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PLAINTIFF(S)

FORTIS LGS STRUCTURES INC.

DEFENDANT(S)

STATION POINT DEVELOPMENTS LTD.
and BCM DEVELOPMENTS LTD.

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BOOK OF AUTHORITIES

ADDRESS FOR SERVICE AND
CONTACT INFORMATION OF
PARTY FILING THIS
DOCUMENT

BENNETT JONES LLP

Barristers and Solicitors
3200 Telus House
South Tower, 10020 – 100th Street
Edmonton, Alberta T5J 0N3

Attention: Katherine J. Fisher and Sean Zweig
Telephone No.: (780) 917-4268/ (416) 777-6254
Fax No.: (780) 421-7591
Email: fisherka@bennettjones.com
zweigs@bennettjones.com

TABLE OF AUTHORITIES

1. *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1 (Ont CA)
2. *Pricewaterhousecoopers Inc. v. 1905393 Alberta Ltd.*, 2019 ABCA 433
3. *Alberta Treasury Branches v. Elaborate Homes Ltd.*, 2014 ABQB 350
4. *Crown Trust Co. v. Rosenberg*, 1986 CarswellOnt 235 (HC)
5. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41
6. *Sherman Estate v Donovan*, 2021 SCC 25
7. *Look Communications Inc. v Look Mobile Corp.*, 2009 CanLII 71005 (Ont SCJ)
8. *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 4838 (SCJ)
9. *Maxtech Manufacturing Inc. (Re)*, 2010 ONSC 1161
10. *887574 Ontario Inc v. Pizza Pizza Ltd.*, 1994 CarswellOnt 1214 (CJ)

Most Negative Treatment: Distinguished

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

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

Judgment: July 3, 1991

Docket: Doc. CA 318/91

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

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

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

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

W.G. Horton , for Ontario Express Limited.

N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors

VII Receivers

VII.6 Conduct and liability of receiver

VII.6.a General conduct of receiver

Headnote

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

Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

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

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

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

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

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

Table of Authorities

Cases considered:

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

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

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

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

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

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

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

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

In that connection I adopt the principles stated by Macdonald J.A. of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.), where he said at p. 11:

In my opinion if the decision of the receiver to enter into an agreement of sale, subject to court approval, with respect to certain assets is reasonable and sound under the circumstances at the time existing it should not be set aside simply because a later and higher bid is made. To do so would literally create chaos in the commercial world and receivers and purchasers would never be sure they had a binding agreement. On the contrary, they would know that other bids could be received and considered up until the application for court approval is heard — this would be an intolerable situation.

While those remarks may have been made in the context of a bidding situation rather than a private sale, I consider them to be equally applicable to a negotiation process leading to a private sale. Where the court is concerned with the disposition of property, the purpose of appointing a receiver is to have the receiver do the work that the court would otherwise have to do.

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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

In the Court of Appeal of Alberta

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

Date: 20191114

Docket: 1903-0134-AC

Registry: Edmonton

Between:

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

Respondent/Cross-Appellants
(Applicant)

- and -

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

Appellants/Cross-Respondents
(Respondents)

- and -

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

Respondents
(Interested Parties)

The Court:

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

Memorandum of Judgment

The Court:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Appeal heard on September 3, 2019

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

Wakeling J.A.

Pentelechuk J.A.

Authorized to sign for

Antonio J.A.

Court of Queen's Bench of Alberta

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

Date: 20140611
Docket: 1103 02937
Registry: Edmonton

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

Between:

Alberta Treasury Branches

Plaintiff

- and -

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

Defendants

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

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

I. Introduction

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

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

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

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

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

B. Sale Transaction

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

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

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

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

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

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

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

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

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

[58] The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In **Royal Bank v Soundair Corp** (1991), 7 CBR (3d) 1, [1991] OJNo 1137 at paras 27-29 (CA), Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

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

confirm a sale recommended by a court-appointed receiver. If they were, the process would be changed from a sale by a receiver, subject to court approval, into an auction conducted by the court at the time approval is sought. In my opinion, the latter course is unfair to the person who has entered *bona fide* into an agreement with the receiver, can only lead to chaos, and must be discouraged.

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

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

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

[61] In *Re Scanwood Canada Ltd*, 2011 NSSC 189, 305 NSR (2d) 34, the receiver was of the view that the best realization of the assets in question would come from a sale *en bloc*. Hood J. held that the receiver's duty to act in the interests of the general body of creditors does not necessarily mean that the majority rules. Rather, the receiver must consider the interests of all creditors and then act for the benefit of the general body.

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

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

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

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

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

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

IX. Conclusion

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

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

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

X. Costs

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

Heard on the 14th day of May, 2014.

Dated at the City of Edmonton, Alberta this 11th day of June, 2014.

K.G. Nielsen
J.C.Q.B.A.

Most Negative Treatment: Distinguished

Most Recent Distinguished: [Ontario Federation of Anglers & Hunters v. Ontario \(Ministry of Natural Resources\)](#) | 1999 CarswellOnt 1444, [1999] O.J. No. 1690, 13 Admin. L.R. (3d) 208, 62 C.R.R. (2d) 303, 98 O.T.C. 341, 43 O.R. (3d) 760 | (Ont. S.C.J., Apr 28, 1999)

1986 CarswellOnt 235
Ontario Supreme Court, High Court of Justice

Crown Trust Co. v. Rosenberg

1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note)

**CROWN TRUST COMPANY, SEAWAY TRUST COMPANY
and GREYMAC TRUST COMPANY v. ROSENBERG et al.**

Anderson J.

Judgment: November 6, 1986

Docket: No. 1380/83

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Civil practice and procedure

III Parties

III.8 Intervenors

III.8.a General principles

Debtors and creditors

VII Receivers

VII.6 Conduct and liability of receiver

VII.6.a General conduct of receiver

Debtors and creditors

VII Receivers

VII.6 Conduct and liability of receiver

VII.6.b Rights

Debtors and creditors

VII Receivers

VII.7 Actions involving receiver

VII.7.a Actions by receiver

Headnote

Receivers — Sale of debtor's assets — Approval by court — Court discussing obligations in determining whether to approve sale.

On a motion by a court appointed receiver and manager to approve the sale of certain properties, the duties of the court are to consider: whether the receiver has made a sufficient effort to get the best price and ensure he has not acted improvidently; the interests of all parties; the efficacy and integrity of the process by which offers have been obtained; and whether there has been unfairness in the working out of the process.

The court has the power and responsibility to disregard the recommendation of the receiver and to approve another offer or offers. On the other hand, the court ought not to enter into the market place or sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which his decision has been reached. Furthermore, the court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific

performance or proceed against the recommendations of its receiver except in special circumstances or where the necessity and propriety of doing so are plain. It is only in exceptional circumstances that a court will intervene and proceed contrary to the receiver's recommendations if satisfied that the receiver has acted reasonably, prudently and fairly, and not arbitrarily.

It is necessary to keep in mind not only the function of the court but the function of the receiver. The receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets. However, the court is not to apply an automatic stamp of approval to the decision of the receiver. The court has power to come to a different decision and a discretion to exercise which must be exercised judicially.

The courts have recognized that they are not making a decision in a vacuum; that they are concerned with the process not only as it affects the case at bar, but as it stands to affect situations of a similar nature in the future. The delicate balance of competing interests is relevant and material.

Anderson J., (orally):

1 This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

2 A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

3 In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

4 In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them during the course of my reasons, although they will form part of the reasons should they be transcribed.

5 On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

6 On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

7 On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

8 This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

9 Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest

50 The evidence of Mr. Zimmerman, a member of the firm of solicitors advising the Receiver, confirmed by the uncontradicted evidence of Shaver, was that on September 16th Carthy and Alson were advised during a telephone conversation that the note purchase undertaking was expected by the Receiver on the following day. It was never received.

51 Taking the evidence as a whole, I am not at all persuaded that Larco was misled in any material respect.

52 In criticism of the conduct of the Receiver, criticism which I may say has been very limited in extent, it was submitted that the Receiver negotiated with other parties after the bid deadline. Specifically reference was made to the Ivordale-Maisonettes property where a discrepancy had appeared between the words and the numerals in the offer. I am not persuaded that the resolution of the problem involved negotiation, nor that if it did it offended the process or was prejudicial to Larco.

53 There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

54 A special and somewhat peculiar position in the matter was put on behalf of the defendant Maysfield Property Management Inc. Maysfield is a corporation whose shares are effectively held by receivers appointed for two other corporations. Maysfield managed and operated the subject properties before Clarkson was appointed Receiver, and by arrangement with Clarkson continued to perform that function after the receivership commenced. It employs something over 200 persons. It has substantial worth and it has substantial revenues.

55 By letter dated October 16, 1986, Larco offered to purchase the outstanding shares in Maysfield for net book value, an offer conditional upon approval of the Larco offer by the court. If the offers recommended by the Receiver are approved, there appears to be no certainty and perhaps not even any probability of the continued viability of Maysfield.

56 In a secondary submission counsel for Maysfield asked that if an order were made as sought by the Receiver, that that order should be stayed for some period of time to enable Maysfield to negotiate with the purchaser.

57 I observe by looking at the clock that I have been going for something well over an hour at the moment, and I regret to tell everyone that I am not finished yet. I propose to take 10 minutes for my benefit and perhaps for yours as well.

58 [Court recessed 11.07 a.m. and resumed 11.19 a.m.]

59 I propose now to express some factual conclusions with respect to the matter.

60 The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

61 Mr. Zimmerman very fairly conceded in his evidence that probably none of those causes was in itself fatal. I think that probably is so. They were, however, considered cumulatively by the Receiver and it was in my view legitimate and reasonable to do so.

62 In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

63 Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

64 Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

65 The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. 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. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. 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.

66 In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

67 To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

68 The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

69 It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

70 Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

71 I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

72 Reference was made in argument to *The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd.* (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

73 The decision made by the Receiver was one to which it brought its experience and expertise for the position to which it was appointed. It was a decision upon which the Receiver had the advice of solicitors and counsel and of an expert real estate consultant retained for the purpose. It was a decision from which the Receiver did not resile at the conclusion of two weeks of hearing.

74 It is clear on the one hand that the court is not to apply an automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

75 The court no doubt has power to enter into the process to any extent which appears proper in the circumstances. In *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, to which I have referred, the judge in chambers actually received bids.

76 In this case it was suggested by counsel for some of the objecting defendants that the court conduct a run-off or direct the Receiver to do so between the Larco and the recommended offerors. I have no doubt that I have the power to do so. To exercise it would, in my view, exhibit very little judgment. It would be to open a Pandora's box, the contents of which might be more unruly and unpredictable than the consequences which followed my decision to hear *viva voce* evidence in this case.

77 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.

78 Much was said during the hearing about the integrity of the process, that is, the process carried through by the Receiver pursuant to the July order made by Catzman J., and whether Larco had abused or evaded or sought to abuse or evade it. The Receiver perceived, not unreasonably in my view, that that was so. Certainly it must be said that Larco fell somewhat short of coming forward promptly, openly, forthrightly and unequivocally with its best offer, an objective at which the process was directed.

79 In the arguments of counsel for the objecting defendants, particularly for the defendant Prousky, the process was very narrowly defined; virtually confined to the precise provisions of the plan approved by the court. I do not consider it appropriate to view it so narrowly or that the ambit of the Receiver's discretion should be so narrowly limited.

80 In addition to the regard which must be had for the process in this case, there is another similar factor for which I must have regard. It was adverted to by Saunders J. in the two cases of *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245, and *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237, which have been referred to in the argument. It was also reflected in the Nova Scotia Court of Appeal decision in *Cameron*. In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J. A. in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests", that is a relevant and material one.

81 In this case I am reviewing the recommendations of the Receiver. I have had the benefit of two weeks of hearing and the assistance of a dozen learned counsel, advantages which were denied to the Receiver.

82 If I were persuaded, and I am not, to conclude that as a result of this hearing the objections of the Receiver had been fully and satisfactorily met, I should still have much hesitation in rejecting the Receiver's recommendation.

83 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.

84 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

**Atomic Energy of Canada
Limited** *Appellant*

v.

Sierra Club of Canada *Respondent*

and

**The Minister of Finance of Canada, the
Minister of Foreign Affairs of Canada,
the Minister of International Trade of
Canada and the Attorney General of
Canada** *Respondents*

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

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF
APPEAL

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

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

**Énergie atomique du Canada
Limitée** *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

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

Référence neutre : 2002 CSC 41.

N° du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

EN APPEL DE LA COUR D’APPEL FÉDÉRALE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

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

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

Jurisprudence

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

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

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

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

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

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



SUPREME COURT OF CANADA

CITATION: Sherman Estate v.
Donovan, 2021 SCC 25

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

BETWEEN:

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

and

**Kevin Donovan and
Toronto Star Newspapers Ltd.**
Respondents

- and -

**Attorney General of Ontario, Attorney General of British Columbia,
Canadian Civil Liberties Association, Income Security Advocacy Centre,
Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc.,
CTV, a Division of Bell Media Inc., Global News, a division of Corus
Television Limited Partnership, The Globe and Mail Inc.,
Citytv, a division of Rogers Media Inc.,
British Columbia Civil Liberties Association,
HIV & AIDS Legal Clinic Ontario, HIV Legal Network
and Mental Health Legal Committee**
Interveners

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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

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

Held: The appeal should be dismissed.

The estate trustees have failed to establish a serious risk to an important public interest under the test for discretionary limits on court openness. As such, the sealing orders should not have been issued. Open courts can be a source of inconvenience and embarrassment, but this discomfort is not, as a general matter, enough to overturn the strong presumption of openness. That said, personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest and a court can make an exception to the open court principle if it is at serious risk. In this case, the risks to privacy and physical safety cannot be said to be sufficiently serious.

Court proceedings are presumptively open to the public. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of Canadian democracy. Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. The open court principle is engaged by all judicial proceedings, whatever their nature. Matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding engaging the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — such that the strong presumption of openness applies.

The test for discretionary limits on court openness is directed at maintaining the presumption while offering sufficient flexibility for courts to protect other public interests where they arise. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time and now extends generally to important public interests. The breadth of this category transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause. While there is no closed list of important public interests, courts must be cautious and alive to the fundamental importance of the open court rule when they are identifying them. Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute. By contrast, whether that interest is at serious risk is a fact-based finding that is necessarily made in context. The identification of an important interest and the seriousness of the risk to that interest are thus theoretically separate and qualitatively distinct operations.

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

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

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

Privacy as predicated on dignity will be at serious risk in limited circumstances. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness. Dignity will be at serious risk only

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

In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. The seriousness of the risk may be affected by the extent to which information is disseminated and already in the public domain, and the probability of the dissemination actually occurring. The burden is on the applicant to show that privacy, understood in reference to dignity, is at serious risk; this erects a fact-specific threshold consistent with the presumption of openness.

There is also an important public interest in protecting individuals from physical harm, but a discretionary order limiting court openness can only be made where there is a serious risk to this important public interest. Direct evidence is not necessarily required to establish a serious risk to an important public interest, as objectively discernable harm may be identified on the basis of logical inferences. But this process of inferential reasoning is not a licence to engage in impermissible speculation. It is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be

likely, but must still be more than negligible, fanciful or speculative. Mere assertions of grave physical harm are therefore insufficient.

In addition to a serious risk to an important interest, it must be shown that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

In the present case, the risk to the important public interest in privacy, defined in reference to dignity, is not serious. The information contained in the probate files does not reveal anything particularly private or highly sensitive. It has not been shown that it would strike at the biographical core of the affected individuals in a way that would undermine their control over the expression of their identities. Furthermore, the record does not show a serious risk of physical harm. The estate trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the deaths and the association of the affected individuals with the deceased is not a reasonable inference but is speculation.

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

final barrier, the estate trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order.

Cases Cited

By Kasirer J.

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

physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. *The Test for Discretionary Limits on Court Openness*

[37] Court proceedings are presumptively open to the public (*MacIntyre*, at p. 189; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567, at para. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

(3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (*Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188, at paras. 7 and 22).

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become “one of the hallmarks of a democratic society” (citing *Re Southam Inc. and The Queen (No.1)* (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that “acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law . . . thereby fostering public confidence in the integrity of the court system and

COURT FILE NO.: 08-CL-7877

DATE: 20091218

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

RE: IN THE MATTER OF LOOK COMMUNICATIONS INC.

Applicant

LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P.

Respondent

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

BEFORE: Justice Newbould

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

Aubrey E. Kauffman, for Inukshuk Wireless Partnership

DATE HEARD: December 17, 2009

ENDORSEMENT

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

Circumstances of Sealing Order

[2] On December 1, 2008, Look was authorized by Pepall J. to conduct a special shareholder's meeting to pass resolutions (i) authorizing Look to establish a sales process for the sale of all or substantially all of its assets and to seek an order approving the sales process, and (ii) authorizing a plan of arrangement under section 192 of the CBCA which contemplated the sale of all or substantially all of Look's assets. The shareholders voted in favour of both a sales process and the arrangement.

[3] On January 21, 2009, Look obtained an order approving the sales process and Grant Thornton Limited was appointed as Monitor to manage and conduct the sales process with Look. The sales process provided for bids from interested persons for five assets of Look, which were substantially all of its assets, being (i) Spectrum, being approximately 100MHz of License Spectrum in Ontario and Quebec; (ii) a CRTC Broadcast License; (iii) Subscribers; (iv) a Network consisting of two network operating centers and (v) approximately \$300 million in "tax attributes" or losses. Court approval was required for any sale.

[4] Under the sales process, a bidder was entitled to bid for any or all of the assets that were being sold, or a combination thereof. Pursuant to the sales process, four bids were received and Look and the Monitor engaged in discussions with each bidder. Look eventually accepted an offer from Inukshuk for the Spectrum and Broadcast License. It is agreed that while not all of the assets of Look were sold, what was sold to Inukshuk were substantially all of the assets of Look.

[5] The parties obtained a consent order on May 14, 2009 from Marrocco J. in which the sale of the Spectrum and Broadcast License to Inukshuk was approved. The order provided that the assets would vest in Inukshuk upon the Monitor filing a certificate with the court certifying as to the completion of the transaction. The sale contemplated a staged closing, with the first taking place immediately following the order of Marrocco J., the second being December 31, 2009 and the final taking place as late as what the sale agreement defined as the Outside Date, being the third anniversary of the date of the final order approving the transaction, i.e., May 14, 2012. I

am told that the reason for the staged dates was that it was anticipated that the necessary regulatory approvals for the sale of the Spectrum and License could take some time.

[6] As it turned out, the final closing took place much earlier than the Outside Date within a few months of the order of Marrocco J. On September 11, 2009, the Monitor filed its certificate with the Court certifying that the purchase price had been paid in full and that the conditions of closing had been satisfied. Thus the sold assets vested in Inukshuk. Under the terms of the plan of arrangement that was approved by the order of Marrocco J., once the certificate of the Monitor as to the completion of the transaction was delivered, the articles of arrangement became effective.

[7] In connection with the application to Marrocco J. to approve the arrangement and the sale to Inukshuk, the Monitor filed a redacted version of its First Report, as is usual in the Commercial List for sales carried out under a court process, redacting the information about the bids received in the sales process. The order of Marrocco J. provided that an unredacted version of the First Report was to be sealed and not form part of the public record until the Monitor's Certificate after the sale was completed was filed with the Court. That certificate, as I have said, was filed with the Court on September 11, 2009. Therefore under the order of Marrocco J. the unredacted First Report of the Monitor was no longer to be sealed.

[8] Look is now attempting to sell its remaining assets, which include a corporation which had been approved by the CRTC to hold a license and has \$350 million of tax losses. Look is presently in discussions for the sale of its remaining assets with some of the same parties with whom discussions were held and bids were received under the previous sales process, including Rogers.

[9] In early November 2009 Inukshuk asked the Monitor for the information contained in the Monitor's First Report that was sealed under the order of Marrocco J. Look immediately obtained an *ex parte* order from Campbell J. on November 4, 2009 extending the sealing of the Monitor's First Report pending a determination of this motion.

Analysis

[10] Look seeks to extend the sealing order for six months while it completes the sale of its remaining assets. It has a concern that publication of the information could impede the sale process now underway and affect the amount received. Look is concerned that if the bids were disclosed, and with Rogers being one of the parties in discussions with Look for the purchase of Look's tax losses, other players in the telecommunications industry would not bid for the remaining assets.

[11] Inukshuk has filed no affidavit material as to why it is interested in the sealed information in the Monitor's First Report dealing with all of the bids that were received for all assets. Inukshuk's position in a nutshell is that the sales process previously approved by the Court is over and that the public interest in seeing an open court process should prevent any further sealing of the Monitor's First Report. Mr. Kauffman said that his clients are here in this motion "in their own interest as two members of the public" seeking access to the documents that were filed in the court process.

[12] It is understandable why Rogers would want the information. It has been negotiating with Look for the purchase of one or more of Look's remaining assets. Having access to prior bids in the prior sales process in which one or more of those remaining assets may have been the subject of a bid would obviously be of benefit to Rogers it in considering what price it is prepared to offer for the company with the tax loss benefits. While Mr. Kauffman pointed out that it is Inukshuk Wireless Partnership that is opposing the order sought, and that includes Bell as well as Rogers, the fact remains that the partnership does include Rogers which is in negotiations with Look. In any event, it is unrealistic to think that Bell, through its interest in Inukshuk, is funding at least in part the opposition to the extension of the sealing order out of altruistic or public purposes.

[13] Section 137 of the *Courts of Justice Act* provides that a court may order any document filed in a civil proceeding to be treated as confidential, sealed and not form part of the public record. The fact that the plan of arrangement consummated under the court proceedings under s. 192 of the CBCA has now been finalized does not in itself mean that the court does not have jurisdiction to continue with the sealing order if it is otherwise appropriate to do so. There is no

limitation in section 137 limiting a sealing order to the time during which the litigation in question is ongoing.

[14] In *MacIntyre v. Nova Scotia*, [1982] 1 S.C.R. 175, it was held that sworn information to obtain a search warrant could not be made available to the public until the search warrant had been executed. In that case, Dixon J. (as he then was) for the majority noted that the case law did not distinguish between judicial proceedings which are part of a trial and those which are not, and that subject to a few well-recognized exceptions, all judicial proceedings should be in public. He held that the presumption was in favour of public access and the burden of contrary proof lay upon the person contending otherwise.

[15] In *Sierra Club of Canada v. Canada (Ministry of Finance)*, [2002] 2 S.C.R. 522, the court authorized a confidentiality order. It stated that an order should be granted in only two circumstances, being (i) when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and (ii) when the salutary effects of the confidentiality order, including the effects on the right civil litigants to a fair trial, outweighs its deleterious effects, including the effects on the right of free expression, which includes public interest in open and accessible court proceedings. In dealing with the notion of an important commercial interest, Iacobucci J. stated:

In addition, the phrase "important commercial interest" is in need of some clarification. In order to qualify as an "important commercial interest", the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality. For example, a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test. Or, in the words of Binnie J. in *Re N. (F.)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at para. 10, the open court rule only yields "where the public interest in confidentiality outweighs the public interest in openness".

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

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

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

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

the original sale process that was conducted by Look and the Monitor, the commercial interest in seeing that the remaining assets are sold to the benefit of all stakeholders, including the public shareholders of Look, remains now as it did before.

[20] The advantage to Rogers in seeing what other bidders may have bid on the assets that have remained unsold is obvious. Rogers is in negotiations with Look regarding the acquisition of one or more of those assets. If other bidders previously bid on one or more of those assets, that information would be beneficial to Rogers. If the other bidders did not bid on any of those remaining assets, that too would be of interest to Rogers. As well, Look's concern that the disclosure of the sealed information could impede other bidders from coming forward is not without some merit.

[21] In *Sierra*, Iacobucci J said there were core values that should be considered in a motion such as this. *Sierra* involved an application by the Government of Canada for a confidentiality order protecting documents from public disclosure in litigation between the *Sierra Club* and the Government. Iacobucci J. stated that under the order sought, public access to the documents in question would be restricted, which would infringe the public's freedom of expression guarantees contained in section 2(b) of the *Charter*. He discussed the core values of freedom of expression and how they should be considered in a motion seeking confidentiality of documents. He stated:

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. 927, [page551] 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. (underlining added)

[22] Rogers, or Inukshuk, cannot, in my view, claim that there will be a substantial detrimental effect on these core values by a continuation of the sealing order for a further six months. What Rogers will lose will be access to information that it could use against the interests of Look and its stakeholders. In my view, the salutary effects of extending the sealing order for six months to permit the sale of the remaining assets of Look outweighs the deleterious effects of such order in this case.

[23] Inukshuk asks that if the extension order is made, there is no reason to seal the prior bids for the Spectrum that Inukshuk purchased and thus the order should permit that information to be made public. It is said by Mr. Kauffman that such information is of historical interest. I would not make this exception as requested by Inukshuk. Bidders under the prior sales process were entitled to bid on all of the assets either individually or together, and Mr. Porter points out that it may well be difficult to separate out the portion of any prior bid dealing with the Spectrum from a bid for other assets that are now sought to be sold. If the interest sought is only for historical purposes, a six month delay will not be of much or any consequence.

[24] In the circumstances, the order sought by Look shall go. Look is entitled to its costs of the motion against Inukshuk. If costs cannot be agreed, short submissions may be made within ten days by Look and reply submissions may be made within a further ten days by Inukshuk.

NEWBOULD J.

DATE: December 18, 2009

2009 CarswellOnt 4838
Ontario Superior Court of Justice [Commercial List]

Nortel Networks Corp., Re

2009 CarswellOnt 4838, [2009] O.J. No. 4487, 56 C.B.R. (5th) 224

**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

Morawetz J.

Heard: July 28, 2009

Judgment: July 28, 2009

Docket: Toronto 09-CL-7950

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

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

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

Related Abridgment Classifications

Bankruptcy and insolvency

[XIV Administration of estate](#)

[XIV.6 Sale of assets](#)

[XIV.6.b Sale by tender](#)

[XIV.6.b.ii Miscellaneous](#)

Judges and courts

[XVI Jurisdiction](#)

[XVI.11 Jurisdiction of court over own process](#)

[XVI.11.c Sealing files](#)

Headnote

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.

Table of Authorities

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.

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 ("CDMA") 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 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:

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. Further, 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 imprudently;

- 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.

CITATION: Maxtech Manufacturing Inc. (Re), 2010 ONSC 1161
COURT FILE NO.: 09-CL-8352
DATE: 20100223

SUPERIOR COURT OF JUSTICE – ONTARIO

(COMMERCIAL LIST)

RE: 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
MAXTECH MANUFACTURING INC., Applicants

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

BEFORE: MORAWETZ J.

COUNSEL: Alissa Mitchell, for the Receiver

Tim Gleason, for the United Steel Workers of America

Brett Harrison, for Export Development Canada

Fred Myers, for Maple Trade Finance Inc.

Ian Aversa, for VLM Finance Ltd.

George Benchetrit, for General Electric

Jonathan Wigley, for Alpha Sitered Metals, Inc.

Jane Dietrich, for Tenneco Automotive

Jeffrey J. Simpson, for Kacee Visudeva, Maxtech Consumer Products Limited,
Maxtech Manufacturing Inc., and 12600976 Ontario Limited

HEARD &

RELEASED: January 28, 2010

ENDORSEMENT

[1] At the conclusion of the motion on January 28, 2010, I endorsed the record as follows:

Motion granted. Transaction with Alpha Sitered approved. Sealing Order granted. Second Report approved. Reasons will follow. Order to go in form presented as amended.

[2] The following are the reasons.

[3] Grant Thornton Limited, in its capacity as Receiver of Maxtech Manufacturing Inc. (the "Receiver") brought this motion to approve the transaction as contemplated by an asset purchase agreement (the "Agreement") between the Receiver, as Seller and Alpha Sitered Metals, Inc., as Purchaser ("Alpha" or the "Purchaser").

[4] The Receiver also sought an order to seal certain appendices annexed to its Second Report and for an order approving the actions and activities of the Receiver as described in the Second Report and the Supplementary Report.

[5] The motion was supported by Export Development Canada ("EDC") and General Electric ("GE"). Counsel to Maple Trade did not oppose the motion on the basis that there was no other offer.

[6] The motion was opposed by counsel on behalf of Mr. Kacee Vasudeva, Maxtech Consumer Products Limited, Maxtech Manufacturing Inc. ("Maxtech") and 1260976 Ontario Limited.

[7] At the outset of argument, Mr. Simpson on behalf of Mr. Vasudeva, Maxtech and related companies brought a motion to adjourn the motion to February 3, 2010 in order that his clients could put forward a further and better offer that complied with requirements previously set forth by the Receiver. The adjournment request was supported by counsel to Maple Trade.

[8] I did not grant the adjournment. Separate reasons were provided.

[9] The Receiver was appointed on November 23, 2009 by order of Pepall J. (the "Appointment Order"). The Appointment Order authorized the Receiver to commence a marketing and sale process.

[10] The Receiver implemented the marketing process and identified and contacted prospective buyers and investors.

[11] The Receiver received six offers to purchase (the "Offers") by December 14, 2009.

[12] The record establishes that the Receiver considered the Offers. The Receiver asked each offeror to provide their "best" offer.

[13] On December 21, 2009, after receipt of its increased offer and after express inquiry from the Receiver, the Receiver was informed by one of the six offerors its increased offer was final (the “Final Bali Offer”). No deposit accompanied the Final Bali Offer. The Final Bali Offer was submitted by an entity related to Mr. Vasudeva.

[14] By early January 2010, the Receiver determined that it was imperative that the sales process be completed as there was a demand for additional cash in order to continue operations on a cash-neutral basis and no additional sources of cash had been identified.

[15] The Receiver, in consultation with the secured lenders, decided to accept the most favourable “asset based” offer. However, on January 7, 2010, before the Receiver was able to accept such offer, it was withdrawn.

[16] The Receiver undertook further negotiations with another of the “asset based” offerors, Alpha and on January 8, 2010, the Receiver reached an agreement in principle with Alpha. The Receiver is of the view that Alpha’s offer was more favourable than the withdrawn offer, the Final Bali Offer, or any of the other Offers. The Alpha Offer was accompanied by the requisite deposit.

[17] Within hours of accepting the Alpha Offer on January 8, 2010, a further Bali Offer was received (the “Amended Bali Offer”). No deposit accompanied the Amended Bali Offer.

[18] On January 11, 2010, with the support of GE and EDC, the Receiver formally accepted the Alpha Offer subject only to court approval.

[19] The Receiver indicates in its Report that, despite the Amended Bali Offer being late, it was considered and it remains the Receiver’s opinion that the Alpha Offer is a more favourable offer than the Amended Bali Offer.

[20] The Receiver provided the following reasons for its opinion:

- (a) the cash component of the Alpha Offer is higher;
- (b) the cash payable in the Alpha Offer was due on closing whereas the Amended Bali Offer deferred payment beyond closing;
- (c) based upon the lack of support of Maxtech’s remaining key customers, the Receiver did not expect sufficient future business on a “going concern” basis to support the cash flow required to service the debt assumption component of the purchase price proposed in the Amended Bali Offer;
- (d) the Alpha Offer was obtained through a fair and equitable process and reflects an offer which respected that process; and

- (e) GE and EDC supported the Receiver's recommendation. The assets being sold are comprised largely of assets in respect of which GE and EDC appear to hold a first-ranking charge.

[21] In opposition to the motion, Mr. Simpson submitted that the Alpha Offer should not be approved in the face of representations that his client could put forward a further and better offer that complied with the requirements previously set forth by the Receiver. However, as I noted in my reasons for refusing the adjournment request, Mr. Simpson's clients had taken no steps to put anything on the record which would substantiate the submissions made by counsel.

[22] Mr. Simpson's clients provided no evidence of what offer they wanted to submit. There was no evidence as to why they needed additional time. There was no evidence that they could submit a deposit and they provided no evidence that they would be in a position to consummate the transaction.

[23] The test on a motion to approve a sale by a receiver is set out in *Crown Trust v. Rosenberg*, (1986) 60 O.R. (2d) 87 (H.C.J.) which was later adopted by the Court of Appeal in *Royal Bank of Canada v. Soundair Corp.* (1991) O.J. No. 1137:

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

[24] In this case, I have concluded that the Receiver has acted properly. Indeed, there is no evidence to the contrary.

[25] The Receiver implemented the sales process which had been approved by the court. There is ample evidence to support the Receiver's contention that the Alpha Offer represents the best bid.

[26] To the extent that the submissions were being made on behalf of Mr. Vasudeva in his capacity as guarantor, his affidavit sworn January 28, 2010 states that his interests as a guarantor have been ignored throughout the receivership process and, if the proposed transaction is approved, he may be one of the largest unsecured creditors of Maxtech, with no ability to collect. Accordingly, he states that his interests will be prejudiced by the sale.

[27] I am satisfied that the Receiver conducted the sales process in an acceptable manner and obtained a fair and reasonable price for the assets in the circumstances. The interests of Mr. Vasudeva have, in my view, not been prejudiced by the sales process nor the actions taken by the

Receiver. The fact that he may be a large unsecured creditor results from other factors. In my view, the opposition expressed by Mr. Vasudeva is not such that the transaction should not be approved.

[28] In the result, I am satisfied that it is appropriate to approve the Agreement.

[29] The Receiver also requested an order sealing the confidential appendices to the Second Report pending further order. In considering this request, I am guided by the decision in *Sierra Club of Canada v. Canada (Minister of Finance)*, (2002) S.C.C. 41, which addresses the issue of a sealing order.

[30] I reviewed the confidential appendices to the Second Report. I am satisfied that the appendices contain sensitive commercial information, the release of which could be prejudicial to the stakeholders. I am satisfied that it is appropriate to grant the requested sealing order.

[31] Finally, counsel to the Receiver advises that there has been no adverse comment received in respect of the actions and activities of the Receiver insofar as they relate to the sales transaction including the acceptance of the Purchaser's offer described in the Second Report and the Supplementary Report and, in my view, it is appropriate to approve the actions and activities of the Receiver as described in the Second Report and the Supplementary Report on this basis.

[32] Finally, it is noted that issues relating to allocation of proceeds are not being dealt with at this time. This has been reflected in the modified language to paragraph 13 of the order.

[33] An order shall issue to give effect to the foregoing.

MORAWETZ J.

Released: January 28, 2010

Reasons: February 23, 2010

1994 CarswellOnt 1214
Ontario Court of Justice (General Division), Commercial List

887574 Ontario Inc. v. Pizza Pizza Ltd.

1994 CarswellOnt 1214, [1994] O.J. No. 3112, 23 B.L.R. (2d) 239, 35 C.P.C. (3d) 323, 52 A.C.W.S. (3d) 516

RE ARBITRATION BEFORE THE HONOURABLE R.E. HOLLAND, Q.C.

887574 ONTARIO INC., 863644 ONTARIO INC., 801409 ONTARIO INC., WESTBRIDGE FOODS LTD., 830542 ONTARIO INC., 779975 ONTARIO LIMITED, 783129 ONTARIO INC., 284055 ONTARIO INC., 946171 ONTARIO INC., 768027 ONTARIO INC., 841875 ONTARIO INC., 660840 ONTARIO LTD., BULE ENTERPRISES LIMITED, 900766 ONTARIO INC., 755950 ONTARIO LIMITED, 554135 ONTARIO INC., 769049 ONTARIO INC., 781380 ONTARIO INC., 892922 ONTARIO INC., 814591 ONTARIO INC., 925446 ONTARIO LTD., 876310 ONTARIO INC., 812138 ONTARIO INC., 880602 ONTARIO INC., 697339 ONTARIO INC., 863008 ONTARIO INC., 898201 ONTARIO INC., 989897 ONTARIO INC., 857387 ONTARIO INC., 828659 ONTARIO INC., 750242 ONTARIO LIMITED, 803767 ONTARIO INC., 910874 ONTARIO INC., 805837 ONTARIO INC., GOLD LION GROUP OF COMPANIES, 697246 ONTARIO LIMITED, 827532 ONTARIO INC., 914470 ONTARIO LIMITED, 804631 ONTARIO INC., 954270 ONTARIO INC., 686603 ONTARIO LIMITED, 741897 ONTARIO LIMITED, 675367 ONTARIO LIMITED, 809692 ONTARIO LIMITED, 681630 ONTARIO INC., 763012 ONTARIO LTD., 905933 ONTARIO INC., 945671 ONTARIO INC., 807352 ONTARIO INC. and 909206 ONTARIO INC. v. PIZZA PIZZA LIMITED

Farley J.

Oral reasons: December 14, 1994 *

Written reasons: December 27, 1994

Docket: Doc. 93-CQ-33541; Commercial Court File Doc. B85/93

Counsel: *Peter Griffin*, *Gavin MacKenzie* and *Daniel Vukovich*, for moving party (defendant).

Nancy Spies and *Timothy Mitchell*, for responding parties (plaintiffs) except 828659 Ontario Inc., 805837 Ontario Inc., 807353 Ontario Inc., and Drag Eleven Pizza Inc.

P. Waldmann, for other responding parties (plaintiffs).

B. Bruser, for Toronto Star.

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

Judges and courts

XVI Jurisdiction

XVI.11 Jurisdiction of court over own process

XVI.11.c Sealing files

Headnote

Judges and Courts --- Jurisdiction — Jurisdiction of court over own process

Arbitration — Commercial arbitration — Large group of franchisees and their franchisor agreeing to discontinue litigation and settle their differences through arbitration — Arbitration agreed to be subject to appeal — Franchisor appealing arbitration award and franchisees cross-appealing — Application by franchisor for order directing material filed on appeal be sealed because arbitration to be kept confidential.

Practice — Practice on appeal — Record on appeal — Application by appellant from arbitration award for order directing record to be sealed denied — No evidence adduced to support any public policy grounds to depart from rule of public accessibility to court proceedings.

In 1993, 50 franchisees commenced legal proceedings against their franchisor, PP Ltd. Later, the parties entered into minutes of settlement whereby the dispute would be mediated and/or arbitrated by H, a retired judge and highly respected private arbitrator. The minutes of settlement also provided that the parties would have a right to appeal any binding decision by H. Arbitration proceedings ensued over many months and interim awards and a final award were issued by H.

He issued a confidentiality award with respect to the arbitration proceedings. This was followed by a consent order made by the judge before whom the present motion was argued confirming that the interim and final awards were to remain confidential until the final Award was filed in court.

PP Ltd. appealed four components of H's award. Six of the franchisees cross-appealed one component of the award. PP Ltd. then brought a motion seeking an order that the appeal material be sealed on the grounds that, (i) the arbitration proceedings were confidential by agreement, (ii) the parties would not have entered into the arbitration process without the condition of confidentiality, and (iii) the disclosure of the arbitration proceedings to the public could affect the competitive position of PP Ltd.

Held:

The motion was dismissed.

When a matter comes to court, the philosophy of the court system is openness. There are established exceptions to this general rule, such as actions involving infants or mentally disturbed people and actions involving matters of secrecy; however, this sealing application did not fit within any of those exceptions.

If the dispute settlement process had involved other types of alternative dispute resolution such as mediation, conciliation or neutral evaluation where the focus is on the parties' coming to a consensual arrangement, then other considerations could be brought to bear.

Curtailment of public accessibility can be justified only where there is present the need to protect social values of great importance. This test is not met by wishing to keep secret the material involved in an arbitration appeal which of necessity takes the parties back into the court system with its insistence on openness, an aspect which one must assume the parties fully recognized before proceeding to appeal the award.

Table of Authorities

Cases considered:

- A. (J.) v. Canada Life Assurance Co.* (1989), 35 C.P.C. (2d) 6, 70 O.R. (2d) 27 (H.C.) — *considered*
- Hassnah Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243, (Q.B.D. [Com. Ct.]) — *considered*
- London & Leeds Estates Ltd. v. Paribas Ltd.* (July 28, 1994), Mance J. (Eng. Q.B.) [unreported] — *considered*
- MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, 26 C.R. (3d) 193, 49 N.S.R. (2d) 609, 96 A.P.R. 609, 40 N.R. 181, 132 D.L.R. (3d) 385, 65 C.C.C. (2d) 129 — *followed*
- MDS Health Group Ltd. v. Canada (Attorney General)* (1993), 20 C.P.C. (3d) 137, 15 O.R. (3d) 630 (Gen. Div.) *applied*
- S. (P.) v. C. (D.)* (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) — *applied*

Statutes considered:

- Arbitration Act, 1991, S.O. 1991, c. 17.
- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.
- Courts of Justice Act, R.S.O. 1990, c. C.43 —
s. 137(2)
- Sale of Goods Act, R.S.O. 1990, c. S.1.

Words and phrases considered:

ALTERNATIVE DISPUTE RESOLUTION

This [non-binding arbitration] differs from other forms of [Alternative Dispute Resolution ("ADR")] in which the parties themselves are part of the decision-making mechanism and the neutral third party's involvement is of a facilitative nature: e.g. mediation, conciliation, neutral evaluation, nonbinding opinion, nonbinding arbitration. Of course, the simplest method — often

overlooked — is that of noninvolvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately, more to the point . . . it would be unusual to see a public ADR session especially where the focus is on coming to a consensual arrangement. The parties need to have the opportunity of discussion and natural give and take with brainstorming and conditional concessions giving without the concern of being under a microscope. If the parties were under constant surveillance, one could well imagine that they would be severely inhibited in the frank and open discussions with the result that settlement ratios would tend to dry up. The litigation system depends on a couple of percent of new cases only going to trial. If this were doubled to several percent the system would collapse . . . public policy supports the nontrial resolution of disputes.

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. . . if the ADR process entered into is along the mediation philosophy structure that it will be appreciated that the best and most productive results re dispute resolution will be achieved generally if such process involves a degree of confidentiality. This of course if subject to some exceptions such as when the parties agree that in a mediation of public policy issues there is a positive requirement for public exposure . . . In other instances public exposure may induce a very negative reaction . . .

BINDING ARBITRATION

. . . a binding arbitration is a noncourt equivalent to a court trial. In either case a neutral third party hears the case and makes his decision which (subject to appeal) is binding upon the parties.

Motion for an order that material relating to appeal from commercial arbitration be sealed on grounds of confidentiality.

Editor's Note

This judgment, taken together with the arbitration award immediately preceding and the two reasons for judgment immediately following, forms an interesting quartet. It provides a basis for comment on several aspects of commercial arbitration in a general business setting. See the Case Comment at p. 277 post.

Farley J.:

1 At the hearing I dismissed the confidentiality/sealing motion, promising formal reasons at a later date. These are those reasons.

2 The defendant Pizza Pizza Limited ("P²") moved for an order:

(a) pursuant to Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C43 directing that the appeal materials upon the appeal to be heard on February 20, 1995 in this Honourable Court be sealed pending further order;

(b) continuing the order of the Honourable Mr. Justice Farley dated July 20, 1994.

P² submitted that the grounds for such a motion were:

1. The parties were originally before this Honourable Court by way of injunction proceedings (and extensive materials) in the spring of 1993;

2. The parties entered into Minutes of Settlement by which they submitted these issues to arbitration/mediation before the Honourable R.E. Holland;

3. Those proceedings were, by agreement and by order of the Honourable R.E. Holland, confidential;

4. The arbitration proceedings were conducted over many months involving at least 20 days of hearing time, during which a wide range of issues were canvassed;

5. The parties would not have entered into the arbitration process without the condition of confidentiality;
6. The parties have expended significant amounts of money upon the arbitration proceedings;
7. Only a handful of the myriad issues before the Honourable R.E. Holland are the subject of the appeal herein;
8. The disclosure of the arbitration proceedings to the public may affect the competitive position of the defendant and its franchisees in releasing the details of its operations to the public and competitors;
9. To fail to continue the order of the Honourable Mr. Justice Farley would discourage the attempts (and success) of the arbitration/mediation process which these parties underwent in confidence.

The aspect of item 8 was not in substance pursued. This is not in essence a situation involving trade secrets or confidential proprietary information. Further it was acknowledged that the proceedings resolved into an arbitration (versus other forms of alternative dispute resolution ("ADR")).

3 On Wednesday, June 22, 1994, the Honourable R.E. Holland, Q.C. ("Arbitrator") issued a confidentiality order. This was followed by a consent order issued by myself on July 20, 1994. Its terms provided (and clearly contemplated not only that there could be an adjustment or amendment to or cancellation of the sealing order, but also that the award would be made public when the matter was in court):

It is hereby ordered that:

1. The Interim Award of the Honourable R.E. Holland dated April 8, 1994 and the Cost Award dated May 19, 1994 (the "Awards") are, as all of the proceedings in this matter, confidential and may not be released to any party other than the parties to this proceeding and their professional advisors in this proceeding.
2. Until such time as it is filed in court, the Final Award arising from the Awards (the "Final Award") is also confidential and may only be released to those parties identified above.

4 The award has been appealed by P² and cross-appealed by the plaintiffs. Thus the matter is "re-entering" the court system after functionally having been in the private confidential sector before the Arbitrator. When the matter went out to the arbitration, it may have been that the parties contemplated some form of arbitration, but it was also conceivable that another form of ADR could have been employed. I think it fair to observe that a binding arbitration is a non-court equivalent to a court trial. In either case a neutral third party hears the case and makes his decision which (subject to appeal) is binding upon the parties. This differs from other forms of ADR in which the parties themselves are part of the decision-making mechanism and the neutral third party's involvement is of a facilitative nature: e.g. mediation, conciliation, neutral evaluation, non-binding opinion, non-binding arbitration. Of course, the simplest method — often overlooked — is that of non-involvement by a neutral: a negotiation between the parties. It is not unusual that ADR resolutions are conducted privately; more to the point, I suspect it would be unusual to see a public ADR session especially where the focus is on coming to a consensual arrangement. The parties need to have the opportunity of discussion and natural give and take with brainstorming and conditional concession giving without the concern of being under a microscope. If the parties were under constant surveillance, one could well imagine that they would be severely inhibited in the frank and open discussions with the result that settlement ratios would tend to dry up. The litigation system depends on a couple of percent of new cases only going to trial. If this were doubled to several percent the system would collapse. Therefore in my view public policy supports the non-trial resolution of disputes. I note the observation of Oliver Tickell, "Shogun's Beginnings" *Oxford Today*, vol. 7, no. 1 Michaelmas Issue 1994 at p. 20 where he observed as to Professor Jeffrey Mass' view of the benefits of the first Shogunate in Japan:

... finding to [Professor Mass'] surprise that its rule was based far more on efficient administration than on military heroics. "Although a warrior government, it was devoted not to the battlefield but to maintaining the peace ... It developed laws, institutions of justice, and an adversarial legal system that even today seems extraordinarily ingenious and sophisticated.

Written evidence always took precedence over oral testimony, and women enjoyed their full day in court. The vendetta was illegal, as the objective was to keep people ensnared in litigation".

I also note that perhaps the legal sector in Canada has progressed a little too far in the ensnarement direction.

5 Section 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA) provides:

A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

However when a matter comes to court the philosophy of the court system is openness: See *MDS Health Group Ltd. v. Canada (Attorney General)* (1993), 15 O.R. (3d) 630 (Gen. Div.) at p. 633. The present sealing application would not fit within any of the exceptions to the general rule of *public* justice as discussed in *A. (J.) v. Canada Life Assurance Co.* (1989), 70 O.R. (2d) 27 (H.C.) at p. 34: "... actions involving infants, or mentally disturbed people and actions involving matters of secrecy '... secret processes, inventions, documents or the like ...' " The broader principle of confidentiality possibly being "warranted where confidentiality is precisely what is at stake" was also discussed at the same page but would not appear applicable.

6 Mr. Griffin raised the question of reorganization material under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 or the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 or valuations submitted by a receiver for the purpose of obtaining court approval on a sale arrangement having been sealed. The purpose of that, of course, is to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information whilst others have to rely on their own resources. I would think the most appropriate sealing order in a court approval sale situation would be that the supporting valuation material remain sealed until such time as the sale transaction has closed.

7 I believe that it is obvious that if the ADR process entered into is along the mediation philosophy structure that it will be appreciated that the best and most productive results re dispute resolution will be achieved generally if such process involves a degree of confidentiality. This of course is subject to some exceptions such as when the parties agree that in a mediation of public policy issues there is a positive requirement for public exposure: see Brown and Marriott, *ADR Principles and Practice* (1993, London), Sweet & Maxwell, at p. 356. In other instances public exposure may induce a very negative reaction — e.g. if outsiders can be observers, then some (depending on their relationship to the parties involved) may become "cheerleaders", "advisors without the benefit of the facts" or "advisors without the discipline of having to live with the end result of the mediation" (which may be a non-resolution of the issues which may otherwise have been resolved). Unwanted pressure may thus be applied to one or more of the participants. Similarly a volunteer advisor-type may give "free" advice (e.g. "Don't settle; take him to court; you've got an absolute winner!") when the hidden agenda of this officious intermeddler is to foment disruption, harass the other side or pursue his own self interests. Allow me to observe that it would be unusual for anyone to feel obliged to conduct all of his negotiations (including those to settle disputes) in a fishbowl: Consider for instance one having a mild disagreement with one's mother as to where the two of you should have lunch — or a debate between a customer and a supplier over whether an order was short-shipped and, if so, what adjustment should be made (all without resort to the *Sale of Goods Act* and/or the courts).

8 While it is true that it appears in this case that the parties went private in a dispute which they could have litigated openly in the courts with a trial rather than an arbitration, I do not see that this choice would oblige the parties to make their arbitration public in and of itself. As for the confidentiality order of July 20, 1994 referring to two types of awards, an interim and a final, I now understand from counsel that the thrust of the interim award was the legal principles and of the final the damage calculation or other results flowing as opposed to the interim being a draft for comment and possible adjustment. If the latter were the case then one would appreciate the practicality/necessity of maintaining confidentiality so as to avoid the types of unwarranted pressures aforesaid in achieving the end result. If of the other nature, I believe the same result prevails. Similarly if the process were something other than non-binding arbitration, one would also see the same type of necessity. In the instant case, the parties could have, if they had so chosen (i.e. either side), decided not to appeal the Arbitration's award. In such case, the result would have been the same as the two sides entering into settlement negotiations to end their dispute and coming to an agreement. In effect that is what they did by entering the arbitration process except that in doing so, they at the start of the piece delegated the resolution determination function to the Arbitrator for him to do so by applying legal principles to the facts as he found

them. If the parties had not made the detour from the main channel of court proceedings leading to trial by going to arbitration but had merely negotiated a settlement, then with a settlement achieved they would customarily merely proceed to put on the public court record that the claim had been dismissed on consent. Details of the settlement would remain with the parties; they would be free to disclose or agree not to disclose, subject to some legal obligation to make disclosure (e.g. timely disclosure requirements under securities legislation).

9 However in this case, it appears that both sides were dissatisfied to some degree by the decision of the Arbitrator for various reasons. Perhaps counsel would be of assistance to their clients if they were able to reflect upon what may have been attempted to be communicated by the other side at the hearing before me. I state the obvious: sometimes signals are obliquely broadcast; sometimes what might be perceived as a signal is nothing more than a false hope by the recipient. However if there is truly a signal intended, it would be very unfortunate if the recipient did not pick it up because it was too oblique or worse still because the mind was closed (possibly because the mouth was open so as to block the ear passage).

10 The onus is upon P² as moving party to demonstrate sound reason for departing from the openness rule: See *MDS*, supra, at p. 633. As the factum of P² put it:

There is an overriding public interest in the 1990's especially in fostering effective Alternative Dispute Resolution ("ADR") in such a way that parties will willingly submit to it in a manner which fosters its use and development and reduces the demands for scarce court resources.

The authority for this was given as *Brown and Marriott*, supra, at p. 356; *London & Leeds Estates Ltd. v. Paribas Ltd.*, unreported decision of Mance, J. (Q.B.) of July 28, 1994 and *Hassnah Insurance Co. of Israel v. Mew*, [1993] 2 Lloyd's Rep. 243 (Q.B. [Com. Ct.]). In citing *Hassnah*, Mance, J. at p. 8 of *London* merely stated:

There is no doubt that the parties to such a previous arbitration owed each other a duty of confidence and privacy in respect of the course of and evidence given during it.

He went on to say at p. 9:

None of those authorities deals with the need to consider the rights of a witness which could arise if duties of confidentiality or privacy were owed to him or her. Despite this I see some force in the submission that it is implicit in the nature of private consensual arbitration that witnesses who give evidence, even paid and professional experts, will within certain limits be accorded the benefits of the privacy which overall attaches to this type of arbitration. The privacy of arbitration is likely to be a factor in persuading many witnesses to give evidence and a factor in encouraging them to speak, or in the case of experts, enabling them to obtain permission from other principals to speak, about matters within their experience about which otherwise they might be hesitant or unable to speak.

London of course involved a question of whether a subpoena to an expert witness should be set aside where the confidential or private documents of the expert were sought to be obtained by the subpoena. It is even clearer in *Hassnah* what the limits of confidentiality would be concerning an arbitration and the award issuing therefrom. In that case there was an arbitration between the defendant who was reinsured by the plaintiff under various reinsurance contracts which had been placed by brokers. The defendant pursued arbitration to recover under the policies; the arbitration went mainly against the defendant which now wished to proceed in court against the placing brokers for negligence in breach of duty. Coleman, J. found as stated in the headnote: "that if it was reasonably necessary for the establishment or protection of an arbitrating party's legal rights vis-a-vis a third party that the award should be disclosed to that third party in order to found a defence or as the basis for a cause of action, so to disclose it including its reasons would not be a breach of the duty of confidence (See p. 249, col. 2)".

11 However as discussed above the parties clearly contemplated the possibility of appeal pursuant to the *Arbitration Act, 1991*, S.O. 1991, c. 17. Both have availed themselves of that opportunity; the court files for whatever is filed pursuant to that appeal (and cross-appeal) will be open for inspection in the same way any other appeal of whatever nature or kind would be (assuming no valid sealing order obtained on the basis of the reasons set out above). This is not a case such as *Hassnah* where

witness statements, documents and transcripts of a confidential arbitration were not to be made public for the purpose of a court action against a third person-*Hassnah* being a completely "separate" proceeding. In this case (the P² case) the court proceedings are merely the continuation of the fight between P² and the plaintiff franchisees (and not between one of them and a third person in separate proceedings), a fight which they took private but which they have now returned to the open arena of the court.

12 As Dickson, J. said at p. 186 (S.C.R.) of *MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609 (and cited in *MDS*, supra, at p. 635):

In my view, curtailment of public accessibility can only be justified where there is present the need to protect social values of superordinate importance. One of these is the protection of the innocent.

In my view "one of these" is not to keep secret the material involved in an arbitration appeal which of its necessity takes the parties back into the court system with its insistence on openness for court proceedings, an aspect which one must assume each side fully recognized before proceeding to appeal the award.

13 I believe it well expressed by Smith, J. in *S. (P.) v. C. (D.)* (1987), 22 C.P.C. (2d) 225 (Ont. H.C.) at p. 229 and p. 231:

It may be argued that private litigants resorting to our public justice system should have the right to do so away from the public glare. The answer, very simply put, is that secrecy can only attend a private system of justice, not a public one. Or put in a different way, publicity is a necessary consequence of the obvious benefits that are derived from a public system put in place to serve society in general, including private litigants (p. 229).

.....

There is no need to refer to the voluminous case law bearing upon the general principles of openness of Court proceedings. There is a dearth of authority on the interpretation of s. 147(2) of the *Courts of Justice Act*. Suffice it to say that it ought to be resorted to sparingly in the clearest of cases and on the clearest of material where as one instance the interests of justice would be subverted and/or the totally innocent would unduly suffer without any significant compensating public interest being served (p. 231).

14 P² has not adduced any evidence to support a sealing order pursuant to s. 137(2) CJA but rather it has relied on the court to fashion an order so as to extend the confidentiality which the parties had in their arbitration to the material in that arbitration which would otherwise be public pursuant to the appeal. I see no public policy grounds for doing so.

15 Mr. Griffin with his usual candour immediately agreed with Mr. Waldmann's proposition that if the sealing motion were dismissed then Mr. Waldmann's two clients outside the arbitration would be allowed access to the arbitration material.

16 The sealing order motion of P² is dismissed. P² is to pay \$1,000 in costs forthwith to the plaintiffs represented by Ms. Spies and Mr. Mitchell; no other costs awarded.

Motion dismissed.

Footnotes

- * Leave to appeal to the Ontario Court of Appeal was refused with costs on June 7, 1995, Doc. CA M15773, McKinlay, Griffiths and Doherty J.J.A. (Ont. C.A.).