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JUDICIAL CENTRE OF EDMONTON
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Clerk of the Court

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 ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.

DOCUMENT	**BENCH BRIEF OF THE MONITOR, ERNST & YOUNG INC.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS	Darren R. Bieganek, Q.C./Ryan F.T. Quinlan Barrister & Solicitor Phone: 780.441.4386/780.441.4336 Fax: 780.969.6381 Email: dbieganek@dcllp.com/rquinlan@dcllp.com	File #204-196164 **DUNCAN CRAIG LLP** LAWYERS MEDIATORS 2800 Scotia Place 10060 Jasper Avenue Edmonton, Alberta Canada T5J 3V9

4146-3028-0725.v2

A. INTRODUCTION

1. On July 5, 2017, the Honourable Justice K.G. Nielsen granted an Initial Order under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") in favour of Canada North Group Inc. ("**CNG**"), Canada North Camps Inc. ("**CNC**"), Campcorp Structures Ltd. ("**Campcorp**"), D.J. Catering Ltd. ("**DJ**"), 816956 Alberta Ltd. ("**816956**"), 1371047 Alberta Ltd. ("**1371047**"), (CNG, CNC, Campcorp, DJ, 816956 and 1371047, collectively, the "**Applicants**"), as well as a stay of proceedings (the "**Stay**") against the Applicants for 30 days up to and including August 3, 2017, and the appointment of Ernst & Young Inc. as monitor of the Applicants (the "**Monitor**").

2. On July 27, 2017, an Order extending the Stay and adding 1919209 Alberta Ltd. ("**191**") as an applicant to the CCAA proceedings was granted by this Honourable Court.

3. On March 20, 2018, the Honourable Mr. Justice Hillier granted an Order in these proceedings that directed the Applicants, under the supervision of the Monitor, to proceed to obtain liquidation proposals for the unutilized and surplus rolling stock and dorms presently located at either the Winterburn Yard or the Farm (both as commonly referred to and known in these proceedings).

4. On April 20, 2018, the Honourable Mr. Justice Nielsen granted an Order in these proceedings that, amongst other things, directed that upon the subsequent filing of the Camp Monitor's Certificate:

   a. Campcorp and DJ were removed as Applicants;

   b. CNG changed its name to 667402 Alberta Ltd. ("**667**") and CNC changed its name to 18512398 Alberta Ltd. ("**185**"); and

   c. the Monitor was granted the expanded powers set out in that Order

   (the "**Expanded Powers Order**").

5. On June 21, 2018, the Honourable Mr. Justice Nielsen granted an Order in these proceedings that extended the stay granted in the Initial Order to December 31, 2018 and added Canada North Group LP Holdings Ltd. ("**Holdings**") as an applicant to the CCAA proceedings.

6. These proceedings are now Court approved and directed liquidating CCAA proceedings.

7. The Monitor now seeks an Order:

   a. authorizing the Monitor to enter into an agreement with Maynards Industries Canada Ltd. ("**Maynards**") for Maynards to sell, by way of auction, upon certain terms set out in the Confidential Supplement to the Monitor's Sixteenth Report (the "**Confidential Supplement**"), the surplus rolling stock and specific other assets (the "**Residual Assets**") of the Remaining Applicants on behalf of the Monitor;

   b. approving and ratifying the sale of the Residual Assets of the Remaining Applicants by way of auction (the "**Auction**") with Maynard's, and vesting title in the Residual Assets to and in the names of respective purchasers of the Residual Assets (the "**Purchasers**") at the Auction (the "**Transaction**");

   c. authorizing the Monitor to conclude the Transaction and to take all such steps and execute all such documents as reasonably be necessary to complete the Transaction, including without limitation permitting the Monitor and Maynards to agree to minor adjustments to the agreement as deemed necessary and appropriate by the parties, provided an accounting of any adjustments made, if any, are reported in a future report to the Court;

d. stipulating that upon closing of the Transaction all of the Remaining Applicants' right, title and interest in and to the Residual Assets shall, without further instrument of transfer or assignment, vest in the respective Purchasers free and clear of and from any and all claims, security interests, assignments, actions, levies, taxes, judgments, writs of execution, trusts, deemed trusts (whether contractual, statutory or otherwise), options, agreements, disputes, debts, easements, covenants, caveats, encumbrances, or other rights, limitations or restrictions of any nature whatsoever including without limitation any rights or interests of any creditors of the Remaining Applicants;

e. temporarily sealing the Confidential Supplement;

f. amending the Order Lifting Stay in Favour of First Island Financial Services Ltd. and Zenex Capital Corporation granted April 20, 2018 to amend the date to which the Monitor is entitled to utilize the Farm lands from July 31, 2018 to October 31, 2018; and

g. approving the activities of the Monitor as set out in its Sixteenth Report and the Confidential Supplement.

8. The Monitor respectfully submits that it is just and appropriate to grant the requested relief in these circumstances.

9. The Honourable Justices Nielsen and Hillier, as co-case management Justices of this matter, have indicated to the Monitor that this Application can be heard before another Commercial Justice in light of their scheduling inability to hear this Application at this time.

B. APPROVAL OF MAYNARD'S OFFER AND VESTING TITLE OF RESIDUAL ASSETS

10. The Remaining Applicants and the Monitor have taken significant steps to liquidate the Residual Assets, as directed by this Honourable Court in its March 20, 2018 Order.

11. After that Order, the Monitor worked with management of the Applicants to identify and contact a number of different parties and liquidators that may have an interest in the Residual Assets, drafted a request for proposals for the Applicants to send to interested parties (the "**First RFP**"), organized and attended all requested viewings of the Residual Assets and reviewed the proposals received.

12. As a result of the efforts outlined above:

    a. 36 potential parties were identified, contacted and sent a copy of the First RFP;

    b. 22 of the potential parties requested copies of the preliminary listing of the Residual Assets;

    c. 9 of the parties that received the preliminary listing of the Residual Assets attended the applicable sites to inspect the Residual Assets; and

    d. 5 parties presented proposals in relation to the First RFP.

13. The proposals received pursuant to the First RFP were underwhelming and varied significantly in relation to amounts and terms.

14. The Monitor inquired with many parties involved in the First RFP (including those that did and did not submit proposals), and it was determined that interest in providing proposals, or in offering more beneficial proposals, was limited due to such parties being unable to have an offsite sale on lands

controlled by the Applicants (as they did not have adequate space of their own to facilitate a liquidation sale) and/or the high transportation costs associated in re-locating assets to another location.

15. On April 20, 2018, an Order was granted in these proceedings which, among other items, expanded the powers of the Monitor, which became effective May 3, 2018. The expanded powers of the Monitor include the ability of the Monitor to market any or all of the Remaining Applicants' property, including advertising and soliciting offers in respect of such property, and to negotiate such terms and conditions of sale as deemed appropriate, subject to approval by this Honourable Court.

16. The Monitor determined that the best results for sale proposals would be achieved by moving the assets from the Winterburn Yard to the Farm owned by 816 in Sturgeon County, Alberta, which the Applicants and the Monitor were at liberty to use and possibly conduct an auction on until July 31, 2018. Further, additional residual assets and equipment not previously located at either the Winterburn Yard or the Farm were also moved to the Farm by the Monitor to be included in the pending sale.

17. On May 29, 2018, the Monitor sent a second Request for Proposals (the "**Second RFP**") to 39 parties with potential interest in the Residual Assets of the Remaining Applicants, which resulted in:

    a. 11 interested parties attending the Farm to view the Residual Assets; and

    b. 8 proposals being submitted to the Monitor.

18. As is set out in the Confidential, the amounts offered in the Second RFP were generally greater than those offered in the First RFP.

19. The proposal put forward by Maynards in the second RFP was superior to all other offers received.

20. Maynard's submitted proposals to the Monitor that would see Maynard's outright purchase ("**ORP**") the Residual Assets or auction the Residual Assets on behalf of the Monitor with the provision of a net minimum guarantee ("**NMG**") and a specific split of sale proceeds beyond the NMG amount (the "**NMG Proposal**"). The specific terms of the NMG Proposal are set out in the Confidential Supplement and are not being repeated in this Brief for confidentiality reasons.

21. The Monitor is recommending to this Honourable Court that the NMG Proposal be approved and that the Residual Assets be liquidated in accordance with the NMG Proposal.

22. It is the Monitor's opinion that proceeding with Maynards' NMG Proposal would likely result in a higher realization for the Residual Assets than would proceeding with its ORP offer. It is the Monitor's experience that auctioneers are conservative when making NMG based auction proposals and that it is more likely than not that the Residual Assets will, as a whole, sell for greater than the proposed ORP amount.

23. This Honourable Court has the power to grant a Vesting Order in respect of the Residual Assets. Section 36 of the CCAA states:

> **36(1)** A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.
>
> **(2)** A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

> **(3)** In deciding whether to grant the authorization, the court is to consider, among other things,
>
> (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
>
> (b) whether the monitor approved the process leading to the proposed sale or disposition;
>
> (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
>
> (d) the extent to which the creditors were consulted;
>
> (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
>
> (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.
>
> ...
>
> **(6)** The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.
>
> **(7)** The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

CCAA, s. 36 [**TAB 1**];

24. The entirety of section 36 of the CCAA is not a pure application to this scenario, since it is not one of the Remaining Applicants selling assets, but rather, the Monitor, pursuant to its expanded powers, selling the assets on behalf of the Applicants for the benefit of stakeholders. Nonetheless, section 36(6) clearly permits this Honourable Court to issue a Vesting Order in respect of the Residual Assets in favour of the ultimate purchasers of such assets.

25. The four factors set out in *Royal Bank of Canada v. Soundair Corp.* ("*Soundair*") have also been routinely considered in CCAA asset sales scenarios. The *Soundair* factors are:

    a. whether the Receiver (Monitor) made sufficient effort to obtain the best price and has not acted improvidently;

    b. the interests of the parties;

    c. the efficacy and integrity of the process by which offers were obtained; and

    d. whether there was unfairness in the working out of the process.

Royal Bank of Canada v. Soundair Corp., 1991 CarswellOnt 205 at para.16 **[TAB 2]**; *Re Veris Gold Corp.*, 2015 BCSC 1204 at paras. 24-25 ("*Veris Gold Corp.*") **[TAB 3]**

26. In *Veris Gold Corp.*, the Court also recognized that "[a] more general test has been restated... namely to consider the transaction as a whole and decide 'whether or not the sale is appropriate, fair and reasonable'," which is sometimes referred to as the *White Burch* test.

Veris Gold Corp. at para. 23 **[TAB 3]**

27. In *Re AbitibiBowater Inc.,* the Court noted that it has jurisdiction to approve a sale of assets in the course of CCAA proceedings, and observed that "[a]bsent some compelling, exceptional factor to the contrary, the Court should accept an applicant's proposed sales process where it was recommended by the Monitor and supported by the stakeholders" (para 59).

Re AbitibiBowater Inc., 2009 QCCS 6460 at paras. 36 and 59 **[TAB 4]**

28. In this case, the Monitor respectfully submits that:

   a. it has given notice of this sale approval and vesting order application to interested creditors and other stakeholders;

   b. Maynard's is an arm's length party to the Remaining Applicants and the Monitor, and is a well-respected auction company;

   c. the ultimate purchasers of the Residual Assets will be the highest bidders, and all potential purchasers will have a fair, transparent and level process upon which to purchase the Residual Assets;

   d. the process leading to the NMG Proposal was diligent and reasonable in the circumstances, and the Monitor took active steps to increase the proposed NMG and split of proceeds above such NMG amount in order to ensure maximization of value for the Residual Assets;

   e. the Monitor has led and approved the process leading to the Maynard's NMG Proposal;

   f. these proceedings have already become liquidating CCAA proceedings, and as such, liquidation of the Residual Assets must occur for creditors to recover amounts owed to them and to complete these CCAA proceedings;

   g. the Monitor filed a Report with this Honourable Court stating that in its opinion the sale of the Residual Assets through the NMG Proposal will be beneficial to the stakeholders of the estate;

   h. by virtue of the March 20, 2018 Order granted by this Honourable Court, creditors knew that liquidation proposals were being obtained by the Remaining Applicants and Monitor, and while creditors were not involved in the day to day tasks related to the Request for Proposal process, any creditors that inquired as to status or certain aspects of such process were responded to and kept up to date, as applicable;

   i. the sale of the Auction Assets through the Maynard's auction proposal is in the best interests of, and will only have a positive effect on, the stakeholders of the estate;

   j. the consideration to be received for the Residual Assets through the NMG Proposal is reasonable and fair taking into account their likely actual value;

   k. the Monitor and the Remaining Applicants made sufficient efforts to obtain the best net realizations for the Residual Assets and have not acted improvidently in recommending that it proceed with the NMG Proposal;

l. the Request for Proposal process undertaken by the Monitor is one characterized by efficacy and integrity; and

m. there was no unfairness in the working out of the Request for Proposal process.

29. For the reasons set out above and in the Confidential Supplement (which are not repeated here for confidentiality reasons), the Monitor submits that proceeding to sell the Residual Assets through the NMG Proposal is appropriate, fair and reasonable in the circumstances of these proceedings.

30. As such, the Monitor recommends that this Honourable Court approve the Maynard's NMG Proposal and grant the required Approval and Vesting Order in respect of the Residual Assets.

C. SEALING OF CONFIDENTIAL SUPPLEMENT

31. On an application to temporarily seal a court file, this Honourable Court has broad discretion and may make a direction on any matter that the circumstances require, and it may grant the Order notwithstanding the provisions of Division 4 of Part 6 of the Rules of Court.

Alberta Rules of Court, Alta. Reg. 124/2010, Rule 6.28 **[TAB 5]**. See Orders granted by the Alberta Court of Queen's Bench in the following proceedings:

Order, granted by Justice K.M. Eidsvik in *Royal Bank of Canada v. Hannaco (2008) Ltd. O/A Canada Grey Motor Inn, Naheed Zia and Nasreen Zia*, January 14, 2011, at para. 11

Order, granted by Justice K.D. Yamauchi in *The Matter of Cow Harbour Construction Ltd.*, May 28, 2010, at para. 5

Order, granted by Justice J. Topolniski in *Bank of Montreal v. Kallbom Sand & Gravel Ltd. et al*, May 15, 2012, at para. 1

32. Temporary sealing Orders should only be granted when:

a. an Order is needed to prevent serious risk to an important interest because reasonable alternative measures will not prevent the risk; and

b. 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.

Sierra Club of Canada v. Canada (Minister of Finance), 2002 SCC 41 (S.C.C.) at para. 45 **[TAB 6]**

33. The most appropriate sealing Order in a Court approval sale situation is that the supporting valuation material remain sealed until such time as the sale transaction has closed.

Look Communications Inc. v. Look Mobile Corp., 2009 CarswellOnt 7952 (Ont. S.C.J.) at para. 17 ("*Look Communications*") **[TAB 7]**

34. Commercial Courts have accepted that temporary sealing Orders are appropriate in circumstances where the information subject to sealing Orders contain sensitive commercial information, the release of which could be prejudicial to the stakeholders of the confidential information.

Alberta Treasury Branches v. Elaborate Homes Ltd., 2014 ABQB 350 at para. 54 ("*Elaborate Homes*") **[TAB 8]**; *Nortel Networks Corp. (Re)* (2009), 56 C.B.R. (5th) 224 (Ont. S.C.J.) at para. 39 **[TAB 9]**; *Maxtech Manufacturing Inc. (Re)* (2010), 64 C.B.R. (5th) 239 (Ont. S.C.J.) at para. 30 **[TAB 10]**

35. In the context of an insolvency proceeding and the sale of assets, it is common for the Court to seal the Receiver or Monitor's confidential documents in case a further bidding process may be required if the transaction being approved falls through.

Look Communications Inc. at para. 17 **[TAB 7]**; *Elaborate* at para. 54 **[TAB 8]**

36. A temporary sealing Order is required until the sale is fully executed due to the confidential nature of the accepted offer and the deleterious effect it would have on the integrity of any future sale process should the original sale not close.

Look Communications at para. 17 **[TAB 7]**; *Elaborate Homes* at para. 54 **[TAB 8]**

37. It is extremely rare that an interested party will come back asking that the sealing Order be set aside as ordinarily all of the assets that are bid on during the court sale process are sold and approved by Court Order. No one will have a further interest in the confidential information when the transaction is closed.

Look Communications at para. 17 **[TAB 7]**; *Elaborate Homes* at para. 54 **[TAB 8]**

38. In this case, the Confidential Supplement contains significant commercial information regarding the value of the Residual Assets, the value of bids made by interested parties and value of the offer supported by the Monitor.

39. If for some reason the Transaction with Maynard's did not close, or not all of the Residual Assets sold at the Auction, having this commercial information widely accessible to the public may cause significant prejudice to the future sales or bidding process, as well as may prejudice the Monitor's ability to obtain the best offers possible on such Residual Assets.

40. Further, it could create a situation where an unfair advantage is created for some bidders or interested parties by obtaining such information from the Court record while others have to rely on their own resources.

41. It is respectfully submitted that the deleterious effects, arising from the release of this sensitive commercial information, would have on the integrity of any future sale process should this Transaction not close or should not all Residual Assets not be sold through the Auction justifies the temporary sealing of the Confidential Supplement.

D. CONCLUSION

42. The Monitor respectfully requests that this Honourable Court grant an Order:

    a. authorizing the Monitor to enter into an agreement with Maynards to sell, by way of auction upon certain terms and conditions, the Residual Assets of the Remaining Applicants;

    b. approving and ratifying the sale of the Residual Assets of the Remaining Applicants by way of the Auction with Maynard's, and vesting title in the Residual Assets to and in the name of the Purchasers at the Auction;

    c. authorizing the Monitor to conclude the Transaction and to take all such steps and execute all such documents as may reasonably be necessary to complete the Transaction, including without limitation permitting the Monitor and Maynards to agree to minor adjustments to agreement as deemed necessary and appropriate by the parties;

d. stipulating that upon closing of the Transaction, all of the Remaining Applicants' right, title and interest in and to the Residual Assets shall, without further instrument of transfer or assignment, vest in the respective Purchasers free and clear of and from any and all claims, security interests, assignments, actions, levies, taxes, judgments, writs of execution, trusts redeem trusts (whether contractual, statutory or otherwise), options, agreements, disputes, debts, easements, covenants, caveats, encumbrances, or other rights, limitations or restrictions of any nature whatsoever including without limitation any rights or interests of any creditors of the Remaining Applicants;

e. temporarily sealing the Confidential Supplement;

f. amending the Order Lifting Stay In Favour of First Island Financial Services Ltd. and Zenex Capital Corporation granted April 20, 2018 to amend the date to which the Monitor is entitled to utilize the Farm lands from July 31, 2018 to October 31, 2018; and

g. approving the activities of the Monitor as set out in its Sixteenth Report and the Confidential Supplement.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF JULY, 2018

DUNCAN CRAIG LLP

DARREN R. BIEGANEK, QC/ RYAN F.T. QUINLAN
COUNSEL FOR THE MONITOR OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD. 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDING LTD.

LIST OF AUTHORITIES

TAB

TAB 1

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 19-43) [Heading added 2005, c. 47, s. 131.]
Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

Most Recently Cited in: Industrial Properties Regina Limited v. Copper Sands Land Corp., 2018 SKCA 36, 2018 CarswellSask 252 | (Sask. C.A., May 23, 2018)

R.S.C. 1985, c. C-36, s. 36

s 36.

Currency

36.

36(1)Restriction on disposition of business assets

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

36(2)Notice to creditors

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

36(3)Factors to be considered

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

36(4)Additional factors — related persons

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

36(5)Related persons
For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

36(6)Assets may be disposed of free and clear
The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

36(7)Restriction — employers
The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

Amendment History
2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14

Currency
Federal English Statutes reflect amendments current to May 23, 2018
Federal English Regulations are current to Gazette Vol. 152:10 (May 16, 2018)

End of Document

TAB 2

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

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver

Headnote

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

Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

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

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

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

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

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

Table of Authorities

Cases considered:

Beauty Counsellors of Canada Ltd., Re (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) — *referred to*
British Columbia Development Corp. v. Spun Cast Industries Ltd. (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) — *referred to*
Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*
Crown Trust Co. v. Rosenburg (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) — *applied*
Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*
Selkirk, Re (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.) — *referred to*
Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

***Galligan J.A.* :**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

improvidently.
2. It should consider the interests of all parties.
3. It should consider the efficacy and integrity of the process by which offers are obtained.
4. It should consider whether there has been unfairness in the working out of the process.

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition

TAB 3

2015 BCSC 1204
British Columbia Supreme Court

Veris Gold Corp., Re

2015 CarswellBC 1949, 2015 BCSC 1204, [2015] B.C.W.L.D. 4800, 256 A.C.W.S. (3d) 765, 26 C.B.R. (6th) 310

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., 1985, c. C-36, As Amended

In the Matter of the Canada Business Corporations Act, R.S.C. 1985, c. C-44

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57

In the Matter of Veris Gold Corp., Queenstake Resources Ltd., Ketza River Holdings, and Veris Gold USA, Inc., Petitioners

Fitzpatrick J.

Heard: May 28, 2015
Judgment: July 10, 2015
Docket: Vancouver S144431

Counsel: J. Sandrelli, T. Jeffries for Monitor, Ernst & Young Inc.
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C. Brousson, J. Bradshaw (A/S) for NV Energy
J. Porter for Government of Yukon
K. Siddall for AIG
S. Ross for Linde LLC

Subject: Insolvency; International

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Approval by court
XIX.3.b.i "Fair and reasonable"

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Assets of petitioner companies were gold mine in USA and mining properties in Canada — Initial order was granted in June 2014 due to steps taken by major secured creditor, DB to collect debt of approximately US$90 billion — Matters were stabilized, and in October 2014 court approved interim financing from WB in amount of US$12 million — Detailed sale and solicitation process was approved, but no qualified bids were received — Eventually petitioner entered into asset sale

agreement with WBVG, which was wholly owned by WB — Monitor brought application to complete asset sale agreement — Application granted — Factors set out in s. 36(3) of Companies' Creditors Arrangement Act supported granting order — Process leading to transaction were fair and reasonable — Sale was best outcome for operational stakeholders — WBVG was to be assigned contracts as this would facilitate continuation of operations — Due to exigent and extraordinary circumstances, assignments were approved subject to US court being satisfied with notification to and service on counterparties to assigned contracts who did not received direct notice of application to approve sale.

Table of Authorities

Cases considered by *Fitzpatrick J.*:

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Nexient Learning Inc., Re (2009), 2009 CarswellOnt 8071, 62 C.B.R. (5th) 248 (Ont. S.C.J.) — considered

PCAS Patient Care Automation Services Inc., Re (2012), 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285 (Ont. S.C.J. [Commercial List]) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 3893, 18 B.L.R. (3d) 298, 31 C.B.R. (4th) 302 (Ont. S.C.J. [Commercial List]) — referred to

Playdium Entertainment Corp., Re (2001), 2001 CarswellOnt 4109, 31 C.B.R. (4th) 309, [2001] O.T.C. 828 (Ont. S.C.J. [Commercial List]) — referred to

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

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Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — considered

Veris Gold Corp., Re (2015), 2015 BCSC 399, 2015 CarswellBC 662, 23 C.B.R. (6th) 321 (B.C. S.C.) — referred to

White Birch Paper Holding Co., Re (2010), 2010 QCCS 4915, 2010 CarswellQue 10954, 72 C.B.R. (5th) 49 (C.S. Que.) — considered

White Birch Paper Holding Co., Re (2010), 2010 QCCA 1950, 2010 CarswellQue 11534, 72 C.B.R. (5th) 74 (C.A. Que.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.
Generally — referred to

Chapter 15 — referred to

s. 365(b)(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
Generally — referred to

s. 11.3 [en. 1997, c. 12, s. 124] — considered

s. 11.3(1) [en. 2005, c. 47, s. 128] — considered

s. 11.3(2) [en. 2005, c. 47, s. 128] — considered

s. 11.3(3) — considered

s. 11.3(4) — considered

s. 11.3(5) [en. 2005, c. 47, s. 128] — considered

s. 36 — considered

s. 36(3) — considered

APPLICATION by monitor for order approving and completing asset sale agreement.

Fitzpatrick J.:

Introduction

1 This is a proceeding pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"). The assets of the petitioner companies (collectively, "Veris Gold") principally comprise a gold mine in the State of Nevada, United States of America and mining properties in Yukon, Canada.

2 There has been no shortage of effort in these proceedings to restructure the considerable debt or monetize the assets of Veris Gold for the benefit of the stakeholders. However, in the face of considerable operational setbacks and disappointing refinancing and sale results, those stakeholders now face two stark options: (i) allow the interim lender to deal with the assets in a receivership or liquidation scenario; or (ii) allow an orderly transfer of the assets to that interim lender by way of a credit bid which would allow operations in the U.S. to continue.

3 The court-appointed monitor, Ernst & Young Inc., (the "Monitor") now applies to complete the sale to a new entity created by the interim lender, which is said to provide the best result achievable in less than desirable circumstances.

Background Facts

4 Much of the history of these proceedings was set out in my reasons for judgment issued earlier this year: *Veris Gold Corp., Re*, 2015 BCSC 399 (B.C. S.C.) . For the purposes of this application, I will summarize that history as follows.

5 On June 9, 2014, this Court granted an initial order. This filing was necessary in light of the imminent steps that were to be taken by Veris Gold's major secured creditor, Deutsche Bank A.G. ("DB") to collect its debt of approximately US$90 million.

6 The Canadian filing was immediately followed by the Monitor commencing proceedings in Nevada pursuant to Chapter

to allow further time to finalize a transaction.

18 On April 24, 2015, this Court granted an order extending the stay of proceedings to June 12, 2015. In addition, at the request of the Monitor, an order was granted increasing the interim funding from WBox by US$3 million to US$15 million, which would allow Veris Gold's operations to continue. WBox approved a cash flow forecast and it was agreed that WBox would maintain control over payments made from this further facility. On April 29, 2015, the U.S. court approved this amendment to the interim financing facility.

19 On May 28, 2015, Veris Gold entered into an asset sale agreement (the "Agreement") with WBVG, LLC ("WBVG"). WBVG is an entity wholly owned by WBox although, as anticipated, WBox sought and obtained the future participation of another equity partner. The transaction provides that WBox will transfer a majority interest in WBVG to 2176423 Ontario Ltd., a company owned by Eric Sprott. Mr. Sprott was already involved in Veris Gold, having a 20% equity interest and also having a royalty interest in the Nevada mining properties.

20 The salient terms of the Agreement are as follows:

a) WBVG will purchase all tangible and intangible assets of Veris Gold, subject to certain defined excluded assets;

b) the Monitor is to continue efforts to sell the Ketza assets in Yukon over a 60-day period with any sale proceeds being payable to WBVG. If no sale occurs, then those assets will be transferred to WBVG;

c) WBVG is to assume certain obligations arising under assumed contracts, including all bonds, and also pay any "cure costs" relating to such assumed contracts, limited to US$10 million;

d) WBVG will assume the amounts owing to WBox under the interim lending facility and will pay certain of the court-ordered charges, such as the administration charges, having priority over the interim lender's charge in favour of WBox to a maximum of US$1.8 million;

e) WBVG will not assume any liabilities for pre-closing obligations;

f) all employees of Veris Gold are to be terminated on closing and WBVG may offer employment to some or all of them; and

g) a "DIP Financing Cash Reserve" fund estimated in the amount of US$3.1 million is to be established to pay certain post-filing obligations that will be outstanding as of the closing date, including employee wages and amounts due to suppliers and contractors for the supply of goods and services. Any funds remaining in the DIP Financing Cash Reserve after these payables have been satisfied shall be returned to WBVG.

21 The Agreement is still conditional in that it is subject to approval by both this Court and the U.S. court. Further conditions relate to obtaining an assignment of certain critical contracts, such as bonding agreements and other arrangements with the Nevada environmental regulators.

Statutory Framework

22 The authority of this Court to approve the sale is found in s. 36 of the *CCAA*. Section 36(3) of the *CCAA* sets out a list of non-exhaustive factors to be considered by the court:

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

23 A more general test has been restated, as discerned from the above factors, namely to consider the transaction as a whole and decide "whether or not the sale is appropriate, fair and reasonable": *White Birch Paper Holding Co., Re*, 2010 QCCS 4915 (C.S. Que.) at para. 49, (2010), 72 C.B.R. (5th) 49 (C.S. Que.), leave to appeal ref'd 2010 QCCA 1950 (C.A. Que.).

24 In addition, the principles identified in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6 are helpful in considering whether to approve a sale:

1. Whether the party conducting the sale made sufficient efforts to obtain the best price and did not act improvidently;
2. The interests of all parties;
3. The efficacy and integrity of the process by which offers were obtained; and
4. Whether there has been any unfairness in the sales process.

25 Various authorities support that, in considering the test under s. 36 of the *CCAA*, the principles of *Soundair* remain relevant and indeed overlap some of the specific factors set out in s. 36(3): *Canwest Publishing Inc./Publications Canwest Inc., Re*, 2010 ONSC 2870 (Ont. S.C.J. [Commercial List]) at para. 13; *White Birch Paper Holding Co., Re* at para. 50; *PCAS Patient Care Automation Services Inc., Re*, 2012 ONSC 3367 (Ont. S.C.J. [Commercial List]) at para. 54.

Discussion

(a) CCAA Factors

26 I am more than satisfied that the factors set out in s. 36(3) of the *CCAA* support the granting of the order approving the Agreement with WBVG.

27 I have already outlined the extensive process by which Veris Gold's assets were exposed to the market by Moelis in accordance with the court-approved sales process. That process, which took place over many months, unfortunately did not yield any realistic offers, despite an extension of the bid deadline.

28 The Monitor did receive a non-binding expression of interest from a party on May 8, 2015. Some of the persons behind this expression of interest had been involved in the unsuccessful sales process. However, despite the purchase price being slightly above the WBox borrowings (US$20 million), the Monitor's view was that it would not be pursued by reason of the numerous significant conditions and the reality that the delay in pursuing any offer would place Veris Gold's operations at significant risk given its precarious financial (cash) condition. On May 13, 2015, this indicative offer was increased to US$23 million but that increase did not elicit any support from either WBox or the Monitor.

29 In response to the concerns of WBox and the Monitor, this party submitted a non-binding indicative offer on May 22, 2015 with additional materials indicating that financing had been tentatively obtained. Even so, the Monitor supported WBox's continued position that this offer should not be pursued further given the risk and delay in doing so. DB did not challenge this assessment.

30 It should be noted that, with the possible exception of DB, no one was more interested in obtaining an offer to purchase the assets than WBox in terms of seeing some recovery under the interim financing. In large part, WBVG's offer is made somewhat reluctantly by WBox as the only real alternative to obtaining some value from the assets secured under its court-ordered charge.

TAB 4

2009 QCCS 6460
Cour supérieure du Québec

AbitibiBowater inc., Re

2009 CarswellQue 14189, 2009 QCCS 6460, EYB 2009-171229

In the matter of the plan of compromise or arrangement of: AbitibiBowater Inc.; Abitibi-Consolidated Inc., Bowater Canadian Holdings Inc., The other Petitioners listed on Schedules "A", "B" and "C", Petitioners, and Ernst & Young Inc., Monitor, v. The ad hoc Committee of the Senior Secured Nnoteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Notes, Respondents, and DDJ Capital Management, LLC, Newstart Factors, inc., Stichting Pensionenfonds ABP, The Foothill Group, Inc. and Foothill CLO I, Ltd., Intervening Parties

Gascon J.C.S

Heard: 25 september 2009 - 29 september 2009
Judgment: 29 september 2009
Docket: C.S. Qué. Montréal 500-11-036133-094

Counsel: *Me Sean Dunphy, Me Guy P. Martel, Me Mélanie Béland, Me Joseph Reynaud*, for Petitioners
Me Avram Fishman, Me Gilles Paquin, for the Monitor
Me Robert Thornton, for the Monitor
Me Patrice Benoît, for Investissement Québec
Me Alain Riendeau, Attorneys for Silver Oak Capital LLC et al., DDJ Capital Management, LLC et al.
Me Gerald F. Kandestin, for Alcoa
Me Frederick L. Myers, Me Robert J. Chadwick, for the Ad hoc Committee of Bondholders
Me Marc Duchesne, Me François D. Gagnon, Me Vanessa Jodoin, Me Michael J. MacNaughton, for the Ad hoc Committee of the Senior Secured Noteholders and U.S. Bank National Association, Indenture Trustee for the Senior Secured Noteholders
Me Christian Roy, for Hydro-Québec

Subject: Insolvency

Gascon J.C.S:

CORRECTED JUDGMENT OCTOBER 6, 2009 ON AMENDED MOTION FOR THE ISSUANCE OF AN ORDER AUTHORIZING THE SALE OF PETITIONER ABITIBI-CONSOLIDATED COMPANY OF CANADA'S INDIRECT INTEREST IN THE MCCORMICK HYDROELECTRIC FACILITY (#233)

THE MOTION AT ISSUE

1 On April 17, 2009, the Court issued an order (the « *Initial Order* ») pursuant to the CCAA[1] in respect of (i) Abitibi-Consolidated Inc. (»*ACI* ») and subsidiaries thereof (collectively, the « *Abitibi Petitioners* »), (ii) Bowater Canadian Holdings Inc. and subsidiaries thereof (collectively, the « *Bowater Petitioners* ») and (iii) certain partnerships[2].

2 By virtue of this Initial Order, Ernst & Young Inc. ("*EYI*") was appointed as monitor of the Petitioners (the "Monitor"). A stay of proceedings in favour of the Petitioners was also granted until May 14, 2009 (the "Stay Period"). On May 14, 2009, it was extended until September 4, 2009 (the "First Stay Extension Order"), and thereafter, until December 15, 2009 (the "Second Stay Extension Order").

3 In the context of these CCAA proceedings, the Petitioners now seek, by their Amended Motion, to implement certain transactions designed to transfer the indirect interest of Abitibi-Consolidated Company of Canada (»*ACCC* »), a subsidiary of ACI, in the business of Manicouagan Power Company (»*MPCo* ») to Hydro-Québec or one of its wholly-owned subsidiary (collectively, « *HQ* »).

4 ACCC holds a 60% equity interest in MPCo (the « *ACCC Interest* »), while Alcoa Canada Ltd. (»*Alcoa Canada* ») holds the remaining 40% equity interest (the « *Alcoa Interest* »).

5 At this stage, the Petitioners request this Court more particularly to:

a) authorize ACCC to sell the 60% interest it indirectly holds in the McCormick hydroelectric facility (the "**McCormick Hydroelectric Facility**") owned and operated by MPCo;

b) approve the terms and conditions of the Implementation Agreement and the exhibits thereto (the "**Implementation Agreement**") between ACI, ACCC, MPCo, Alcoa Canada and Alcoa Ltd. (collectively, Alcoa Canada and Alcoa Ltd. are referred to herein as "**Alcoa**"), to which HQ has intervened;

c) authorize and direct ACI and ACCC to implement and complete the transactions and steps (the "**Proposed Transactions**") as contemplated in the Implementation Agreement and as outlined in Exhibit A to the Implementation Agreement (the "**Step Plan**"), with such alterations, amendments, deletions or additions as the parties agree, with the consent of the Monitor, and to perform the obligations in the Implementation Agreement;

d) declare that (i) the proceeds from the Proposed Transactions, net of certain payments, holdbacks, reserves and deductions, and (ii) the shares of ULC (as defined in the Amended Motion), shall constitute the proceeds of the disposition of ACCC's MPCo shares (collectively, the "**MPCo Share Proceeds**");

e) declare that the MPCo Share Proceeds will be subject to a replacement charge (the "**MPCo Noteholder Charge**") in favour of US Bank, National Association as Indenture Trustee and Collateral Trustee (the "**Trustee**") for the benefit of the holders (the "**Senior Secured Noteholders**") of the 13.75% senior secured notes due April 1, 2011 (the "**Secured Notes**"), with the same rank and priority as the security held by the Trustee in respect of the shares of MPCo held by ACCC.

6 Initially, the Senior Secured Noteholders had filed a written Contestation to the Amended Motion, which the Intervening Parties supported in part. The Senior Secured Noteholders were in disagreement with the way in which they were being treated in the contemplated transaction.

7 The Senior Secured Noteholders have advanced approximately US$413 million to ACCC in April 2008, under the terms of a Senior Secured Loan. With accrued interest, the approximate amount presently owing in respect of this Senior Secured Loan is in excess of US$450 million, and interest continues to accrue on the Notes monthly.

8 To secure the obligations of ACCC, ACCC, ACI and other guarantors granted security to the Trustee, which includes a Senior Secured Notes Hypothec. The Senior Secured Notes' Hypothec provides specific rights to the Senior Secured Noteholders with respect to the equity interest detained by ACCC in MPCo that is at issue here.

9 However, during the course of the hearing, the Senior Secured Noteholders filed a Reamended Contestation that included numerous alternative conclusions that were acceptable to them. Since most of these alternative conclusions mirrored the conclusions of the Amended Motion and the suggestions contained in the Monitor Sixteenth Report, these were, in the end, agreed upon as acceptable by the Petitioners, the Monitor and the Intervening Parties.

g) the granting of a replacement charge (the « **MPCo Noteholder Charge** ») in favour of the Senior Secured Noteholders with the same rank and priority as the existing security held in respect of the shares of MPCo held by ACCC over: (i) the net proceeds from the Proposed Transactions; and (ii) the shares of ULC;

h) the granting of a guarantee in favour of the Senior Secured Noteholders by ULC (the « **ULC Subordinated Guarantee** »);

i) an order (the « Subrogation **Order** ») which provides that the Senior Secured Noteholders shall be subrogated in the ACI DIP Charge in accordance with paragraph 61.10 of the Initial Order to the extent that any payment from the transaction proceeds is made to the ACI DIP Lender under the ACI DIP Agreement;

j) an order (the « **Net** Cash **Proceeds Order** ») which provides that the cash component of the MPCo Share Proceeds and the ULC Reserve shall be paid to and be held by the Monitor; and

k) an order (the « **ULC** Borrowing **Order** ») which provides that the Abitibi Petitioners may not borrow any portion of the ULC Reserve except on terms and conditions permitted under the Implementation Agreement, including as to amount, security, priority, interest rates, fees, default, reporting and repayment, and except upon approval of the Court made on notice to the Trustee.

35 The parties to the Proposed Transactions have agreed to use reasonable commercial efforts to finalize all of the legal documentation to implement the Proposed Transactions by September 30, 2009 and to close the Proposed Transactions by October 15, 2009. If the Proposed Transactions have not closed by December 31, 2009, any party may terminate any of its obligations to complete the Proposed Transactions.

ANALYSIS AND DISCUSSION

36 The Court has jurisdiction to approve a sale of assets in the course of CCAA proceedings, notably when such a sale of assets is in the best interest of the stakeholders generally[3].

37 In determining whether to authorize a sale of assets under the CCAA, the Court should consider, amongst others, the following key factors:

- have sufficient efforts to get the best price been made and have the parties acted providently;
- the efficacy and integrity of the process followed;
- the interests of the parties; and
- whether any unfairness resulted from the working out process.

38 These principles were enunciated in *Royal Bank v. Soundair Corp*.4. They are equally applicable in a CCAA sale situation5.

39 In this case, the Court considers that all these factors are satisfied.

40 First, the Petitioners' sales process for the ACCC Interest was proper even if limited to only one potential purchaser. There were valid and compelling reasons for the narrow focus of the sales process. Suffice to highlight in that regard the unique characteristics of the asset, the market in which the asset is situated and the external factors that most likely deterred or failed to attract potential purchasers.

41 The regulatory environment, the restrictions on pricing for the sale of electricity and the significant risk that the expiry of the MPCo Water Rights could disrupt the power production at MPCo indefinitely easily explain why the market for the ACCC Interest was severely limited.

42 The Petitioners have acted in good faith and with due diligence in their efforts to sell the ACCC Interest.

43 Second, even though the sale of the ACCC Interest was not widely canvassed in the market, in order to assess the reasonableness of the Purchase Price contemplated in the Proposed Transactions, the Monitor performed certain financial analyses.

44 Based on the compiled trading multiples, the review of transaction multiples and the discounted cash-flows analysis that he made, the Monitor was of the view that a Purchase Price of CDN$615 million for the ACCC Interest was fair and reasonable based on the assumptions, forecasts and other financial information that he considered.

45 The Proposed Transactions will generate estimated net proceeds before holdbacks and reserves of approximately CDN$547.9 million, of which up to CDN$97.2 million will be used to repay the ACI DIP Facility.

46 Third, the evidence indicates that the sale is warranted at this time because the Petitioners need cash to repay the ACI DIP Facility in accordance with the ACI DIP Agreement and to continue and implement their restructuring. Moreover, the projected costs of holding onto MPCo are too high, as the renewal of the water rights expiring in 2011 would require important infrastructure investments.

47 From that standpoint, the sale will benefit the whole economic community because it will allow the Petitioners to monetize certain non-liquid assets, use net cash proceeds to repay certain secured creditors (including the Senior Secured Noteholders) and secure cash to fund their ongoing restructuring effort, for the benefit of all stakeholders.

48 In fact, it is fair to say there may well be material prejudice to the Petitioners' stakeholders if the transaction does not proceed because the value of MPCo's assets would likely be far less in a liquidation scenario than in the proposed going concern sale.

49 In addition, despite the fact that ACCC will have to purchase electricity at a higher price as a result of the transaction, the Petitioners are of the view that the Baie-Comeau Mill will remain competitive.

50 Fourth, the MPCo sale and the Proposed Transactions form part of the Petitioners' continuing objective and strategy to reduce costs and improve profitability. The ACCC Interest is not required to continue the operations of the Abitibi Petitioners, nor is it vital for the Petitioners to retain it to successfully restructure their business.

51 Fifth, the Amended Motion provide to the Senior Secured Noteholders assurances that prove, in the end, to be satisfactory to safeguard their rights and protect the value of their security.

52 Finally, even though it is highly unusual in a CCAA proceeding to have significant levels of pre-filing obligations satisfied in full other than through a plan of arrangement as it is the case here with the HQ pre-filing claims, the Court finds that the unique situation at hand, coupled with the importance of the sale in the present restructuring, justify adopting a flexible approach to the issue.

53 The payment of these intercompany payables was imposed as an essential condition by HQ in order to enter into the MPCo transaction. Furthermore, this condition was negotiated prior to the CCAA proceedings, when the Purchase Price agreed upon was arrived at. This price remains the same even today.

54 While it is important to maintain a fair and delicate balance between the positions of all stakeholders in a CCAA restructuring, equitable treatment does not entail inflexibility at all costs. Here, it is clear that the chances of a successful restructuring are enhanced considerably by the Proposed Transactions. From that perspective, there is a definite benefit to all stakeholders by the approval of the Implementation Agreement.

55 To some extent, the situation bears some analogy with that of a critical vendor or key supplier. This is, no doubt, a critical asset sale with the only available purchaser in the market. Having to concede the payment of these HQ claims may not be the perfect outcome, but it remains, all things considered, an acceptable one under the circumstances.

56 Indeed, although this aspect of the Proposed Transactions is unusual, the Monitor notes, rightly so, that HQ could have achieved the same net economic terms had it simply required, in order to complete the transaction, a lower Purchase Price on

account of all pre-transaction outstanding liabilities, including the pre-filing liabilities stayed as a result of the filing by the Petitioners.

57 Furthermore, the Monitor notes as well that, to the extent ACCC pays a liability on behalf of BCFPI (approximately CDN$9 million), ACCC will benefit from the intercompany charge described in the Initial Order.

58 All in all, the completion of the Proposed Transactions will both materially advance the restructuring of the Petitioners and benefit stakeholders, while the failure of the Proposed Transactions would greatly complicate the restructuring if not completely frustrate it.

59 The balance of interests clearly favours approval. The Monitor supports and recommends the approval sought. The recommendation of the Monitor, a court-appointed officer experienced in the insolvency field, carries great weight with the Court in any approval process. Absent some compelling, exceptional factor to the contrary, a Court should accept an applicant's proposed sale process where it is recommended by the Monitor and supported by the stakeholders[6].

60 In view of the urgency in closing the Proposed Transactions rapidly, and to take away any uncertainty in a context where, after much discussions and compromises, the conclusions sought are acceptable to all, the Court is satisfied that provisional execution of this Judgment should be ordered.

FOR THESE REASONS, THE COURT:

61 *GRANTS* the Petitioners' *Amended Motion for the Issuance of an Order Authorizing the Sale of Petitioners' Interests in Manicouagan Power Company* (the « *Motion* »).

62 *EXEMPTS*, if applicable, the Petitioners from having to serve the Motion and from any notice or delay of presentation.

63 *DECLARES* that, unless otherwise provided, undefined capitalized terms and expressions used herein shall have the respective meanings ascribed thereto in the Second Amended Initial Order of the Honourable Mr. Justice Clement Gascon, J.S.C. of the Court dated May 6, 2009, as amended (the « *Initial Order* »).

Approval of Implementation Agreement and Related Transactions

64 *ORDERS* that the terms and conditions of a certain Implementation Agreement (the « *Implementation Agreement*) among Abitibi-Consolidated Inc., Abitibi Consolidated Company of Canada (»*ACCC* »), Manicouagan Power Company (»*MPCo* »), Alcoa Canada Ltée and Alcoa Ltd. (collectively, « *Alcoa* »), to which has intervened HQ Energie Inc., a wholly-owned subsidiary of Hydro-Quebec, a copy of which is filed as Exhibit R-1 to the Motion, are approved.

65 *ORDERS AND DECLARES* that Petitioners are authorized to implement and complete the transactions and steps contemplated in the Implementation Agreement and the Step Plan (Exhibit A thereto) (the « *Proposed Transactions* ») with such non-material alterations, amendments, deletions or additions as the parties thereto may agree to with the consent of the Monitor, and to perform the obligations contained in the Implementation Agreement.

66 *ORDERS* that in completing the Proposed Transactions, subject to the terms and conditions of the Implementation Agreement, the Petitioners are authorized:

a) to execute the agreements and to execute and deliver any documents and assurances governing or giving effect to the Implementation Agreement (including, without limitation, the directions of payment contemplated therein) as the Petitioners, in their discretion, may deem to be reasonably necessary or advisable to conclude the Proposed Transactions, including, without limitation, the execution of such deeds, contracts or documents, as may be contemplated in the Implementation Agreement and all such deeds, contracts or documents are hereby ratified, approved and confirmed (collectively with the Implementation Agreement, the « **Transaction Documents** »); and

b) to take such steps as are, in the opinion of the Petitioners, necessary or incidental to the performance of their

TAB 5

Alberta Rules
Alta. Reg. 124/2010 — Alberta Rules of Court
Part 6 — Resolving Issues and Preserving Rights
Division 4 — Restriction on Media Reporting and Public Access to Court Proceedings

Most Recently Cited in: Feuerhelm v. Alberta (Justice and Attorney General), 2017 ABQB 709, 2017 CarswellAlta 2506, 144 W.C.B. (2d) 164, [2018] A.W.L.D. 713 | (Alta. Q.B., Nov 27, 2017)

Alta. Reg. 124/2010, s. 6.28

s 6.28 Application of this Division

Currency

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

(a) to ban publication of court proceedings,

(b) to seal or partially seal a court file,

(c) permitting a person to give evidence in a way that prevents that person or another person from being identified,

(d) for a hearing from which the public is excluded, or

(e) for use of a pseudonym.

Currency
Alberta Current to Gazette Vol. 114:9 (May 15, 2018)

TAB 6

Most Negative Treatment: Distinguished
Most Recent Distinguished: Canada (Procureur général) c. Contrevenant No. 10 | 2015 CAF 155, 2015 FCA 155, 2015 CarswellNat 2920, 2015 CarswellNat 4847, 476 N.R. 142, 123 W.C.B. (2d) 413, 256 A.C.W.S. (3d) 759, [2015] A.C.F. No. 873 | (F.C.A., Jun 30, 2015)

2002 SCC 41, 2002 CSC 41
Supreme Court of Canada

Sierra Club of Canada v. Canada (Minister of Finance)

2002 CarswellNat 822, 2002 CarswellNat 823, 2002 SCC 41, 2002 CSC 41, [2002] 2 S.C.R. 522, [2002] S.C.J. No. 42, 113 A.C.W.S. (3d) 36, 18 C.P.R. (4th) 1, 20 C.P.C. (5th) 1, 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 287 N.R. 203, 40 Admin. L.R. (3d) 1, 44 C.E.L.R. (N.S.) 161, 93 C.R.R. (2d) 219, J.E. 2002-803, REJB 2002-30902

Atomic Energy of Canada Limited, Appellant v. Sierra Club of Canada, Respondent and The Minister of Finance of Canada, the Minister of Foreign Affairs of Canada, the Minister of International Trade of Canada and the Attorney General of Canada, Respondents

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

Heard: November 6, 2001
Judgment: April 26, 2002
Docket: 28020

Proceedings: reversing (2000), 2000 CarswellNat 970, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note), 2000 CarswellNat 3271, [2000] F.C.J. No. 732 (Fed. C.A.); affirming (1999), 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283, [1999] F.C.J. No. 1633 (Fed. T.D.)

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant
Timothy J. Howard and *Franklin S. Gertler*, for respondent Sierra Club of Canada
Graham Garton, Q.C., and *J. Sanderson Graham*, for respondents Minister of Finance of Canada, Minister of Foreign Affairs of Canada, Minister of International Trade of Canada, and Attorney General of Canada

Subject: Intellectual Property; Property; Civil Practice and Procedure; Evidence; Environmental

Related Abridgment Classifications

Civil practice and procedure
XII Discovery
XII.2 Discovery of documents
XII.2.h Privileged document
XII.2.h.xiii Miscellaneous

Civil practice and procedure
XII Discovery
XII.4 Examination for discovery
XII.4.h Range of examination
XII.4.h.ix Privilege

XII.4.h.ix.F Miscellaneous

Evidence
VII Documentary evidence
VII.5 Privilege as to documents
VII.5.d Crown privilege

Headnote

Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges
Confidentiality order was necessary in this case because disclosure of confidential documents would impose serious risk on important commercial interest of Crown corporation and there were no reasonable alternative measures to granting of order — Confidentiality order would have substantial salutary effects on Crown corporation's right to fair trial and on freedom of expression — Deleterious effects of confidentiality order on open court principle and freedom of expression would be minimal — Salutary effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — Federal Court Rules, 1998, SOR/98-106, R. 151, 312.

Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité
Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire — Confidentialité — Divers types de confidentialité

Ordonnance de confidentialité était nécessaire parce que la divulgation des documents confidentiels menacerait gravement l'intérêt commercial important de la société d'État et parce qu'il n'y avait aucune autre option raisonnable que celle d'accorder l'ordonnance — Ordonnance de confidentialité aurait des effets bénéfiques considérables sur le droit de la société d'État à un procès équitable et à la liberté d'expression — Ordonnance de confidentialité n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et sur la liberté d'expression — Effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables — Loi canadienne sur l'évaluation environnementale, L.C. 1992, c. 37, art. 5(1)b) — Règles de la Cour fédérale, 1998, DORS/98-106, r. 151, 312.

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

The trial judge refused to grant the order and ordered the Crown corporation to file the documents in their current form, or in an edited version if it chose to do so. The Crown corporation appealed under R. 151 of the *Federal Court Rules, 1998* and the environmental organization cross-appealed under R. 312. The majority of the Federal Court of Appeal dismissed the appeal and the cross-appeal. The confidentiality order would have been granted by the dissenting judge. The Crown corporation appealed.

Held: The appeal was allowed.

Publication bans and confidentiality orders, in the context of judicial proceedings, are similar. The analytical approach to the exercise of discretion under R. 151 should echo the underlying principles set out in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). A confidentiality order under R. 151 should be granted in only two circumstances, when an order is needed to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk, and when the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

The alternatives to the confidentiality order suggested by the Trial Division and Court of Appeal were problematic. Expunging the documents would be a virtually unworkable and ineffective solution. Providing summaries was not a reasonable alternative measure to having the underlying documents available to the parties. The confidentiality order was necessary in that disclosure of the documents would impose a serious risk on an important commercial interest of the Crown corporation, and there were no reasonable alternative measures to granting the order.

The confidentiality order would have substantial salutary effects on the Crown corporation's right to a fair trial and on freedom of expression. The deleterious effects of the confidentiality order on the open court principle and freedom of expression would be minimal. If the order was not granted and in the course of the judicial review application the Crown corporation was not required to mount a defence under the *Canadian Environmental Assessment Act*, it was possible that the Crown corporation would suffer the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. The salutary effects of the order outweighed the deleterious effects.

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

31 Robertson J.A. stated that, although the principle of open justice is a reflection of the basic democratic value of accountability in the exercise of judicial power, in his view, the principle that justice itself must be secured is paramount. He concluded that justice as an overarching principle means that exceptions occasionally must be made to rules or principles.

32 He observed that, in the area of commercial law, when the information sought to be protected concerns "trade secrets," this information will not be disclosed during a trial if to do so would destroy the owner's proprietary rights and expose him or her to irreparable harm in the form of financial loss. Although the case before him did not involve a trade secret, he nevertheless held that the same treatment could be extended to commercial or scientific information which was acquired on a confidential basis and attached the following criteria as conditions precedent to the issuance of a confidentiality order (at para. 13):

> (1) the information is of a confidential nature as opposed to facts which one would like to keep confidential; (2) the information for which confidentiality is sought is not already in the public domain; (3) on a balance of probabilities the party seeking the confidentiality order would suffer irreparable harm if the information were made public; (4) the information is relevant to the legal issues raised in the case; (5) correlatively, the information is "necessary" to the resolution of those issues; (6) the granting of a confidentiality order does not unduly prejudice the opposing party; and (7) the public interest in open court proceedings does not override the private interests of the party seeking the confidentiality order. The onus in establishing that criteria one to six are met is on the party seeking the confidentiality order. Under the seventh criterion, it is for the opposing party to show that a *prima facie* right to a protective order has been overtaken by the need to preserve the openness of the court proceedings. In addressing these criteria one must bear in mind two of the threads woven into the fabric of the principle of open justice: the search for truth and the preservation of the rule of law. As stated at the outset, I do not believe that the perceived degree of public importance of a case is a relevant consideration.

33 In applying these criteria to the circumstances of the case, Robertson J.A. concluded that the confidentiality order should be granted. In his view, the public interest in open court proceedings did not override the interests of AECL in maintaining the confidentiality of these highly technical documents.

34 Robertson J.A. also considered the public interest in the need to ensure that site-plans for nuclear installations were not, for example, posted on a web-site. He concluded that a confidentiality order would not undermine the two primary objectives underlying the principle of open justice: truth and the rule of law. As such, he would have allowed the appeal and dismissed the cross-appeal.

V. Issues

35

> A. What is the proper analytical approach to be applied to the exercise of judicial discretion where a litigant seeks a confidentiality order under R. 151 of the *Federal Court Rules, 1998*?
>
> B. Should the confidentiality order be granted in this case?

VI. Analysis

A. The Analytical Approach to the Granting of a Confidentiality Order

(1) The General Framework: Herein the Dagenais Principles

36 The link between openness in judicial proceedings and freedom of expression has been firmly established by this Court. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480 (S.C.C.) [hereinafter *New Brunswick*], at para. 23, La Forest J. expressed the relationship as follows:

> The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place.

Under the order sought, public access and public scrutiny of the Confidential Documents would be restricted; this would clearly infringe the public's freedom of expression guarantee.

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order should begin with the principles set out by this Court in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Although that case dealt with the common law jurisdiction of the court to order a publication ban in the criminal law context, there are strong similarities between publication bans and confidentiality orders in the context of judicial proceedings. In both cases a restriction on freedom of expression is sought in order to preserve or promote an interest engaged by those proceedings. As such, the fundamental question for a court to consider in an application for a publication ban or a confidentiality order is whether, in the circumstances, the right to freedom of expression should be compromised.

38 Although in each case freedom of expression will be engaged in a different context, the *Dagenais* framework utilizes overarching *Canadian Charter of Rights and Freedoms* principles in order to balance freedom of expression with other rights and interests, and thus can be adapted and applied to various circumstances. As a result, the analytical approach to the exercise of discretion under R. 151 should echo the underlying principles laid out in *Dagenais, supra*, although it must be tailored to the specific rights and interests engaged in this case.

39 *Dagenais, supra,* dealt with an application by four accused persons under the court's common law jurisdiction requesting an order prohibiting the broadcast of a television programme dealing with the physical and sexual abuse of young boys at religious institutions. The applicants argued that because the factual circumstances of the programme were very similar to the facts at issue in their trials, the ban was necessary to preserve the accuseds' right to a fair trial.

40 Lamer C.J. found that the common law discretion to order a publication ban must be exercised within the boundaries set by the principles of the *Charter*. Since publication bans necessarily curtail the freedom of expression of third parties, he adapted the pre-*Charter* common law rule such that it balanced the right to freedom of expression with the right to a fair trial of the accused in a way which reflected the substance of the test from *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). At p. 878 of *Dagenais,* Lamer C.J. set out his reformulated test:

> A publication ban should only be ordered when:
>
>> (a) Such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>>
>> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban. [Emphasis in original.]

41 In *New Brunswick, supra,* this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case

dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

42 La Forest J. found that s. 486(1) was a restriction on the s. 2(b) right to freedom of expression in that it provided a "discretionary bar on public and media access to the courts": *New Brunswick*, *supra*, at para. 33; however, he found this infringement to be justified under s. 1 provided that the discretion was exercised in accordance with the *Charter*. Thus, the approach taken by La Forest J. at para. 69 to the exercise of discretion under s. 486(1) of the *Criminal Code*, closely mirrors the *Dagenais* common law test:

> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives available;
>
> (b) the judge must consider whether the order is limited as much as possible; and
>
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.

In applying this test to the facts of the case, La Forest J. found that the evidence of the potential undue hardship consisted mainly in the Crown's submission that the evidence was of a "delicate nature" and that this was insufficient to override the infringement on freedom of expression.

43 This Court has recently revisited the granting of a publication ban under the court's common law jurisdiction in *R. v. Mentuck*, 2001 SCC 76 (S.C.C.), and its companion case *R. v. E. (O.N.)*, 2001 SCC 77 (S.C.C.). In *Mentuck*, the Crown moved for a publication ban to protect the identity of undercover police officers and operational methods employed by the officers in their investigation of the accused. The accused opposed the motion as an infringement of his right to a fair and public hearing under s. 11(d) of the *Charter*. The order was also opposed by two intervening newspapers as an infringement of their right to freedom of expression.

44 The Court noted that, while *Dagenais* dealt with the balancing of freedom of expression on the one hand, and the right to a fair trial of the accused on the other, in the case before it, both the right of the accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

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

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

public trial, and the efficacy of the administration of justice.

46 The Court emphasized that under the first branch of the test, three important elements were subsumed under the "necessity" branch. First, the risk in question must be a serious risk well-grounded in the evidence. Second, the phrase "proper administration of justice" must be carefully interpreted so as not to allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

47 At para. 31, the Court also made the important observation that the proper administration of justice will not necessarily involve *Charter* rights, and that the ability to invoke the *Charter* is not a necessary condition for a publication ban to be granted:

> The [common law publication ban] rule can accommodate orders that must occasionally be made in the interests of the administration of justice, which encompass more than fair trial rights. As the test is intended to "reflect . . . the substance of the *Oakes* test", *we cannot require that Charter rights be the only legitimate objective of such orders any more than we require that government action or legislation in violation of the Charter be justified exclusively by the pursuit of another Charter right.* [Emphasis added.]

The Court also anticipated that, in appropriate circumstances, the *Dagenais* framework could be expanded even further in order to address requests for publication bans where interests other than the administration of justice were involved.

48 *Mentuck* is illustrative of the flexibility of the *Dagenais* approach. Since its basic purpose is to ensure that the judicial discretion to deny public access to the courts is exercised in accordance with *Charter* principles, in my view, the *Dagenais* model can and should be adapted to the situation in the case at bar where the central issue is whether judicial discretion should be exercised so as to exclude confidential information from a public proceeding. As in *Dagenais*, *New Brunswick* and *Mentuck*, granting the confidentiality order will have a negative effect on the *Charter* right to freedom of expression, as well as the principle of open and accessible court proceedings, and, as in those cases, courts must ensure that the discretion to grant the order is exercised in accordance with *Charter* principles. However, in order to adapt the test to the context of this case, it is first necessary to determine the particular rights and interests engaged by this application.

(2) The Rights and Interests of the Parties

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

50 Aside from this direct commercial interest, if the confidentiality order is denied, then in order to protect its commercial interests, the appellant will have to withhold the documents. This raises the important matter of the litigation context in which the order is sought. As both the motions judge and the Federal Court of Appeal found that the information contained in the Confidential Documents was relevant to defences available under the CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

TAB 7

2009 CarswellOnt 7952
Ontario Superior Court of Justice [Commercial List]

Look Communications Inc. v. Look Mobile Corp.

2009 CarswellOnt 7952, [2009] O.J. No. 5440, 183 A.C.W.S. (3d) 736

IN THE MATTER OF LOOK COMMUNICATIONS INC. (Applicant) and 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

Newbould J.

Heard: December 17, 2009
Judgment: December 18, 2009
Docket: 08-CL-7877

Counsel: John T. Porter for Look Communications Inc.
Aubrey E. Kauffman for Inukshuk Wireless Partnership

Subject: Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Business associations
VI Changes to corporate status
VI.3 Arrangements and compromises
VI.3.b Under general corporate legislation

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation
Corporation made plan of arrangement under Canada Business Corporations Act — Court approved sale of most of corporation's assets to joint venture — Monitor's first report was ordered sealed until sale was completed — Completion occurred much earlier than expected — Corporation meanwhile was attempting to sell remaining assets and wished to keep earlier bids confidential — Joint venture wanted information to gain advantage in bidding for remaining assets — Corporation brought motion to extend sealing order for six months — Motion granted — Court had jurisdiction under s. 137 of Courts of Justice Act to extend order notwithstanding that plan of arrangement was finalized — Corporation had commercial interest in selling its remaining assets — Extending order would not have substantial detrimental effect on core values of freedom of expression.

Table of Authorities

Cases considered by *Newbould J.*:

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982

CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — considered

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

887574 Ontario Inc. v. Pizza Pizza Ltd. (1994), 35 C.P.C. (3d) 323, 23 B.L.R. (2d) 239, 1994 CarswellOnt 1214 (Ont. Gen. Div. [Commercial List]) — considered

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 192 — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 2(b) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 137 — considered

MOTION by corporation for order extending sealing order made in court approved sale of assets.

***Newbould J.*:**

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 (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.), 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 (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), 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 it 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 *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]), 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* 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 <u>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</u>: *Irwin Toy Ltd. v. Quebec (AttorneyGeneral)*, [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. <u>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.</u> (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.

Motion granted.

End of Document

TAB 8

2014 ABQB 350
Alberta Court of Queen's Bench

Alberta Treasury Branches v. Elaborate Homes Ltd.

2014 CarswellAlta 921, 2014 ABQB 350, [2014] A.W.L.D. 3322, [2014] A.W.L.D. 3353, 14 C.B.R. (6th) 199, 243 A.C.W.S. (3d) 80, 590 A.R. 156

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

Alberta Treasury Branches, Plaintiff and Elaborate Homes Ltd., Elaborate Developments Inc., Manjit (John) Nagra, Jaswinder Nagra, Defendants

K.G. Nielsen J.

Heard: May 14, 2014
Judgment: June 11, 2014*
Docket: Edmonton 1103-02937

Counsel: Robert M. Curtis, Q.C. for Alco Industrial Inc.
Michael J. McCabe, Q.C. for PriceWaterhouseCoopers Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.1 Proceedings against bankrupt
XVI.1.a Before discharge of trustee
XVI.1.a.ii Granting of leave

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.c Duties
VII.6.c.i General principles

Headnote

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave

Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Debtors and creditors — Receivers — Conduct and liability of receiver — Duties — General principles
Company E went into receivership, with P being appointed as receiver — Corporation A held second mortgage on condominium property owned by E, before bankruptcy — Secured creditor held first mortgage on this property — P accepted bid from numbered company, to purchase assets of E — P submitted this bid for court approval, as they were required to do — Approval was given by court — However, A claimed they were not properly notified of this proceeding — A claimed that had they known, they would have raised issue that property was being sold for less than market value, against their interests — A brought motion for leave to file action against P — Motion dismissed — Threshold was low to allow for leave — However, A did not demonstrate that service was improper — Service by e-mail was proper and should have come to attention of A and its principal — It was principal's actions that caused A to be unaware of proceeding, not any misconduct on part of P — P followed necessary steps in sale of assets — P made best efforts to obtain best price, and did not act improvidently — A did not have evidence to show that P acted against its interests in sale of assets — Action would not have sufficient merit to proceed, so not granting leave was appropriate remedy.

Table of Authorities

Cases considered by *K.G. Nielsen J.*:

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2006), 51 C.C.E.L. (3d) 1, 22 C.B.R. (5th) 163, 53 C.C.P.B. 167, [2006] 2 S.C.R. 123, 215 O.A.C. 313, 2006 CarswellOnt 4621, 2006 CarswellOnt 4622, 2006 SCC 35, 351 N.R. 326, (sub nom. *Industrial Wood & Allied Workers of Canada, Local 700 v. GMAC Commercial Credit Corporation)* 2006 C.L.L.C. 220-045, (sub nom. *GMAC Commercial Credit Corp. v. TCT Logistics Inc.)* 271 D.L.R. (4th) 193 (S.C.C.) — followed

Look Communications Inc. v. Look Mobile Corp. (2009), 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) — considered

McCulloch v. Murray (1942), [1942] S.C.R. 141, 1942 CarswellNS 15, [1942] 2 D.L.R. 179 (S.C.C.) — considered

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

RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receiver of) (1988), (sub nom. *Roynat Inc. v. Allan)* 61 Alta. L.R. (2d) 165, (sub nom. *Roynat Inc. v. Allan)* [1988] 6 W.W.R. 156, (sub nom. *RoyNat Inc. v. Omni Drilling Rig Partnership No. 1 (Receivership))* 90 A.R. 173, 1988 CarswellAlta 299, (sub nom. *Roynat Inc. v. Allan)* 69 C.B.R. (N.S.) 245 (Alta. Q.B.) — considered

Scanwood Canada Ltd., Re (2011), 2011 NSSC 189, 2011 CarswellNS 564, 966 A.P.R. 34, 305 N.S.R. (2d) 34, 84 C.B.R. (5th) 57 (N.S. S.C.) — considered

Skyepharma PLC v. Hyal Pharmaceutical Corp. (1999), 1999 CarswellOnt 3641, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 (Ont. S.C.J. [Commercial List]) — followed

Société Telus Communications v. Peracomo Inc. (2014), 369 D.L.R. (4th) 622, 2014 CarswellNat 1118, 2014 CarswellNat 1119, 2014 SCC 29, 2014 CSC 29 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 14.06 [en. 1992, c. 27, s. 9(1)] — considered

s. 81.4(5) [en. 2005, c. 47, s. 67] — considered

s. 81.6(3) [en. 2005, c. 47, s. 67] — considered

s. 243(1) — referred to

s. 244(1) — considered

s. 245 — considered

s. 246 — referred to

Business Corporations Act, R.S.A. 2000, c. B-9
s. 99(a) — referred to

Judicature Act, R.S.A. 2000, c. J-2
s. 13(2) — referred to

Personal Property Security Act, R.S.A. 2000, c. P-7
s. 65(7) — referred to

Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1
Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

R. 9.15 — considered

R. 9.15(1) — considered

R. 9.15(2) — considered

R. 11.21 — considered

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

R. 3 — considered

R. 6(1) — considered

R. 124 — considered

MOTION by corporation for leave to file action against receiver, in bankruptcy matter.

***K.G. Nielsen J.*:**

I. Introduction

account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

43 PWC derived its authority from the Receivership Order which specifically references the *BIA*. Rule 6(1) of the *BIA Rules* requires that every notice or other document pursuant to the *BIA* or the *BIA Rules* be "served, delivered personally or sent by mail, courier, facsimile or electronic transmission". Both the Application and the Sale Order were sent by electronic transmission to an email address provided by Alco. There is nothing in the material before the Court to suggest that service was not effected in compliance with Rule 6(1) of the *BIA Rules*.

44 In contrast, *BIA* Rule 124 provides that a notice pursuant to s. 244(1) of the *BIA* by a secured creditor who intends to enforce a security on all or substantially all property of an insolvent may be "sent, *if agreed to by the parties*, by electronic transmission". Neither s. 245 regarding the initial notice of the receiver, nor general Rule 6(1) imposes a similar requirement.

45 The *Alberta Rules of Court* supplement the *BIA Rules* to the extent that they are not inconsistent with the *BIA* or the *BIA Rules*. Rule 11.21 requires that the recipient has specifically provided an address. Arguably, this is more onerous than Rule 6(1), and therefore inconsistent with it. However, even if Rule 11.21 of the *Alberta Rules of Court* applies, there is nothing in the material before the Court to suggest that the requirements of Rule 11.21 were not met in this case.

46 I also note that if Alco wished to pursue the position that the Sale Order had been obtained without notice to it, it could have availed itself of Rule 9.15 of the *Alberta Rules of Court* which provides a mechanism to seek to vary or discharge a judgment or order on that basis. Such an application must be made within 20 days after the earlier of service of the order on the applicant, or the date the order first came to the applicant's attention.

47 The Sale Order was, of course, also served by email on Alco. Therefore, Alco would argue that the Sale Order was not properly served upon it. However, on the record before me it is clear that Alco was aware of the Sale Order by January 11, 2012 at the latest, when it resisted the apportionment of receivership costs as against the proceeds from the sale of the Condo. Alco took no timely steps to set aside the Sale Order for lack of service upon becoming aware of it.

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 Corp.*, 2009 CarswellOnt 7952, [2009] O.J. No. 5440 (Ont. S.C.J. [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 C.B.R. (3d) 1, [1991] O.J. No. 1137 (Ont. C.A.) at paras 27-29, 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

TAB 9

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
XVII Jurisdiction
  XVII.10 Jurisdiction of court over own process
    XVII.10.e **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.

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 improvidently;

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.

TAB 10

2010 ONSC 1161
Ontario Superior Court of Justice [Commercial List]

Maxtech Manufacturing Inc., Re

2010 CarswellOnt 1072, 2010 ONSC 1161, 185 A.C.W.S. (3d) 22, 64 C.B.R. (5th) 239

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

Morawetz J.

Heard: January 28, 2010
Judgment: February 23, 2010
Docket: 09-CL-8352

Counsel: Alissa Mitchell for Receiver, Tim Gleason
Tim Gleason for 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., 12600976 Ontario Limited

Subject: Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Sale of assets by receiver — Receiver wished to sell assets of insolvent business, and solicited offers — Highest offer was withdrawn before it could be accepted — Receiver negotiated with another offeror and reached agreement better than previous agreement — Offeror of original highest offer submitted another bid, which was not accepted — Receiver brought motion for approval of sale — Motion granted — Sale approved — Cash component of offer was higher, and was payable earlier — Offeror of original highest offer's ability to service debt assumption was suspect — Process was fair — Creditors with first ranking charge over assets at issue approved of sale — No evidence of what bid other offerors wished to make, and

if they could provide deposit interest of guarantor was not prejudiced — Appendices contained confidential information and were sealed.

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

Romspen v. 6176666 Canada Ltee. (2009), 2009 CarswellOnt 7318, 60 C.B.R. (5th) 101 (Ont. S.C.J. [Commercial List]) — referred to

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

MOTION by receiver for approval of sale of assets.

***Morawetz J.*:**

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. [2009 CarswellOnt 7318 (Ont. S.C.J. [Commercial List])] (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 comprises 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 Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) which was later adopted by the Court of Appeal in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.):

> 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 SCC 41 (S.C.C.), 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

