pattillo J. also held that it was not appropriate to include in the break fee, as the proposed receiver had done, an amount in respect of future negotiations with the purchaser of the properties. There had been no information concerning the overbid fee and why it was reasonable in the context of the proposed sale. Justice Pattillo observed that the purpose of the sale process in a receivership is to obtain the highest and best price for the property. It is important in approving the sale process to ensure that it is open to competing bidders. Any break fees and overbid fees must be reasonable in the circumstances in that they must not jeopardize the ability of a competing bidder to make a bid. Given the property interests to be sold and the proposed credit bid in this case, Pattillo J. was not satisfied that the proposed break fee and the overbid fee, individually and combined, were reasonable: *American Iron v 1340923 Ontario*, 2018 CarswellOnt 8441, 61 C.B.R. (6th) 135, 2018 ONSC 2810 (Ont. S.C.J. [Commercial List]).

The Newfoundland and Labrador Supreme Court held that a receiver had acted properly and according to the directions provided by the court. Justice Hurley was satisfied that the receiver took the necessary and reasonable steps to obtain the best price for the assets. Where a receiver has achieved its main obligation in obtaining as high a value for the assets as it reasonably could, the court is entitled to find that the receiver has acted properly. The court is entitled to rely on the receiver's expertise unless it is clearly shown to be otherwise: *Re Canadian Imperial Bank of Commerce*, 2018 CarswellNfld 331, 2018 NLSC 175 (N.L. S.C.).

A mortgagee of a property over which a receiver had obtained an approval and vesting order had no right of appeal. The Ontario Court of Appeal held that the receiver had acted properly under the appointment order's terms, had obtained the best price, and had considered all the parties interests in making the sale: *B&M Handelman Investments Limited v. Drotos*, 2018 CarswellOnt 10201, 61 C.B.R. (6th) 208, 2018 ONCA 581 (Ont. C.A.).

The Nova Scotia Supreme Court appointed a receiver pursuant to s. 243 of the *BIA*. Justice Brothers noted that the test to be applied was whether it was just and convenient in the circumstances to appoint a receiver; and in making this decision, the court will consider all the circumstances, the particular nature of the property, and the rights and interests of all the parties. Here, the creditor held first priority security; the company was in default of its obligations; the creditor had made demand for payment and had issued a notice of intention to enforce security; the time periods for repayment had expired, without payment being made; the creditor was in a position to enforce its security should it choose to do so; the appointment of a receiver would allow for the company's property to be preserved and protected pending liquidation; and the receiver, as an officer of the court, would provide transparency and reassurance to the company's creditors that the liquidation of the property would be handled expeditiously and in a commercially reasonable manner. Justice Brothers also granted an administration charge and a funding provision. With respect to the request for a sale

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

process order, Brothers J. noted that the principal asset owned by the company was real property (six condominium lots). The receiver recommended proceeding with a sale process and not a foreclosure due to the greater flexibility for marketing and hopefully a better return on the asset to the stakeholders. An offer had been received to purchase the real property, and in order to maximize the value for creditors and to minimize the risk of losing this offer, the receiver requested that the offer be a stalking horse in a court-supervised sale process. Justice Brothers found that the offer was in line with opinions of value provided by realtors; the property had been listed for two years and no acceptable offers had been received; and the largest creditor supported the stalking horse sale process. Justice Brothers noted that a stalking horse bidding process is an accepted means of realization in insolvency matters in Canada, as it establishes a baseline acceptable to the senior creditor while testing the market to determine if a superior offer can be obtained. In approving the process, Brothers J. considered: the fairness, transparency and integrity of the proposed process; the commercial efficacy of the proposed process in light of the specific circumstances facing the receiver; and whether the sales process will optimize the chances, in the particular circumstances, of securing the best possible price for the assets: *First National Financial GP Corporation v. 3291735 Nova Scotia Limited*, 2018 CarswellNS 714, 2018 NSSC 235 (N.S. S.C.).

The Court of Appeal for Ontario allowed the appeal from the motion judge who had declined to approve a sale by a court-appointed receiver. The debtor was established as a religious, private charitable organization to buy the property and operate a temple, but later became insolvent. The property had been the subject of litigation. On application of the first mortgagee of the property, the motion judge granted an order appointing a receiver, authorizing it to sell the property, subject to court approval. The receiver prepared a report in support of its motion for court approval of the agreement and sale of the property, which detailed the sales process the receiver undertook with respect to the property. The debtor opposed the receiver's motion. The motion judge declined to approve the sale of the property to the appellant and, instead, established a process that would permit the assignment of the first mortgage. Associate Chief Justice Hoy also noted that the motion judge has relied on the four tests in *Royal Bank v. Soundair Corp.*, 1991 CarswellOnt 205, 4 O.R. (3d) 1, 7 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.); and while the motion judge found that the receiver took reasonable steps to obtain the best price for the property, he declined to approve the sale, explaining that "except for the conduct of the receiver/plaintiff relative to the defendant" debtor, he would have approved the sale. Associate Chief Justice Hoy noted that the motion judge's order was discretionary in nature and an appeal court will interfere only where the judge considering the receiver's motion for approval of a sale has erred in law, seriously misapprehended the evidence, exercised his or her discretion based on irrelevant or erroneous considerations, or failed to give any or sufficient weight to relevant considerations. Associate Chief Justice Hoy held that the motion judge erred in performing the second *Soundair* duty by failing to properly consider and give sufficient weight to the interests of creditors, and by failing to consider the interests of the appellant, *qua* purchaser. While the primary interest is that of the creditors, the interests of a person who has negotiated an agreement with a court-appointed receiver ought also to be taken into account. The motion judge did not consider how declining to approve the sale, so that the assignment of the first mortgage may proceed, would affect the creditors' interests. If the sale proceeded, the creditors could be repaid. On the other hand, the assignment of the first mortgage would simply replace one creditor with another. Hoy, A.C.J. then considered whether the court should approve the sale transaction *de novo* or set aside the order below and order a new hearing. Ultimately, she concluded that it was appropriate to set aside the order below and ordered a new hearing, on notice to all parties with an interest in the property. In arriving at this conclusion, Hoy, A.C.J. noted that this was not a case where the receiver unequivocally recommended that the sale be approved. Rather, the receiver did not oppose the assignment, provided it was discharged and released from any potential liability to the appellant. A re-hearing would permit the motion judge to obtain clarity on the receiver's position: *Reciprocal Opportunities Incorporated v. Sikh Lehar International Organization*, 2018 CarswellOnt 14182, 63 C.B.R. (6th) 169, 2018 ONCA 713 (Ont. C.A.).

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB2

C

2009 CarswellOnt 4838, 56 C.B.R. (5th) 224

Nortel Networks Corp., Re

In the matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended (Applicants)

And In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation

Ontario Superior Court of Justice [Commercial List]

Morawetz J.

Heard: July 28, 2009
Judgment: July 28, 2009
Docket: Toronto 09-CL-7950

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Counsel: Mr. D. Tay, Ms J. Stam for Nortel Networks Corporation et al.

Mr. J.A. Carfagnini, Mr. C.G. Armstrong for Monitor, Ernst and Young Incorporated

Mr. Arthur O. Jacques for Felske, Sylvain

S.R. Orzy for Noteholders

Ms S. Grundy, Mr. J. Galway for Telefonaktiebolaget LM Ericsson

Ms L. Williams, Ms K. Mahar for Flextronics

Mr. M. Zigler for Former Employees

Mr. L. Barnes for Board of the Directors of Nortel Networks Corporation, Nortel Networks Limited

Mr. A. MacFarlane for Official Committee of Unsecured Creditors

Ms T. Lie for Superintendent of Financial Services of Ontario

Mr. B. Wadsworth for CAW Canada

Mr. S. Bomhof for Nokia Siemens

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

Mr. R.B. Schwill for Nortel Networks UK Limited

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

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Sale by tender — Miscellaneous

Telecommunication company entered protection under Companies' Creditors Arrangement Act — Court order was granted approving bidding procedures for sale of certain of Code Division Multiple Access business and Long-Term Evolution Access — Three qualified bids were received by bid deadline — Highest offer was selected as starting bid — Auction was held — Bid submitted by buyer was determined to be successful bid — Company brought motion for order approving and authorizing execution of asset sale agreement — Motion granted — Sale process was conducted in accordance with bidding procedures and with principles set out in jurisprudence — Consideration provided by buyer constituted reasonably equivalent value and fair consideration for assets.

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

Telecommunication company entered protection under Companies' Creditors Arrangement Act — Company brought motion for order approving and authorizing execution of asset sale agreement and order sealing confidential appendixes to seventh report — Motion granted — Sealing order granted — Appendixes contained sensitive commercial information release of which could have been prejudicial to stakeholders.

Cases considered by *Morawetz J.*:

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

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

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

Tiger Brand Knitting Co., Re (2005), 2005 CarswellOnt 1240, 9 C.B.R. (5th) 315 (Ont. S.C.J.) — considered

Statutes considered:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

MOTION by telecommunications company for approval of asset sale agreement, vesting order, approval of intellectual property licence agreement, order declaring that ancillary agreements were binding and sealing order.

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

Morawetz J.:

1 Nortel Networks Corporation ("NNC), Nortel Networks Limited (NNL), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation, (collectively the "Applicants"), bring this motion for an Order approving and authorizing the execution of the Asset Sale Agreement dated as of July 24, 2009, ("the Sale Agreement"), among Telefonaktiebolaget LM Ericsson (PUBL) (the "Purchaser"), as buyer, and NNL, NNC, Nortel Networks, Inc.) ("NNI) or ("Ericsson"), and certain of their affiliates as vendors, (collectively, the "Sellers"), in the form attached and as an Appendix to the Seventeenth Report of Ernst and Young Inc. in its capacity as Monitor in the CCAA proceedings.

2 The Applicants also request, among other things, a Vesting Order, an Order approving and authorizing the execution and compliance with the Intellectual Property Licence Agreement substantially in the form attached to the confidential appendix to the Seventeenth Report and the Trademark Licence Agreements substantially in the form attached to the appendix and an Order declaring that the Ancillary Agreements, (as defined in the Sale Agreement), including the IP Licences, shall be binding on the Applicants that are party thereto, and shall not be repudiated disclaimed or otherwise compromised in these proceedings, and that the intellectual property subject to the IP Licences shall not be sold, transferred, conveyed or assigned by any of the Applicants unless the buyer or assignee of such intellectual property assumes all of the obligations of NNL under the IP Licences and executes an assumption agreement in favour of the Purchaser in a form satisfactory to the Purchaser.

3 Finally, the Applicants seek an order sealing the Confidential Appendixes to the Seventeenth Report pending further order of this court.

4 This joint hearing is being conducted by way of video conference. His Honor Judge Gross is presiding over the hearing in the U.S. Court. This joint hearing is being conducted in accordance with the provisions of the Cross-Border Protocol, which has previously been approved by both the U.S. Court and this court.

5 The Applicants have filed two affidavits in support of the motion. The first is that of Mr. George Riedel, sworn July 25, 2009. Mr. Riedel is the Chief Strategy Officer of NNC and NNL. Mr. Riedel also swore an affidavit on June 23, 2009 in support of the motion to approve the Bidding Procedures. The second affidavit is that of Mr. Michael Kotrly which relates to an issue involving Flextronics which was resolved prior to this hearing.

6 The Monitor has also filed its Seventeenth Report with respect to this motion. The Monitor recommends that the requested relief be granted.

7 The Applicants' position is also enthusiastically supported by the Unsecured Creditors' Committee in the Chapter 11 proceedings and the Noteholders.

8 No party is opposed to the requested relief.

9 On June 29, 2009 this court granted an Order approving the Bidding Procedures for a sale process for certain of Nortel's Code Division Multiple Access ("CMDA") business, and Long Term Evolution ("LTE") Access. The procedures were attached to the Order.

10 The Court also approved the Stalking Horse Agreement dated as of June 19, 2009 among Nokia Siemens Networks B.V. ("Nokia Siemens") and the Sellers (also referred to as the "Nokia Agreement") and accepted agreement for the purposes of conducting the Stalking Horse bidding process in accordance with the Bidding

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

Procedures, including the Break-Up-Fee and Expense Reimbursement as both terms are defined in the Stalking Horse Agreement.

11 The order of this court was granted immediately after His Honor, Judge Gross, of the United States Bankruptcy Court for the District of Delaware, approved the Bidding Procedures in the Chapter 11 proceedings.

12 The Bidding Procedures contemplated a bid deadline of 4 p.m. on July 21, 2009. This gave interested parties 22 days to conduct due diligence and submit a bid.

13 By the Bid Deadline, three bids were acknowledged as "Qualified Bids" as contemplated by the Bidding Procedures. Qualified Bids were received from MPAM Wireless Inc., otherwise known as Matlin Patterson and Ericsson.

14 The Monitor also reports that on July 15, 2009 one additional party submitted a non-binding letter of intent and requested that it be deemed a Qualified Bidder. The Monitor further reports that upon receiving this request, the Applicants' provided such party with a form of Non-Disclosure Agreement substantially in the form as that previously executed by Nokia Siemens. This party declined to execute the Non Disclosure Agreement and was not deemed a Qualified Bidder. The Monitor further reports that it, the UCC and the Bondholder Group were all consulted in connection with the request of such party to be considered a Qualified Bidder.

15 The Monitor also reports that it is of the view that any party that wanted to bid for the business and complied with the Bidding Procedures was permitted to do so.

16 In the period up to July 21, 2009, the Monitor reports that it was kept apprised of all activity conducted between Nortel and the potential buyers. In addition, the Monitor participated in conference calls and meetings with the potential buyers, both with Nortel and independently. The Monitor further reports that it conducted its own independent review and analysis of materials submitted by the potential buyers.

17 On July 22, 2009, in accordance with the Bidding Procedures, copies of both the MPAM bid and the Ericsson bid were provided to Nokia Siemens, MPAM and Ericsson were both notified that three Qualified Bids had been received.

18 After consultation with the Monitor and representatives of the UCC and the Bondholder Group, the Sellers determined that the highest offer amongst the three bids was submitted by Ericsson and accordingly on July 22, 2009, the three Qualified Bidders were informed that the Ericsson bid had been selected as the starting bid pursuant to the Bidding Procedures. Copies of the Ericsson bid were distributed to Nokia Siemens and MPAM.

19 The Monitor reports that the auction was held in New York on July 24, 2009.

20 Pursuant to the Bidding Procedures the auction went through several rounds of bidding. The Sellers finally determined that the Ericsson bid submitted in the sixth round should be declared the Successful Bid and that the Nokia Siemens bid submitted in the fifth round should be an Alternate Bid. The Monitor reports that these determinations were made in accordance with consultations with the Monitor and representatives of UCC and the Bondholder group held during the seventh round adjournment.

21 The Monitor reports that the terms and conditions of the Successful Bid are substantially the same as the Nokia Agreement described in the Fourteenth Report with the significant differences being as follows:

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

1) The purchase price has been increased from U.S. $650 million to U.S. $1.13 billion plus the obligation of the Purchaser to pay, perform and discharge the assumed liabilities. The Purchaser made a good faith deposit of U.S. $36.5 million.

2) The Termination Date has been extended to September 30, 2009 or in the event that closing has not occurred solely because regulatory approvals have not yet been obtained, October 31, 2009 as opposed to August 31 and September 30, respectively, for the Nokia Agreement.

3) The provisions in the Nokia Agreement with respect to the Break-Up Fee and Expense Reimbursement have been deleted.

22 Further, I note that the Nokia Agreement provided for a commitment to take at least 2,500 Nortel employees worldwide. Under the Sale Agreement, the Purchaser has also committed to make employment offers to at least 2,500 Nortel employees worldwide.

23 The Nokia Agreement provided for a payment of a Break-Up Fee of $19.5 million and the Expense Reimbursement to a maximum of $3 million, upon termination of the Nokia Agreement. The Monitor reports that if both this court and the U.S. Court approve the Successful Bid, the Applicants are of the view that the Break-Up Fee and the Expense Reimbursement will be payable and in accordance with the order of June 29, 2009, the company intends to make such a payment. The Monitor reports that it is currently contemplated that 50% of the amount will be funded by NNL and 50% by NNI.

24 The assets to be transferred by the Applicants and the U.S. Debtors pursuant to the successful bid are to be transferred free and clear of all liens of any kind. The Monitor is of the understanding that no leased assets are being conveyed as part of this transaction.

25 The Monitor also reports that at the request of the Purchaser, the proposed Approval and Vesting Orders specifically approves Intellectual Property Licence Agreement and Trademark Licence Agreement, collectively, (the "IP Licences"), entered into between NNL and the Purchaser in connection with the Successful Bid.

26 The Monitor also reports that subject to court approval, closing is anticipated to occur in September 2009.

27 The Bidding Procedures provide that the Seller may seek approval of the next highest or otherwise best offer as the Alternate Bid. If the closing of the transaction contemplated fails to occur the Sellers would then be authorized, but not directed, to proceed to effect a Sale Pursuant to the terms of the Alternate Bid without further court approval. The Sellers, in consultation with the Monitor, the UCC and the Bondholders, determined that the bids submitted by Nokia Siemens in the fifth round with a purchase price of $1,032,500,000 is the next highest and best offer and has been deemed to be the Alternative Bid. Accordingly, the company is seeking court approval of the alternative bid pursuant to the Bidding Procedures.

28 The Monitor reports that, as noted in its Fourteenth Report, the CMDA division and the LTE business are not operated through a dedicated legal entity or stand alone division. The Applicants have an interest in intellectual property of the CMDA business and the LTE business which is subject to various inter-company licensing agreements with other Nortel legal entities around the world, in some cases on an exclusive basis and in other cases, on a non-exclusive basis. The Monitor is of the view that the task of allocating sale proceeds stemming from the Successful Bid amongst the various Nortel entities and the various jurisdictions is complex. Fur-

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

ther, as set out in the Fifteenth Report, the Applicants, the U.S. Debtors, and certain of the Europe, Middle East, Asia entities, ("EMEA") through their U.K. Administrators entered into the Interim Funding and Settlement Agreement, the IFSA, which was approved by this court on June 29, 2009. Pursuant to the IFSA, each of the Applicants, U.S. Debtors and EMEA Debtors agreed that the execution of definitive documentation with a purchaser of any material Nortel assets was not conditional upon reaching an agreement regarding the allocation of sale proceeds or binding procedures for the allocation of the sale proceeds. The Monitor reports that the parties agreed to negotiate in good faith and attempt to reach an agreement on a protocol for resolving disputes concerning the allocation of sale proceeds but, as of the current date, no agreement has been reached regarding the allocation of any sales proceeds. Accordingly, the Selling Debtors have determined that the proceeds are to be deposited in an escrow account. The issue of allocation of sale proceeds will be addressed at a later date.

29 The Monitor expects that the Company will return to court prior to the closing of the transaction to seek approval of the escrow agreement and a protocol for resolving disputes regarding the allocation of sale proceeds.

30 In his affidavit, Mr. Riedel concludes that the sale process was conducted by Nortel with consultation from its financial advisor, the Monitor and several of its significant stakeholders in accordance with the Bidding Procedures and that the auction resulted in a significantly increased purchase price on terms that are the same or better than those contained in the Stalking Horse Agreement. He is of the view that the proposed transaction, as set out in the Sale Agreement, is the best offer available for the assets and that the Alternate Bid represents the second best offer available for the Assets.

31 The Monitor concludes that the company's efforts to market the CMDA Business and the LTE Business were comprehensive and conducted in accordance with the Bidding Procedures and is further of the view that the Section 363 type auction process provided a mechanism to fully determine the market value of these assets. The Monitor is satisfied that the purchased priced constitutes fair consideration for such assets and, as a result, the Monitor is of the view that the Successful Bid represents the best transaction for the sale of these assets and the Monitor therefore recommends that the court approve the Applicants' motion.

32 A number of objections have been considered by the U.S. Court and they have been either resolved or overruled. I am satisfied that no useful purpose would be served by adding additional comment on this issue.

33 Turning now to whether it is appropriate to approve the transaction, I refer back to my Endorsement on the Bidding Procedures motion. At that time, I indicated that counsel to the Applicants had emphasized that Nortel would aim to satisfy the elements established by the court for approval as set out in the decision of *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont. C.A.), which, in turn, accepts certain standards as set out by this court in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.).

34 Although the *Soundair* and *Crown Trust* tests were established for the sale of assets by a receiver, the principles have been considered to be appropriate for sale of assets as part of a court supervised sales process in a CCAA proceeding. For authority see *Tiger Brand Knitting Co., Re* (2005), 9 C.B.R. (5th) 315 (Ont. S.C.J.).

35 The duties of the court in reviewing a proposed sale of assets are as follows:

1) It should consider whether sufficient effort has been to obtain the best price and that the debtor has not acted improvidently;

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

2) It should consider the interests of all parties;

3) It should consider the efficacy and integrity of the process by which offers have been obtained; and

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

36 I am satisfied that the unchallenged record clearly establishes that the sale process has been conducted in accordance with the Bidding Procedures and with the principles set out in both *Soundair*, and *Crown Trust*. All parties are of the view that the purchase price represents fair consideration for the assets included in the Sale Agreement. I accept these submissions. The consideration provided by Ericsson pursuant to the Sale Agreement, in my view, constitutes reasonably equivalent value and fair consideration for the assets.

37 In my view, it is appropriate to approve the Sale Agreement as between the Sellers and Purchaser. I am also satisfied that it is appropriate to grant the relief relating to the Vesting Order, the IP Licences, the Ancillary Agreement and the Alternate Bid, all of which are approved.

38 The Applicants also requested an order sealing the Confidential Appendixes to the Seventeenth Report pending further order. In considering this request I referred to the decision of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (S.C.C.), which addresses the issue of a sealing order. The Supreme Court of Canada held that such orders should only be granted when:

1) An order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk;

2) The salutary effects of the order outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

39 I have reviewed the Confidential Appendixes to the Seventeenth Report. I am satisfied that the Appendixes contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that the request for a sealing order is appropriate and it is so granted.

40 Other than with respect to the payment and reimbursement of amounts in respect of the Bid Protections nothing in this endorsement or the formal order is meant to modify or vary any of the Selling Debtors' (as such term is defined in the ISFA) rights and obligations under the ISFA. It is further acknowledged that Nortel has advised that the Interim Sales Protocol shall be subject to approval by the court.

41 An order shall issue in the form presented, as amended, to give effect to the foregoing reasons.

Motion granted.

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. Govt. Works

TAB3

Unofficial Transcript of the Endorsement of Justice Morawetz – heard March 9, 2012

Court File No. CV-12-9539-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Applicants

A. Taylor, M. Konyukhova for Applicant
D. Bish for QSI
A. Lockhart for Wacker Chemie
D. Wray for CEP
L. Rogers for FTI, Monitor
C. Sinclair for USW
A. Kaufman, G. Phoenix for IQ
M. Bailey for Superintendent of Financial Services
A. Hatnay for Mercer – Administrator of Timminco Haley Pension Plan
K. McElheran for Dow Corning
K. Peters for AMG Advanced

March 9, 2012

The motion was not opposed.

I am satisfied that it is appropriate to postpone the AGM during the Stay period. The factual basis for the request is set out in the factum and the legal basis for authorizing the postponement is set out at 22-25 of the factum.

With respect to the request to approve the Stalking Horse Bid Process I am satisfied that it is appropriate in these circumstances, to approve the request. In doing so, however, it is noted that counsel to CEP has noted, for the record, that CEP does have concerns about the process and specifically has reserved its rights to challenge certain provisions specifically 2.5(a) which addresses Excluded Obligations and in particular certain claims related to employees and pensioners. Counsel to CEP raised the issue as to the legality of the provision and whether it was contrary to law. Counsel also references section 9.14 – Severability. In addition counsel made reference to s.32 and 33 of the CCAA and certain

provisions of s.45 of the Quebec Labour Code. The position of CEP is noted. It is recognized that those points may be raised on a future motion.

Having reviewed the record and hearing submissions, I am satisfied that it is appropriate to approve the Stalking Horse agreement and the bidding procedures. Although the time lines are short, the Applicant is of the view that it will lead to a reasonable outcome. The Monitor is of the view that the bidding procedures are reasonable and appropriate in the circumstances.

I am also satisfied that the payment and priority of the Expense Reimbursement in the amount of $500,000 is reasonable in the circumstances and it is approved. The DIP Amendment is also approved. Ancillary relief is also appropriate. The motion is granted and an Order has been signed in the form presented.

Morawetz, J.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

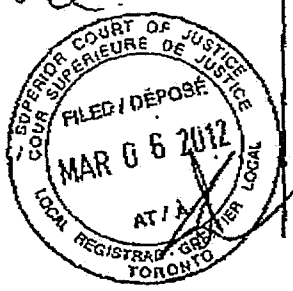
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF TIMMINCO LIMITED AND BÉCANCOUR SILICON INC.

Court File No. CV-12-9539-00CL

March 9/12

A. Taylor M. Konyukhova for Applicant March 9, 2012
D. Bish for QSI
R. Lorkhart for Walker Chester.
D. Wray for ~~CEP~~ CEP
L. Rogers for ~~CEP~~ FTI, Monitor.
C. Sinclair for USW
A. Kaufman for 1Q
C. Thomas
M. Bailey for Superintendent of Financial Services
A. Hatnay for Mercer - Asbestos Personal Injury Claimants
K. McElcheran for Dow Corning
K. Peters for AMG Advanced

The motion was not opposed.
I am satisfied that it is appropriate to postpone the A.G.M. during the stay period. The basis for the request is set out in the Fourth and the legal basis for authorizing the postponement



5933862 v1

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceeding commenced at Toronto

MOTION RECORD
(RETURNABLE MARCH 9, 2012)

STIKEMAN ELLIOTT LLP
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, Canada M5L 1B9

Ashley John Taylor LSUC#: 39932E
Tel: (416) 869-5236
Maria Konyukhova LSUC#: 52880V
Tel: (416) 869-5230
Kathryn Esaw LSUC#: 58264F
Tel: (416) 869-6820
Fax: (416) 947-0866

MAR-12-2012 08:51 MAG

is not out at 22-25. I the fourth
With respect to the request to approve
the Stelling Street Bird Bureau
I am satisfied that it is appropriate
in these circumstances, to approve the request.
In doing so, however, it is noted that counsel
to CEP has noted, for the record,
that CEP does have concerns about
the process and specifically has reserved
its rights to challenge certain provisions
specifically 2.5(a) which addresses
Excluded Obligations and in particular certain
claims related to employees and
pensions. Counsel to CEP raised
the issues as to the legality of the
provision and whether it was contrary
to law. Counsel also referenced
section 9.14 - Severability. In addition
counsel made reference to s 32+33
of the CCAA and certain provisions of
s 45 of the Ontario Labour Relations Act.
The points of CEP is noted. It
is recognized that these points
may be raised in a future

note.

Having review the record & hearing submissions, I am satisfied that it is appropriate to approve the staffing report and the bidding procedures. Although the time lines are short the Applicant is of the view that it will lead to a reasonable outcome. The Monitor is of the view that the bidding procedures are reasonable and appropriate in the circumstances I am also satisfied that the payment and provision of the Expense Reimbursement in the amount of $500,000 is reasonable in the circumstances and it is approved. The DIP Amendment is also approved. Amending relief is also appropriate. The motion is granted and an Order to be signed in the form presented.

TAB4

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

2015 ONSC 7574 (CanLII)

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:

2015 ONSC 7574 (CanLII)

> ... 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.

2015 ONSC 7574 (CanLII)

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

2015 ONSC 7574 (CanLII)

> test appears to me to be that the party should have raised the matter and, in deciding whether the party should have done so, a number of factors are considered.
>
> ...
>
> 37. Although many of these authorities cite with approval the broad language of *Henderson* v. *Henderson, supra*, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether proceeding constitutes a collateral attack on the earlier findings, whether it simply assets a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

2015 ONSC 7574 (CanLII)

[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.

2015 ONSC 7574 (CanLII)

[24] By limiting the effect of the approval, the concerns of the objecting parties are addressed as the approval of Monitor's activities do not constitute approval of the activities of parties other than the Monitor.

[25] Further, limiting the effect of the approval does not impact on prior court orders which have approved other aspects of these CCAA proceedings, including the sales process and asset sales.

[26] The Monitor's Reports 3-18 are approved, but the approval the limited by the inclusion of the wording provided by counsel to Rio Can and KingSett, referenced at paragraph [7].

Regional Senior Justice G.B. Morawetz

Date: December 11, 2015

2015 ONSC 7574 (CanLII)

TAB5

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp. Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1

[1991] O.J. No. 1137

Action No. 318/91

ONTARIO
Court of Appeal for Ontario

Goodman, McKinlay and Galligan JJ.A.

July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has 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, and 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. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. 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.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no 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.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) 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 by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); 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.); 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 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137 Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

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

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). 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.

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.

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 $65,000,000. 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 $50,000,000 on the winding-up of Soundair.

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.

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.

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.

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.

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, 1991. 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.

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.

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.

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.

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?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY IN AGREEING TO SELL TO OEL?

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.

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.

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, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.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.

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?

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.

When the receiver got the OEL offer on March 6, 1991, it was over ten 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.

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.

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 v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.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)

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 (C.A.), at p. 11 C.B.R., p. 314 N.S.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)

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 to 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.

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 ten 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.

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.

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 v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.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.

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. Bkcy.), 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.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), 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.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), 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)

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.

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.

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.

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.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-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.

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.

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.

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.

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

2. Consideration of the interests of all parties

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 (1986, Saunders J.), supra. 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".

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, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), 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.

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

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.

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 (1986), 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 finding 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.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., 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.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.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)

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.

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., p. 548 D.L.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.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the 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?

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.

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.

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.

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.

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.

Moreover, I am not prepared top 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.

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 seven 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, it would have told the court that it needed more information before it would be able to make a bid.

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.

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.

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., p. 548 D.L.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., p. 550 D.L.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.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, 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.

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

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.

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.

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.

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 debtors' assets.

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 interlender 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 interlender 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 $6,000,000 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.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 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.

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 interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

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.

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.

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.

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-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- 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), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). 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.

I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefrom), the wishes of the interested creditors should be very seriously considered by the receiver. 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):-- 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.

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 Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital

Corporation (collectively 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 (the Bank). 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.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., 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 having 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.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, 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 [pp. 17-18]:

> 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.

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 $3,000,000 to $4,000,000. 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 downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority of the court, said at p. 10 C.B.R., p. 312 N.S.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 the 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.

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.

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.

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.

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. Bkcy.) 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.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for 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 C.B.R.:

> 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 the commercial efficacy and integrity.

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, at pp. 92-94 O.R., pp. 531-33 D.L.R., 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., p. 314 N.S.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.

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.

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.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> 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 1. 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.

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 this 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 "hard ball" 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.

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.

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.

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.

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.

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 $18,000,000. 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.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June 29, 1990.

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.

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.

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 $10,000,000 and $12,000,000.

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 $3,000,000 for the good will relating to certain Air Toronto routes but did not include the purchase of any tangible assets or leasehold interests.

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.

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.

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.

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.

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.

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 any 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.

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.

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 interlender 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.

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 three 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.

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.

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.

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 three 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.

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 three 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.

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 [p. 31]:

> They created a situation as of March 8, 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.

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".

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 interlender condition removed.

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 $3,000,000 to $4,000,000.

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.

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.

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 a 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.

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.

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.

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.

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, it knew that CCFL was interested in purchasing Air Toronto.

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.

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.

For the above reasons I would allow the appeal with 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-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

TAB6

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.

Table of Authorities

Cases considered by *Farley J.*:

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

Central Capital Corp., Re (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.*) 88 O.A.C. 161 (Ont. C.A.) — applied

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

Greyvest Leasing Inc. v. Merkur (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) — applied

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

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

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

Farley J.:

Endorsement

1 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;

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

(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 jeopordize 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 Plimsoll line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *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 affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *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

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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.

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

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 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB7

1989 CarswellAlta 347
Alberta Court of Appeal

Integrated Building Corp. v. Bank of Nova Scotia

1989 CarswellAlta 347, [1989] A.W.L.D. 699, 16 A.C.W.S. (3d) 66, 71 Alta. L.R. (2d) 320, 75 C.B.R. (N.S.) 158

INTEGRATED BUILDING CORP. et al. v. BANK OF NOVA SCOTIA, CLARKSON GORDON (Receiver) and EXTRA EQUITY CORP. (Third Party)

Laycraft C.J.A., McClung and Hetherington JJ.A.

Judgment: May 12, 1989
Docket: Edmonton No. 8903-0252-AC

Counsel: *R.G. McLennan*, for appellants.
R.W. Block, for respondent.
W.E. Wilson, Q.C., for receiver.
J.N. Agrios, Q.C., and *R. Reeson*, for third party.

Subject: Corporate and Commercial; Insolvency

Headnote

Receivers --- Conduct and liability of receiver — Duties

Receivers — Sale of debtor's assets — Receiver not having to reinstitute tender process for sale of land after receiving better offer from person who did not respond to public invitation.

Receivers — Actions — Court refusing to interfere in proposed action by court-appointed receiver to excite interest in sale of land — Receiver having been fair and reasonable in all it did in sale process.

When determining whether to interfere to reject a proposed action by a court-appointed receiver to excite interest in the sale of lands, the court must ask whether the receiver has been fair and reasonable in all that it has done in the sale process, which has a practical, business aspect as well as a judicial aspect to it. Further, when a receiver has received a better offer from a person who did not respond to the public invitation for proposals, the receiver is not bound to reinstitute the tender process.

Table of Authorities

Cases considered:

Crown Trust Co. v. Rosenberg (1986), 67 C.B.R. (N.S.) 320 (Ont. H.C.) (not yet reported) — *considered*

Appeal from dismissal of application to reject proposed action of court-appointed receiver on sale of lands.

***Laycraft C.J.A.* (for the court) (Memorandum of judgment delivered from the bench):**

1 We are all of the view that the reasons for judgment of the learned chambers judge properly assessed the considerations determining when a court will interfere to reject a proposed action by its court-appointed receiver. In this case the chambers judge reviewed the effort made by the receiver to excite interest in the sale of the lands. She quoted the Ontario decision of *Crown Trust Co. v. Rosenberg* [summarized at 67 C.B.R. (N.S.) 320 (H.C.)], which states the test in these terms:

> The court must consider the efficacy and the integrity of the process by which offers are obtained. The court ought not to enter into the marketplace. 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 its decision is reached.

2 She then went on to say, applying these principles to the case here:

WestlawNext CANADA Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

There is, of course, a good deal of law restating these basic general principles and I think it comes down to this, that I must ask whether a party in the position of Clarkson Gordon has been fair and reasonable in all that they have done in this process which has a practical business aspect to it, but also a judicial judiciary aspect to it.

Counsel for Genesis has candidly admitted that Genesis was not misled. It is relevant to me that a director of Genesis is a defendant in this action. It is important to me that parties involved in Genesis are related to, or connected to, or are the defendants in the primary action, the Bank of Nova Scotia action, because it indicates that Genesis Corp. was knowledgeable about what was happening with regard to Integrated Building Corp., the Oluks, the Bank of Nova Scotia and this receivership being managed by Clarkson Gordon.

3 The learned chambers judge then found that the receiver had taken reasonable steps. We note that the proposed sale presented for approval was an improvement on the best proposal received after the public exposure of the property. We do not agree with the proposition that, when a receiver has received a better offer from a person who did not respond to the public invitation for proposals, the receiver is then bound to reinstitute the tender process.

4 The chambers judge found that the receiver's actions were reasonable and we are not persuaded that she made any error in fact or in law in exercising her discretion to make that decision.

5 Accordingly, the appeal is dismissed.

Appeal dismissed.

End of Document

Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved.

TAB8

Case Name:

Battery Plus Inc. (Re)

IN THE MATTER OF The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3. Section 47.1, as amended
AND IN THE MATTER OF Battery Plus Inc. and 1271273 Ontario Inc.

[2002] O.J. No. 731

Court File No. 01-CL-4319

Ontario Superior Court of Justice
Commercial List

Spence J.

Heard: February 7-8 and 11-14, 2002.
Judgment: February 26, 2002.

(76 paras.)

Receivers -- Property -- Sale of property -- Duties of Receiver -- Bankruptcy -- Voluntary assignments -- Corporations -- Authority to make assignments.

Application by an interim receiver for approval of a sale of assets and to assign a company into bankruptcy. The interim receivers for Battery Plus and 1271273 Ontario entered into an agreement to sell the assets of the companies to a third party. To facilitate this sale, they wanted to assign 1473722 Ontario, the assignee of some of Battery Plus's leases, into bankruptcy. 1271273 was the sole shareholder of 1473722. The sale was opposed by Battery Plus, 1271273, and by two individuals: a creditor of the companies who had unsuccessfully bid for the assets, and by the principal of the companies who was also a guarantor.

HELD: Applications allowed. The sale of assets was approved, and the assignment into bankruptcy was authorized. The interim receiver made a sufficient effort to get the best price for the assets, the process was fair and the interests of the parties would not be prejudiced by the sale. 1473722 was insolvent. As interim receivers for its sole shareholder, they had the authority to file an assignment in bankruptcy.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, ss. 2(c), 244, 244(2).

Ontario Business Corporations Act, ss. 108(3), 108(5).

Counsel:

Harvey Chaiton and George Benchetrit, for the Interim Receiver, Deloitte & Touche Inc.
Melvyn Solmon and Stuart Chelin, for Battery Plus Inc. and 1271273 Ontario Inc.
Aubrey Kauffman, for Laurentian Bank of Canada.
Alan Mark, for Cadillac Fairview Corporation.
Susan Addison, for Pensionfund Realty Limited, Acktion Capital Corporation, Bramalea City Centre Equities Inc., OPB Realty Inc., Kingsway Gardens Holdings Inc., Scarborough Town Centre Holdings Inc., Yorkdale Shopping Centre Holdings Inc., Ivanhoe Cambridge 1 Inc., Morguard Investments Limited and 20 Vic Management Inc.
David Foulds, for Sharpe Electronics of Canada Ltd.
Gavin Tighe and Bryan Skolnik, for Dominick Bellisario.

---

1 **SPENCE J.**:-- Deloitte & Touche Inc., the Interim Receiver, requests approval of the sale of the assets of Battery Plus Inc. ("BPI") and 1271273 Ontario Inc. ("127") (the "Companies"), except the Argentia property, pursuant to the Purchase Agreement dated January 21, 2000 between the Interim Receiver and LEAP Energy and Power Corporation ("Leap") and an order authorizing the Interim Receiver to assign into bankruptcy 1473722 Ontario Limited ("147") to facilitate the completion of the Purchase Agreement.

Motion for Approval of Sale

2 The approach to be followed by the Court in determining whether a receiver has acted properly in concluding an agreement for the sale of property and therefore whether to approve that sale is set out in paragraph 16 of the reasons of the Court of appeal in Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1, where the Court, per Galligan J.A. adopts the following statement of the duties the court must perform in making its decision.

3 The Court is required to consider (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) the interests of all parties; (iii) the efficacy and integrity of the process by which offers were obtained and (iv) whether there has been unfairness in the working out of the process.

Opposition by the Companies and Bellisario

4 The Companies oppose the approval of the sale. They invoke what they say are three duties of a receiver which are relevant in the present case:

(i) the duty of the receiver to make full disclosure to the court: Bennett on Receiverships, 2nd ed. p. 180

(ii) the duty of a receiver and manager to preserve the goodwill of the business: Re Newdigate Colliery Limited, [1915] 1 Ch. 682 (at p. 472 and 475, in the report excerpts provided by the Companies), and

(iii) the duty to be disinterested and impartial so as to deal fairly and even-handedly with the interests of all parties: Re Federal Trust Co. and Frisina et al (1976), 20 O.R. (2d) 32 at 35 (C.A.).

5 The Companies raise issues of fact with respect to the following matters:

(i) the involvement of Radio Shack in the sale process;

(ii) the information as to whether the Interim Receiver used qualified people in the sale process and had all relevant information;

(iii) the information provided by the Interim Receiver as to the advertising process and the time limits for expressions of interest;

(iv) the information provided by the Interim Receiver as to whether sufficient efforts have been made to obtain the best price, in the absence of a valuation;

(v) the disparity in the prices offered by the different bidders and whether they were given different information;

(vi) the assessment made by the Interim Receiver of the Indeka offer net of the Argentia property.

The points identified in items (v) and (vi) do not raise issues that require comment.

6 The Companies also dispute the actions of the Interim Receiver in deciding to close 22 stores at the outset, based on their lack of profitability, and purchasing only a limited quantity of inventory, despite the sales potential said to be afforded by the prospective Christmas season.

7 Mr. Bellisario, an unsuccessful bidder and creditor, raises other issues, as follows:

(i) the failure of the Interim Receiver to pursue the opportunity indicated by Mister Keys' expression of interest through the offers it made for BPI assets;

(ii) the failure of the Interim Receiver to advise Mister Keys that Leap would be accepted as the offeror, which would have allowed Mister Keys to bargain with Leap in the way it is said that Radio Shack must have done and must be assumed to still be doing, even though Radio Shack is not before the Court and may make a deal with Leap that will not be put to the Court for approval and may allow Leap to receive from Radio Shack value

that would otherwise have been available to the creditors and other interested parties;

(iii) the Leap deal is conditional on one group of leases being assignable and on price adjustments in respect of leases in a second group that turn out to be non-assignable, so the Leap deal may not proceed even if approved, and its value if it does proceed is subject to the above contingencies;

(iv) the Interim Receiver used an inventory amount of $3.5 million which Mister Keyes relied on in setting its trigger number of $2.5 million and of the Interim Receiver considered that these numbers could lead to a reduction in net price by $980,000 as indicated, that matter should have been raised with Mister Keyes;

(v) the suggestion that the Mister Keyes' offer is effectively subject to the repayment of the loan from Mr. Bellisario, when all that is called for is "satisfactory resolution" in respect of this matter;

(vi) the diminution in the value of the Leap agreement that may be occurring because Leap is not paying operating costs, contrary to its agreement;

(vii) the apparently preferential treatment given to Leap in the form of an option on the Argentia property;

(viii) the possibility of receiving further bids before February 28, 2002, under Court supervision, instead of leaving the matter in the hands of Leap, with the deficiencies referred to above.

8 The Companies say that the Interim Receiver has a duty to take into account the interests of all parties and that the Court is also required to do so and this involves recognizing that Mr. Badr is a guarantor of the Companies, and is an unsecured creditor of the Companies for at least $1 million and is director with the duties of that office and has spent 10 years developing the business of the Companies. Mr. Badr arranged a financing proposal with Mr. Taddeo to assist the Companies for the Christmas season but received no response from the Interim Receiver about it.

9 The Companies take issue with the efficacy and integrity of the sale process. They say their requests for information have been refused, including their requests as to dealings between Laurentian Bank and the Interim Receiver. The Companies question what information was given to the different bidders. The Companies question the dealings with InterTAN including its conduct of due diligence at present with a view to taking an assignment from Leap, which requires the consent of the Interim Receiver.

10 The Companies say that, contrary to the Purchase Agreement between Leap and the Interim Receiver, Leap is not managing the business of the Companies and there must be an agreement between Leap and the Interim Receiver which has not been disclosed, contrary to what has been told to the Court. The Companies question whether Leap is meeting responsibilities it has under the Purchase Agreement for certain losses and expenses incurred from and after January 21, 2002.

11 The Companies submit that the report of the Interim Receiver to the Court is unreliable because it contains a meritless allegation of theft which the Companies say was made by the Interim Receiver without first making proper enquiry to the Companies.

12 The Companies say that the Interim Receiver failed to disclose that it knew about the transfer of leases to 147, at the end of September, without notice to the landlords. Later, in November, the Interim Receiver consented to the Laurentian Bank registering under the P.P.S.A. against 147 without seeking directions from the Court, which the Companies say showed partiality on the part of the Interim Receiver towards the Laurentian Bank without regard for the interests of other stakeholders.

13 The Companies also complain that the Interim Receiver made an unfounded allegation that certain cheques were never deposited into the Battery Plus account at the Laurentian Bank as they should have been.

14 The Companies say that, although the Interim Receiver said on November 19, 2001 it would give Mr. Badr access to his personal information on the computer hard drive, it failed to do so until after Mr. Badr had to resort to Court for an order for access, and the information was then made available in a form that was not usable.

15 The Companies complain that the process followed by the Interim Receiver in its possession and control of computer information does not reflect paragraph 7 of the Interim Receivership Order. Paragraphs 3(a) and 5 of the Order seem to meet this point.

16 The Companies say that the Interim Receiver has not fairly characterized the undertaking given with respect to communications with prospective purchasers and has misstated that copies of letters were not sent to the Interim Receiver's lawyers.

17 The Companies say that these deficiencies support its claim that the sale process should be redone properly, including marketing in the United States, or at least that there should be a judicial sale. The Company submits no decision should be made to allow the presently proposed sale without allowing examination of Mr. Baigle and Mr. Allen in order to ensure the Court has full disclosure of the relevant information.

18 The Companies submit that the Interim Receiver mismanaged the business by purchasing insufficient inventory to preserve the goodwill, having regard to the credit resources in place, and without seeking Court approval for its course of action. The Company says that the Interim Receiver closed stores that were forecast to be profitable and failed to deliver promised inventory.

Approach to be followed

19 In order to give proper consideration to the issues of principle and fact that are raised by the contending positions it is necessary to determine at the outset the relevant context within which

these issues are to be addressed. The context here is a proposed sale by a court-appointed receiver of a business under its direction for the benefit of the interested parties. It is not disputed that the circumstances of the Companies are such that a sale of the business is the appropriate way to address the interests of the parties. The alternatives to the sale now proposed are said to include the holding of a new sale conducted differently from the present one, or a judicial sale, but there is no proposal that would obviate the need for a sale of some kind. Accordingly, it is appropriate to address the sale now proposed in terms of the tests set out in the Soundair decisions, as stated above.

Sufficient Effort to Get the Best Price

20 The sale process that the Interim Receiver followed is set out in its factum at paragraphs 14 to 23 and paragraphs 27 to 32. The process involved preparation of a Confidential Information Memorandum ("CIM"), preparation of and communication with a list of 80 prospective purchasers, 53 of whom received the CIM, newspaper advertisements, the receipt of 16 expressions of interest for some or all of the assets, determination of the five parties that had submitted the highest offers and met all of the minimum criteria imposed by the Interim Receiver, facilitation of due diligence via data rooms and briefing sessions, the submission of one or more letters of intent ("LOI") by each of the five parties, analysis by the Interim Receiver of the LOI's and discussions and negotiations with each of the parties, identification by the Interim Receiver of the Leap offer as the best offer and further due diligence and negotiation with Leap, and execution of the proposed Purchase Agreement with Leap and a related entity, Winner International LLC, on January 21, 2002.

21 In conducting the sale as described and referred to above the Interim Receiver followed a customary approach for the sale of a business. The proposed sale has the support of the Laurentian Bank of Canada, the largest secured creditor of Battery Plus, with a debt owing to it of $6.6 million and Sharpe Electronics which is owed $500,000. RoyNat Ltd., which is owed $300,000, is not opposed. The sale is opposed by Mr. Bellisario, a secured creditor who is owed about $1 million and is also the principal in Mister Keys, one of the unsuccessful bidders. The sale is also opposed by the Companies and by their principal Mr. Badr. The sale is supported by Cadillac Fairview which is the landlord under about 20 lessees and is not opposed by the landlords under another 20 leases. A group of unsecured creditors takes no position.

22 It is relevant at this stage to refer to the general observations Galligan J.A. made in Soundair (above) immediately before he adopted and set out the enumeration of the Court's duties which is referred to above:

> 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.
>
> 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.

23 Also relevant are Galligan J.A.'s comments at paragraph 21 of the Soundair decision, as follows:

> 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 give 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, 60 O.R. (2d) 87, 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.

24 The purchase price offered by Leap is $5 million maximum, an amount that may be adjusted downward in certain contingencies. This amount is considerably less than the amount owed to the Laurentian Bank of Canada.

25 The price is subject to a reduction of up to $262,500 on account of non-assignable leases. The next highest offer is that of Mister Keys. The maximum price payable under that offer is $4.75 million. The third and most recent Mister Keys offer is conditional on satisfactory resolution of the security and repayment of the loan of Mr. Bellisario for $1 million. While it is conceivable this condition could be satisfied by some arrangement or concession less than either a recognition of the priority of the security held by Mr. Bellisario or the repayment of his loan, this would be up to Mr. Bellisario and there is no way to determine from the terms of the condition whether any particular amount or concession would be acceptable to him. The provision leaves the matter up to Mister Keys. The Mister Keys offer also requires all remaining leases or allows termination.

26 Mister Keys submits that its interest was evident from its willingness to submit three offers and the Interim Receiver should have come back to it to invite further offers and to disclose that Leap was in the lead, rather than assessing Leap as the highest bidder and commencing exclusive negotiations with it. But whether Mister Keys would have been willing to make an offer better than that of Leap is just a matter of sheer conjecture. Certainly, the fact that it made three offers with the terms and conditions they contained suggests the contrary.

27 The Interim Receiver could properly conclude that the Leap offer provided the prospect of a better deal. It also had a condition as to leases but the Interim Receiver could properly form the view that, after considering the two offers with their differing conditions as to leases, the Leap offer was the better one to pursue; its condition as to leases is potentially less onerous than the Mister Keys condition and if the Leap offer condition as to leases could be met, it provided the prospect of a better price than the Mister Keys offer could be considered to provide.

28 A further relevant factor in comparing the offers is that the Mister Keys offer also has a provision for reduction in respect of an inventory shortfall. The Interim Receiver considered this provision would result in a reduction in the price by a further $950,000. Mister Keys submitted that its use of a $2,500,000 minimum value for inventory was based on the CIM statement that the inventory level was $3.5 million and if the Interim Receiver was subsequently adjusting that number downward, what it should have done was to so advise Mister Keys so that the parties could have negotiated about the matter. The $3.5 million amount appears as an unaudited figure for

September 30, 2001. There is nothing in the terms of the Mister Keys offer to suggest that its minimum was premised on an assumption based on the amount in the CIM and that, if inventory had fallen considerably lower since then, Mister Keys would be prepared to negotiate about reducing its minimum accordingly. It would be at least as reasonable, if not more so, to assume that Mister Keys regarded $2,500,000 of inventory as a necessary component of its maximum purchase price.

29 Article 7 of the Leap Purchase Agreement provides that it is the general intention of the parties that, subject to court approval, Leap is to manage the operations of the business in the period from January 21, 2002 or a later agreed date up to closing. This arrangement has not been activated. Under the arrangement Leap would have paid the cost and expenses of the operations during the period and would have borne any losses during such period. The Interim Receiver submits that this arrangement was, in effect, additional to the basic value of the Leap offer that was the relevant amount to be compared with the other offers, because none of the other offers provided for such a management arrangement. Mr. Davis' affidavit says that Mister Keys offered to help manage the business free of charge in order to maximize value but such an offer does not go as far as the one that was contemplated in the Leap Purchase Agreement. There is nothing on which an assessment could be made that the Mister Keys offer of management assistance should have been considered material to the comparison of the value of the offers.

30 Mister Keys says that the Leap offer is ultimately dependent on the landlords because of the requirements for a minimum number of 40 leases. All the offers, in one way or another, are conditional on leases being assigned. Mister Keys submits that the Leap offer should not be decided until the landlords decide but no reason is apparent why the matter would be better dealt with that way than instead proceeding with the assessment that is now under way.

31 Mister Keys submits that the report of the Interim Receiver discloses that preferential treatment is being given to Leap in respect of the Argentia property, but section G of the report, which deals with the Argentia property, does not suggest that any preference has been given. It simply reports about the status of sale prospects.

32 The Companies submit that the sale process was flawed in two respects that relate in part to lack of full disclosure. The Companies say they were denied disclosure which they requested about the expertise of the representatives of the Interim Receiver who administered the sale process. The Company say no valuation of the business was obtained and the sale was not advertised in the United States and there is no explanation from the Interim Receiver as to why not.

33 The Companies say that, as well, the Interim Receiver has mismanaged the business during the sale process by not purchasing adequate inventory and by prematurely closing unprofitable stores. This latter claim does not clearly amount to or support a claim that the sale process itself has been flawed or improvident, so it is dealt with below in respect of the other tests applicable for purposes of the requested approval.

34 No doubt the sale process, like any sales process, could have been conducted on a larger scale, with the retaining of expert consultants and valuators and an advertising program deployed internationally and a time schedule allowing ample time for exhaustive consideration at each stage. But in the present case, the Interim Receiver considered, based on the financial condition of the business, that it should move promptly to conduct a sale on an expeditious basis, and it did so. The process was certainly not precipitous. Mister Keys was allowed to come in with three successive offers. There is nothing before the court to suggest that if the Interim Receiver had conducted a different kind of sale process it would have had a prospect of obtaining a significantly better offer. The major creditor, the Laurentian Bank, does not think so. The Companies ask the court to second guess the Interim Receiver's decisions about the sale process but they offer no basis for the court to engage in such a venture.

The other requirements for court approval

35 The three other matters which the Soundair decision says require consideration for court approval to be granted are: the interests of the parties; the efficacy and integrity of the process; and the fairness of the process. These considerations overlap to some extent and so do the factual issues raised in this case, so the following part of these reasons mainly considers the requirements together in the context of the matters that are the subject of complaint.

Interests of the Parties

36 The interests that are involved here are those of secured and unsecured creditors and the shareholder Mr. Badr who is also a guarantor.

37 There is a priorities dispute between certain of the secured creditors and Mr. Bellisario. The order sought by the Interim Receiver will not prejudice the legal positions of the creditors in regard to the priorities dispute. If the leases in 147 are included in a sale the cash proceeds referrable to them will be available to meet the claims of those interested in 147 in accordance with their respective interests and priorities. Mr. Bellisario may have a tactical interest in deferring any sale of the leases but it does not seem that his legal interests would be prejudiced by a sale of the leases as part of the sale of the overall business, since it is not apparent how the leases can have any material value otherwise.

38 Mr. Badr and the Companies propose to bring other proceedings against the Interim Receiver, as mentioned above. The interests of the parties in this regard are addressed below.

Inadequate Purchases of Inventory

39 The Companies say that the Interim Receiver failed to purchase adequate inventory to support the operation of the business and failed to use credit facilities available for this purpose. The Interim Receiver disputes these allegations. Whether the level of inventory was inadequate is disputed. The question of inventory levels is addressed in the first report of the Interim Receiver in the first

paragraph on page 4 of the report but no inference can be drawn from that paragraph or from the other material referred to. A proposal was provided for financing from V. Taddeo but it was made to the Laurentian Bank and was not acceptable to the bank. It would have involved the removal of the Interim Receiver and the resumption of management by Mr. Badr. There is a dispute as to what the situation and prospects were with Panasonic and Sony.

40 The issue whether the Interim Receiver failed to purchase adequate inventory is part of the other proceedings the Companies seek to bring against the Interim Receiver, to remove the Interim Receiver and for leave to sue the Interim Receiver. For purposes of the present matter, it cannot be concluded on the material before the court at present that the Interim Receiver failed to purchase adequate inventory.

Premature Store Closings

41 The Interim Receiver decided to close 22 stores promptly, on the basis that the stores were unprofitable and by closing them a core of profitable stores could be created for a sale of the business. The Companies object, based on the affidavit of Mr. Mastantuono, that the commercially responsible course would have been to keep the stores open during the more active Christmas season to get the advantage of the seasonal sales and then to see if the prospective purchasers wanted the stores. This question is obviously one of business strategy and raises a number of other questions to which it offers no answers, such as: what direct and indirect cost consequences would have resulted from the proposed course of action; and, if the stores were basically unprofitable why would the purchasers want them?

42 The matter of how to deal with the unprofitable stores had been a subject of discussions with the Companies from July on, and by October the Companies had put forward a proposal to enhance profitability by closing all unprofitable stores, which were said to be ten in number. If it made sense to the Companies in October to close the unprofitable stores and if by mid-November the number of unprofitable stores was identified by the Interim Receiver at 22, then it is hard to see how the decision to close them can have been unsound.

The Radio Shack Factor

43 The Companies and Mr. Bellisario raise issues about the dealings that it has been learned are underway between Leap and Radio Shack and/or its owner InterTAN for the transfer to Radio Shack of Leap's interest in the purchase of the business. Radio Shack is doing due diligence on the business, facilitated by the Interim Receiver.

44 The Interim Receiver has a binding agreement of purchase and sale with Leap. No basis has been established for an inference that Leap is proposing not to perform its obligations under the agreement. The agreement has not been terminated. The bidding has not been reopened. The Interim Receiver has an agreement, and it is with Leap.

45 Under the terms of the agreement, it cannot be assigned by Leap to another party without the consent of the Interim Receiver. Counsel for the Interim Receiver advised the court that, if an assignment from Leap to Radio Shack is proposed, the Interim Receiver will seek the approval of the court for its consent to the assignment. That effectively disposes of any concern in regard to the Radio Shack matter.

Unreliability of Reports

46 The Companies submit that the Interim Receiver's reports are unreliable in a number of important respects, such that the court ought not to base an approval decision upon them.

47 It is said that the reports make a meritless allegation of theft in respect of batteries that were removed from inventory the night before the Interim Receiver assumed its responsibilities. There is a dispute about the relevant facts. On the material available at present, it cannot be concluded that the way in which the Interim Receiver reported on the matter and dealt with it raises a question about the reliability of its reports for purposes of the present proceeding.

48 The Companies raise an issue about the Interim Receiver's statement on page 15 of its second report as to how and when the facts relating to the assignment of leases to 147 mainly came to its attention, but no material issue of concern is established in this regard.

49 The Companies say that the Interim Receiver acted with partiality in favour of the bank and other secured creditors when it permitted them to register under the PPSA against 147. Assuming the Bellisario security was already registered, the other subsequent registrations would not, without more, have a prejudicial effect against his security but only against subsequent security holders and no case is advance in that regard. This matter can be left for further consideration in the other proceedings to the extent appropriate.

50 The Companies say the Interim Receiver incorrectly alleged that certain cheques were not properly deposited. It is said that the record shows that a cheque for $73,000 on account of G.S.T. refund was in fact picked up for deposit. It is not shown that the report of the Interim Receiver in this regard is materially unreliable.

51 The Companies raise similar issues concerning franchisees' monies, Mr. Badr's access to his hard drive and other matters which counsel for the Companies characterized as minor, as to communications about the proceedings in the Court of Appeal and copying of documents to the counsel for the Interim Receiver. There is nothing material here.

52 For the reasons given above, the objections raised to the sale process and to the purchase price and the Purchase Agreement fail. On the material, the Interim Receiver has satisfied the test in Soundair and the proposed sale in accordance with the Purchase Agreement is approved.

Motions for Authority to Assign 147 into Bankruptcy

53 The Factum of the Interim Receiver provides its submissions on this request at paragraphs 33 to 39 and paragraphs 45 to 48.

54 The Interim Receiver relies, on its argument for the relief it seeks, on its contention that Battery Plus assigned the leases to 147 without notice to or consent from the landlords affected and therefore breached those leases on at least a number of them, ie. all but four. Nothing in the materials or submissions contradicts the claim that these leases have been put in breach by the assignments and it follows that they have thereby been placed in jeopardy. It is said that Bellisario had a commercially based interest in receiving security on those leases but this hardly justifies Battery Plus placing them in jeopardy to the detriment of the creditors of Battery Plus. It is proper for the Court to take into account this context in considering the Interim Receiver's request to be empowered to file an assignment in bankruptcy on behalf of 147.

55 If 147 is placed in bankruptcy the trustee in bankruptcy would be in a position to seek an order for the assignment of the leases for the benefit of all of the creditors of 147 whatever may be their respective claims and priorities. If such an order were obtained by the trustee it would facilitate the transaction now under consideration. If that transaction is approved then it would also serve the proper interests of the interested parties to have the leases now in 147 dealt with in that manner.

56 Bellisario objects that the authority that the Interim Receiver has by the existing court order is only to make an assignment in bankruptcy on behalf of the Companies, which does not extend to 147. The Interim Receiver submits that 1271273 Ontario ("127") is subject to the court order and, because 127 is the sole shareholder of 147, the Interim Receiver, in the exercise of its powers, may authorize a declaration under the Business Corporations Act of Ontario ("OBCA") to exercise the powers of the Board of Directors of 147 including the power to authorize it to make an assignment in bankruptcy. Bellisario objects that for the Interim Receiver to be allowed to proceed in this way would fail to respect the pledge of shares of 147 and the option on shares of 147 which he holds as security in respect of his loan to Battery Plus, but it is not apparent that the terms of those security instruments preclude 127, and therefore the Interim Receiver, from exercising shareholders rights in respect of 147 unless and until proper action is taken by Mr. Bellisario to exercise his security rights in respect of 147.

57 The Companies submit that, even if the Interim Receiver could, in the effective capacity of the directing authority of 147, make an assignment of 147 into bankruptcy, it could properly do so only if 147 is insolvent and there is no evidence that that is so.

58 It is not disputed that under the terms of the Pledge Agreement relating to the shares of 147, 127 as Pledgor is in default. Accordingly s. 3.3 of the Pledge Agreement is applicable. That section by its terms entitles the Pledgor (sic) to deliver to the trustee holding the shares a default certificate directing the trustee to deliver the shares to the lender, Mr. Bellisario. There is no evidence that 127 as Pledgor has delivered such a default certificate. S. 3.1 of the Pledge Agreement provides that until the security interest becomes enforceable, the shares are to be voted by proxies for 127. No

provision addresses how the shares are to be voted after the securities become enforceable but before a certificate is given under s. 3.3. Until that certificate is given, the shares cannot be released to the lender, so the only reasonable inference is that, until then, 127 can direct the voting of the shares. S. 108(3) and (5) of the OBCA give adequate authority to 127 as the sole shareholder of 147 to exercise the duties of the Board of Directors of 147 if 127 is so authorized by a unanimous shareholders agreement, which it would be entirely within the power of 127 to authorize. Since 127 is under the direction of the Interim Receiver, it should be regarded as having the necessary authority, in place of 147, to authorize the assignment into bankruptcy of 147, subject to what is said below.

59 With respect to the above analysis, Bellisario submits that s. 3.3 of the Pledge Agreement is to be construed as permitting the Lender, ie. himself, rather than the Pledgor, to deliver the Default Certificate, on the basis that the word "Pledgor" is obviously an error in the context of the section, and the context requires that the word "Lender" be read in its place. It is apparent that without some change the clause as worded makes no real commercial sense and substituting the word "Lender" would give the provision commercial sense. That does not necessarily mean that it is to be inferred that that is what the parties had in mind and had agreed to. Even if it is, there is still the question whether a Default Certificate has been delivered to the Trustee under s. 3.3. No reference has been made to any document purporting to be a Default Certificate delivered under that section. Reference was made to the letter of November 2, 2001 from Gardiner Roberts LLP to Laurentian Bank (Tab 134 to the Affidavit of Michael Nero, January 31, 2000, Exhibit "A", Vol. IV) which states that demand letters and notices of intention under s. 244 were issued on October 18, 2001 to the Companies and 147 relating to their obligations under the Bellisario loan to Battery Plus. Copies of the October 18, 2001 letters and notices have been provided by counsel to Mr. Bellisario.

60 Bellisario submits that the October 18, 2001 letters and notices constitute the Certificate of Default required by s. 3.3 of the Pledge Agreement.

61 The November 2, 2001 letter from Gardiner Roberts was sent by them in their capacity as counsel to Bellisario and does not purport to relate to that firm's role as the trustee under the Pledge Agreement. The same is true of the October 18, 2001 letters and notices. So it cannot be said that there has been a delivery to Gardiner Roberts LLP in its capacity as the trustee under the Pledge Agreement as required by s. 3.3.

62 None of the three demand letters constitutes a statement to the effect required under s. 3.3 of the Pledge Agreement. A notice under s. 244 of the Bankruptcy And Insolvency Act is intended to give Notice of an intention to enforce security and not to constitute the act of enforcement contemplated by s. 3.3(c) of the Pledge Agreement. S. 244(2) provides that the act of enforcement is to be effected only after ten days. So a notice of intention under s. 244 does not constitute a Certificate of Default under s. 3.3 of the Pledge Agreement. Nothing in the terms of the October 18, 2001 notices alters this analysis.

63 It was suggested that the letters and notices of October 18, 2001 ought to be considered to be sufficient for purposes of s. 3.3 of the Pledge Agreement, presumably on the basis that the proper inference to be taken from them is that the Lender was thereby effectively giving to the trustee the notification and the authorization and direction required by paragraphs (a), (b) and (c) of s. 3.3 of the Pledge Agreement. However, all that can be concluded is that by giving the letters and notices of October 18, 2001, Bellisario was putting himself in a position where he would be able to trigger s. 3.3, but not that he had actually triggered it. There is nothing in the material that would justify disregarding the express requirements set out in s. 3.3.

64 The Interim Receiver contends that 147 is an insolvent person within the definition of that term in s. 2 of the Bankruptcy And Insolvency Act, with particular reference to paragraph (c) of the definition. Paragraph (c) includes in the definition of an "insolvent person", a person "the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due."

65 According to the reporting letter dated July 27, 2001 from Keyser Mason Ball LLP to Battery Plus, 147 was, at that time "a newly incorporated company, the sole business of which is to act as assignee in respect of the assignment of the Leases", ie. the group of leases of Battery Plus assigned to 147 in connection with the Bellisario loan to Battery Plus. No evidence has been led to suggest that 147 has any other assets. Leave has been requested by the Companies to obtain evidence on the matter. The Notice of Motion by the Interim Receiver made it clear that it would be seeking authority for an assignment in bankruptcy in respect of 147 so the matter of the insolvency of 147 has effectively been in issue from the outset, so there is no basis established for the request for leave at this stage of the proceedings. There is no valuation of the assets of 147 before the Court. The leases held by 147 constitute only a part of the leases of the overall business. All but four of the leases held by 147 are in jeopardy because of their having been assigned without consent. In the circumstances the assets of 147 must be worth substantially less than the value of the total assets of the overall business.

66 147 gave to the Laurentian Bank an undertaking, dated June 5, 2001, in consideration of the continuation of specific credit facilities, to deliver to the Bank a guarantee of the credit facilities and a general security agreement on all of its assets. These instruments have not yet been delivered. Laurentian Bank submitted that, by reason of the definition of "Lien" in the Priority Agreement among certain of the parties, dated June 5, 2001, and the definition in that agreement of "Bank Security" and s. 2.3(a) of that Agreement, the Bank has a claim against 147. The Bank advised that it intends to assert that claim at the appropriate time as a claim having priority over Bellisario with respect to 147. That priority question is not before the Court in the present hearing. What is relevant for now is the submission that the Bank, by reason of the undertaking given by 147, holds an obligation of 147 in respect of the Battery Plus debt owing to the Bank, for purposes of the "insolvent person" definition in the Bankruptcy And Insolvency Act. This contention is sound. Moreover, since the undertaking of 147 was to give a guarantee in respect of the debt that is due to

the Bank from Battery Plus, the obligation of 147 is one that is due or accruing due, as required by the definition. On this basis, the value of the property of 147 must be significantly less than its obligations.

67 For the above reasons, 147 is an insolvent person and the Interim Receiver is in a proper position to act on behalf of 127 to cause 147 to file an assignment in bankruptcy.

Prejudice to Mr. Badr if 147 is assigned into bankruptcy

68 For Mr. Badr it is said that, if 147 is allowed to be assigned into bankruptcy and the leases it holds are therefore allowed to be assigned, this would prejudice Mr. Badr's right, as guarantor, to redeem Mr. Bellisario's loan and recover the leases. It is not shown how or why whatever right of redemption Mr. Badr has in this regard is entitled to priority over the rights of the Interim Receiver in respect of the assets of 127, including the shares of 147.

69 It is also said for Mr. Badr that if an order is to be made to approve the proposed sale, any sale should be subject to any exercise by Mr. Badr of any right of redemption he is determined to have, within 10 days of that determination being made in the priorities application now under way.

70 The Bank submits that there is no reason offered by the known facts to take seriously the prospect that Mr. Badr would pay $1 million to redeem a group of leases most of which are in default and that there is no evidence of any clear intent on the part of Mr. Badr to do so. The most that could be concluded is that Mr. Badr would like to be in a legal position to redeem the loan if he wished to do so.

71 Mr. Chaiton for the Interim Receiver produced on the afternoon of February 14, the last day of the hearing, a document which he said had just come to his office the previous night together with a corporate profile report obtained only minutes earlier in the afternoon of February 14. The document purports to be an assignment dated February 13, 2002, (the previous day) by 147 to 2008612 Ontario Limited of the leases that had previously been assigned by Battery Plus to 147, for a consideration of $2.00. The document appears to have been executed by Mr. Badr on behalf of 147. Counsel for Mr. Badr had no submissions to make about the document other than that information should be obtained about the purported assignee.

72 The document is a suspicious and troubling document. Without some explanation, it appears to be an effort to avoid or obstruct the effect of the order that the Interim Receiver is now before the Court seeking to obtain with respect to 147. An effort of such a kind is obviously offensive to the process of the Court and is not to be countenanced or permitted. For this reason an order is to go that no action shall be taken by any person to give effect to the document and the document shall be stayed from having any effect in respect of the matters now before the Court in the present motion without further order of the Court sought and obtained prior to the closing of any sale that may be approved and effected pursuant to this motion.

73 In all the circumstances, there is no basis for imposing the condition sought by Mr. Badr with respect of the exercise of the right of redemption.

Conclusion

74 For the reasons given above, orders are to go as requested by the Interim Receiver to approve the sale and to authorize the Interim Receiver to assign 147 into bankruptcy.

75 Certain of the matters raised in this motion relate to the motion now pending as to priorities and the proposed litigation between the Companies and Mr. Badr and the Interim Receiver. The material filed in respect of those proceedings was allowed to be referred to in this motion. For the record, it is noted that not all preliminary steps have been completed in the other proceedings.

76 Counsel may make submissions about costs.

SPENCE J.

cp/d/qlhcc/qlkjg/qlmjb

TAB9

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

2008 CanLII 54791 (ON SC)

RE: IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: MORAWETZ J.

COUNSEL: D. Bish, for the Applicant, Tool-Plas

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD
& RELEASED: SEPTEMBER 29, 2008

ENDORSEMENT

[1] This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

[4] Prior to the receivership appointment, Richter assessed the viability of the Company. Richter concluded that any restructuring had to focus on the mould business and had to be concluded expeditiously given the highly competitive and challenging nature of the auto parts business. Further, steps had to be taken to minimize the risk of losing either or both key customers – namely Ford and Johnson Controls. Together these two customer account for 60% of the Company's sales.

[5] Richter was also involved in assisting the Company in negotiating with its existing Secured Lenders. As a result, these Lenders have agreed to continue to finance the Company's short term needs, but only on the basis that a sale transaction occurs.

[6] Under the terms of the proposed offer the Purchaser will acquire substantially all of the assets of the Company. The purchase price will consist of the assumption or notional repayment of all of the outstanding obligations to each of the Secured Lenders, subject to certain amendments and adjustments.

[7] The proposed purchaser would be entitled to use the name Tool-Plas. The purchaser would hire all current employees and would assume termination and vacation liabilities of the current employees; the obligations of the Company to trade creditors related to the mould business, subject to working out terms with those creditors; as well as the majority of the Company's equipment leases, subject to working out terms with the lessors.

[8] The only substantial condition to the transaction is the requirement for an approval and vesting order.

[9] The Receiver is of the view that the transaction would enable the purchaser to carry on the Company's mould business and that this would be a successful outcome for customers, suppliers, employees and other stakeholders, including the Secured Lenders.

[10] The Receiver recommends the 'quick flip' transaction. The Receiver is of the view that there is substantial risk associated with a marketing process, since any process other than an expedited process could result in a risk that the key customers would resource their business elsewhere. Reference was made to other recent insolvencies of auto parts suppliers which resulted in receivership and owners of tooling equipment repossessing their equipment with the result that there was no ongoing business. (Polywheels and Progressive Moulded Tooling).

[11] The Receiver is also of the view that the proposed purchase price exceeds both a going concern and a liquidation value of the assets. The Receiver has also obtained favourable security opinions with respect to the security held by the Secured Lenders. Not all secured creditors are being paid. There are subordinate secured creditors consisting of private arms-length investors who have agreed to forego payment.

[12] Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that

2008 CanLII 54791 (ON SC)

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

2008 CanLII 54791 (ON SC)

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: **October 24, 2008**

2008 CanLII 54791 (ON SC)

TAB10

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*

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*

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.

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.

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

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

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

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

The deleterious effects of granting a confidentiality order include a negative effect on the open court principle, and therefore on the right to freedom of expression. The more detrimental the confidentiality order would be to the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons, the harder it will be to justify the confidentiality order. In the hands of the parties and their experts, the confidential documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would assist the court in reaching accurate factual conclusions. Given the highly technical nature of the documents, the important value of the search for the truth which underlies

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

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

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

both freedom of expression and open justice would be promoted to a greater extent by submitting the confidential documents under the order sought than it would by denying the order.

Under the terms of the order sought, the only restrictions relate to the public distribution of the documents, which is a fairly minimal intrusion into the open court rule. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, the second core value of promoting individual self-fulfilment would not be significantly affected by the confidentiality order. The third core value figures prominently in this appeal as open justice is a fundamental aspect of a democratic society. By their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection, so that the public interest is engaged here more than if this were an action between private parties involving private interests. However, the narrow scope of the order coupled with the highly technical nature of the confidential documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts. The core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. The salutary effects of the order outweigh its deleterious effects and the order should be granted. A balancing of the various rights and obligations engaged indicates that the confidentiality order would have substantial salutary effects on AECL's right to a fair trial and freedom of expression, while the deleterious effects on the principle of open courts and freedom of expression would be minimal.

Cases Cited

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

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

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

Jurisprudence

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

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

Statutes and Regulations Cited

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

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

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

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

Graham Garton, Q.C., and *J. Sanderson Graham*, for the respondents the Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some material can be made the subject of a confidentiality order. This appeal raises the important

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. nº 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, 2*b*).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)*b*), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. nº 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. nº 1633 (QL). Pourvoi accueilli.

J. Brett Ledger et *Peter Chapin*, pour l'appelante.

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

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

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI —

I. Introduction

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

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. 2

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. 3

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. 4

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*. 5

Dans le cadre de la requête de Sierra Club en annulation des ententes financières, l'appelante a 6

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.

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.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

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.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang which summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

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. 9

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. 10

III. Dispositions législatives

Règles de la Cour fédérale (1998), DORS/98-106 11

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 12

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.

17 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.

18 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.

19 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.

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.

24 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.

25 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 doive 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.

26 Le juge Evans rejette l'argument selon lequel le juge des requêtes a commis une erreur en statuant

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. 31

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) : 32

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-divulgation 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

Appliquant 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. 2*b*). 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. 2*b*), 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.

37 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.

38 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.

39 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

religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. 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. 2*b*) 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.

43 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. 11*d*) 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.

44 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.

45 In spite of this distinction, the Court noted that underlying the approach taken in both *Dagenais* and *New Brunswick* was the goal of ensuring that the judicial discretion to order publication bans is subject to no lower a standard of compliance with the *Charter* than legislative enactment. This goal is furthered by incorporating the essence of s. 1 of the *Charter* and the *Oakes* test into the publication ban test. Since this same goal applied in the case before it, the Court adopted a similar approach to that taken in *Dagenais*, but broadened the *Dagenais* test (which dealt specifically with the right of an accused to a fair trial) such that it could guide the exercise of judicial discretion where a publication ban is requested in order to preserve any important aspect of the proper administration of justice. At para. 32, the Court reformulated the test as follows:

> A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to

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 assujetti 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.

47 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.

48 *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

However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

49 The immediate purpose for AECL's confidentiality request relates to its commercial interests. The information in question is the property of the Chinese authorities. If the appellant were to disclose the Confidential Documents, it would be in breach of its contractual obligations and suffer a risk of harm to its competitive position. This is clear from the findings of fact of the motions judge that AECL was bound by its commercial interests and its customer's property rights not to disclose the information (para. 27), and that such disclosure could harm the appellant's commercial interests (para. 23).

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the *CEAA*, the inability to present this information hinders the appellant's capacity to make full answer and defence, or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, 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.

51 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.

52 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. 2*b*) 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

53 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;

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

54 As in *Mentuck*, I would add that three important elements are subsumed under the first branch of this test. First, the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat to the commercial interest in question.

55 In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *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).

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

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

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

De plus, l'expression « intérêt commercial important » exige une clarification. Pour être qualifié d'« intérêt commercial important », l'intérêt en question ne doit pas se rapporter uniquement et spécifiquement à la partie qui demande l'ordonnance de confidentialité; il doit s'agir d'un intérêt qui peut se définir en termes d'intérêt public à la confidentialité. Par exemple, une entreprise privée ne pourrait simplement prétendre que l'existence d'un contrat donné ne devrait pas être divulguée parce que cela lui ferait perdre des occasions d'affaires, et que cela nuirait à ses intérêts commerciaux. Si toutefois, comme en l'espèce, la divulgation de renseignements doit entraîner un manquement à une entente de non-divulgation, 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).

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. 1re inst.), p. 439, le juge Muldoon.

57 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

58 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.

59 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.

60 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. nº 1850 (QL) (C.F. 1re inst.), par. 29-30. J'ajouterais à cela

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).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant's commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL's competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the *CEAA* and this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (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.

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

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).

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.

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.

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.

64 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.

65 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

authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are reasonably alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

(2) The Proportionality Stage

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free

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.

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.

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.

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) L'étape de la proportionnalité

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. 70

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. 71

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 72

permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

(b) *Deleterious Effects of the Confidentiality Order*

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(*b*) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick*, *supra*, at paras. 22-23. Although as a general principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the particular deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. 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. 2*b*) 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. 2*b*) 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.

76 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.

77 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-

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.

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.

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:

81 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 :

> 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.

> On voit que la liberté d'expression est d'une importance fondamentale dans une société démocratique. Il est également essentiel dans une démocratie et fondamental 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.

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.

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.

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.

82 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.

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

83 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

principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the substance of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below where he stated, at para. 87:

> While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of fundamental importance under the *CEAA*. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish public interest, from media interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public nature of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case.

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'accentue 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 ».

86 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.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the *CEAA*, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations, or withholding the documents in the hopes that either it will not have to present a defence under the *CEAA*, or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the *CEAA* are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain, with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the *CEAA*, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on either the public interest in freedom of expression or the appellant's commercial interests or fair trial right. This neutral result is in contrast with the

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.

90 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

91 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.

92 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)*.

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.

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 December 13, 2018)
(Approval of Brampton Stalking Horse Agreement and Bidding Procedures)
(Sale Approval – Forma-Con Business)

TORYS LLP
79 Wellington St. W., Suite 3000
Box 270, TD Centre
Toronto, ON M5K 1N2 Canada

Fax: 416.865.7380

Scott A. Bomhof (LSO#: 37006F)
Tel: 416.865.7370
Email: sbomhof@torys.com

Adam M. Slavens (LSO#: 54433J)
Tel: 416.865.7333
Email: aslavens@torys.com

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