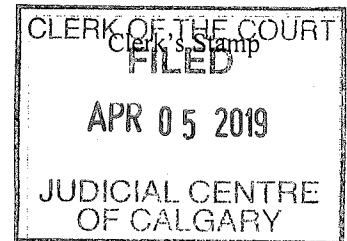


COURT FILE NUMBER 1801-09188
COURT COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE CALGARY
APPLICANTS THIRD EYE CAPITAL CORPORATION
RESPONDENTS RANCH ENERGY CORPORATION,
OPSMOBIL INC., 1734163 ALBERTA INC.,
1859821 ALBERTA INC., OPSMOBIL GROUP
INC., OPSMOBIL CONSTRUCTION INC.,
OPSMOBIL ENERGY SERVICES INC., AIR
DALLAIRE LTD. and K.L. CAPITAL CORP.



DOCUMENT **BENCH BRIEF OF THE
RECEIVER, re: Application for
Approval of Sale and Vesting Order**

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I. INTRODUCTION

1. This Bench Brief is submitted on behalf of Ernst & Young Inc., in its capacity as the court-appointed receiver and manager (the “**Receiver**”) of OpsMobil Inc., OpsMobil Group Inc., OpsMobil Energy Services, OpsMobil Construction Inc., Ranch Energy Corporation, Air Dallaire Ltd., K.L. Capital Corp., 1734163 Alberta Inc. and 1859821 Alberta Inc. (collectively, the “**Debtors**”),¹ in support of its application (the “**Application**”) for approval of the sale and vesting of the Amended AES Transaction and Second AES Transaction (collectively, the “**Transactions**”).²
2. The facts in support of the Receiver’s Application are detailed in the Seventh Report of the Receiver filed on April 2, 2019 (the “**Seventh Report**”), which the Receiver adopts as if reproduced herein.
3. The Receiver submits that the Transactions are commercially reasonable and fair, and satisfy the *Soundair* principles in the unique circumstances of this receivership. As more fully set out in the Seventh Report, while the Receiver has not run a sale process for the assets, it has been involved in extensive negotiations with the proposed purchaser and the fulcrum creditor, who support the Transactions. These negotiations have been conducted against a backdrop in which the proposed purchaser, AES, has been in possession of the majority of the assets and has been operating the business since November, 2017. Specifically, as has been described in earlier applications in this receivership, AES has possessed and operated the majority of the assets since November 2017, pursuant to a transitional services agreement entered between the OpsMobil Debtors and AES dated December 14, 2017.³ In short, the Receiver has grave concerns that unwinding this arrangement and executing any separate sale and solicitation process would cause the estate to incur substantial costs, and delay any recoveries to stakeholders. The costs, delay and uncertainty all militate in favour of approving the Transactions to AES.
4. In its Application, the Receiver also seeks a sealing order of the Confidential Supplement (the “**Confidential Supplement**”) to the Seventh Report, which contains unredacted copies of the Amended AES PSA and Second AES PSA. Disclosure of this information before the Transactions close could undermine any future sale process.

¹ See, Receivership Order pronounced by Justice B.E.C. Romaine on July 19, 2018, as amended on August 7, 2018 (“**Receivership Order**”).

² Unless otherwise indicated, capitalised terms used herein shall have the meanings ascribed to them in the Seventh Report of the Receiver filed on April 2, 2019 (the “**Seventh Report**”).

³ First Report of the Receiver filed on August 8, 2018, para. 25.

II. LEGAL PRINCIPLES

A. Duties of a Receiver

5. A receiver is required to act honestly and in good faith, and to deal with the property of the insolvent person in a commercially reasonable manner.⁴
6. The Alberta Court of Appeal has recently affirmed that a receiver is “expected ‘to realize on the debtor’s assets and pay the security holders and the other creditors who are owed money’” (underlining added).⁵

B. Court Approval of Receivership Sales

7. In considering whether to approve a proposed sale of assets by a receiver, Courts apply the four factors set out in *Royal Bank v Soundair Corp*, as follows:⁶
 - (a) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently;
 - (b) the interests of all parties;
 - (c) the efficacy and integrity of the process by which offers are obtained; and
 - (d) whether there has been unfairness in the working out of the process.
8. Although several of these factors relate to the sale process adopted by the receiver, Alberta Courts have found that *Soundair* does not require a formal court-supervised sale process in every case. Rather, the approval of a sale by a receiver is a “matter of discretion”⁷ and Courts consider the relevant facts and circumstances in a particular case.
9. For example, in *Salima Investments Ltd. v. Bank of Montreal*,⁸ the Alberta Court of Appeal explained that:

It certainly does not follow, for example, that the court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In *Can. Permanent Trust Co. v. King Art Dev. Ltd.*, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a

⁴ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“BIA”), Section 247 [TAB 1].

⁵ *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109 (“*Reid-Built*”), para. 22, in which the Court refers to *Bennett on Receiverships* [TAB 2].

⁶ *Sydco Energy Inc (Re)*, 2018 ABQB 75 (“*Sydco*”) at para. 50 [TAB 3], citing *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205 (CA) (“*Soundair*”) [TAB 4].

⁷ *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47 (“*Snowdon*”), para. 20 [TAB 5].

⁸ *Salima Investments Ltd v Bank of Montreal*, 1985 CarswellAlta 332 (CA) (“*Salima*”) [TAB 6].

commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations.⁹ (Underlining added)

10. Similarly, in *Calpine Canada Energy Ltd., Re*,¹⁰ Justice Romaine considered whether to approve competing transactions in CCAA proceedings, and remarked that “*Soundair* did not suggest that a formal auction process was necessary or advisable in every case.”¹¹ In the particular circumstances of that case, Justice Romaine further remarked that the uniqueness of an asset may bear on the appropriate sales process.¹²
11. In *Sanjel Corp., Re*,¹³ the Court approved an asset sale in CCAA proceedings, even though the marketing process had occurred before the insolvency proceedings and outside of the Court’s oversight. In reaching the conclusion that the sale was reasonable in the circumstances, the Court considered a number of factors including the following which are relevant to the present case:
 - (a) the deteriorating financial condition of the debtor militated against running a further sale process;
 - (b) creditors were consulted and involved in the sale process;
 - (c) while the sale would only provide returns to the debtor’s primary secured, other options were considered, and there was a prospect that “there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them”; and
 - (d) the evidence demonstrated that the consideration was reasonable and fair.¹⁴
12. Other Canadian Courts have also approved asset sales by a receiver, without a court-supervised sale process or formal marketing process at all. Specifically, in *Tools-Plas Systems Inc., Re*,¹⁵ Justice Morawetz approved a “quick flip” sale in a receivership. In that case, RSM Richter was engaged prior to the receivership to assess the financial viability of the debtor. Eventually, a transaction was agreed to, and an application was made to appoint RSM Richter as receiver and to approve the sale. While RSM Richter considered “alternative courses of action”¹⁶ prior to filing the sale approval application, there was no formal marketing process.

⁹ *Ibid*, para. 11.

¹⁰ *Calpine Canada Energy Ltd., Re*, 2007 ABQB 49 (“*Calpine*”) [TAB 7].

¹¹ *Ibid*, para. 29.

¹² *Ibid*, para. 49.

¹³ *Sanjel Corp., Re*, 2016 ABQB 257 (“*Sanjel*”) [TAB 8].

¹⁴ *Ibid*, para. 112.

¹⁵ *Tools-Plas Systems Inc., Re*, 2008 CarswellOnt 6258 (SC) (“*Tools-Plas*”) [TAB 9].

¹⁶ *Ibid*, para. 18.

13. Justice Morawetz nevertheless approved the sale and concluded that “in circumstances of this case I am satisfied that the principles set out in *Soundair* have been followed.”¹⁷ He held:

A ‘quick flip’ transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a ‘quick flip’ transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the ‘quick flip’ transaction would realistically be any different if an extended sales process were followed.¹⁸ (Underlining added)

14. Simply stated, the *Soundair* principles apply to whether the Court should approve an asset sale by a receiver; but, the decision is discretionary¹⁹ and the application of the *Soundair* principles depends on the circumstances of the receivership.²⁰ The appropriate process in a given case may, for example, depend on the uniqueness of the assets,²¹ the deteriorating financial position of the debtor,²² whether there are any realistic alternatives,²³ and whether stakeholders (including secured creditors and employees) are served by the proposed sale.²⁴

III. THE TRANSACTIONS SHOULD BE APPROVED

15. The Receiver considers the Transactions to be commercially reasonable and meet the *Soundair* principles in the unique circumstances of this receivership.
16. First, as set out in the Seventh Report, although the Receiver did not undertake a formal marketing process, the Receiver has participated in numerous phone calls, meetings and other consultations with AES and TEC in arriving at the terms of the Transactions.²⁵ In doing so, the Receiver has undertaken significant effort to obtain the best possible price for the relevant aviation assets. The Court is entitled to rely on informal processes.²⁶
17. In any event, the highly unique circumstances of this receivership, namely that AES has possessed and operated the Initial Aircraft Assets since November, 2017 (and well before the Receivership Order), mean that litigating with AES to achieve the inherently uncertain result of transitioning the Initial Aircraft Assets back to the Receiver for a formal marketing process, would be highly

¹⁷ *Ibid*, para. 20.

¹⁸ *Ibid*, para. 15.

¹⁹ *Snowdon*, *supra* at para. 20 [TAB 5].

²⁰ *Tools-Plas*, *supra* at para 15 [TAB 9].

²¹ *Calpine*, *supra* at para. 49 [TAB 7].

²² *Sanjel*, *supra* at para. 112 [TAB 8].

²³ *Tools-Plas*, *supra* at para. 15 [TAB 9].

²⁴ *Sanjel*, *supra* at para. 112 [TAB 8]; *Tools-Plas*, *supra* at para. 16 [TAB 9].

²⁵ Seventh Report, paras. 7 and 14; *see also*, Fifth Report of the Receiver filed on November 30, 2018, para. 7.

²⁶ *See e.g. Sanjel*, *supra* para. 70 [TAB 8] and *Tools-Plas* *supra* paras. 15-20 [TAB 9].

complicated, time consuming and extremely costly to the estate.²⁷ Thus, the Receiver has determined that the best, most value maximizing transaction, is a sale of the Initial Aircraft Assets and Additional Aviation Property to AES.

18. Second, the Transactions should be approved as the Receiver considers the only other alternative to be a piece-meal liquidation of the relevant aviation assets.²⁸ This would occur only if the Receiver successfully litigates with AES. Specifically, the estate has been operating on a month-to-month loss²⁹ since the Receivership Order, and thus a litigation process followed by a marketing process is not feasible in the circumstances.
19. Third, the Transactions are fully supported by TEC, the Debtors' primary secured creditor, who is the fulcrum creditor.³⁰ As of June 19, 2018, the OpsMobil Debtors owed TEC a total of over \$23 million plus interest, fees and costs.³¹ This amount does not include the approximately \$7 million in borrowings granted by TEC to the receivership estate pursuant to various Receiver's Certificates.³² Nor does it include the debt owed to Ranch. The Transactions also benefit other stakeholders, including by preserving the employment of many AES (formerly OpsMobil) personnel.³³ The interests of employees is an important consideration to be weighed by the Court.³⁴
20. Fourth, the Receiver has independently analyzed the Transactions, and concluded that they are likely the best possible recovery in the circumstances.³⁵ Importantly, "a court will not lightly interfere with the commercial judgment of the receiver"³⁶ and a "sales process is only required to be reasonable, not perfect".³⁷
21. Finally, there is no evidence that the Receiver has acted improvidently or unfairly. Further, the Receiver is unaware of any stakeholders who oppose the Transaction and the Receiver has made specific provision to address potential concerns of the CRA, Element, Tumbleweed and Robinson.³⁸

²⁷ Seventh Report, para. 26.

²⁸ *Ibid*, para. 27.

²⁹ *Ibid*.

³⁰ *Ibid*, para. 29.

³¹ Affidavit of Mark Horrox, sworn June 26, 2018, filed on June 27, 2018, at para 38(a).

³² See, Receiver's Sixth Report filed on February 26, 2019, para. 9.

³³ Seventh Report, para. 29.

³⁴ *Sanjel*, *supra* at para. 112 [TAB 8]; *Tools-Plas*, *supra* at paras. 16-17 [TAB 9].

³⁵ Seventh Report, para. 29.

³⁶ *Soundair*, *supra* para. 46 [TAB 4].

³⁷ *Sanjel*, *supra* para. 80 [TAB 8].

³⁸ Seventh Report, paras. 31-42.

22. In all the circumstances, the Receiver respectfully requests that the Court exercise its discretion to approve the Transactions.

IV. SEALING ORDER FOR THE CONFIDENTIAL SUPPLEMENT

23. The test for granting a sealing order was set out by Justice Iacobucci in *Sierra Club of Canada v Canada (Minister of Finance)*. Specifically, the applicant must demonstrate that:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.³⁹

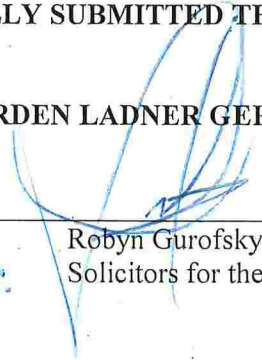
24. Here, the Confidential Supplement contains commercially sensitive information of the Debtors, namely the purchase price, purchase price allocations and deposit amounts. The remainder of the terms of the Transactions have been disclosed. If this information is disseminated, and should the Transactions fail to close, the ability of the Receiver to maximize the value of the Debtors' assets would be placed at risk.⁴⁰
25. The temporary sealing order sought for the Confidential Supplement is the least restrictive and prejudicial alternative to prevent dissemination of the Debtors' commercially sensitive information and it is fair and just in the circumstances to restrict public access to the Confidential Supplement.

V. CONCLUSION

26. For the reasons above, the Receiver respectfully requests that the Honourable Court grant an order approving the Amended AES PSA and Second AES PSA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF APRIL 2019

BORDEN LADNER GERVAIS LLP

Per: 
Solicitors for the Receiver

For:

³⁹ *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*"), para. 53 [TAB 10].

⁴⁰ Seventh Report, paras. 19 and 25.

TABLE OF AUTHORITIES

TAB	DOCUMENT
1.	<i>Bankruptcy and Insolvency Act</i> , RSC 1985, c B-3
2.	<i>Edmonton (City) v Alvarez & Marsal Canada Inc</i> , 2019 ABCA 109
3.	<i>Sydco Energy Inc (Re)</i> , 2018 ABQB 75
4.	<i>Royal Bank v Soundair Corp</i> , 1991 CarswellOnt 205 (CA)
5.	<i>Jaycap Financial Ltd v Snowdon Block Inc</i> , 2019 ABCA 47
6.	<i>Salima Investments Ltd v Bank of Montreal</i> , 1985 CarswellAlta 332 (CA)
7.	<i>Calpine Canada Energy Ltd., Re</i> , 2007 ABQB 49
8.	<i>Sanjel Corp, Re</i> , 2016 ABQB 257
9.	<i>Tools-Plas Systems Inc, Re</i> , 2008 CarswellOnt 6258 (SC)
10.	<i>Sierra Club of Canada v Canada (Minister of Finance)</i> , 2002 SCC 41

TAB 1

Canada Federal Statutes
Bankruptcy and Insolvency Act
Part XI — Secured Creditors and Receivers (ss. 243-252)

R.S.C. 1985, c. B-3, s. 247

s 247. Good faith, etc.

Currency

247. Good faith, etc.

A receiver shall

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

Amendment History

1992, c. 27, s. 89(1)

Currency

Federal English Statutes reflect amendments current to February 28, 2019

Federal English Regulations are current to Gazette Vol. 153:5 (March 6, 2019)

End of Document

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TAB 2

2019 ABCA 109
Alberta Court of Appeal

Edmonton (City) v. Alvarez & Marsal Canada Inc

2019 CarswellAlta 511, 2019 ABCA 109

**City of Edmonton (Respondent / Applicant) and Alvarez & Marsal Canada Inc.,
in its capacity as Court-appointed Receiver of the current and future assets,
undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid
Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary
Ltd, Reid Investments Ltd, and Reid Capital Corp. (Appellants / Defendants)
and Royal Bank of Canada (Not a Party to the Appeal / Plaintiff) and Reid-
Built Homes Ltd and Emilie Reid (Not Parties to the Appeal / Defendants)**

Marina Paperny J.A., Sheila Greckol J.A., and Ritu Khullar J.A.

Heard: February 7, 2019

Judgment: March 25, 2019

Docket: Edmonton Appeal 1803-0050-AC

Proceedings: Reversed, 2018 CarswellAlta 305, 2018 ABQB 124, [2018] A.W.L.D. 1031, [2018] A.W.L.D. 1107, [2018] A.W.L.D. 1030, 289 A.C.W.S. (3d) 16, 72 M.P.L.R. (5th) 55, 65 Alta. L.R. (6th) 230, 57 C.B.R. (6th) 1, [2018] 5 W.W.R. 565 (Alta. Q.B.)

Counsel: H.A. Gorman, Q.C., A.M. Badami, for Appellants
A. Turcza-Karhut, C.N. Androschuk, for Respondent

Appeal from the Order of The Honourable Mr. Justice R.A. Graesser Dated the 21st day of February, 2018 Filed the 11th day of April, 2018 (2018 ABQB 124, Docket: 1703 21274)

Per curiam:

Introduction and Standard of Review

1 The issue on this appeal is whether the chambers judge properly exercised his discretion under s 243(6) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] when he refused to prioritize a receiver's charge for fees and disbursements over a municipality's claim for unpaid property taxes: *Royal Bank of Canada v. Reid-Built Homes Ltd*, 2018 ABQB 124 (Alta. Q.B.) [*Decision*].

2 The exercise of discretion is given deference on appeal unless the judge proceeded arbitrarily or on a wrong principle, or failed to consider or properly apply the applicable test: *Secure 2013 Group Inc. v. Tiger Calcium Services Inc*, 2017 ABCA 316 (Alta. C.A.) at para 34, (2017), 58 Alta. L.R. (6th) 209 (Alta. C.A.).

Background

3 The appellant, Alvarez & Marsal Canada Inc, was the court-appointed receiver (the Receiver) for seven companies, collectively referred to as Reid-Built, a residential home builder. Reid-Built was placed in receivership and the Receiver appointed under the *BIA* by court order on November 2, 2017. The receivership order gives priority to the Receiver's charges over other claims.

4 On November 24, 2017, the Receiver applied for an order granting it the authority to repair, maintain and complete Reid-Built's properties, and a corresponding first priority charge as against each specific property for any expenses incurred (Property Powers Order). Such expenses are included in the Receiver's claim for fees and disbursements (Receiver's Charge). The Receiver's application was heard on November 29, 2017. At the same time, the chambers judge heard applications filed by two secured creditors of Reid-Built, both of which disputed the priority for the Receiver's Charge. Before those applications were disposed of, the respondent Edmonton applied to modify the Property Powers Order, or alternatively for a declaration that its special lien for unpaid property taxes ranks ahead of the Receiver's Charge.

5 The chambers judge dismissed the applications of the secured creditors (that part of his order has not been appealed), but granted Edmonton's application. The Receiver appeals.

Issues on appeal

6 The issue on appeal is whether the chambers judge erred in principle in his approach to the applications before him. The Receiver submits that the chambers judge erred in the exercise of his discretion under s 243(6) by relying on considerations that were incorrect in fact or in law.

7 The Receiver also submits that the chambers judge failed to provide the parties with a proper opportunity to make submissions on the point, thereby breaching the duty of fairness.

8 For the reasons that follow, we have decided that the first ground of appeal must be allowed. The chambers judge improperly exercised his discretion in deciding that the Receiver's Charge ought not to rank ahead of Edmonton's property tax claim. Given our decision on the first issue, it is not necessary for us to consider the procedural fairness issue, and we have not done so.

Analysis

9 Section 243 of the *BIA* deals with the appointment of a receiver by the court on the application of a secured creditor. This appeal concerns the discretion granted the court by s 243(6), which governs the making of orders respecting the payment of the receiver's fees and disbursements and, in particular, gives the court the discretion to grant a super priority to a receiver's claim for fees and disbursements. It provides:

(6) If a receiver is appointed under subsection (1), the court may make any order respecting the payment of fees and disbursements of the receiver that it considers proper, including one that gives the receiver a charge, ranking ahead of any or all of the secured creditors, over all or part of the property of the insolvent person or bankrupt in respect of the receiver's claim for fees or disbursements, but the court may not make the order unless it is satisfied that the secured creditors who would be materially affected by the order were given reasonable notice and an opportunity to make representations.

10 The standard receivership order template provides for such a priority. The intended purpose of the template, which was developed as a joint project of the insolvency bar and bench, is to standardize receivership practice. It has provided guidance for practitioners and the judiciary since its inception. The standard receivership order does not bind the court, but serves as a standard form from which deviations must be blacklined before the court grants the initial receivership order. The receivership order issued in this matter included the following provision with respect to the Receiver's accounts:

Any expenditure or liability which shall properly be made or incurred by the Receiver . . . shall be allowed to it in passing its accounts and shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person (the "Receiver's Charge")

11 Edmonton objected to the Receiver's Charge being granted priority over its claim to unpaid property taxes. It pointed out that s 348 of the *Municipal Government Act*, RSA 2000, c M-26 [MGA], grants to Edmonton a special lien over land and any improvements on it for property tax amounts owing. Section 348 provides:

Tax becomes debt to municipality

348 Taxes due to a municipality

- (a) are an amount owing to the municipality,
- (b) are recoverable as a debt due to the municipality,
- (c) take priority over the claims of every person except the Crown, and
- (d) are a special lien
 - (i) on land and any improvements to the land, if the tax is a property tax, a community revitalization levy, a special tax, a clean energy improvement tax, a local improvement tax or a community aggregate payment levy, or
 - (ii) on goods, if the tax is a business tax, a community revitalization levy, a well drilling equipment tax, a community aggregate payment levy or a property tax imposed in respect of a designated manufactured home in a manufactured home community. [emphasis added]

12 Edmonton argued that its lien for unpaid property taxes should rank ahead of the Receiver's Charge, as Edmonton, whose claim is fully secured and in first position, will not gain any benefit from the receivership. In short, as Edmonton's claim will be paid out in full regardless of the receivership, it should not have to bear the cost of the receivership.

13 In addition to Edmonton's application, the chambers judge had before him two other applications from secured creditors — a mortgagee and a builders' lien claimant. The first, ICI Capital Corporation (ICI), had a first mortgage on certain of the debtor's properties and sought to have the stay lifted so that it could take proceedings to enforce those mortgages. ICI also argued that, as a first mortgagee, it should not yield its priority position to the Receiver, a position similar to that taken by Edmonton. In the absence of evidence of prejudice to ICI, the chambers judge declined to lift the stay, although he gave ICI leave to reapply should circumstances materially change. The other applicant, Standard General Inc (Standard General), a contractor to Reid-Built that had filed builders' liens against certain lands, argued that Alberta's builders' lien legislation establishes its priority position ahead of the Receiver. That argument was dismissed. The chambers judge ultimately determined that it was appropriate for the Receiver's Charge related to the assets in question to take priority over the builders' liens.

14 The chambers judge exercised his discretion to grant the Receiver's Charge priority over the claims of both the mortgagee and builders' lien claimant. Relevant to his consideration was the decision in *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 59 D.L.R. (3d) 492, 9 O.R. (2d) 84 (Ont. C.A.) [*Robert F. Kowal Investments Ltd.*], applied in *Royal Bank v. Vulcan Machinery & Equipment Ltd.*, [1992] 6 W.W.R. 307, 13 C.B.R. (3d) 69 (Alta. Q.B.). *Robert F. Kowal Investments Ltd.* refers to a general rule that secured creditors may not be subject to the charges and expenses of a receivership. This is so because, "the general purpose of a general receivership is to preserve and realize the property for the benefit of creditors in general. No receivership may be necessary to protect or realize the interests of lienholders": *Robert F. Kowal Investments Ltd.*, quoting Ralph Ewing Clark, *Clark On Receivers*, 3rd ed, vol 1, s 22, p 25. There are, however, exceptions to that general rule, three of which were enumerated in *Robert F. Kowal Investments Ltd.*:

1. if a receiver has been appointed at the request or with the consent or approval of the holders of security, the receiver will be given priority over the security holders;

2. if a receiver has been appointed to preserve and realize assets for the benefit of all interested parties, including secured creditors, the receiver will be given priority over the secured creditors for charges and expenses properly incurred; or

3. if the receiver has expended money for the necessary preservation or improvement of the property, the receiver may be given priority for those expenditures over secured creditors.

15 These principles are well accepted and proper considerations for a court in exercising its discretion under s 243(6). The principles are also expressly incorporated in the explanatory notes to the template receivership order, which also states that the order should be modified so as not to provide for priority over a security interest holder if none of the exceptions apply.

16 In his discussion of the applications by ICI and Standard General, the chambers judge made several pertinent observations with respect to the policy considerations relevant to the prioritization of the fees and disbursements of receivers (*Decision* at paras 136-137):

[136] The difficulty with making a determination at the outset of a receivership (even a liquidating receivership) is that the nature and extent of the work necessary to preserve, protect, maintain, and eventually liquidate a particular asset is unknown. I do not see that claimants with a proprietary claim are entitled to a free ride in a receivership, such that they should be responsible for payment of the costs of the receivership as they relate to the claimants' claims and the cost of monetizing the claim. Those costs may include a part of the Receiver's general costs as well as those that can be specifically tied to the specific assets in question.

[137] Up front, it is appropriate to have the Receiver's charges rank ahead of claimants who will benefit from the Receivership, to the extent that they have benefitted from the Receivership. That means that for creditors who may benefit from the Receivership, the super priority is generally appropriate for the Receiver's fees and disbursements, on the expectation that these fees and disbursements will ultimately be fairly apportioned.

17 In making these observations, the chambers judge rightly recognized the modern commercial realities that affect receiverships. The super priority is necessary to protect receivers; without security for their fees and disbursements they would be understandably concerned about taking on receiverships. This is in keeping with the decision in, *CCM Master Qualified Fund Ltd. v. blutip Power Technologies Ltd.*, 2012 ONSC 1750 (Ont. S.C.J. [Commercial List]), where it was noted that in *CCAA* proceedings, "professional services are provided . . . in reliance on super priorities contained in initial orders".¹ We agree with the observation of Brown J at para 22 that:

... comments regarding the need for certainty about the priority of charges for professional fees or borrowings apply, with equal force, to priority charges sought by a receiver pursuant to section 243(6) of the *BIA*. Certainty regarding the priority of administrative and borrowing charges is required as much in a receivership as in proceedings under the *CCAA* . . .

18 The chambers judge also noted that the creditor who brings the application for the receivership should not be left to bear the entire financial burden of the process. Rather, those costs should be shared equitably amongst all the creditors. As was noted in, *JP Morgan Chase Bank N.A. v. UTTC United Tri-Tech Corp.* (2006), 25 C.B.R. (5th) 156 (Ont. S.C.J.) at para 45 (and cited in, *Caisse Desjardins des Bois-Francs v. River Rock Financial Canada Corp.*, 2013 ONSC 6809 (Ont. S.C.J.) at para 22), where a receiver is "appointed for the benefit of interested parties to ensure that all creditors are treated fairly and to ensure a fair process to deal with the assets, there is no valid reason for a secured creditor to avoid paying its fair share of the receivership costs".

19 Finally, the chambers judge noted that "[f]or creditors who have little if anything to benefit from a receivership, or who see their security eroding because of the passage of time or the costs of the receivership, their remedy is to apply to lift the stay" (para 141).

20 The chambers judge reasonably applied these principles in declining to give priority to the claims of ICI and Standard General over the Receiver's Charge. In our view, those observations and policy considerations were equally apposite to the application by Edmonton. However, the chambers judge approached Edmonton's application differently. Having decided that Edmonton's position "may be properly subordinate to the Receiver's fees, disbursements, and borrowings", the chambers judge held that this was not an appropriate case in which to subordinate the municipal tax claims to the costs of the receivership.

21 There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

22 We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money"; Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

23 The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in, *Royal Bank of Canada v. Delta Logistics Transportation Inc.*, 2017 ONSC 368 (Ont. S.C.J.) at para 26:

The whole point of a court-appointed receivership is that one person . . . is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

24 With respect to ICI's claim, the chambers judge held:

I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

25 This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of individual auctions would serve to maximize the value of the properties; rather, it is likely that the opposite is the case.

26 Although the court has discretion under s 243(6) with respect to the priority to be given to receiver's charges, the exercise of discretion must be on a principled basis. For the foregoing reasons, we have concluded that the appeal with respect to Edmonton's application for priority must be allowed. The Receiver has a super priority for its fees and disbursements in accordance with the original receivership order. As was noted by the chambers judge, the amount of those costs to be paid by Edmonton, and the other secured creditors, will ultimately be the subject of an apportionment

exercise. Issues raised by Edmonton in this appeal regarding the extent to which it benefits from the receivership process may be relevant at the apportionment phase.

Footnotes

- 1 *First Leaside Wealth Management Inc., Re*, 2012 ONSC 1299 (Ont. S.C.J. [Commercial List]) at para 51.

TAB 3

2018 ABQB 75
Alberta Court of Queen's Bench

Sydco Energy Inc (Re)

2018 CarswellAlta 157, 2018 ABQB 75, [2018] A.W.L.D. 1029,
289 A.C.W.S. (3d) 13, 57 C.B.R. (6th) 73, 64 Alta. L.R. (6th) 156

In the Matter of the Receivership of Sydco Energy Inc.

MNP Ltd, in its capacity as the Court-appointed Receiver and Manager of Sydco Energy Inc (Applicant)

B.E. Romaine J.

Judgment: January 31, 2018

Docket: Calgary 1701-02520

Counsel: Tom Cumming, Anthony Mersich, for Receiver MNP Ltd.
Patrick Fitzpatrick, for Rothwell Development Corporation
Jeffrey Oliver, for Wormwood Resources
Patricia M. Johnston, Q.C., Keely R. Cameron, for Alberta Energy Regulator
Ryan Algar, for Trican Partnership & Trican Well Service Ltd.
Gregory Plester, for Clear Hills County

B.E. Romaine J.:

I. Introduction

1 In this application, the Receiver of Sydco Energy Inc sought an order approving a sale of assets. The approval and vesting order proposed by the Receiver departed from the usual order of its kind by specifically including certain declarations relating to the Alberta Energy Regulator ("AER") arising from the decisions in *Re Redwater Energy Corporation* and the Receiver's experiences and communications with the AER leading up to the application. I approved the sale of assets, and allowed the order to include the specific provisions sought by the Receiver, given the conduct of the AER leading up to the sale application, the evidence of AER's intentions with respect to the sale and its view of the scope of its regulatory authority. These are my reasons.

II. Facts

2 The history of this receivership is relevant to the issues that were before me.

3 Rothwell Development Corporation is a major shareholder of Sydco Energy Inc, holding, in combination with the principals of Rothwell, about 65% of its shares. It is also Sydco's major secured creditor. As at February 10, 2017, Sydco owed Rothwell in excess of \$15.9 million.

4 In 2016, it had been apparent for some time to Rothwell that Sydco was in financial difficulty. In October 2016, Rothwell engaged James Catherwood and Warren Coles to become employees of Sydco in order to perform an operational review and to determine whether Sydco could be continued as a long-term going concern business. Mr. Catherwood and Mr. Coles had not had any relationship with Sydco prior to this and were not shareholders of Sydco. They were retained because of their knowledge of and experience in the oil and gas industry. In early February 2017, Rothwell, in consultation with its legal and financial advisors, Mr. Catherwood and Mr. Coles, determined that Sydco was no longer viable as a going concern. Rothwell obtained an order putting Sydco into receivership on February 23,

directors, officers, employees, security holders and agents of the debtor company in approving a transfer of a license, the language at the end of section 11(d) allows the AER to do so where the transferee is non-arm's length to any of those parties that are caught by the definition of non-arm's length adopted by the AER.

46 The AER submitted that this case was the type of situation described in the dissent of Martin, J.A. in the *Redwater Appeal Decision*, where she commented on the unfairness of allowing an insolvent entity to preserve any assets and avoid the costs of public obligations. It submitted that "(p)arties should not be permitted to place themselves into insolvency proceedings voluntarily and shed their obligations and then reacquire their assets at the expense of the environment, the public and the orphan fund."

47 The AER also submitted that, by asking the Court to find that the AER does not have the jurisdiction to consider whether the proposed purchaser is arm's length, the Receiver and 203 were attempting to collaterally attack the AER's license eligibility decision regarding 203. It asserted that, if 203 wished to contest the conditions on its approval, its remedy was to avail itself of the appeal mechanisms under the *Responsible Energy Development Act*, SA 2012, c R-17.3.

48 The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

49 It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decisions*) specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

IV. Analysis

A. Approval of the Wormwood Transaction

50 The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) at 6, and endorsed in *Bank of Montreal v. River Rentals Group Ltd.*, 2010 ABCA 16 (Alta. C.A.) at para 12, are as follows:

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

51 The only issue with respect to whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

TAB 4

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.

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:

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

13 I will deal with the two issues separately.

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

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

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

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

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

2. It should consider the interests of all parties.

3. It should consider the efficacy and integrity of the process by which offers are obtained.

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

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

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

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

19 When the receiver got the OEL offer on March 6, 1991, it was over 10 months since it had been charged with the responsibility of selling Air Toronto. Until then, the receiver had not received one offer which it thought was acceptable.

After substantial efforts to sell the airline over that period, I find it difficult to think that the receiver acted improvidently in accepting the only acceptable offer which it had.

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL*. Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer

represented a radical reversal of this position by Air Canada at the eleventh hour. However, it contained a significant number of conditions to closing which were entirely beyond the control of the Receiver. As well, the CCFL offer came less than 24 hours before signing of the agreement with OEL which had been negotiated over a period of months, at great time and expense.

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

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

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

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

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

27 In two judgments, Saunders J. considered the circumstances in which an offer submitted after the receiver had agreed to a sale should be considered by the court. The first is *Re Sellkirk* (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 Sellkirk* (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.), at p. 142, McRae J. expressed a similar view:

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely

TAB 5

2019 ABCA 47
Alberta Court of Appeal

Jaycap Financial Ltd v. Snowdon Block Inc

2019 CarswellAlta 160, 2019 ABCA 47, [2019] A.W.L.D. 951, 301 A.C.W.S. (3d) 475

Jaycap Financial Ltd. (Respondent / Plaintiff) and Snowdon Block Inc., Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation (Appellants / Defendants)

Brian O'Ferrall, Barbara Lea Veldhuis, Ritu Khullar JJA.

Heard: November 7, 2018
Judgment: February 4, 2019
Docket: Calgary Appeal 1701-0314-AC

Counsel: A. Henderson, for Respondent
K.W. Jesse, for Appellants

Per curiam:

Introduction

1 This appeal arises in the context of insolvency proceedings. The guarantors appeal a chambers judge's decision vacating an earlier order and approving an agreement between the receiver and a nominee of the main secured creditor for the purchase of the debtor's assets. These parties had earlier entered into an agreement for the same assets and obtained a court order approving that sale. However, they terminated this agreement after court approval on the basis of a mistake about the purchase price. The parties then entered into a second asset purchase agreement for a lower purchase price, which exposed the guarantors to a significant deficiency judgment. The guarantors (and as discussed below, the court) were provided very little information about what transpired between the execution of first and second agreements. The guarantors were unsuccessful before the chambers judge in arguing that the first asset purchase agreement should not be rectified because mutual mistake was not established on the record. The guarantors appeal to this Court alleging errors with the chambers judge's finding of mutual mistake and that the receiver's conduct challenged the integrity of the process.

2 We agree with the guarantors that there are some significant deficiencies with how the receiver proceeded and that the integrity of the process was seriously compromised. As a result, we allow the appeal.

Background

3 MNP Ltd. (the Receiver) was appointed receiver and manager of the debtor company, Snowdon Block Inc. (Snowdon) in February 2016. The only material asset of Snowdon was a parcel of land and a building in Calgary. In July 2016 the Receiver commenced a sales process to solicit offers for the assets. In October 2016 the Receiver finally received two offers for the assets and accepted a conditional offer from a third party. After months of extensions and negotiations, the would-be purchaser was unable to remove its conditions and the sale did not proceed.

4 Jaycap Financial Ltd. (Jaycap) was the primary creditor of Snowdon and was financing the Receiver's costs. Over time Jaycap became concerned with the increasing costs and protecting its investment. The Receiver advised Jaycap that a credit bid would be a viable option to obtain title to the assets and bring the receivership to an end. On July 5, 2017

Jaycap emailed the Receiver that it would credit bid its "current costs" noted to be a certain amount. Jaycap arranged for a numbered company it controlled to be the purchaser, but for simplicity, we will refer to Jaycap's nominee as Jaycap.

5 An asset purchase agreement was prepared and executed by Jaycap and the Receiver on August 2, 2017. The total debt was defined to be the amount contained in the July 5, 2017 email and that amount was also the purchase price.

6 On August 2, 2017 a representative of the Receiver and a representative of Jaycap also emailed about a request from one of the guarantors, the appellant Mr. Richardson, about the pending transaction. As part of this exchange, the two sides set out their understanding of the purchase price and the impact on the guarantors' liability. This was their exchange:

Reid [*Jaycap's representative*]. Neil Richardson [*one of the appellants*] has contacted us asking for an adjournment of the application next week as he is out of town. His concern is that he does not have any idea of what #Co's offer is and is concerned about his personal guarantee. As #Co is offering Jaycap's total indebtedness, Neil would not be exposed to any shortfall payable under his guarantee. We can't be giving him any legal or other advice but should you wish you could let Neil know that you would not be going after him for any amount. Otherwise we will likely have to adjourn the application until such time as he is available.

Please let us know what you wish to do.

Best regards,

Vic [*Receiver's representative*]

....

Vic, [*Receiver's representative*]

I believe that is incorrect actually.

Neil Richardson [*one of the appellants*] has guaranteed the debt which has been accruing.

Our Numbered Co is offering our full debt (carrying value) *NOT everything* we are legally entitled to.

Please don't adjourn and please don't communicate anything to [N]eil, we will do that.

Thanks,

Reid [*Jaycap's representative*]

7 It appears from the record that the Receiver did not respond to this email nor did it obtain any clarification from Jaycap about what exactly was incorrect about its understanding of the purchase price and resulting impact on the guarantors.

8 On August 21, 2017 the Receiver obtained an approval and vesting order approving the first asset purchase agreement. The guarantors did not oppose this application as they were not facing a deficiency.

9 What happened next is a little unclear because of the lack of evidence and the Receiver's reliance on evidence from legal counsel about legal conclusions instead of the facts underlying those conclusions. The Receiver states in its third report that on August 28, 2017 counsel for Jaycap indicated that there was an error in the purchase price. The report then goes on to state that the Receiver was advised by its legal counsel that a common mistake occurred regarding the purchase price as set out in the first asset purchase agreement and that court approval was required to amend the mistake.

10 It appears from the evidence of Jaycap that the asset purchase agreement was incorrect when it equated the purchase price (the amount contained in the July 5, 2017 email) to the total debt. The total debt was \$1.3 million higher than the purchase price, and continued to accrue with interest and costs.

11 The first asset purchase agreement did not close at the end of August 2017. On September 6, 2017 the Receiver and Jaycap entered into a second asset purchase agreement, which reduced the purchase price. On September 8, 2017 the Receiver filed an application to vacate the first approval and vesting order and sought approval of the second asset purchase agreement.

12 The guarantors were served with this application and the appellant, Mr. Richardson, sent a series of letters to the Receiver's counsel asking for information and documents to support that a mistake had occurred. The Receiver's legal counsel provided answers to some, but not all, of these requests.

13 The application was set for September 19, 2017 but adjourned and heard on October 26, 2017. The chambers judge reserved to consider the submissions and to review Mr. Richardson's materials which had not made it to the court file before the hearing. She issued her decision a week later and granted the second approval and vesting order. She found that she was not precluded from vacating the first order and issuing another. The first approval and vesting order did not direct the Receiver to close the transaction, but approved the terms of the asset purchase agreement and its execution by the Receiver. Pursuant to the termination clause, the agreement could be terminated by the parties if certain conditions were met.

14 The chambers judge also found that the Receiver and Jaycap terminated the first asset purchase agreement since they had, by error, failed to revise the purchase price in the agreement in accordance with earlier correspondence. The chambers judge found that the parties met the requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

15 The chambers judge then considered the merits of the second asset purchase agreement and whether it met the criteria established in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (Ont. C.A.). She was satisfied the second asset purchase agreement was reasonable in the circumstances, and that the Receiver had made sufficient efforts to obtain the best price and was not acting improvidently. She noted the lack of offers, the inability to close an earlier conditional offer, the earlier order approving the sale, and the revised purchase price, which was still higher than the asset's appraised value.

16 The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

17 Jaycap responds that the only real issue is whether the exercise of the court's discretion to accept the second asset purchase agreement was reasonable in the circumstances. Jaycap argues that notwithstanding the lengthy marketing process for the debtor's assets, there were no foreseeable offers. Further, there was no indication that relisting the assets would benefit either the secured creditors or the guarantors and that the chambers judge properly relied upon the Receiver's expertise in this regard.

18 Jaycap also raises a number of contractual law difficulties with the guarantors' position. First, the termination provisions were duly exercised and the first asset purchase agreement no longer exists. Jaycap submits that neither this Court nor the court below can revive or reinstate a contract against the wishes of the actual parties or create a contract on

their behalf. As a result, whether there was a mutual mistake or an error in finding mutual mistake is irrelevant. Second, the guarantors do not have standing to force a rectification as strangers to the contract.

Standard of Review

19 The grounds of appeal that challenge facts and inferences are subject to palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 (S.C.C.) at paras 10 and 23, [2002] 2 S.C.R. 235 (S.C.C.). Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36-37.

20 The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (S.C.C.) at para 27, [2013] 2 S.C.R. 125 (S.C.C.).

Analysis

There was no mutual mistake

21 We agree with the guarantors that the evidence does not establish mutual mistake and it was a palpable and overriding error for the chambers judge to conclude that the test was met. The evidence establishes that on August 2, 2017, the day the first asset purchase agreement was signed, the parties may have had *different* understandings about the purchase price and the Receiver's understanding of the purchase price was incorporated into the agreement. A different understanding is not a common misapprehension as to the facts: *Beazer v. Tollestrup Estate*, 2017 ABCA 429 (Alta. C.A.) at para 28, (2017), [2018] 4 W.W.R. 513 (Alta. C.A.).

22 This difference was due, in part, to the imprecise language used by Jaycap in its communications with the Receiver about the amount. Jaycap described the purchase price as its "current cost" in July 2017, and later as the "full debt" and "carrying value" in August 2017. Jaycap's counsel could not explain the differences among these terms to this Court nor was he able to explain how the amounts were determined or what the \$1.3 million difference was comprised of. As the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the \$1.3 million difference cried out for an explanation before this Court and the court below.

23 While the guarantors are successful on this ground of appeal, this does not end the matter as mutual mistake was an alternative argument. The appeal cannot succeed unless the guarantors establish a reviewable error in the chambers judge's *Soundair* analysis.

Lack of fairness and integrity of the process

24 The guarantors raise two issues supporting their allegation that the integrity of the process was compromised. First, the Receiver failed to disclose relevant and material documents about what transpired after August 2, 2017. Second, the Receiver did not appear to be acting independently of Jaycap.

25 We agree that the Receiver's evidence about what transpired after August 2, 2017 is not satisfactory, even considering the evidence contained in the confidential supplement to the third report. Legal counsel's conclusion that there was a common mistake does not provide the evidentiary foundation to establish mutual mistake. That is for the court to decide.

26 A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase price was put forward as a reason why the first transaction did not close. However, because the Receiver was seeking to vacate an earlier court order, some information about why the order needed to be vacated was required.

27 Further, the Receiver provided little information about the critical August 2, 2017 email and why no further clarification was sought from Jaycap about what it meant before the court order approving the first transaction was obtained. There was enough information in that email to put the Receiver on notice that there was a misunderstanding. Had the Receiver been more diligent, this whole situation may well have been avoided.

28 While insolvency proceedings are subject to special procedural rules and are understandably time sensitive in nature, these considerations do not relieve the Receiver from its basic obligations to the parties and the court. Nor do these considerations relieve the Receiver from providing evidence to meet its burden of proof to the requisite standard for each application that it brings. As summarized by the court in *Ravelston Corp., Re*, 2007 CanLII 2663, (2007), 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]):

[60] A court-appointed receiver is an officer of the Court appointed to discharge certain duties prescribed by the appointment order. *Parsons et al. v. Sovereign Bank of Canada*, 1912 CanLII 365 (UK JCPC), [1913] A.C. 160 at 167 (J.C.P.C.).

[61] When a court-appointed receiver is appointed in the normal course, "the receiver-manager is given exclusive control over the assets and affairs of the company and, in this respect, the board of directors is displaced." *TD Bank v. Fortin et al.* (1978), 1978 CanLII 1934 (BC SC), 85 D.L.R. (3d) 111 at 113 (B.C.S.C.). The essence of a receiver's power is to settle liabilities and liquidate assets.

[62] It is well established that a court-appointed receiver owes duties not only to the Court, but also to all parties interested in the debtor's assets, property and undertakings. This includes competing secured claimants, guarantors, creditors or contingent creditors and shareholders. *Ostrander v. Niagra Helicopters Ltd.* (1974), 1973 CanLII 467 (ON SC), 1 O.R. (2d) 281 (Ont. H.C.J.) [*Ostrander*].

[63] A receiver has the duty to exercise such reasonable care, supervision and control of the debtor's property as an ordinary person would give to his or her own. A receiver's duty is to discharge the receiver's powers honestly and in good faith. A receiver's duty is that of a fiduciary to all interested stakeholders involving the debtor's assets, property and undertaking. *Ostrander, supra* at 286.

29 The Receiver's materials on their own do not provide the evidentiary basis to support the relief it was seeking. It was only several weeks later, when faced with serious opposition from Mr. Richardson, that Jaycap filed an affidavit with more, although still incomplete, information about what transpired.

30 The lack of information about what happened and the way the Receiver and Jaycap skirted around the issue in its application materials certainly did not help the perception of the Receiver's independence. The optics of the situation likely contributed to the guarantors' suspicion that what transpired merited further inquiries and that the Receiver was following Jaycap's instructions to conceal from the guarantors the true state of affairs. Jaycap and the Receiver were jointly represented before this Court, which was also unusual and unhelpful particularly when counsel for Jaycap could not answer questions the Receiver would be expected to know. During the hearing, the panel found that the guarantors' submissions were persuasive.

31 The termination of the first asset purchase agreement was also left unexplained by the Receiver. Jaycap's evidence is that the Receiver failed to deliver closing documents, which allowed Jaycap to terminate. Jaycap signed a unilateral termination notice and the parties executed a mutual termination notice several weeks after the second asset purchase agreement was signed, and after Mr. Richardson launched his opposition. The chambers judge found that the first asset purchase agreement was terminated, but she did not explain in her reasons which termination was valid or why. Termination in these circumstances is not merely a matter between the parties as suggested by Jaycap. The circumstances surrounding the termination of the first asset agreement ought to have been canvassed as this remained a court-supervised sales process where the Receiver owed fiduciary duties to the parties to act fairly.

32 The Receiver provided no evidence about termination nor did it explain why it failed to deliver the final closing documents, giving rise to termination, when the first asset purchase agreement reflected its understanding of the purchase price. Typically, sophisticated commercial parties who sign unambiguous agreements, drafted with the assistance of their legal counsel, will be held to their bargain. Had the Receiver sought to compel Jaycap to close the first asset purchase agreement, instead of abandoning it, its application may well have been successful.

33 What is missing here is transparency. The process should be transparent. It should enable the court and interested parties to make an informed decision as to whether the sale can be considered fair and reasonable in the circumstances: *Toronto Dominion Bank v. Canadian Starter Drives Inc.*, 2011 ONSC 8004 (Ont. S.C.J. [Commercial List]) at para 5, 2011 CarswellOnt 15140 (Ont. S.C.J. [Commercial List]). Given the significant questions left unanswered by the Receiver, we have serious concerns about the efficacy, fairness and integrity of the process the Receiver followed between August 2, 2017 and the hearing of the application to approve the second asset purchase agreement. As a result, we disagree with the chambers judge that the Receiver met the requirements of *Soundair*.

Conclusion

34 As an aside, and as a further indication of the parties' approach to procedure was the parties' approach to the sealing orders. The court record demonstrates that the parties failed to file a sealing order, failed to file an affidavit they undertook to file, and failed to ensure that the Receiver's certificate met the requirements to release the bans and restore public access to the proceedings if that was the Receiver's intention in filing it.

35 After the hearing concluded, and in preparation for filing this judgment, this Court was unable to discern the scope of the sealing orders, in part because of the missing information and the patchwork of numerous blanket orders that were taken over information that probably should not have been sealed. We asked for assistance from the parties and were provided with very little useful information.

36 A review of the transcripts suggests to this Court that the parties ought to be more thoughtful in drafting their materials, in seeking bans, and in drafting those ban orders carefully, limiting public access to what is truly sensitive confidential information that could prejudice the insolvency process. The test for a sealing ban is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522 (S.C.C.) and is not merely the consent or non-objection of the parties. Sealing bans are the exception and not the rule because they engage *Charter* interests and materially impact the court's work. Better practices are required.

37 The appeal is allowed, the order is set aside and the matter returned to Queen's Bench for a rehearing before a different judge.

Appeal allowed.

TAB 6

1985 CarswellAlta 332
Alberta Court of Appeal

Salima Investments Ltd. v. Bank of Montreal

1985 CarswellAlta 332, [1985] A.W.L.D. 1418, [1985] A.W.L.D. 1419, 21 D.L.R. (4th)
473, 33 A.C.W.S. (2d) 257, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242, 65 A.R. 372

**SALIMA INVESTMENTS LTD. v. BANK OF MONTREAL, MAMMOTH
DEVELOPMENTS LTD. and BOLERO MANAGEMENT LTD.**

Laycraft C.J.A., Harradence and Kerans JJ.A.

Judgment: August 26, 1985
Docket: Calgary Nos. 17697, 17696

Counsel: *R. Dodic*, for appellant.

G. McKibben, for respondent Bank of Montreal.

Q. Smith, for respondents Mammoth Developments Ltd. and Bolero Management Ltd.

D. Barber, for third party, 304987 Alberta Ltd.

Memorandum of judgment delivered from the bench by *Kerans J.A.*:

1 This is an appeal from an order approving the sale of property in receivership.

2 A Queen's Bench order made 16th April 1985 named the respondent Cooper-Lybrand as receiver-manager of the property of Mammoth Developments Ltd. and Bolero Management Ltd. on the application of a secured creditor, the Bank of Montreal. The order granted to the receiver the power, among other things, to "sell ... any ... property" including the 168-room hotel complex and a 76-unit motel.

3 The receiver advertised the property widely, and called for tenders. The tender notice indicated that the receiver considered the tenders as only a first step and that it was prepared to negotiate the sale.

4 Seven tenders were received. The highest was from the appellant, Salima Investments Ltd., at \$4,400,000. The others were much lower. The tender of 304987 Alberta Ltd. also involved \$300,000 less cash. The appraised value of the property for forced sale on terms was \$4,593,000.

5 The receiver decided to negotiate further with Salima and opened negotiations on 24th July, six days after tenders were opened. A bargain was made the next day, and the receiver at once notified the other tenderers that their tenders were rejected and that the receiver was dealing with somebody else. When asked before us why the receiver did not approach other tenderers for further negotiations, counsel for the receiver replied that the receiver was of the view that the Salima tender was substantially better than all of the others and, in any event, that it was not appropriate to negotiate with more than one prospective purchaser at the same time.

6 The bargain with Salima involved an increase of \$50,000 from the tendered price, and an increase in the deposit from \$150,000 to \$400,000. Further, the negotiated sale was made subject to court approval.

7 The receiver then issued a motion on 1st August, returnable 8th August, for an order approving the sale. On the morning of 8th August, before court opened, 304987 Alberta Ltd. made a new offer of \$4,533,000 through the clerk. We infer that this offer was made with knowledge of the Salima bargain, because that information was in the materials filed in support of the application.

8 Apprised of this development, and of the fact that seasonal market fluctuations made an immediate sale of great importance, the learned chambers judge adjourned the matter for one day and said that he would consider new bids. Three were received: the highest was from 2884701 Alberta Ltd., at \$4,800,000. The next highest was from 304987 Alberta Ltd. in the amount of \$4,756,000, and the third, for \$4,700,000 was from Salima. The learned chambers judge decided that, because it had the earliest completion date and offered the prospect of unbroken chain of management, the bid of 304987 Alberta Ltd. was the best offer. He directed the receiver to complete a sale. Salima appeals.

9 The first ground raises the question of jurisdiction. It is said that the learned chambers judge had no application before him to approve the sale to 304987 Alberta Ltd. It is also said that he improperly considered the other offers and other materials. The existence of the other offers was relevant on the question whether to approve the Salima sale and we see no merit to that argument. Further, we understand the events before him in this way: he first refused to approve the sale to Salima; then he decided, on his own motion and because of the urgency of the matter, to conduct summarily a court sale. He dispensed with notice of motion or other formalities. He had jurisdiction to do that which he did and there is no merit to this ground of appeal.

10 The second ground of appeal raised for Salima is that the decision of the learned chambers judge gave an unfair advantage to 304987 Alberta Ltd. over Salima. Salima has no complaint. It agreed to buy the property subject to court approval, and its contract left it exposed to the risk of something like this happening. I agree with what was said by Hart J.A. in this respect in *Cameron v. Bank of N.S.* (1981), 38 C.B.R. (N.S.) 1 at 9-10, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.):

It is obvious that the receiver did in fact have the power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval...

This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval.

11 The real issue, in our view, is the appropriate exercise of the admitted discretion of the court when "looking to the interests of all persons concerned". It certainly does not follow, for example, that the court on an application for approval of a sale is bound to conduct a judicial auction or even to accept a higher last-minute bid. There are, however, binding policy considerations. In *Can. Permanent Trust Co. v. King Art Dev. Ltd.*, 32 Alta. L.R. (2d) 1, [1984] 4 W.W.R. 587, 12 D.L.R. (4th) 161, 54 A.R. 172, we said that receivers (and masters on foreclosure) should look for new and imaginative ways to get the highest possible price in these cases. Sale by tender is not necessarily the best method for a commercial property which involves also the sale of an ongoing business. The receiver here accepted the challenge offered by this court, and combined a call for tenders with subsequent negotiations. In order to encourage this technique, which we understand has met with some success, the court should not undermine it. It is undermined by a judicial auction, because all negotiators must then keep something in reserve. Worse, the person who successfully negotiates with the receiver will suffer a disadvantage because his bargain will become known to others.

12 We think that the proper exercise of judicial discretion in these circumstances should be limited, in the first instance, to an inquiry whether the receiver has made a sufficient effort to get the best price and not acted improvidently. In examining that question, there are many factors which the court may consider. As Macdonald J.A. said in the *Cameron* case at pp. 11-12:

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

13 This is not a total catalogue of those factors which might lead a court to refuse to approve a sale.

14 The principal argument before us turned on the question why the receiver did not approach 304987 Alberta Ltd. to negotiate at the same time as it approached Salima.

15 We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver — while always in good faith — had not been adequate. In our view, there was evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 We dismiss the appeal.

Appeal dismissed.

TAB 7

2007 ABQB 49
Alberta Court of Queen's Bench

Calpine Canada Energy Ltd., Re

2007 CarswellAlta 156, 2007 ABQB 49, [2007] A.W.L.D. 1172, 155 A.C.W.S. (3d) 77, 28 C.B.R. (5th) 185

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company (Applicants)

B.E. Romaine J.

Heard: January 22, 2007
Judgment: February 8, 2007
Docket: Calgary 0501-17864

Counsel: Larry B. Robinson, Q.C., Sean I. Collins, Fred Myers, Jay A. Carfagnini, Brian Empey for CCAA Debtors
Patrick McCarthy, Q.C., Josef A. Krueger for Monitor
A. Robert Anderson, Q.C., Kevin P. McElcheran (present by telephone) for Independent Trustees of Calpine Commercial Trust
John Finnigan, Robert Thornton for ULC2 Ad Hoc Committee of Bondholders
Sean Dunphy, Elizabeth Pillon for ULC2 Trustee
Frank Dearlove for HSBC Bank
Howard Gorman, Randal Van de Mosselaer for ULC1 Noteholders
Peter H. Griffin for Calpine Corporation and other U.S. Debtors
Peter T. Linder, Q.C., Emi R. Bossio for HCP Acquisition Inc.
Richard Billington for Catalyst Capital Group Inc.
Glenn Solomon for certain creditors

B.E. Romaine J.:

Introduction

1 These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

Facts

2 This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

3 On December 21, 2006, the Calpine Applicants filed a Notice of Motion, returnable on December 28, 2006, seeking authorization to market and sell the following assets (the "Fund-related Assets"):

a) certain contracts, being a management agreement, an administration agreement and some operating agreements (collectively, the "MA&O Agreements") relating to the Fund, the Trust and Calpine Power L.P. ("CLP") and to the operation of two power plants owned by CLP; and

b) the Class B Units in CLP.

4 An affidavit sworn on December 21, 2006 by Toby Austin, President and CEO of CCPL, includes at para. 10 a simplified diagram of the structure of CCPL's relationship with the Fund, the Trust and CLP.

5 Briefly, CLP is a limited partnership with Calpine Power L.P. Ltd. ("CLPGP") as its general partner and the Trust and CCPL as limited partners. CLPGP has assigned its rights and obligations as a general partner to CCPL. The Trust is an open-ended trust, the sole beneficiary of which is the trustee of the Fund. The Fund is a publicly held income fund listed on the TSX. Since CCPL and the other Canadian Calpine entities sought the protection of the CCAA, the Trust and the Fund have been governed by the independent trustees of the Trust and the independent directors of CLPGP (who are also trustees).

6 The Trust's principal asset is its interest in CLP. CLP indirectly owns two power plants, the Island Cogen Facility in British Columbia and the Calgary Energy Centre. CLP granted a participating unsecured loan to Calpine Canada Whitby Holdings Company, an entity that owns 50% of a joint venture that is developing a cogeneration facility in Ontario.

7 The Trust owns A Units in the CLP limited partnership. CCPL owns B Units. The B Units, which represent 30% of the equity of CLP, are subordinate to the A Units. Further complicating this already intertwined relationship, the Trust purchased from CCPL in May 2004 a promissory note with a face value of approximately \$53.5 million pursuant to a loan known as the Manager's Loan. As security for the Manager's Loan, CCPL granted to the Trust a pledge of the B Units.

8 CCPL administers the Fund and the related entities pursuant to the MA&O Agreements. The MA&O Agreements all provide that they may be assigned by CCPL only with the consent of either the Trust or CLP, which consent shall not be unreasonably withheld. In support of their motion for authorization to sell the Fund-related Assets, the Calpine Applicants advised that on December 19, 2006, Harbinger Capital Partners ("Harbinger") had announced its intention to launch a take-over bid for the publicly-traded trust units of the Fund and that the Calpine Applicants believed that this presented them with an opportunity to negotiate the sale of the Fund-related Assets with bidders who might be interested in acquiring the Fund.

9 In response to the Calpine Applicants' motion, the Fund advised that it intended to bring a cross-application to terminate the MA&O Agreements. The Christmas break intervened and the application and proposed cross-application were adjourned to a date in January 2007. The Fund was to circulate materials with respect to its cross-application by Friday, January 12, 2007.

10 During the days leading up to and including Saturday, January 13, 2007, the Fund and the Calpine Applicants negotiated and entered into a settlement agreement (the "Settlement Agreement"). A notice of motion and supporting affidavit with respect to this Settlement Agreement was circulated to the service list on January 13 and 14, 2007. The Calpine Applicants applied for an order:

a) authorizing CCPL to enter into the Settlement Agreement;

b) approving the Settlement Agreement and the various transaction agreements that accompanied it;

c) terminating the MA&O Agreements upon the closing of the Settlement Agreement and lifting the stay of proceedings under the CCAA proceedings for that limited purpose;

d) directing that a confidential supplemental report on the Settlement Agreement that was to be prepared by Ernst & Young Inc. (the "Monitor") be sealed until closing of the Settlement Agreement; and

e) miscellaneous other relief.

11 The Fund prepared a Notice of Motion bearing the same date in which the independent trustees of the Trust and the directors of CLPGP applied to lift the stay imposed under the CCAA for the purpose of terminating the MA&O Agreements if the Settlement Agreement was not approved by the Court. The motion to approve the Settlement Agreement was to be heard on Wednesday, January 17, 2007.

12 On Monday, January 15, 2007, I heard from various stakeholders in this CCAA proceeding who were aggrieved about both the timing of the application and the stringent requirements of confidentiality that had been imposed by the Fund on information relating to the Settlement Agreement. That day was a holiday in the United States where a number of stakeholders are resident and several counsel had been unable to receive instructions from their clients on these issues. I directed that the application to approve the Settlement Agreement be set over to Monday, January 22, 2007 and that the issue of the terms of confidentiality be adjourned to Wednesday, January 17, 2007 so that counsel could obtain adequate instructions from their clients.

13 Late on January 16, 2007, the Monitor received an offer (the "Harbinger Offer") for the Fund-related Assets from HCP Acquisition Inc. ("HCP"), the subsidiary of Harbinger that is the vehicle for Harbinger's take-over bid for the public Trust units. The Monitor provided the Court with a copy of the offer, together with an application for advice and directions, shortly before Court opened to hear submissions on the confidentiality issue. The Harbinger Offer for the Fund-related Assets was publicly disclosed by press release, but most parties had only recently become aware of its terms. The Monitor, of course, was not in a position at that time to provide advice on the offer and how it compared to the terms of the Settlement Agreement. It became apparent during the course of the hearing that the stakeholders wanted the Monitor to prepare a comparison of the Settlement Agreement and the Harbinger Offer. Submissions from that point focussed on how much, if any, of the Monitor's report with respect to that comparison should be subject to confidentiality, and whether the confidentiality provisions imposed by the Fund on the Settlement Agreement and on the Monitor's Supplemental Report (as defined below) should be lifted. Some stakeholders argued vigorously for a different process more akin to an open auction or tender for the assets.

14 At this point, the Monitor had prepared two reports, a Sixteenth Report that discussed the Settlement Agreement in general terms, without disclosing its specific financial terms, which was disclosed without restriction to the service list, and a Supplemental Report to the Sixteenth Report (the "Supplemental Report") that disclosed those financial terms, together with the Monitor's comments on the value of the MA&O Agreements and the B Units. These latter comments included a review of CCPL's discounted cash flow financial model of the B Units. The Supplemental Report was made available only to stakeholders who entered into confidentiality agreements as required by the Settlement Agreement.

15 The Calpine Applicants and the Fund submitted that the Settlement Agreement and the Supplemental Report were confidential and commercially sensitive to both parties. The Calpine Applicants were concerned that pricing and valuation information contained in the Supplemental Report would have a negative impact on any subsequent marketing process if the Settlement Agreement was not approved. The Fund had concerns relating to its response to the Harbinger take-over bid of the publicly-traded trust units and submitted that disclosure of the pricing and financial terms could be used by Harbinger to the disadvantage of the Fund. The Fund also asserted strenuously that it did not want to be placed in the position of a stalking horse for the Fund-related Assets and that, if it was put in that position, it would withdraw its offer.

16 The parties who sought access to the terms of the Settlement Agreement and the Supplemental Report were offered certain choices of confidentiality agreements, but it is clear that the Fund sought to ensure that such parties would be precluded from using the information for any purpose other than evaluating the Settlement Agreement, and particularly from making any kind of competing bid for the Fund's public trust units. One version of confidentiality agreement proffered by the Fund allowed stakeholders to establish an internal confidential screen that would remain in effect for two years in order to evaluate the information without requiring confidentiality to be imposed on the stakeholder's

entire organization. Another allowed legal advisors to review the material without allowing them to disclose confidential terms to their clients. Although an attempt to impose this degree of restriction on access to information is exceptional in litigation generally, it is not without precedent in cases involving CCAA proceedings and receivers where assets of a business are sought to be sold: See *In the matter of a Plan of Compromise and Arrangement of Air Canada, et al.*, under the CCAA, R.S.C. 1985, c. C-36, as amended; see also *In the matter of the CCAA, R.S.C. 1985, c. C-36, as amended*, and *In the Matter of the Courts of Justice Act, R.S.O. 1990 c. C-43, as amended* and *In the Matter of a Plan of Compromise or Arrangement of Royal Oak Mines, et al.* (all unreported).

17 I concluded that, although the Settlement Agreement was negotiated under stringent terms of confidentiality and the Supplemental Report was prepared pursuant to an assumption of confidentiality and on the assumption that the likelihood of CCPL receiving any offers whose benefits to CCPL exceeded those of the Settlement Agreement was remote, the situation had changed with the introduction of the Harbinger Offer. I was concerned, however, that it could be prejudicial to the primary goal of maximizing value to stakeholders if I ordered unrestricted disclosure of the Settlement Agreement or of the Supplemental Report during the short period of time between January 17 and January 22, 2007, when the Monitor's new report comparing the offers became available, particularly if I determined after hearing full submissions on January 22, 2007 that a different process should be followed.

18 I therefore declined either to endorse the confidentiality provisions imposed by the Fund to that date or to order greater disclosure, on the basis that the fairness of the process that led to the Settlement Agreement and the confidentiality requirements that had been imposed by it were live issues for submissions on January 22, 2007 and would be factors in any decision on whether or not to approve the Settlement Agreement. I directed the Monitor to prepare its comparison report with the analysis of the Settlement Agreement remaining subject to restricted disclosure, but with the Monitor's conclusions and recommendations being available on an unrestricted basis to stakeholders. I asked the Monitor to address the issue of whether a broader auction or marketing process should be undertaken.

19 The Monitor's Seventeenth Report was prepared and circulated on Friday, January 19, 2007. The Monitor concluded that, taking into account the material variables affecting the comparison between the Harbinger Offer and the Settlement Agreement, the completion of the Settlement Agreement proposal was the prudent approach. The Monitor stipulated, however, that the Calpine stakeholders should have the benefit of the Seventeenth Report and that the Monitor and the Court "should consider the stakeholders' tolerance for increased risk and potentially incremental realizations for the Fund-related Assets when considering the motion to approve the [Settlement Agreement] on January 22, 2007."

20 The Monitor considered two broad options, the completion of the Settlement Agreement and an auction marketing process. The Monitor noted that the Fund had advised the Court that it would not participate in an auction process and had indicated that, if the Settlement Agreement was not approved on January 22, 2007, it would proceed on January 26, 2007 with its motion to terminate the MA&O Agreements. If the Fund removed itself from the auction process, there would be no competitive tension with the Harbinger Offer unless other parties came forward. The Monitor believed that a limited number of new parties would be available to participate in an auction process because parties who might otherwise be interested might have become restricted in submitting an offer because of participation in the Fund's efforts to find a "white knight" with respect to the Harbinger take-over bid for the Fund public trust units. The Monitor pointed out that the B Units are an illiquid, subordinated minority position in a private entity, attractive primarily to parties who may be interested acquiring the Fund. He also noted that the Harbinger Offer could be terminated at any point prior to acceptance. Given all of these factors, the Monitor believed there was substantial risk in pursuing an auction process.

21 On the morning of January 22, 2007, shortly before the motion to approve the Settlement Agreement was heard, Harbinger submitted a revised offer for the Fund-related Assets (the "Harbinger Revised Offer") that increased the price offered from the greater of \$100 million or the value of the Settlement Agreement transaction price plus \$2 million, as set out in the Harbinger Offer, to the greater of \$110 million and 110% of the value of the Settlement Agreement transaction price. The Harbinger Revised Offer also removed Harbinger's ability to withdraw the offer without the Monitor's permission before the earlier of:

- a) February 16, 2007;
- b) Court approval of an alternate proposal; and
- c) Harbinger making a replacement offer that the Monitor concludes is superior to the Harbinger Revised Offer.

22 At the hearing, the Ad Hoc Committee of ULC II Bondholders, which includes Harbinger as a member, and the ULC II Indenture Trustee were in vehement opposition to the motion to approve the Settlement Agreement, suggesting that the process that led to the Settlement Agreement and the restrictions on access to financial information imposed by the Fund had resulted in a "fatally flawed secret marketing process" that placed the stakeholders and the Court in an untenable position. In answer to the Monitor's suggestion that the Court hear from the stakeholders regarding their tolerance for increased risk and potentially incremental realizations for the Fund-related Assets, the Ad Hoc Committee advised that its members, absent Harbinger, had conferred and that "they are prepared to forego the secret benefits of the Settlement Agreement and either take their chances with a properly supervised process, or if need be, revert to the status quo where the marketing of this asset had not yet been commenced." Counsel for the ULC II Bondholders and Trustee submitted that an expedited sales process should be conducted, and that there was still time, given the status of the Harbinger take-over bid, for there to be an auction between the two existing bidders.

23 The Ad Hoc Committee of the ULC II Bondholders and the ULC II Indenture Trustee were the only major creditor group who had not entered into a form of confidentiality agreement with CCPL and the Trust so as to obtain access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's reports. As noted by counsel, the ULC II Bondholders are in the business of trading in distressed bonds, and the possession of non-public information relating to the B Units would preclude them from trading in any Calpine securities until the information became public. While the alternatives offered by CCPL and the Trust would allow counsel to the Bondholders to evaluate the Settlement Agreement with a view to the interests of their clients, it would not allow them direct access to information without the unpalatable result to their business of restricting their freedom to trade in Calpine securities. Thus, for this group of stakeholders, anything less than full public disclosure of information about the B Units would be problematic. This placed these creditors in direct conflict with the Trust and the Fund in their efforts to maintain confidentiality of commercially-sensitive information and to avoid becoming a "stalking-horse" for higher offers. While neither of these private commercial interests is of primary significance to this Court in the context of CCAA proceedings, which have as a primary goal the maximization of value of the debtors' assets for the benefit of stakeholders as a whole, they are factors to be weighed in a determination of the fairness and integrity of the sale process.

24 Counsel for the Ad Hoc ULC I Noteholders Committee, who had access to all information relating to the Settlement Agreement through a "counsel's eyes only" confidentiality agreement, noted that his clients were in favour of a short auction between the Fund and Harbinger, with the Fund publicly releasing the details of the Settlement Agreement.

25 Harbinger submitted that the Harbinger Revised Offer addressed a number of the Monitor's concerns, including the elimination of the right to withdraw the offer at any time prior to acceptance, and called for an open auction/marketing process for the assets.

26 The Fund pointed out that eighteen creditors or creditor groups had signed a form of confidentiality agreement, leaving only the ULC II Bondholders and the ULC II Indenture Trustee among the major creditors who had not had access to the financial terms of the Settlement Agreement and the restricted portions of the Monitor's Reports. It "strongly objected" to the marketing of the MA&O Agreements and set out the requirements it indicated it would insist that an assignee of those agreements and a purchaser of the B Units must fulfill if the Settlement Agreement was not approved.

27 When it became apparent that the Settlement Agreement likely would not be approved on the day of hearing, counsel for the Fund noted that the Settlement Agreement expired at midnight on January 23, 2007 and he could not indicate if the independent trustees and directors would extend the deadline or would let the Settlement Agreement lapse.

He stated that the Fund would not participate if the process became an auction. Counsel for the Fund suggested that the terms of the Settlement Agreement be disclosed to all parties other than Harbinger for a very brief period of two hours that day, after which the Monitor would prepare a supplemental report on any additional offers that this disclosure would generate overnight, with the hearing continuing the next day. The Calpine Applicants pointed out that they were bound to support the Settlement Agreement and that they, too, were reluctant to prolong the process beyond the time the Settlement Agreement would expire, as they feared losing the benefits of that agreement.

28 This one-day proposal, which excluded Harbinger, was characterized by the ULC II Bondholders group and the ULC I Noteholders group as being unworkable and wholly ineffective in maximizing value. Harbinger, through its counsel, suggested that the process required at least 10 days, the creation of a data room and a general invitation to bidders.

29 The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.* (1991), 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 (Ont. C.A.) at para. 16 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.

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *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 (Alta. C.A.), where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

30 I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

31 There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open process may not lead to greater value, and may, as in this case, give rise to the possibility that an existing bidder may exit the process, the nature of a court-supervised process demands a process that meets at least minimal requirements of fairness and openness. The process undertaken to the point of the hearing on January 22, 2007, particularly with its emphasis on control of information and confidentiality for the primary benefit of the Fund, did not pass the test.

32 In addition, the fact of the Harbinger Offer necessitated closer consideration of the Monitor's assumption, reasonable as it may have been at the time it was made, that the likelihood that the Calpine Applicants would receive any offers that would exceed the benefits to CCPL of the Settlement Agreement was remote.

33 I concluded that circumstances had conspired to produce a situation that was neither fish nor fowl, a kind of lop-sided auction where different bidders were privy to different information and bound by different constraints. What had already occurred could not be changed, but a different process was required from that point forward. While there were differences of opinion as to how much time was available to conduct a sales process with an acceptable degree of integrity, it was necessary that such process be conducted quickly, given the circumstances affecting the two interested bidders. It appeared clear that it would be to the benefit of all stakeholders if the process were accelerated. I decided that an abbreviated sales process was necessary in order to balance the competing requirements of fairness, speed imposed by external circumstances and protection of *bona fide* proprietary or commercially-sensitive information.

34 While not dismissing the application to approve the Settlement Agreement, I directed that:

- a) the Monitor issue its Eighteenth Report which would disclose the financial terms of the Settlement Agreement to all stakeholders, including HCP, by noon on January 23, 2007;
- b) offers for the Fund-related Assets were to be submitted to the Monitor by noon on Thursday, January 25, 2007;
- c) the Monitor would issue its Nineteenth Report comparing offers received by 2:00 p.m. on Friday, January 26, 2007; and
- d) the hearing would resume on Tuesday, January 30, 2007.

35 These time limits were later changed by agreement of affected parties so that final offers were to be received by noon on Friday, January 26, 2007 and the Monitor would issue its Nineteenth Report by noon on Saturday, January 27, 2007.

36 I directed that HCP would be able to meet and discuss issues relating to its offer with the Monitor and/or, if the Fund decided not to extend the Settlement Agreement, the Calpine Applicants.

37 I did not release the Supplemental Report generally, on the basis that it had been prepared in the scenario of a single offer and on the assumption of confidentiality. Nor did I release the confidential portion of the Monitor's Seventeenth Report, which had been superseded by events.

38 The Monitor issued its Nineteenth Report providing a summary and analysis of offers received for the Fund-related Assets by noon on January 26, 2007. However, immediately prior to releasing the report, the Monitor was contacted by HCP and the Fund, acting jointly, requesting a delay of two hours to allow time for the submission of a revised offer. The Monitor advised me of the receipt of such revised offer when it delivered the Nineteenth Report to me on January 26, 2007 and provided a copy of the newly-revised offer (the "Harbinger Final Offer"). The Monitor indicated that it would be canvassing major stakeholders to receive their input on the offers and would issue a supplemental report to the Nineteenth Report prior to the court hearing on January 30, 2007. On Monday, January 29, 2007, I asked the Monitor to include in such report an analysis of the Harbinger Final Offer and any other offers it might receive prior to the release of this supplemental report.

39 The Monitor issued its Twentieth Report late in the day on January 29, 2007. In addition to the Harbinger Final Offer, the Monitor had received a letter from Catalyst Capital Group Inc. ("Catalyst") varying certain of the terms of an offer it had submitted by Friday's deadline in view of the press release issued by HCP relating to the Harbinger Final Offer. These revised terms were incorporated into the Monitor's analysis of the Catalyst offer.

40 Four offers were presented to the Court on Tuesday, January 30, 2007. One was a revised offer from the Fund. One was a revised offer from HCP received by the Monitor on January 26, 2007 (the "Second Revised HCP Offer"). One was an offer from Catalyst as revised on January 29, 2007 (the "Revised Catalyst Offer"). One was the Harbinger Final Offer. The Monitor recommended the Harbinger Final Offer.

41 The Harbinger Final Offer provides certainty of price and certainty of closing. It eliminates risks associated with the splitting and realization of certain claims CLP has made against the Calpine Applicants, and it facilitates the capture of value for creditors with respect to the Whitby cogeneration project by allowing the prepayment of a loan related to the project and the sale by CCPL of its interest in the project. It has no material conditions, and eliminates the uncertainty of future litigation with the Fund as the Fund has undertaken to support the offer and to provide the necessary consents.

42 This certainty, of course, comes with a price, which is that between approximately \$10 million and \$34 million of additional potential consideration would be forgone compared to the Second Revised HCP Offer, the Revised Catalyst Offer or a new Catalyst offer briefly described by counsel during the hearing (the "New Catalyst Offer").

43 As the Monitor points out, there is substantial closing risk associated with the Second Revised HCP Offer and the Revised Catalyst Offer, risks that likely would erode the potential financial upside of those offers. The Second Revised HCP Offer, which carries the least risk, could not guarantee the consent of the Fund to either the transfer of the MA&O Agreements and the B Units or the outcome of an application to hold in abeyance the Fund's application to terminate the MA&O Agreements for a reasonable time following closing. Nor could it guarantee the outcome of an application for a permanent stay of any claim by the Trust or the Fund to terminate the MA&O Agreements for default due to the CCAA proceedings. These are risks not only of outcome but of time, as litigation would be required not only in this Court, but also might be prolonged by appeal.

44 The Revised Catalyst Offer and the New Catalyst Offer carry the same risks and more. Although the Fund may be constrained in rationalizing a refusal of consent with respect to the Second Revised HCP Offer by reason of its support of the Harbinger Final Offer, it would not be so constrained in refusing consent with respect to Catalyst. The Revised Catalyst Offer (and presumably the New Catalyst Offer, although this was not made clear) were subject to due diligence, regulatory approval, and, with respect to its higher range of value, the ability of Catalyst to come to an agreement with CCPL and perhaps the Fund to achieve value from the Whitby project. Originally, the Revised Catalyst Offer could be terminated at any time before acceptance. While Catalyst, in its submissions during the hearing, stated that it was prepared to abandon this condition, it was not clear how long it was prepared to leave its offers open.

45 The Ad Hoc ULC I Noteholders Committee expressed the wish to continue the process to see if greater value could be achieved. While the temptation to continue the process is understandable, given the carrot of higher offers and the suggestion of late-breaking developments in the take-over bid for the Fund's public trust units, prolonging the process would not allow Catalyst or any other new bidder the opportunity to overcome the serious contract transfer and contract termination risks that shadow their offers, given that the Fund is now bound to support the Harbinger Final Offer. Only the Harbinger Final Offer can provide the assurance that prolonged litigation with the Fund will be avoided, at least in the time frame imposed on this process by the take-over bid.

46 In addition, given my decision on January 22, 2007 to allow an abbreviated process, and not the more leisurely time-frame requested by some of the bidders, it would be unfair to extend the process on the basis of Catalyst's last-minute, in-Court efforts to improve its bid.

47 I also considered the objection raised by the Ad Hoc ULC I Noteholders Committee to the transfer of value to the public unitholders arising from the Harbinger Final Offer. It is true that value that potentially existed under the Second Revised HCP Offer has been transferred from the Calpine creditors to the public unitholders of the Fund under the Harbinger Final Offer through the sweetening of the HCP take-over bid, but this did not occur without the significant

advantage of greater certainty. It is noteworthy that the Monitor in his Seventeenth Report was prepared to recommend the Settlement Agreement with its lower consideration over the Harbinger Offer on the basis of that uncertainty.

48 The process was certainly not pretty. It started with a privately-negotiated Settlement Agreement that could not be disclosed in a way that would create a level playing field for all interested parties. There were good-faith reasons for the negotiation of such an agreement, set out in the affidavits and cross-examinations of the Calpine Applicants and the Fund, reasons rooted in attempting to achieve a balance between the Calpine Applicants' goal of value maximization and the Fund's need for confidentiality arising from both commercial proprietary interest and the threat of the take-over bid. Nevertheless, as I indicated earlier, the restrictions on disclosure arising from these circumstances could not be sanctioned in the context of a public CCAA proceeding with many stakeholders.

49 The Fund-related Assets are, as many parties noted, unique and unusual assets. They are part of a web of intertwined relationships in a complex corporate structure. As the Calpine Applicants recognized, the value of these assets could be optimized because of the take-over bid and the strategic challenges facing Harbinger and the Fund relating to that take-over bid. While advantageous to the Calpine creditors in that respect, the situation foreclosed a more traditional court-supervised auction that may have been appropriate for a different kind of asset and created a brief window of time for maximizing value. Perfection of process was highly unrealistic in these circumstances.

50 Has value been maximized under the abbreviated sales process? As some of the case law on process notes, a good test of whether a process has produced improvident bids is whether a substantially higher bid surfaces at the approval stage. In this case, while the last-minute bid by Catalyst was higher, it was not substantially so, and the improvements offered at the last minute by Catalyst to eliminate conditions in its bid were not so attractive as to lead to the concern that unrealized value lurked in the market if only the process had been extended.

51 There was criticism of the Harbinger Final Offer on the basis that it came in after the deadline for final offers had expired. However, Catalyst was afforded the same opportunity to revise its previous offer. In fact, it did so, and its revised offer was considered by the Monitor. This was not a formal tender process with an elaborate set of terms and conditions. Given the short time line forced by external circumstances, a certain amount of flexibility was necessary and was afforded to both HCP and Catalyst, but the integrity of the process required that that flexibility end at the time of hearing on January 30, 2007. The ability afforded to both HCP and Catalyst to revise their bids prior to the completion of the Monitor's Twentieth Report was not unfair, nor did it materially compromise the process.

52 It must be emphasized that the Monitor recommended that the HCP Final Offer be accepted and set out thorough and thoughtful reasons for that recommendation in its Twentieth Report. That recommendation was unshaken by Catalyst's last-minute attempts to improve its bid. While this application involves a Monitor under the CCAA, rather than a court-appointed receiver, I endorse the view of the Anderson, J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320 (note), 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (Ont. H.C.) set out at page 112:

If the court were to reject the recommendations 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.

53 The Monitor in this case has been intimately involved in the proposed sale of the Fund-related Assets from the beginning and for more than a year has accumulated valuable knowledge and insight into the complications and intricacies of the very complex corporate structure of the Calpine Applicants. The opinion of the Monitor deserves respect and deference. If, as the Court in *Soundair* commented at para. 14, "(t)he best method of selling an airline at the best price is something far removed from the expertise of a court", so is navigating the difficult shoals of selling unique, illiquid assets forming part of a complex corporate network with bidders preoccupied with broader external challenges.

The recommendation of the Monitor, who was faced with a number of difficult variables and a rapidly-changing set of circumstances, was sound and reasonable.

54 I therefore found that the Harbinger Final Offer should be approved, as it provided for a reasonable balance of price and closing certainty, was endorsed by many of the stakeholders and was recommended by the Monitor.

55 Given the unique nature of the assets being sold, the nature of the closing risks, and in particular the nature of the material conditions affecting the value of the Revised Catalyst Offer, I agree with the Monitor, the Calpine Applicants, the independent trustees, the ULC II Bondholder groups and the U.S. Calpine entities that the potential for increased consideration through a continuation of the process or acceptance of the more conditional offers is outweighed by the risks and potential delay that would follow.

Application granted.

TAB 8

2016 ABQB 257
Alberta Court of Queen's Bench

Sanjel Corp., Re

2016 CarswellAlta 900, 2016 ABQB 257, [2016] A.W.L.D. 2474, 266 A.C.W.S. (3d) 542, 36 C.B.R. (6th) 239

**In the Matter of the Companies' Creditors
Arrangement Act, R.S.C. 1985, c. C-36, as amended**

In the Matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC

B.E. Romaine J.

Heard: April 28, 2016
Judgment: May 16, 2016
Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

B.E. Romaine J.:

I. Introduction

- 1 The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the *Companies' Creditors Arrangement Act*. The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.
- 2 The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.
- 3 After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

II. Facts

- 4 On April 4, 2016, the Sanjel Corporation and its affiliates were granted an Initial Order under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended. PricewaterhouseCoopers Inc., ("PWC") was appointed as Monitor of the applicants.
- 5 Sanjel and its affiliates (the "Sanjel Group" or "Sanjel") provide fracturing, cementing, coiled tubing and reservoir services to the oil and gas industry in Canada, the United States and Saudi Arabia. Sanjel Corporation, the parent company, is a private corporation, the shares of which are owned by the MacDonald Group Ltd. It was incorporated under the *Alberta Business Corporations Act* in 1980, and its principal executive and registered office is located in Calgary.

Four of the other members of the group were incorporated in Alberta, seven in various American states and three in offshore jurisdictions.

6 The sole director of all Canadian and US Sanjel companies resides in Calgary, as do all of the officers of these companies. The affidavit in support of the Initial Order sets out a number of factors relevant to the Sanjel Group's ability to file under the CCAA and that would be relevant to a determination of a Centre of Main Interest ("COMI") of the Sanjel Group. In subsequent Chapter 15 proceedings in the United States, the US Court declared COMI to be located in Canada and the CCAA proceedings to be a "foreign main proceeding." It is clear that the Sanjel Group is a fully integrated business centralized in Calgary.

7 Sanjel Corporation and Sanjel (USA) Inc. are borrowers under a credit agreement (the "Bank Credit Facility") dated April 21, 2015 with a banking syndicate (the "Syndicate") led by Alberta Treasury Branches as agent. The total amount outstanding under the Bank Credit Facility at the time of the CCAA filing was approximately \$415.5 million. The Syndicate has perfected security interests over substantially all of the assets of the Sanjel Group, and is the principal secured creditor of the Sanjel Group in these CCAA proceedings.

8 On June 18, 2014, Sanjel Corporation issued US \$300 million 7.5% Callable Bonds due June 19, 2019. Interest is payable on the Bonds semi-annually on June 19 and December 19. The Bonds are unsecured. Nordic Trust ASA (the "Trustee") is the trustee under the Bond Agreement.

9 The Sanjel Group has been severely impacted by the catastrophic drop in global oil and gas prices since mid-2014. Over the last 18 months, the Sanjel Group has taken aggressive steps to cut costs, including by reducing staffing levels by more than half. However, by late October, 2015, Sanjel Corporation was in breach of certain covenants under the Bank Credit Facility. By late December, 2016, the Syndicate was in a position to exercise enforcement rights. In addition, an interest payment of USD \$11,250,000 was due on the Bonds on December 19, 2015. Since late 2015, the Sanjel Group has been in negotiations with both the Syndicate and two bondholders, Ascribe Capital LLC and Clearlake Capital Group L.P., (the "Ad Hoc Bondholders"). The Ad Hoc Bondholders hold over 45% of the Bonds.

10 In the fall of 2015, Sanjel Corporation engaged Bank of America Merrill Lynch ("BAML") to identify strategic partners and attempt to raise additional capital for the Sanjel Group. BAML contacted 28 private equity firms; 19 non-disclosure agreements were executed and 9 management presentations were made. However, the BAML process did not result in a successful transaction.

11 In December, 2015, the Ad Hoc Bondholders retained a New York law firm, Fried Frank, as their legal advisor and Moelis & Company as their financial advisor.

12 On December 10, 2015, Fried Frank conveyed a proposal from the Ad Hoc Bondholders to Sanjel. Under this proposal, Sanjel would be required to pay the USD \$11,250,000 interest payment. Provided that the interest payment was made, the bondholders would agree to a standstill agreement for the same period as may be agreed with the Syndicate. In return, the Ad Hoc Bondholders would lend back their pro rata share of that interest payment to Sanjel in return for secured notes ranking *pari passu* with the Bank Credit Facility, bearing interest at the same rate as the Bank Credit Facility plus 2%. The new notes would not be repaid until the Bank Credit Facility was repaid.

13 The Ad Hoc Bondholders indicated that they would consider acting as standby lenders to Sanjel for the remainder of the interest payment and would offer the other bondholders the option of lending back their pro-rata share to Sanjel on the same basis. If they agreed to be standby lenders, the Ad Hoc Bondholders would receive a commitment fee equal to 10% of their standby commitment, payable in new notes.

14 The proposal letter indicated that the Ad Hoc Bondholders were aware that Sanjel had been engaged in a process to address liquidity and leverage issues over the past few months, including attempting to raise equity to sell assets. In their view, Sanjel had exhausted those efforts, and the only remaining option was a deal negotiated with the bondholders.

However, the Ad Hoc Bondholders would only embark on such a process if the December 19, 2015 interest payment was made.

15 Sanjel rejected the proposal on December 14, 2015. It is noteworthy that the Bank Credit Facility includes a negative covenant prohibiting Sanjel from granting a security interest over its assets. The Syndicate advised Sanjel that the Ad Hoc Bondholders' proposal to have their existing unsecured position elevated to rank *pari passu* with the Bank Credit Facility was unacceptable, and that it would not provide its consent.

16 On December 15, 2015, the Ad Hoc Bondholders advised counsel to the Syndicate that they wished to work towards a restructuring, which they envisaged would involve paying down a portion of the Syndicate's debt "in an amount to be mutually agreed on". They also suggested that Sanjel would implement a rights offering to holders of Bonds and then to existing equity, with a conversion of the Bonds into new debt and equity.

17 On or about December 15, 2015, the Ad Hoc Bondholders sent Sanjel a draft waiver and standstill agreement, which required the payment of part of the December 19 interest payment by December 23, 2015 and the payment of the fees and disbursements of Fried Frank and Moelis in return for arranging for a bondholder meeting to be called to consider a period of forbearance to March 31, 2016.

18 Fried Frank and Moelis executed Non-Disclosure Agreements ("NDAs") on December 24, 2015, but the Ad Hoc Bondholders did not, thus not restricting their right to trade the Bonds. Fried Frank and Moelis were granted access to a Sanjel virtual database ("VDR") on January 9, 2016.

19 By January, 2016, given the prolonged downturn in oil and gas prices, Sanjel's liquidity was limited. Events of default under the Bank Credit Facility that had occurred as of October 31, 2015 were exacerbated by a cross-default based on the non-payment of interest under the Bond Agreement. As of January 31, 2016, the Sanjel Group had total consolidated liabilities of approximately \$1.064 billion.

20 Sanjel was facing very significant negative cash flow projections over the next few months. As of early January, 2016, Sanjel's projected cash flows showed that its cash position would deteriorate by more than half as of the first week of April, 2016, and would be further reduced by anticipated forbearance payments.

21 In the circumstances, Sanjel agreed with the Syndicate to implement a Sales and Investment Solicitation Process ("SISP"). Sanjel states that it hoped that if a SISP was implemented, it might find a transaction that preserved the business as a going concern, which would maximize stakeholder value and preserve goodwill and jobs.

22 In mid-January, 2016, Sanjel engaged PWC as a proposed Monitor in the event it would become necessary to file under the CCAA.

23 The SISP was commenced on behalf of Sanjel by its financial advisors, PJT Partners Inc. ("PJT") and Credit Suisse Securities (CANADA), Inc. ("CS") on January 17, 2016. The advisors contacted prospective bidders, many of whom had already been identified through the BAML process of late 2015.

24 The process of soliciting non-bidding indications of interest ran from January 17, 2016 to February 22, 2016. On January 26, 2016, the advisers updated and opened a VDR available to anyone who had signed a NDA. A teaser letter was distributed and meetings and conference calls were held with bidders. A process letter was distributed on January 28, 2016. Nine indications of interest were submitted on or about February 22, 2016.

25 Before and during the SISP process, Sanjel was negotiating with both the Syndicate and the Ad Hoc Bondholders with respect to separate forbearance agreements, and with the Ad Hoc Bondholders with respect to NDAs to be signed by the Ad Hoc Bondholders. The Ad Hoc Bondholders complain that there was a delay of almost a month before Sanjel's counsel responded to a mark-up of a NDA provided by Fried Frank, but negotiations were stymied by the Ad Hoc Bondholders' insistence that the December interest payment be paid. Until this issue was settled, there was no reason to

finalize the NDAs. In addition, it was not until January 29, 2016 that representatives of the Ad Hoc Bondholders advised Sanjel that they were prepared to be restricted from trading and therefore able to receive confidential information. During this period of time, the Ad Hoc Bondholders refused to meet with Sanjel management when they travelled to New York on January 20, 2016.

26 On February 1, 2016, counsel to Sanjel sent counsel to the Ad Hoc Bondholders a copy of the draft forbearance agreement between the Syndicate and Sanjel, which set out the key dates of the SISP, including the completion of definitive purchase and sales agreements by March 24, 2016. It would have been clear to the Ad Hoc Bondholders from this draft that Sanjel was proceeding on a dual track basis, considering both a potential stand-alone restructuring of the company and a sales process.

27 The Ad Hoc Bondholders made a second proposal to Sanjel on February 2, 2016, very shortly after the NDAs were signed. This proposal involved the Syndicate recovering a portion of its loan from Sanjel's existing cash reserves and a rights offering backstopped by the Ad Hoc Bondholders. A portion of the Bonds would be converted into equity. The December interest payment would have to be paid. Sanjel's management team met with the Ad Hoc Bondholders and their advisors in New York on February 3, 2016 and Sanjel's team, the Syndicate and its advisors and the Ad Hoc Bondholders met on February 8, 2016.

28 Sanjel delivered an indicative restructuring term sheet to the Ad Hoc Bondholders on February 12, 2016, as required by the forbearance agreement that the parties were negotiating. The restructuring term sheet emphasized that a bondholder-led restructuring would require significant new money, a significant capital commitment and ongoing capital, with a significant pay-down of the Syndicate's debt.

29 Commencing on February 15, 2016, Sanjel allowed representatives of Alvarez and Marsal ("A&M"), advisors to the Ad Hoc Bondholders, to attend in Calgary and conduct due diligence.

30 On February 18, 2016, Sanjel uploaded to its VDR the final, unsigned versions of the Syndicate Amending and Forbearance Agreement and the Bondholders Forbearance Agreement.

31 Under the SISP, preliminary, non-binding indications of interest were delivered to the advisors and the company by February 22, 2016. Six such indications of interest were received, all of which were materially superior to the Ad Hoc Bondholders proposal of February 2, 2016. The Ad Hoc Bondholders have admitted that they were aware of the milestones under the SISP and the Bank Forbearance Agreement by mid-February, 2016, although it is clear that their advisors would have been aware of these milestones from February 1, 2016.

32 As part of finalizing the form of Bond Forbearance Agreement, counsel for Sanjel and for the Ad Hoc Bondholders had negotiated a form of summons that would be used to call a bondholder meeting to consider the agreement. The only item for consideration to be considered at the meeting was to be the Bond Forbearance Agreement. The plan was to have 2/3 of the bondholders approve and execute the Bond Forbearance Agreement, and then to hold a bondholders meeting.

33 Instead, on February 25, 2016, the Ad Hoc Bondholders caused the Trustee to issue a summons for a meeting on March 10, 2016 to consider and vote on a) whether to declare the Bonds in default, accelerate them and exercise remedies, including commencing involuntary bankruptcy proceedings against Sanjel under Chapter 11 of the *United States Bankruptcy Code*, including claims against the MacDonald family and MacBain Properties Ltd., which owns the business premises that are leased by the Sanjel Group or b) approve the Bond Forbearance Agreement.

34 On March 2, 2016, the Ad Hoc Bondholders submitted a restructuring proposal to Sanjel. This proposal provided no cash recovery to the Syndicate. Instead, a portion of the debt owed to the Syndicate would be converted to a new loan and the remainder extinguished, with the Syndicate receiving warrants in a reorganized company. There would be a Chapter 11 filing and the bondholders would provide a debtor-in-possession ("DIP") facility to rank *pari passu* with the Syndicate debt. Bondholders who contributed to the DIP would receive new 2nd lien notes for part of their

previous notes, the remainder being extinguished. The DIP facility would be converted into 100% of the equity of the reorganized company. Sanjel would be required to appoint a Chief Restructuring Officer ("CRO") designated by the Ad Hoc Bondholders.

35 On March 4, 2016, in a follow-up letter to a telephone meeting on March 3, 2016, US counsel to the Syndicate wrote to Fried Frank requesting that the March 10 bondholders meeting be adjourned to March 31, 2016. Canadian counsel to Sanjel made the same request of the Trustee.

36 Also on March 4, 2016, a template Asset Purchase Agreement ("APA") for SISP bidders was posted on the VDRs, which disclosed a CCAA/Chapter 15 filing with PWC as designated Monitor. This template agreement was available to the Ad Hoc Bondholders and their advisors.

37 Counsel for the Ad Hoc Bondholders replied on March 5, 2016 that they would advise the Trustee to postpone the March 10 meeting subject to:

- a) a response to their March 2 proposal by March 10, 2016;
- b) full disclosure of company records for A&M's representative, "so that [that representative] is ready and best positioned to commence his duties as Chief Restructuring Officer for the Company".
- c) payment by March 7, 2016 of roughly USD \$2.2 million in fees and disbursements for the Ad Hoc Bondholders' legal and financial advisors.

38 After some negotiation, Sanjel agreed to these terms for an adjournment, other than with respect to a small deduction in fees and disbursements. Sanjel made it clear that it reserved all rights with respect to the appointment of a CRO and a filing under Chapter 11, which it would not agree to at that time. On March 8, 2016 the Trustee confirmed that the meeting would be postponed to March 31.

39 On March 9, 2016, second round bids under the SISP were received. Five bids were received, all of which were materially superior to the Ad Hoc Bondholders' March 2, 2016 proposal in terms of cash recovery for the Syndicate.

40 An information update conference for bondholders was scheduled to be held on March 11, 2016, at which Sanjel, the Trustee and the Ad Hoc Bondholders would provide an update to any bondholder that wished to call in. This was rescheduled by the Trustee to March 31, 2016.

41 On March 11, 2016, the Syndicate sent the counter-offer required by the postponement of meeting agreement to the Ad Hoc Bondholders. This counter-proposal made it clear that there would be a CCAA/Chapter 15 process, rather than a Chapter 11 process. While this counter-proposal is confidential, it is fair to say that the parties were far apart in their negotiations, particularly with respect to treatment of the Syndicate indebtedness.

42 Also on March 11, 2016, a representative of Sanjel met with A&M's representative and discussed Sanjel's intention to disclaim certain leases in the anticipated CCAA proceedings.

43 Following receipt of the second round bids, Sanjel and its advisors identified the top three bidders and began negotiations with them with the goal of finalizing due diligence and being in a position to execute final APAs on March 24, 2016, as indicated in the Bank Forbearance Agreement.

44 In the meantime, Sanjel continued meetings with the A&M representative, who asked for, and was provided with:

- a) access to the newly created VDR for second stage bidders/investors in the SISP on March 12, 2016.
- b) draft materials relating to the CCAA filing, including current drafts of cash flow projections and drafts of stakeholder communication regarding the CCAA, on March 21, 2016.

45 On March 20, 2016, the Ad Hoc Bondholders provided Sanjel and the Syndicate with a third restructuring proposal. This one provided for some paydown of the Syndicate's debt, but involved less than half of that recovery in new money, about the same amount in debt secured by accounts receivable and a substantial amount of bank debt rolled over into a new loan. It also provided for a DIP facility to rank *pari passu* with a new bank credit facility in the event of a liquidation and the conversion of some bondholder debt into secured notes.

46 On March 23, 2016, counsel for Sanjel requested that the Trustee postpone the bondholder meeting scheduled for March 31, 2016 to April 14, 2016. He also proposed to set up the requested informational update on March 31, 2016. On March 25, 2016, counsel for the Trustee consented to this request.

47 In the SISP, final bids were received from the three top bidders on March 24, 2016, with negotiations to continue on final APAs. On the same day, Sanjel and its advisors hosted a call with A&M and Moelis, during which they walked through a 13 week cash forecast.

48 On March 31, 2016 the Syndicate and the Ad Hoc Bondholders had discussions with respect to the Ad Hoc Bondholders' March 20 proposal. In previous correspondence, the Syndicate's counsel had questioned the adequacy of the proposed DIP financing in the proposal and noted Sanjel's significant cash needs following exit from an insolvency proceeding, as opposed to the proposal's assumption that there would be better cash flow. At the conclusion of the call, the Ad Hoc Bondholders indicated that they would provide further modelling with respect to their proposal.

49 On April 3, 2016, Sanjel entered into final APAs with the proposed purchasers, STEP and Liberty. On April 4, 2016, the Sanjel Group filed for CCAA protection. Counsel for Sanjel Group disclosed that the application was made without notice to the Ad Hoc Bondholders. He submitted that notice would imperil the CCAA proceedings as the bondholders may, with notice, have pre-empted the CCAA filing by an involuntary filing under Chapter 11. There is no requirement to give notice to unsecured creditors of a CCAA filing. There are circumstances, and this was one of them, where it is appropriate to seek an initial order on an ex parte basis:

This may be an appropriate — even necessary — step in order to prevent "creditors from moving to realize on their claims, essentially a 'stampede to the assets' once creditors learn of the debtor's financial distress": J.P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (2007), at p. 55 ("Rescue!"); see also *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 7

50 On April 11, 2016, the Ad Hoc Bondholders presented their fourth proposal for restructuring, not to Sanjel but to the Syndicate. This proposal increases the amount the bondholders would contribute to Sanjel for new equity, which would be used to repay a portion of the Syndicate's loan.

51 According to Fried Frank, the Syndicate's counsel responded on April 13, 2016 advising that while they appreciated the work done by the Ad Hoc Bondholders, the Syndicate preferred the sale route. The Syndicate proposed alternatives that it might consider involving a higher pay-out of the Syndicate's debt than offered by the April 11, 2016 proposal. The Ad Hoc Bondholders have not responded.

52 The Sanjel Group apply for an order approving the sales transactions generated through the SISP, being a sales agreement between Sanjel and STEP Energy Services Ltd., including an assignment of the sale of the debtor's cementing assets in favour of 1961531 Alberta Ltd., and a sales agreement between Sanjel and Liberty.

53 The Trustee applied for an order dismissing the application for approval of these transactions, allowing the Ad Hoc Bondholders to propose a plan of arrangement, lifting the stay to allow the Trustee to commence a Chapter 11 filing and directing a new Court-monitored SISP, among other applications

III. Applicable Law

54 Section 36(3) of the CCAA sets out six non-exhaustive factors that must be considered in approving a sale by a CCAA debtor of assets outside the ordinary course of business. They are:

- (a) whether the process leading to the proposed sale was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale;
- (c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to 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 on 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.

55 In this case, the Monitor was not in place at the time of the process leading to the proposed sales, nor at the time the SISP was commenced. However, the Monitor has given an opinion on the process, which I will consider as part of my review.

56 Prior to the enactment of section 36, CCAA courts considered what are known as the Soundair principles in considering approval application, and they are still useful guidelines:

- a) Was there a sufficient effort made to get the price at issue? Did the debtor company act improvidently?
- b) Were the interests of all parties considered?
- c) Are there any questions about the efficacy and integrity of the process by which offers were obtained?
- d) Was there unfairness in the working out of the process?

Royal Bank v. Soundair Corp., 1991 CarswellOnt 205 (Ont. C.A.) at para 20.

57 Gascon, J. (as he then was) suggested in *AbitibiBowater inc., Re*, 2010 QCCS 1742 (C.S. Que.) at paras 70-72 that a court should give due consideration to two further factors:

- a) the business judgment rule, in that a court will not lightly interfere with the exercise of the commercial and business judgment of the debtor company and the monitor in the context of an asset sale where the marketing and sale process was fair, reasonable, transparent and efficient; and
- b) the weight to be given to the recommendation of the monitor.

58 As noted by Gascon, J., it is not desirable for a bidder to wait to the last minute, even up to a court approval stage, to submit its best offer. However, a court can consider such an offer, if it is evidence that the debtor company did not properly carry out its duty to obtain the best price for creditors.

IV. Analysis

59 The Trustee has raised a number of objections to the proposed sales, many of which relate to the factors and principles set out in section 36 of the CCAA, the Soundair principles and the AbitibiBowater factors:

A. The Trustee submits that the CCAA can only be used to liquidate the assets of a debtor company and distribute the proceeds where such use is uncontested or where there is clear evidence that the CCAA provides scope for greater recoveries than would be available on a bankruptcy.

60 Most of the cases relied upon by the Trustee with respect to this submission predate the 2009 enactment of section 36 of the CCAA. While prior to this change to the CCAA, there was some authority that questioned whether the CCAA should be used to carry out a liquidation of a debtors' assets, there was also authority that accepted this as a proper use of the statute.

61 An analysis of the pre-section 36 state of the law on this issue, and support for the latter view, is well summarized in *Nortel Networks Corp., Re*, [2009] O.J. No. 3169 (Ont. S.C.J. [Commercial List]). As noted by Morawetz, J. at para 28 of that decision, the CCAA is a flexible statute, particularly useful in complex insolvency cases in which the court is required to balance numerous constituents and myriad interests. This is such a case.

62 Section 36 now provides that a CCAA court may authorize the sale or disposition of assets outside the ordinary course of business if authorized to do so by court order. There is thus no jurisdictional impediment to the sale of assets where such sales meet the requisite tests, even in the absence of a plan of arrangement.

63 Morawetz, J in *Target Canada Co., Re*, 2015 ONSC 303 (Ont. S.C.J.) at paras 32 and 33, describes the change brought about by section 36:

Prior to the 2009 amendments to the CCAA, Canadian courts accepted that, in appropriate circumstances, debtor companies were entitled to seek the protection of the CCAA where the outcome was not going to be a going concern restructuring, but instead, a "liquidation" or wind-down of the debtor companies' assets or business.

The 2009 amendments did not expressly address whether the CCAA could be used generally to wind-down the business of a debtor company. However, I am satisfied that the enactment of section 36 of the CCAA, which establishes a process for a debtor company to sell assets outside the ordinary course of business while under CCAA protection, is consistent with the principle that the CCAA can be a vehicle to downsize or wind-down a debtor company's business.

See also *Re Brainhunter Inc.*, 2009 CarswellOnt 8207 at para 15.

64 Whether before or after the enactment of section 36, Canadian courts have approved en bloc sales of a debtor company, recognizing that such sales are consistent with the broad remedial purpose and flexibility of the CCAA.

65 What the provisions of the CCAA can provide in situations such as those facing the Sanjel Group is a court-supervised process of the execution of the sales, with provision for liquidity and the continuation of the business through the process provided by interim financing, a Key Employee Retention Plan that attempts to ensure that key employees are given an incentive to ensure a seamless transition, critical supplier relief that keeps operations functioning pending the closing of the sales and a process whereby a company with operations in Canada, the United States and internationally is able to invoke the aid of both Canadian and US courts during the process. It is true that the actual SISP process preceded the CCAA filing, and I will address that factor later in this decision.

66 As counsel to the Sanjel Group notes, this type of insolvency proceeding is well-suited to the current catastrophic downturn of the economy in Alberta, with companies at the limit of their liquidity. It allows a business to be kept together and sold as a going concern to the extent possible. There have been a number of recent similar filings in this jurisdiction: the filing in Southern Pacific and Quicksilver are examples.

67 The Monitor supports the sales, and is of the view, supported by investigation into the likely range of forced sale liquidation recoveries with financial advisors and others with industry knowledge, that a liquidation of assets would not generate a better result than the consideration contemplated by the proposed sales. The Monitor's investigations were

hampered by the lack of recent sales of similar businesses, but I am satisfied by its thorough report that the Monitor's investigation of likely recoveries is the best estimate available. A CS estimate provided a different analysis, but I am satisfied by the evidence that it has little probative value.

68 In summary, this is not an inappropriate use of the CCAA arising from the nature of the proposed sales.

B. The Trustee submits that the proposed sales are the product of a defective SISP conducted outside of the CCAA.

69 It is true that the SISP, and the restructuring negotiations with the Ad Hoc Bondholders, took place prior to the filing under the CCAA, that this was a "pre-pack" filing.

70 A pre-filing SISP is not of itself abusive of the CCAA. Nothing in the statute precludes it. Of course, a pre-filing SISP must meet the principles and requirements of section 36 of the CCAA and must be considered against the Soundair principles. The Trustee submits that such a SISP should be subject to heightened scrutiny. It may well be correct that a pre-filing SISP will be subject to greater challenges from stakeholders, and that it may be more difficult for the debtor company to establish that it was conducted in a fair and effective manner, given the lack of supervision by the Court and the Monitor, who as a court officer has statutory duties.

71 Without prior court approval of the process, conducting a SISP outside of the CCAA means that both the procedure and the execution of the SISP are open to attack by aggrieved stakeholders and bitter bidders, as has been the case here. Any evidence or reasonable allegations of impropriety would have to be investigated carefully, whereas in a court-approved process, comfort can be obtained through the Monitor's review and the Court's approval of the process in advance. However, in the end, it is the specific details of the SISP as conducted that will be scrutinized.

72 Similar issues were considered in *Nelson Education Ltd., Re*, 2015 ONSC 5557 (Ont. S.C.J. [Commercial List]) at paras 31-32, and in *Bloom Lake, g.p.l., Re*, 2015 QCCS 1920 (C.S. Que.) at para 21.

73 The Trustee submits that the SISP was defective in that its timelines were truncated and that it was destined not to generate offers that maximized value for all stakeholders. The Trustee filed an affidavit of a representative of Moelis indicating that it would be typical in a SISP to establish a deadline for non-binding offers one or two months following commencement of the process, while in this SISP, participants had only 12 to 25 days to evaluate the business and provide non-binding indications of interest. This opinion did not address the previous BAML process that identified likely purchasers and thus lengthened the review process for these parties who participated in the first process. The Trustee's advisor was also critical that the SISP provided only 16 days for final offers, suggesting that it is more typical to provide two months.

74 While likely correct for normal-course SISP's, this analysis does not take into account the high cash burn situation of these debtors, nor the deteriorating market. The Moelis opinion suggests that potential purchaser would have a heightened diligence requirement in the current unfavourable market conditions, requiring extra time for due diligence. However, despite the speed of the SISP, it appears to have generated a range of bids significantly above liquidation value. The process was not limited to the SISP, but included the previous BAML process and the negotiations with the Ad Hoc Bondholders.

75 The evidence discloses a thorough and comprehensive canvassing of the relevant markets for the debtors and their assets despite the aggressive timelines. The BAML process identified some interested parties and Sanjel's financial advisors built on that process by re-engaging with 28 private equity firms that had already expressed interest in these unique assets as well as identifying new potential purchasers, reaching out to 85 potential buyers.

76 Of those 85 parties, 37 executed NDAs, 25 conducted due diligence and 17 met with the management team. Eight submitted non-binding indications of interest, five were invited to submit second-round bids and finally the top three were chosen for the continuation of negotiations to final agreements.

77 While some interested parties may have found the time limits challenging, a reasonable number were able to meet them and submit bids. I am satisfied from the evidence that, despite a challenging economic environment, the process was competitive and robust.

78 I also note the comments of the Monitor in its First Report dated April 12, 2016. While it was not directly involved in the SISP, the Monitor reports that the financial advisors advised the Monitor, that given the size and complexity of the Sanjel Group's operations and the time frames involved, all strategic and financial sponsors known to the advisors were contacted during the SISP and that it is unlikely that extending the SISP time frames in the current market would have resulted in materially better offers.

79 Based on this advice and the Monitor's observations since its involvement in the SISP from mid-February 2016, the Monitor is of the opinion that it is highly improbable that another post-filing sales process would yield offers materially in excess of those received.

80 Finally, I note that the Ad Hoc Bondholders' own March 20 proposal envisaged a pre-packaged CCAA proceedings. A sales process is only required to be reasonable, not perfect. I am satisfied that this SISP was run appropriately and reasonably, and that it adequately canvassed the relevant market for the Sanjel Group and its assets.

C. The Ad Hoc Bondholders submit that negotiations among them, the Sanjel Group and the Syndicate were a sham conducted by Sanjel to delay the Ad Hoc Bondholders from taking action under Chapter 11 while it finalized the APAs. The Trustee alleges that the SISP has been conducted and the CCAA filing occurred in an atmosphere tainted by manoeuvring for advantage, bad faith, deception, secrecy, artificial haste and excessive deference by the Sanjel Group to the Syndicate.

81 These are serious allegations, but they are not supported by the evidence.

82 As the somewhat lengthy history of negotiations establishes, the Ad Hoc Bondholders had almost three months to present and negotiate restructuring proposals, with access to confidential information afforded to their advisors from January 9, 2016, weeks before the SISP participants. They presented four proposals, the last one after final bids had been received in the SISP. Although the final proposal breached the timelines of the SISP process, and could potentially raise an issue with respect to the integrity of the SISP process, Sanjel, the Syndicate and the prospective purchasers are not pressing that argument, as they take the position that the final offer is inferior at any rate.

83 These proposals received responses from Sanjel and the Syndicate, and counter proposals were received. The evidence discloses that, in all proposals and counter proposals, the parties were far apart on a major issue: the extent to which the Syndicate's debt was to be paid down and how far it was willing to allow a portion to remain at risk.

84 The Ad Hoc Bondholders were aware of the SISP from its commencement, and aware of the timing of the process. Throughout the SISP, the financial advisors had regular contact with Moelis and Fried Frank and directly with the Ad Hoc Bondholders. Michael Genereux, the lead partner at PJT with respect to the SISP, has sworn that he believes the Ad Hoc Bondholders were aware of the SISP and that it was progressing at a rapid pace. He says that he urged the Ad Hoc Bondholders to accelerate the pace at which they were advancing their restructuring negotiations.

85 The Ad Hoc Bondholders were aware, or should have been aware, that the Sanjel Group intended a CCAA/Chapter 15 process from at the latest mid-March, 2016. Their representative from A&M was aware of the possibility of a CCAA filing from March 4, 2016. Reference to PWC as Monitor under the CCAA was available through the template APAs from March 4, 2016

86 The Trustee and the Ad Hoc Bondholders submit that the Ad Hoc Bondholders' April 11, 2016 proposal provides superior recovery to the proposed sales generated by the SISP, that it "implies" a purchase price significantly in excess of the values generated by the APAs. The proposal, which was made directly to the Syndicate, was rejected by the Syndicate.

It provides less immediate recovery to the Syndicate, and leaves a substantial portion of the Syndicate debt outstanding in a difficult and highly uncertain economic environment. It fails to address previously-expressed concerns about the need for capital going forward. The implied value of the proposal appears to rest on assumptions about improved economic recovery that the Syndicate does not accept or share.

87 In addition, the proposal would require at least six months to execute and leaves a number of questions outstanding, not the least being whether a plan that raises some and not all unsecured debt to secured status would pass muster. The proposal was rejected by the Syndicate for reasonable and defensible justifications.

88 The Ad Hoc Bondholders describe their proposal as a "germ" of a viable plan. While a germ of a viable plan may be sufficient to justify the commencement of a CCAA proceeding, it is not comparable to the proposed sales generated by a reasonably-run and thorough SISP.

89 The Trustee also submits that the Court should not be deterred by the Syndicate's rejection of the proposal, insisting on its value and citing cases where a creditor's stated intention not to accept a plan did not prevent a CCAA filing from proceeding. This is a different situation: the Ad Hoc Bondholder's proposals are specific proposals with clear risks of timing and certainty. It is not up to this Court to second guess the Syndicate's rejection of such a plan, even if inclined to do so.

90 The Trustee submits that Sanjel did not act in good faith towards the Ad Hoc Bondholders in the period leading up to the filing. The Trustee notes that, contrary to the terms of the Bond Agreement, Sanjel failed to disclose to the bondholders that the Syndicate had issued a demand for payment acceleration and a notice of intention to enforce security pursuant to the terms of the Bankruptcy and Insolvency Act (the "Demand Acceleration and NOI") on March 18, 2016. While this was a contractual breach, the Ad Hoc Bondholders were well aware that Sanjel was in breach of the Bank Credit Facility, and that the Syndicate was taking steps to enforce its rights in negotiations with Sanjel and the Ad Hoc Bondholders. The Syndicate, and the Ad Hoc Bondholders, were both careful to preserve their rights of enforcement in proposals and counter-proposals. In fact, the Syndicate did not exercise its right to set-off, and has allowed Sanjel to continue to have access to liquidity going into the CCAA process.

91 This failure by Sanjel to advise the Trustee, (and other unsecured creditors that had similar provisions in their contracts), of this further step by the Syndicate does not constitute a reason to refuse to approve that APAs.

92 The Trustee submits that Sanjel failed to make full and plain disclosure during the initial hearing because it failed to disclose that in 2015, 62 % of the Sanjel Group's revenue was generated in the United States. Sanjel made extensive disclosure of its corporate structure and the integration of its business in its initial filing, including the fact that the Sanjel Group's "nerve centre", management team and treasury and financial functions are largely based in Calgary. The factors disclosed were more than sufficient to establish jurisdiction for a CCAA filing. The US Court in the Chapter 15 filing found the Sanjel Group's COMI to be in Calgary. The single statistic of 2015 revenue would not have changed the outcome of the Initial Order.

93 The Trustee's most serious allegation, given its implications for the professional reputations of those involved, is that Sanjel and its counsel and the Syndicate and its counsel misled the Trustee and the Ad Hoc Bondholders in their requests for adjournment of the bondholders' meeting, that the correspondence relating to the requests for adjournment created an obligation to negotiate in good faith, and that Sanjel and the Syndicate failed to do so. The Trustee and the Ad Hoc Bondholders allege that Sanjel and the Syndicate were negotiating with the Ad Hoc Bondholders only to gain time to finalize the APAs and file under the CCAA.

94 Again, this serious allegation is not supported by the evidence. The correspondence relating to the adjournment requests discloses no promises to hold off proceedings. The letter of request for the first adjournment for counsel to the Syndicate, while it refers to engaging with the Ad Hoc Bondholders with respect to the March 2, 2016 proposal, stipulates that in requesting the postponement of the meeting, counsel is not promising any course of action and reserves all rights.

95 The request from counsel to Sanjel refers to the dual track of negotiating a financial restructuring and/or sale of assets. It speaks of focusing on negotiations for the balance of the month, instead of "prospective enforcement action as proposed for consideration at the scheduled bondholders meeting," as was threatened by the notice of meeting. The Ad Hoc Bondholders were well-compensated financially for this adjournment.

96 The second request to adjourn the meeting to April 14, 2016 was similarly without any promise to forbear and the acceptance of the request by the Trustee did not impose any conditions nor give any reasons for the acceptance. The representatives of the Ad Hoc Bondholders are knowledgeable and sophisticated with respect to financing and insolvency matters. They cannot be said to have been misled by the language used in the adjournment requests.

97 The Trustee submits that the CCAA process to date has been engineered to effect a foreclosure in favour of the Syndicate "to the serious and material prejudice of the Bondholders" and other unsecured creditors.

98 The SISP did not disclose any possibility that, in the current economic climate, the disposition of the assets would generate even enough to cover the debt owed to the secured creditors. The proposals made by the Ad Hoc Bondholders did not offer nearly enough to pay out that debt.

99 The views of the Syndicate and its priority rights must be given due consideration: *Windsor Machine & Stamping Ltd., Re*, 2009 CarswellOnt 4471 (Ont. S.C.J. [Commercial List]) at para 43.

100 Section 6 of the CCAA requires that any compromise of creditors' rights must be supported by a double majority of the affected creditors. The Syndicate (as the principal secured creditor group) and the Ad Hoc Bondholders (as unsecured creditors with other unsecured creditors) would form separate voting classes for the purposes of a vote on any plan of arrangement. Each class must have a double majority of creditors, representing both two-thirds in value and a majority of number, voting in support of the plan as a condition precedent to court approval. Thus, the Syndicate holds an effective "veto" over the approval of any plan proposed by the Ad Hoc Bondholders: *SemCanada Crude Co., Re*, 2009 ABQB 490 (Alta. Q.B.) at para 22.

101 As noted by the Syndicate, the Ad Hoc Bondholders proposals, including the April 11, 2016 proposal, pose substantial risk to the Syndicate, and it is under no obligation to support them. There is no evidence that the Syndicate is acting unreasonably or unfairly in asserting that it would exercise the statutory protection afforded to a secured creditor under the CCAA; in fact, the evidence is that the Syndicate was willing to consider a less than 100% payout in negotiations with the Ad Hoc Bondholders. There was however no agreement as to the extent of the payout and the extent to which the Syndicate would agree to remain at risk.

102 The prejudice to the bondholders is that they were unable to persuade the secured creditors to compromise or put its financial interests at risk in order to provide the bondholders with some chance that an improved economic climate may save this enterprise. As noted, the Syndicate had doubts that the Ad Hoc Bondholder's proposals would even provide sufficient operating capital to keep the Sanjel Group operating for the months it would take to implement their proposals.

103 The prejudice, if any, to the Ad Hoc Bondholders is that they were not able to pre-empt the CCAA filing with a filing under Chapter 11 of the *United States Bankruptcy Code*, with an automatic stay that, according to US bankruptcy law, has worldwide effect. A subsequent CCAA filing could be considered a breach of the stay, and provoke a jurisdictional issue that would delay proceedings and prove expensive to the Syndicate, improving the Ad Hoc Bondholders' bargaining position.

104 While there is only hearsay opinion before me with respect to the advantages of a Chapter 11 filing, the Trustee suggests that under such a filing:

- (a) the Liberty and Step APAs would have been subject to market test and to higher and better offers;

(b) Sanjel could confirm a plan without the consent of the Syndicate; and

(c) parties in interest and estate fiduciaries could pursue claims and causes of action against Sanjel, the Syndicate, Sanjel's equity holders and MacBain.

105 Sanjel cites academic commentary that the cram-down provisions of Chapter 11 require strict compliance so as not to override the protections and elections available to secured creditors in opposition to a plan that they do not support. Specifically, if a class of creditors is impaired, the plan must be fair and equitable with respect to that class.

106 This is an issue for the US Courts. However, even if the Chapter 15 filing was replaced by a Chapter 11 filing, the current CCAA proceedings would not be terminated and any restructuring in the United States would necessarily have to be coordinated with these CCAA proceedings. Accordingly, the voting requirements for any plan of arrangement or the requirements for approval of a sale under the CCAA could not be avoided.

D. The Ad Hoc Bondholders were prejudiced in that they were not provided with information regarding the process and the bids received.

107 The Ad Hoc Bondholders had access to the same information afforded to bidders under the SISP and more. They were able to make proposals both before and after that process. Their financial advisors were afforded an opportunity for due diligence, and exercised it.

108 What they did not receive was disclosure of the details of the bids. There was a dispute about whether or not the Ad Hoc Bondholders could be considered "bidders". While they were not part of the SISP, they certainly had interests in conflict with the SISP bidders. Had the bids been disclosed to them, there would indeed have been concern over the integrity of the process, as such disclosure would allow them to tailor their proposals in such a way as to undermine the bids.

109 The Ad Hoc Bondholders were aware that they would not be given copies of the bids by mid-February, 2016 when the Bondholders Forbearance Agreement was settled, as it included a provision clarifying that they were not entitled to any pricing or bidder information from the SISP.

110 The Bond Forbearance Agreement also recognized that, while Sanjel would negotiate in good faith with the Ad Hoc Bondholders, nothing restricted its ability to enter into or conduct negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

111 The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

112 I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbable that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

VI. Postscript

113 On May 9, 2016, before these reasons were released, I received a copy of a letter dated May 5, 2016 from Fried Frank on behalf of the Ad Hoc Bondholders addressed to Canadian and US counsel for the Sanjel Group, the Monitor, the Syndicate and the prospective purchasers. In extravagant language, the Ad Hoc Bondholders state that they have become aware of information that the addressees are "duty bound" to bring to the attention of the Courts as officers of the Courts. That information is that Shane Hooker has been designated to lead the Canadian cementing operations when the STEP sale closes, according to a STEP press release. Evidently, Mr. Hooker is married to the daughter of Dan MacDonald, the chairman of Sanjel's board, and is the sister of Darin MacDonald, who was Chief Executive Officer of Sanjel and head of the restructuring committee.

114 The letter asserts the following:

- a) There are "substantial and material" connections between STEP and the MacDonald family. It appears that the basis for this statement is that Mr. Hooker is married to Mr. MacDonald's daughter and an employee and "executive in residence" of ARC Financial Corp., STEP's financial sponsor in the sale;
- b) Mr. Hooker is "an intimate beneficiary of all that is and all that belongs to the MacDonald family." In subsequent correspondence with the Monitor, it appears that the Ad Hoc Bondholders have no evidence to support this allegation;
- c) Mr. Hooker is "the loyal son-in-law and brother-in-law" of the MacDonald family. Again, the Ad Hoc Bondholders admit that they have no information to support this allegation;
- d) By reason of Mr. Hooker's relationship with the "MacDonald family", the proposed STEP transaction and the entirety of the SISP process "is tainted and worse". "(O)ur clients have every reason to believe the substance, of self-dealing and deception of the highest order";

e) "Mr. Hooker's personal and professional ties to the MacDonald family raise the spectre that all at hand is and has been a thinly-veiled scheme between the Company and the Syndicate and their advisors to deliver, on the one hand, an adequate recovery to the Syndicate and, on the other hand, Sanjel's Canadian assets back into the hands of the MacDonald family thereby working a substantial forfeiture of value to the Bondholders and all other unsecured creditors of the Company".

115 The letter repeats previous allegations that the SISP was "driven by self-interest and self-dealing", "riddled with conflicts of interest," "inappropriate and flawed in every respect", "chilled, inadequate" and "not conducted in good faith and efforts were undertaken to mislead and misdirect the company's stakeholders". It alleges:

a) "That none of this has been brought to the attention of the Courts and all parties in interest is reprehensible at best and has all indicia of fraudulent intent and purpose."

b) "Be advised that with respect to each and all of you and each and all of your respective clients as well as with respect to STEP, Liberty and any and all funding sources and sponsors for each, our clients hereby reserve all of their rights and remedies with respect to any and all claims and causes of action of every kind and nature whatsoever whether such claims and causes of action are grounded in contract, tort, equity, statute and otherwise including, but not limited to, any and all breach of fiduciary duties, civil conspiracy, tortious interference and lender liability."

c) "... the efforts to continue with malfeasance wrapped in the cloak of SISP and CCAA by each and all of you and your clients must stop now. As above, the Courts and others should and must be informed, the failure to do so is and will be a misrepresentation and fraud on the Courts."

116 The letter comments that "(w)hen Justice Romaine is in receipt of the information, she will have reason and basis and we believe that Her Ladyship will be constrained, to vacate the order."

117 The Monitor took immediate action to investigate these serious allegations of fraud, misrepresentation, conspiracy and collusion, requesting urgent responses from counsel for Sanjel, the Syndicate, Mr. MacDonald, PJT and CS. Relevant witnesses were contacted and follow-up questions directed. The Monitor was also in contact with Fried Frank to determine the source of the allegations, and what investigation had been undertaken by Fried Frank or the Ad Hoc Bondholders to verify or support their allegations.

118 On Saturday, May 7, 2016, Fried Frank made the further allegation that potential bidders in the SISP were provided with forecasts that were far worse than actual results in order to facilitate the alleged fraud and conspiracy. The Monitor added this allegation to its investigation.

119 The Monitor was satisfied by its rapid but thorough investigations that:

a) Mr. Hooker and Mr. MacDonald have been estranged for the last two and a half-years, and have had no communication on any personal or business matters;

b) Mr. Hooker left Sanjel in March, 2014 and began working for ARC Financial in the fall of 2015 to assist ARC in an unrelated transaction. ARC is a large private investor focussed on energy, which provides financing through a number of funds financed by from third party investors. ARC is the primary financial stakeholder in the STEP acquisition. No one from the MacDonald family has an ownership position in ARC, nor are any of them investors in any ARC funds. Mr. Hooker has no involvement in ARC's fundraising efforts or fund deployment and he has no ownership interest in ARC;

c) Mr. MacDonald had no involvement in the negotiation of the STEP APA, other than attendance as a Sanjel representative at three meetings between November 2015 and January 2016, before the SISP was commenced;

d) Mr. Crilly as CFO of Sanjel (and later CRO) led the SISP process for Sanjel, while Mr. MacDonald concentrated on attempting to find a buyer for the whole company;

e) The senior Mr. MacDonald has not had an active role in Sanjel's management for years, was not involved in the SISP and does not own shares in STEP or ARC;

f) Mr. Hooker's involvement with the SISP and negotiations with STEP was limited to conducting on-site diligence on behalf of STEP;

g) Sanjel has no direct or indirect ownership interest or other financial interest in ARC, STEP, the newly formed company that will be purchasing the cementing assets or any other entity owned or controlled by ARC;

h) No consideration was provided to Mr. Hooker or either Mr. MacDonald in connection with the STEP APA;

i) In the opinion of many of those who provided responses, the relationship between Mr. Hooker and Mr. MacDonald had an adverse effect, if anything, on the merits of the STEP bid. The advisors and the Syndicate repeat their previous position that the STEP offer, in combination with the Liberty offer, was materially superior to any en bloc bid or combination of bids, and was supported on the basis of its economic merits.

120 This information was largely confirmed by a number of sources. The Monitor did not obtain sworn statements, nor conduct any kind of discovery process. It did not present the information in its Sixth Report to the Court as evidence, but as a report on its investigation to determine whether there was any probative value to the Ad Hoc Bondholders' allegations.

121 When the Monitor was unable to find any real evidence to support the allegations, other than the bare fact that Mr. Hooker is an employee of ARC and is married to Mr. MacDonald's sister, it asked the Ad Hoc Bondholders if they had any supporting evidence. The substance of counsel to the Ad Hoc Bondholders' response is that there is an appearance of inappropriate dealing (arising from the relationship), and that it was up to the Monitor to investigate this.

122 The Ad Hoc Bondholders instead provided the Monitor with a list of additional questions that they wish the Monitor to investigate through sworn statements subject to cross-examination. These questions appear designed to elicit some evidence that may support the Ad Hoc Bondholder's speculations.

123 The Monitor cannot be faulted for failing to obtain sworn evidence from relevant parties. The allegations were made after approval of the APAs in the context of tight timelines to the closing of the transactions and the risk of losing the recommended sales transactions. If the Monitor had discovered anything that would give any legitimacy to the allegations, or raise any doubt about the integrity of the SISP, it may have been appropriate to direct further investigation, including sworn evidence. However, mere speculation resting on a family relationship is insufficient to require the Monitor to undertake further expensive investigation or to conduct a fishing expedition. This is particularly the case as there is no real evidence that Mr. Hooker's prospective employment will benefit either Mr. MacDonald or Sanjel in any way, or Mr. Hooker himself, other than the offer of employment.

124 This is not a case where evidence that should be presented in affidavit form has been incorporated improperly into a Monitor's report. The Monitor decided, quite properly, that at this stage of the process, a quick investigation to determine whether there was any real basis for the Ad Hoc Bondholders complaint was warranted. This investigation has satisfied the Monitor that, other than the fact that Mr. Hooker is indeed Mr. MacDonald's brother-in-law, there is no evidence of collusion between them, Mr. MacDonald was not involved in the STEP APA, Mr. Hooker was in no position to influence that STEP APA and no evidence that Mr. Hooker or the "MacDonald family" will profit in any way from the STEP APA, other than Mr. Hooker's offer of employment.

125 Given the lack of any indicia that there is any basis for the Ad Hoc Bondholders' speculations of fraud or conspiracy, there is no reason for this Court to require the Monitor to take further steps to investigate the allegations, which appear to be thinly veiled and reckless attempts to delay and obfuscate the process.

126 With respect to the allegations that potential bidders were provided with forecasts far worse than actual results in order to facilitate the alleged fraud and conspiracy, the Monitor has reviewed the forecasts and the variances from the forecasts provided during the SISP to actuals. The Monitor reports that these relate to collection of accounts receivable and payment of accounts payable. The actual collection of receivables was better than forecasted for the months of March and April. However, the Monitor understands that is a temporary timing variance based on earlier collection of receivables and does not represent a permanent improvement in Sanjel's actual cash position.

127 Thus, the Monitor is of the view that the allegations by the Ad Hoc Bondholders with respect to forecasts being far worse than actual results lack merit.

128 I accept the Monitor's advice on this issue.

129 With respect to disclosure, the Monitor was not aware of the connection between STEP and the company alleged in the Fried Frank letter. The Monitor has reported that it did not become aware of anything that would support or substantiate the allegations since its involvement in the SISP process after February 24, 2016.

130 The Ad Hoc Bondholders' allegations are in essence that the SISP was structured to achieve a preferential outcome for the MacDonald family through the familial connections between Mr. Hooker and the MacDonald family. If a sale of assets of a debtor company is to be made to a person related to the debtor, the Court may only approve the sale 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 debtor 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: CCAA section 36(4).

131 A related party pursuant to section 36(5) is defined to include certain categories of persons, and neither Mr. Hooker, his wife or either Mr. MacDonald fall into these categories.

132 There is no evidence or indication that any member of the "MacDonald family" will benefit from the STEP APA, other than Mr. Hooker's offer of employment. I am therefore satisfied that section 36(3) is not applicable to the STEP or the Liberty transactions and that no disclosure of any relationship was necessary before the APAs were approved.

133 Even if disclosure had been made, given the evidence before me with respect to the SISP process and the offers received, I would have been satisfied the requirements of section 36(3) were met.

134 In conclusion, the allegations of the Ad Hoc Bondholders do not change my decision with respect to approval of the APAs. I see no reason why the Monitor should continue its investigation.

135 The issue of who should bear the cost of the investigation into these allegations is reserved.

Debtors' application granted; trustee's application dismissed.

TAB 9

Tool-Plas Systems Inc., Re

2008 CarswellOnt 6258, [2008] O.J. No. 4218, 172 A.C.W.S. (3d) 112, 172 A.C.W.S. (3d) 113, 48 C.B.R. (5th) 91

**IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS
SYSTEMS INC. (Applicant) AND IN THE MATTER OF SECTION
101 OF THE COURTS OF JUSTICE ACT, AS AMENDED**

Morawetz J.

Heard: September 29, 2008

Judgment: October 24, 2008

Docket: CV-08-7746-00-CL

Counsel: D. Bish for Applicant, Tool-Plas
T. Reyes for Receiver, RSM Richter Inc.
R. van Kessel for EDC, Comerica
C. Staples for BDC
M. Weinczok for Roynat

Headnote

Debtors and creditors --- Receivers --- Conduct and liability of receiver --- General conduct of receiver
Debtor manufactured auto parts --- Debtor wished to appoint receiver and execute "quick flip", including terms that purchaser would acquire assets of debtor and hire same employees, and assume debt to secured lenders --- Receiver brought motion for approval of transaction --- Motion granted --- Transaction was best available option, and was reasonable --- Plan was in best interests of shareholders --- Certain parties would benefit, including secured lenders, certain lessors, and certain employees --- Certain employees and suppliers would have no possibility of recovery, but were unlikely to recover under any scenario --- Price proposed was higher than liquidation value or value of going concern --- Secured lenders supported transaction and subordinated secured lenders did not object --- Harm could be caused by delay in that relationship with customers could be harmed by disruption.

Table of Authorities

Cases considered by Morawetz J.:

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.) --- referred to

Morawetz J.:

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

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

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

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

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

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

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

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

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

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

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

12 Counsel to the Receiver pointed out that the transaction only involved the mould business. The die division has already been shut down. The die division employees were provided with working notice. They will not have ongoing jobs. Suppliers to the die division will not have their outstanding obligations assumed by the purchaser. There is no doubt that employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

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

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

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

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

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

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

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

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

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

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

Motion granted.

TAB 10

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

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 — Salutory 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 minimales 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 minimales 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 minimales 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 des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

Le juge de première instance a refusé l'ordonnance de confidentialité et a ordonné à la société d'État de déposer les documents sous leur forme actuelle ou sous une forme révisée, à son gré. La société d'État a interjeté appel en vertu de la r. 151 des *Règles de la Cour fédérale, 1998*, et l'organisme environnemental a formé un appel incident en vertu de la r. 312. Les juges majoritaires de la Cour d'appel ont rejeté le pourvoi et le pourvoi incident. Le juge dissident aurait accordé l'ordonnance de confidentialité. La société d'État a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Il y a de grandes ressemblances entre l'ordonnance de non-publication et l'ordonnance de confidentialité dans le contexte des procédures judiciaires. L'analyse de l'exercice du pouvoir discrétionnaire sous le régime de la r. 151 devrait refléter les principes sous-jacents énoncés dans l'arrêt *Dagenais c. Société Radio-Canada*, [1994] 3 R.C.S. 835. Une ordonnance de confidentialité rendue en vertu de la r. 151 ne devrait l'être que lorsque: 1) une telle ordonnance est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le cadre d'un litige, en l'absence d'autres solutions raisonnables pour écarter ce risque; et 2) les effets bénéfiques de l'ordonnance de confidentialité, y compris les effets sur les droits des justiciables civils à un procès équitable, l'emportent sur ses effets préjudiciables, y compris les effets sur le droit à la liberté d'expression, lequel droit comprend l'intérêt du public à l'accès aux débats judiciaires.

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurier les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance. L'ordonnance de confidentialité aurait d'importants effets bénéfiques sur le droit de la société d'État à un procès équitable et à la liberté d'expression. Elle n'aurait que des effets préjudiciables minimes sur le principe de la publicité des débats et

sur la liberté d'expression. Advenant que l'ordonnance ne soit pas accordée et que, dans le cadre de la demande de contrôle judiciaire, la société d'État n'ait pas l'obligation de présenter une défense en vertu de la *Loi canadienne sur l'évaluation environnementale*, il se pouvait que la société d'État subisse un préjudice du fait d'avoir communiqué cette information confidentielle en violation de ses obligations, sans avoir pu profiter d'un avantage similaire à celui du droit du public à la liberté d'expression. Les effets bénéfiques de l'ordonnance l'emportaient sur ses effets préjudiciables.

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AB Hassle v. Canada (Minister of National Health & Welfare), 2000 CarswellNat 356, 5 C.P.R. (4th) 149, 253 N.R. 284, [2000] 3 F.C. 360, 2000 CarswellNat 3254 (Fed. C.A.) — considered

Canadian Broadcasting Corp. v. New Brunswick (Attorney General), 2 C.R. (5th) 1, 110 C.C.C. (3d) 193, [1996] 3 S.C.R. 480, 139 D.L.R. (4th) 385, 182 N.B.R. (2d) 81, 463 A.P.R. 81, 39 C.R.R. (2d) 189, 203 N.R. 169, 1996 CarswellNB 462, 1996 CarswellNB 463, 2 B.H.R.C. 210 (S.C.C.) — followed

Dagenais v. Canadian Broadcasting Corp., 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.) — followed

Edmonton Journal v. Alberta (Attorney General) (1989), [1990] 1 W.W.R. 577, [1989] 2 S.C.R. 1326, 64 D.L.R. (4th) 577, 102 N.R. 321, 71 Alta. L.R. (2d) 273, 103 A.R. 321, 41 C.P.C. (2d) 109, 45 C.R.R. 1, 1989 CarswellAlta 198, 1989 CarswellAlta 623 (S.C.C.) — followed

Eli Lilly & Co. v. Novopharm Ltd., 56 C.P.R. (3d) 437, 82 F.T.R. 147, 1994 CarswellNat 537 (Fed. T.D.) — referred to
Ethyl Canada Inc. v. Canada (Attorney General), 1998 CarswellOnt 380, 17 C.P.C. (4th) 278 (Ont. Gen. Div.) — considered

Irwin Toy Ltd. c. Québec (Procureur général), 94 N.R. 167, (sub nom. *Irwin Toy Ltd. v. Quebec (Attorney General)*) [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) — followed

M. (A.) v. Ryan, 143 D.L.R. (4th) 1, 207 N.R. 81, 4 C.R. (5th) 220, 29 B.C.L.R. (3d) 133, [1997] 4 W.W.R. 1, 85 B.C.A.C. 81, 138 W.A.C. 81, 34 C.C.L.T. (2d) 1, [1997] 1 S.C.R. 157, 42 C.R.R. (2d) 37, 8 C.P.C. (4th) 1, 1997 CarswellBC 99, 1997 CarswellBC 100 (S.C.C.) — considered

N. (F.), Re, 2000 SCC 35, 2000 CarswellNfld 213, 2000 CarswellNfld 214, 146 C.C.C. (3d) 1, 188 D.L.R. (4th) 1, 35 C.R. (5th) 1, [2000] 1 S.C.R. 880, 191 Nfld. & P.E.I.R. 181, 577 A.P.R. 181 (S.C.C.) — considered

R. v. E. (O.N.), 2001 SCC 77, 2001 CarswellBC 2479, 2001 CarswellBC 2480, 158 C.C.C. (3d) 478, 205 D.L.R. (4th) 542, 47 C.R. (5th) 89, 279 N.R. 187, 97 B.C.L.R. (3d) 1, [2002] 3 W.W.R. 205, 160 B.C.A.C. 161, 261 W.A.C. 161 (S.C.C.) — referred to

R. v. Keegstra, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed

R. v. Mentuck, 2001 SCC 76, 2001 CarswellMan 535, 2001 CarswellMan 536, 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 47 C.R. (5th) 63, 277 N.R. 160, [2002] 2 W.W.R. 409 (S.C.C.) — followed

R. v. Oakes, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — referred to

Statutes considered:

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

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

Canadian Environmental Assessment Act, S.C. 1992, c. 37

Generally — considered

s. 5(1)(b) — referred to

§. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

Criminal Code, R.S.C. 1985, c. C-46

s. 486(1) — referred to

Rules considered:

Federal Court Rules, 1998, SOR/98-106

R. 151 — considered

R. 312 — referred to

The judgment of the court was delivered by *Iacobucci J.*:

I. Introduction

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

2 For the following reasons, I would issue the confidentiality order sought and, accordingly, would allow the appeal.

II. Facts

3 The appellant, Atomic Energy of Canada Ltd. ("AECL"), is a Crown corporation that owns and markets CANDU nuclear technology, and is an intervener with the rights of a party in the application for judicial review by the respondent, the Sierra Club of Canada ("Sierra Club"). Sierra Club is an environmental organization seeking judicial review of the federal government's decision to provide financial assistance in the form of a \$1.5 billion guaranteed loan relating to the construction and sale of two CANDU nuclear reactors to China by the appellant. The reactors are currently under construction in China, where the appellant is the main contractor and project manager.

4 The respondent maintains that the authorization of financial assistance by the government triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*, S.C. 1992, c. 37 ("CEAA"), which requires that an environmental assessment be undertaken before a federal authority grants financial assistance to a project. Failure to undertake such an assessment compels cancellation of the financial arrangements.

5 The appellant and the respondent Ministers argue that the CEAA does not apply to the loan transaction, and that if it does, the statutory defences available under ss. 8 and 54 apply. Section 8 describes the circumstances where Crown corporations are required to conduct environmental assessments. Section 54(2)(b) recognizes the validity of an environmental assessment carried out by a foreign authority provided that it is consistent with the provisions of the CEAA.

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared

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.

51 Thus, the interests which would be promoted by a confidentiality order are the preservation of commercial and contractual relations, as well as the right of civil litigants to a fair trial. Related to the latter are the public and judicial interests in seeking the truth and achieving a just result in civil proceedings.

52 In opposition to the confidentiality order lies the fundamental principle of open and accessible court proceedings. This principle is inextricably tied to freedom of expression enshrined in s. 2(b) of the *Charter: New Brunswick, supra*, at para. 23. The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice," guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick, supra*, at para. 22.

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

53 Applying the rights and interests engaged in this case to the analytical framework of *Dagenais* and subsequent cases discussed above, the test for whether a confidentiality order ought to be granted in a case such as this one should be framed as follows:

A confidentiality order under R. 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

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

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

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

56 In addition to the above requirement, courts must be cautious in determining what constitutes an "important commercial interest." It must be remembered that a confidentiality order involves an infringement on freedom of expression. Although the balancing of the commercial interest with freedom of expression takes place under the second branch of the test, courts must be alive to the fundamental importance of the open court rule. See generally Muldoon J. in *Eli Lilly & Co. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437 (Fed. T.D.), at p. 439.