COURT FILE NUMBER	1703 12327	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	

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

AND IN THE MATTER OF THE PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919219 ALBERTA LTD. and CANADA NORTH GROUP LP HOLDINGS LTD.

DOCUMENT	**SUPPLEMENTAL WRITTEN BRIEF OF NORTHLAND MORTGAGE & INVESTMENT CORPORATION WITH RESPECT TO THE VARIOUS CONFIDENTIAL SUPPLEMENTS TO BE ADDRESSED AT THE OUTSET OF THE APPLICATION BEFORE THE HONOURABLE ASSOCIATE CHIEF JUSTICE NIELSEN ON FEBRUARY 25, 2021**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	PARLEE MCLAWS LLP 1700 Enbridge Centre 10175 – 101 Street NW Edmonton, AB T5J 0H3 **Attention: Jeremy H. Hockin, Q.C./Allie Larson** Telephone: (780) 423-8500 Facsimile: (780) 423-2870 File Number: 78874-1/JHH Email: jhockin@parlee.com/alarson@parlee.com

TABLE OF CONTENTS

I. INTRODUCTION

1. Northland Mortgage & Investment Corporation ("Northland") provides these submissions in relation to the Confidential Supplements provided by the Monitor throughout these proceedings.[1]

2. In the Written Argument of Northland, submitted for filing and provided to this Honourable Court and the service list on February 19, 2021, reference was made to the Confidential Supplements to various Monitor's Reports.[2] This is also raised at paragraph 5 of the Reply Brief of the Monitor.[3] For the reasons set out in detail below, the Confidential Supplement to the Monitor's 31st Report should not be sealed and the prior Confidential Supplements should be unsealed.

II. ISSUES

3. The issues addressed herein are broken down as follows:

   (a) The information contained in the Confidential Supplements is no longer confidential;

   (b) If the Confidential Supplements do contain any confidential information, it is information that, if disclosed, would only affect Northland, who does not object to having any information that was contained in any of the Confidential Supplements put on the Court record;

   (c) Considering the relief sought by the Monitor, which includes the approval of the February 2021 Allocation, the interests of litigation and the importance of public disclosure favour placing the February 2021 Allocation, and past allocation methodologies, on the Court record to ensure the parties can adequately respond and address the issues before this Honourable Court.

III. LAW & ARGUMENT

A. The information contained in the Confidential Supplements is no longer confidential.

4. The Supreme Court of Canada has confirmed that a sealing Order should only be granted when:

   > (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

---

[1] References to the "Confidential Supplements" throughout these submissions includes, without limitation, the Confidential Supplements to the Monitor's 11th, 12th, 13th, 16th, 17th, 18th, 20th, 21st, 22nd, 27th, 29th and 31st Reports, as well as the Monitor's Confidential 24th Report

[2] Written Argument of Northland, filed February 19, 2021 at paras 3, 12, 17, 18, 25, 28, 29, 31, 51, 54 and 61

[3] Reply Brief of the Monitor, filed February 22, 2021 at para 5

> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[4]

5. While it is common, where assets are being sold pursuant to a Court process, to seal reports that include valuation material, these materials need only be sealed until the sale transaction has closed.[5] In *Alberta Treasury Branches v Elaborate Homes Ltd*.[6], quoting the reasons for decision in *Look*, Justice Nielsen, as he then was, commented on the duration of the confidentiality of information relating to the sale of assets:

> [54] It is common practice in the insolvency context for information in relation to the sale of the assets of an insolvent corporation to be kept confidential until after the sale is completed pursuant to a Court order. In *Look Communications Inc. v. Look Mobile Corp.* 2009 CarswellOnt 7952, [2009] OJ No 5440 (Sup Ct Just – Commercial List), Newbould J. explained the reasons for such confidentiality:
>
>> [17] It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *8857574 Ontario Inc. v. Pizza Pizza Ltd*, (1994), 23 B.L.R. (2nd) 239, Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.[7] [emphasis added]

---

[4] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 45 [*Sierra Club*] **[TAB 1]**
[5] *Look Communications Inc. v. Look Mobile Corporation*, 2009 CanLII 71005 (ONSC) at para 17 [*Look*] **[TAB 2]**
[6] *Alberta Treasury Branches v Elaborate Homes Ltd*., 2014 ABQB 350 [*Elaborate Homes*] **[TAB 3]**
[7] *Elaborate Homes* at paras 54-55 **[TAB 3]**

6. In *Elaborate Homes*, the bid summary was directed to be sealed until the sale transaction had been approved and closed for the purpose of ensuring the integrity of the marketing process and avoiding misuse of the information by a subsequent bidder to obtain an unfair advantage in the event if was necessary to remarket the relevant assets.[8]

7. In *Pinnacle Capital Resources Ltd. v Kraus*[9], Equistar sought an order unsealing the Confidential Appendices to the Receivers report. The Appendices were prepared by the Receiver with assistance from the debtor companies' management for a sale process, to which a detailed summary of the offers and a liquidation analysis were appended. The Appendices were sealed by order of the Court, which provided "the Appendices contain confidential information and shall remain confidential and shall not form part of the permanent record pending further order of the court."[10]

8. Equistar argued that there was no reason to continue with the sealing order as the sale had concluded.[11] A secured creditor, Red Ash, opposed the request to unseal the documents, on the basis that Equistar had not established that the documents were no longer confidential.[12] While Justice Pattillo did not rule on whether the Appendices should be unsealed, he did refer to both *Look* and *Sierra Club* in stating the following:

> [39] As Newbould J. pointed out in *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 (Ont. S.C.J. [Commercial List]) at para. 17, it is often the case that on the Commercial List sensitive documents concerning an asset sale are sealed in order to protect the sale process. <u>Once that process has been completed, it follows that the information in the documents is no longer confidential.</u>
>
> [40] <u>I am mindful of the importance of public disclosure in the courts as discussed in *Sierra Club*. I therefore think, given the circumstances in which the Appendices were sealed, that Red Ash should be required to establish that the documents in issue still remain confidential</u>.[13] [emphasis added']

9. The Confidential Supplements in this proceeding have been sealed for reasons similar to those addressed in the above-cited authorities – to maintain the confidentiality of information pertaining to the sale of assets of the Applicant Companies in case the assets need to be remarketed if the transaction being approved falls through. This is best particularized in the Brief of the Monitor, filed September 10, 2018, wherein the Confidential Supplement to the Monitor's 17th Report is addressed. There, the Monitor took the positon that disclosing the appraised or expected values of assets remaining the subject of marketing and future sales could cause significant prejudice to the sales, any

---

[8] *Elaborate Homes* at para 55 **[TAB 3]**
[9] *Pinnacle Capital Resources Ltd. v Kraus,* 2012 ONSC 6376 [*Pinnacle*] **[TAB 4]**
[10] *Pinnacle* at para 36 **[TAB 4]**
[11] *Pinnacle* at para 37 **[TAB 4]**
[12] *Pinnacle* at para 38 **[TAB 4]**
[13] *Pinnacle* at paras 39-40 **[TAB 4]**

bidding process and the Monitor's ability to obtain the best offers possible on such assets.[14] The Monitor's position was further particularized as follows:

> 57. … it could create a situation where an unfair advantage is created for some bidders or interested parties by obtaining such information from the Court record while others have to rely on their own resources.
>
> 58. It is respectfully submitted that the deleterious effects that the release of this sensitive commercial information would have on the results and integrity of any future sale process justifies the temporary sealing of the Confidential Supplement.[15]

10. It is noted that, although the Confidential Supplement to the Monitor's 17th Report included a Proposed Revised Allocation Methodology Analysis, the allocation itself was not the basis for sealing the Confidential Supplement. It appears to have been sealed on the basis of the appraised and expected values disclosed in relation to assets that had not yet been sold.

11. Moreover, paragraph 25 of the Monitor's 11th Report provides that specific comments in relation to the pending offer on the Winterburn Property were not particularized in the report as the sale was still pending. The Monitor included "additional details and comments in relation to the pending sale of Winterburn in its Confidential Supplement to the Monitor's Eleventh Report."[16]

12. The Monitor's 12th Report similarly provided that "[t]he Monitor continues to be of the view that the specific details in relation to the proposed sale of the Winterburn Yard are sensitive in nature, and should not be disclosed to the public at this time in the event the transaction does not close."[17] To address this, information regarding the sale of the Winterburn Property was included in the Confidential Supplement to the Monitor's 12th Report. The purpose of the Confidential Supplement to the Monitor's 12th Report was disclosed therein as having been limited to information relating to sale of the Winterburn Property.[18]

13. The sale of the Winterburn Property was authorized by this Honourable Court on April 20, 2018, and closed on May 3, 2018.[19] Much of the information in relation to this sale could now be obtained at the Land Titles Office or, in part, through subsequent documents filed with this Court in relation to the Application heard on September 21, 2018, regarding the interim distribution of the sale proceeds and the holdback amount.

---

[14] Brief of the Monitor, filed September 10, 2018 at para 56
[15] Brief of the Monitor, filed September 10, 2018 at paras 57-58
[16] Monitor's 11th Report at para 25
[17] Monitor's 12th Report at para 10
[18] Confidential Supplement to the Monitor's 12th Report at para 1
[19] Order of the Honourable Justice K.G. Nielsen, filed April 20, 2018 **[February 19th Brief of Northland, TAB H]**; Monitor's Certificate (Winterburn), filed May 3, 2018 **[February 19th Brief of Northland, TAB I]**

14. The Monitor's 17th Report indicates that the Confidential Supplement to the Monitor's 17th Report was prepared in order to maintain the confidentiality of "details in relation to the assets at Bonnyville which are the subject of this ownership dispute".[20] Those assets were later sold in what has since been referred to in these proceedings as the 726 Settlement. Again, the Monitor's argument with respect to sealing the Confidential Supplement to the Monitor's 17th Report is set out in paragraphs 9-10 above.

15. The Monitor indicated that it sought to have the Confidential Supplement to the Monitor's 22nd Report sealed due to information contained therein that it considered sensitive and "should not be disclosed to the public at this time."[21] It was clearly contemplated that the Confidential Supplement required only temporary sealing.

16. The Confidential Supplements were sealed on the basis that they contained information in relation to the sale of assets or the valuation of assets that had not yet been sold. As such, once the relevant assets were sold, the two circumstances justifying a sealing order, as set out in *Sierra Club*, were no longer present. As suggested in *Elaborate Homes*, and as confirmed by Justice Pattillo in *Pinnacle*, the information contained in the Confidential Supplements need only be kept confidential until the relevant sale is completed.[22]

17. In *Pinnacle*, the Appendices were sealed to protect information regarding a pending sale. Following the close of the relevant transaction, it was held that any party wishing to object to the unsealing of the Appendices "should be required to establish that the documents in issue still remain confidential." The Court rejected the argument that the party seeking to unseal the documents should bear the onus of establishing why the records were no longer confidential.[23]

18. Similarly, due to the circumstances in which the sealing orders were granted in this case, any stakeholder wishing to object to the unsealing of the Confidential Supplements should be required to establish that the Confidential Supplements must still remain confidential.

B. If the Confidential Supplements do contain any confidential information, it is information that, if disclosed, would only affect Northland, who does not object to having any information that was contained in any of the Confidential Supplements put on the Court record.

19. The Monitor's 29th Report specifically addressed that significant sensitivities remained in relation to "the Applicants' remaining unsold real properties" and that "the October Allocation should not be made public at this time."[24] Again, it was contemplated by the Monitor that this may be made public at some time, however, was understandably sealed in the interests of the most directly affected stakeholders (those with an interest in the

---

[20] Monitor's 17th Report at para 20
[21] Monitor's 22nd Report at para 49
[22] *Elaborate Homes* at para 54 **[TAB 3]**; *Pinnacle* at para 39 **[TAB 4]**
[23] *Pinnacle* at paras 38 and 40 (read together) **[TAB 4]**
[24] Monitor's 29th Report at para 19

remaining unsold real properties). The directly affected stakeholder in these properties is Northland.

20. Similarly, in the Monitor's 31st Report, it indicated that the "allocation figures, values and calculations" needed to remain confidential "to protect the value attributed to the Applicants' remaining real estate".[25] Again, the stakeholder directly affected by this remaining real estate is Northland.

21. Northland submits that, due to the lack of any legitimate continuing interest in these properties outside of its own, there is no consequence of the disclosure of this information and no requirement that it remain confidential. Any potential consequence would be visited only by Northland. Northland has confirmed to the Monitor, via its counsel, that it does not object to having any information that was contained in any of the Confidential Supplements put on the Court record, and particularly does not insist upon the information regarding the Bonnyville and Wabasca property values being held in confidence.

C. The interests of litigation and the importance of public disclosure favour placing the February 2021 Allocation, and past allocation methodologies, on the Court record to ensure the parties can adequately respond and address the issues before this Honourable Court.

22. It is important to consider the nature of the relief sought by the Monitor in its Application, filed February 5, 2021 and returnable February 25, 2021, as well as the grounds for seeking such relief, when determining whether the allocation methodologies must be disclosed and placed on the Court record.

23. The Monitor has requested, among other items, an Order approving the February 2021 Allocation as defined and included in the Confidential Supplement to the Monitor's 31st Report.[26] The Monitor seeks this relief on, *inter alia*, the following grounds:

> 11) The Monitor's rationale and approach to the preparation of the February 2021 Allocation has been outlined in the 31st Report and in the Confidential Supplement to the 31st Report. The Monitor has crafted a proposed allocation based on a methodology which it considers to be fair and equitable in all of the circumstances and generally treats all non-super priority secured creditors equitably. The nature of the security held and potential benefit received by mortgage lenders necessitated an equitable variance in their favour, in order to reduce the amount of general costs attributed to their assets, based on the nature of their assets, the types of their security held and the demonstrable recoveries in respect of those particular assets.

[25] Monitor's 31st Report at para 5
[26] Application of the Monitor, filed February 5, 2021 at para 1(c) **[TAB A]**

> 12) The Monitor's approach is consistent with principles articulated in case law and will result in distributions to creditors which are:
>
> > a) based on the actual realizations attributed to the collateral;
> > b) less a *pro rata* share (based on realizations) of any specific charges or costs incurred applicable to the specific Applicant owning the collateral; and
> > c) less a proposed percentage of general costs varied to account for what the Monitor believes are differences obtained by creditors based on the nature of the collateral held.
>
> 13) In all of the circumstances, the February 2021 Allocation is fair and reasonable.[27]

24. There is a general public interest in open and accessible court proceedings; a fundamental principal which was confirmed by the Supreme Court in *Sierra Club*.[28]

25. In the context of privilege, the Courts have held that a party cannot assert privilege over a document that grounds its claim or bases its defence, the rationale for which is fairness.[29] This exception to privilege is aimed at ensuring that the effect of a claim of privilege does not prevent a party from making a full answer and defence.

26. In *Goodswimmer v Canada (Attorney General)*[30], Justice O'Ferrall quoted and accepted the following statement of the case management judge:

> I am of the view, as submitted by Alberta and Canada, that here, the Plaintiffs by their pleadings have voluntarily asserted a claim which makes the Plaintiffs' knowledge of the law relevant. As stated by Mason J. in *Petro Can Oil & Gas Corp. v Resource Service Group Ltd.* (1988), 1988 CanLII 3474 (AB QB), 32 CPC (2d) 50 and adopted by Berger J. in *Ed Miller*, <u>it would be unfair to permit a party who has set up a claim based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege</u>. Further, that indeed fairness would dictate disclosure here.[31]

[27] Application of the Monitor, filed February 5, 2021 at paras 11-13 **[TAB A]**
[28] *Sierra Club* at para 52 **[TAB 1]**
[29] *R v Steiert*, 2018 ABQB 211 at paras 18-19 [*Steiert*] **[TAB 5]**, citing *Petro Can Oil & Gas Corp. v. Resource Service Group Ltd*., 1988 CanLII 3474 (ABQB)
[30] *Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253 [*Goodswimmer*] *excerpt from dissenting reasons, but on issue not addressed by the majority **[TAB 6]**
[31] *Goodswimmer* at para 33 **[TAB 6]**

27. In *Marion v Wawanesa Mutual Insurance Co*.[32], Justice Rowbotham considered whether Wawanesa had waived privilege where it relied on the privileged communication to ground its defence. Here, the Court found:

> Wawanesa chose to put the reports in issue by the manner in which it responded to the application. If its only defence to the action arose as a result of the investigative reports, then in response to the summary judgment application the reports ought to be disclosed. In this context, the interests of litigation favour disclosure over the maintenance of a claim of privilege. Accordingly, the investigative reports must be disclosed.[33]

28. This is consistent with the general public interest in open and accessible court proceedings and the fairness element addressed in both the *Steiert* and *Goodswimmer* decisions.

29. The same considerations should apply here in relation to any assertion of confidentiality over the allocation methodologies contained in the Confidential Supplements provided throughout the course of these proceedings, which are central to both the relief sought by the Monitor and its grounds for seeking such relief.[34] Northland, and indeed all stakeholders, are unable to respond to the proposed February 2021 Allocation, without the ability to refer to the details contained in the Confidential Supplement to the Monitor's 31st Report and the previous allocation methodologies set out in earlier Confidential Supplements. It follows that the interests of litigation would favour disclosure of the Confidential Supplements over the maintenance of their confidentiality.

30. This must be considered in addition to Northland's submission that there is no continuing confidentiality in relation to the information contained in the Confidential Supplements and that the two circumstances justifying a sealing order, as set out in *Sierra Club*, are no longer present.

IV. CONCLUSION

31. The Confidential Supplements were sealed on the basis that they contained information in relation to the sale of assets or the valuation of assets that had not yet been sold. Once the relevant assets were sold, the circumstances justifying the sealing orders were no longer present. With respect to the remaining real properties, referred to in the Monitor's 29th and 31st Reports, any potential consequence would be visited only by Northland, and Northland has confirmed that it does not object to having any information that was contained in any of the Confidential Supplements put on the Court record, and particularly does not insist upon the information regarding the Bonnyville and Wabasca property values being held in confidence.

---

[32] *Marion v Wawanesa Mutual Insurance Co*., 2003 ABQB 767 [*Marion*] **[TAB 7]**
[33] *Marion* at para 15 **[TAB 7]**
[34] Application of the Monitor, filed February 5, 2021 at paras 1(c) and 11-13 **[TAB A]**

32. Moreover, due to the circumstances in which the sealing orders were granted, any stakeholder wishing to object to the unsealing of the Confidential Supplements should be required to establish that the Confidential Supplements must still remain confidential.

33. The interests of litigation and the general public interest in open and accessible court proceedings further support the disclosure of the Confidential Supplements over the continued maintenance of their confidentiality.

V. RELIEF SOUGHT

34. For the foregoing reasons, Northland respectfully requests an Order or Orders:

(a) Denying the Monitor's application for the sealing of the Confidential Supplement to the Monitor's 31st Report;

(b) Directing that all prior sealing orders in relation to the Confidential Supplements prepared by the Monitor be lifted and the Confidential Supplements be filed with this Honourable Court;

(c) Relieving Northland's counsel of its undertaking provided in respect of the Confidential Supplements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of February, 2021.

PARLEE McLAWS LLP

for: Jeremy H. Hockin, Q.C.
Solicitor for Northland Mortgage & Investment Corporation

TABLE OF EVIDENCE/AUTHORITIES

EVIDENCE

TAB A	Application of the Monitor, filed February 5, 2021

AUTHORITIES

TAB 1	*Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41
TAB 2	*Look Communications Inc. v Look Mobile Corporation*, 2009 CanLII 71005
TAB 3	*Alberta Treasury Branches v Elaborate Homes Ltd*., 2014 ABQB 350
TAB 4	*Pinnacle Capital Resources Ltd. v Kraus*, 2012 ONSC 6376
TAB 5	*R v Steiert*, 2018 ABQB 211
TAB 6	*Goodswimmer v Canada (Attorney General)*, 2015 ABCA 253
TAB 7	*Marion v Wawanesa Mutual Insurance Co*., 2003 ABQB 767

TAB A

Clerk's Stamp

COURT FILE NO.	1703 12327
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON

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

AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF 667402 ALBERTA LTD., 18512398 ALBERTA LTD., 816956 ALBERTA LTD., 1371047 ALBERTA LTD., 1919209 ALBERTA LTD. AND CANADA NORTH GROUP LP HOLDINGS LTD.

DOCUMENT

APPLICATION BY MONITOR

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

Darren R. Bieganek, QC/Ryan F.T. Quinlan
Barrister & Solicitor
Phone: 780.441.4386/780.441.4336
Fax: 780.428.9683
Email: dbieganek@dcllp.com/rquinlan@dcllp.com

File #204-196164
DUNCAN CRAIG LLP
LAWYERS MEDIATORS
2800 Scotia Place
10060 Jasper Avenue
Edmonton, Alberta Canada T5J 3V9

NOTICE TO RESPONDENTS

This application is made against you. You are a respondent. You have the right to state your side of this matter before the judge.

To do so, you must be in Court when the application is heard as shown below:

Date:	February 25, 2021
Time:	10:00AM
Where:	**BY WEBEX (log in information to be provided)**
Before Whom:	The Honourable Associate Chief Justice K.G. Nielsen sitting on the Commercial List

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1) An Order:

   a) declaring Service of this Application and its supporting materials good and sufficient, and if necessary, abridging time for notice of this Application to the time actually given;

   b) an Order approving the accounts of the Monitor and those of its legal counsel without further need for the passing of accounts;

   c) approving the cost allocation as defined and included in the Confidential Supplement to the Monitor's 31st Report (herein the "February 2021 Allocation");

   d) approving a distribution of net proceeds presently held by the Monitor in trust to the creditors in accordance with the recommendations outlined in the February 2021 Allocation;

   e) ancillary orders directing creditors to make payment to others as the Court may direct;

   f) an Order authorizing the Monitor to provide 30 days written notice to municipalities and secured parties claiming an interest in the remaining real property assets of the Applicants of the Monitor's intention to abandon the real property and further authorizing the Monitor to abandon the real properties without recourse against the Monitor after the expiry of the 30 day notice period;

   g) an Order approving the activities of the Monitor as set out in the Monitor's 31st Report and the Confidential Supplement to the Monitor's 31st Report;

   h) a temporarily sealing the Confidential Supplement to the Monitor's 31st Report by way of Sealing Order or Order Restricting Access; and

   i) for such further and other relief as this Honourable Court deems just and appropriate in the circumstances.

Grounds for making this application:

2) On July 5, 2017, Canada North Group Inc., Canada North Camps Inc., Campcorp Structures Ltd. ("Campcorp"), D.J. Catering Ltd. ("DJ"), 816956 Alberta Ltd., and 1371047 Alberta Ltd. (hereinafter made an application before this Honourable Court requesting certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended and obtained an initial order (the "Initial Order"), a stay of proceedings ("Stay") against the Applicants for a period of 30 days up to and including August 3, 2017, and the appointment of Ernst & Young Inc. (the "Monitor") as monitor of the Applicants.

3) Since that time, 1919209 Alberta Ltd. and Canada North Group LP Holdings Ltd. have been added as "Applicants" to these proceedings, while Campcorp and DJ have been removed from the proceedings.

4) The Stay has been extended on multiple occasions, and is currently in place up to April 16, 2021.

5) In early 2018, at the direction of the Court, the Monitor prepared a proposed allocation analysis regarding anticipated recoveries and anticipate allocation of costs of the proceedings to those recoveries in an effort to inform the Court and the stakeholders of the effective net realization opportunities available to the Estate of the Applicants post-closing of a transaction involving the sale of operational camp assets (the "Camp Sale Transaction").

6) The proposed original allocation was outlined in a Confidential Supplement to the Monitor's 11th Report.

7) Since that time, realizations have been undertaken by the Monitor pursuant to an Order and Orders granting the Monitor enhanced powers to affect the realizations.

8) The realizations are now substantially complete and the proceedings are moving forward to a conclusion.

9) Pursuant to paragraph 47 of the Initial Order granted in these proceedings on July 5, 2017, any interested Person may apply to this Court on notice to any other party likely to be affected, for an Order to allocate the Administration Charge, the Interim Lender's Charge and the Director's Charge amongst the various assets comprising of the property. This application is made in accordance with that direction.

10) The Monitor's proposed February 2021 Allocation is contained within the Confidential Supplement to the Monitor's 31st Report.

11) The Monitor's rationale and approach to the preparation of the February 2021 Allocation has been outlined in the 31st Report and in the Confidential Supplement to the 31st Report. The Monitor has crafted a proposed allocation based on a methodology which it considers to be fair and equitable in all of the circumstances and generally treats all non-super priority secured creditors equitably. The nature of the security held and potential benefit received by mortgage lenders necessitated an equitable variance in their favour, in order to reduce the amount of general costs attributed to their assets, based on the nature of their assets, the types of their security held and the demonstrable recoveries in respect of those particular assets.

12) The Monitor's approach is consistent with principles articulated in caselaw and will result in distributions to creditors which are:

a) based on the actual realizations attributed to the collateral;

b) less a *pro rata* share (based on realizations) of any specific charges or costs incurred applicable to the specific Applicant owning the collateral; and

c) less a proposed percentage of general costs varied to account for what the Monitor believes are differences obtained by creditors based on the nature of the collateral held.

13) In all of the circumstances, the February 2021 Allocation is fair and reasonable.

14) With respect to certain unsold real property assets, the Monitor notes that realizable value of the remaining real property assets may not be sufficient to cover outstanding property taxes and the outstanding mortgage debt on the property. There is no need or reason for the Monitor to continue to pay for the maintenance and security of those real property assets and is accordingly recommending that the interested stakeholders be given a 30 day notice of the

Monitor's intention to abandon the property in order to give those stakeholders an opportunity to assume the maintenance and security obligations in relation of same, failing which the Monitor will be authorized to abandon those properties without further notice and without recourse to the Monitor.

15) As part of the allocation process, the Monitor's fees and costs and those of its counsel must be evaluated and considered. The Monitor requests that the Court confirm the fairness and reasonableness of the Monitor's fees and costs and those of its legal counsel without the need for the full and complete passing of accounts. The Monitor believes that its fees and costs and those of its counsel are reasonable and fair in the circumstances considering the tasks undertaken by the Monitor and its legal counsel in bringing the proceedings to this stage and the efforts that were required in order to do so.

16) The Confidential Supplement to the Monitor's 31st Report contains the proposed February Allocation and includes information pertaining to values of remaining real property assets which have yet to be disposed of. In the circumstances, preserving confidentiality with respect to those assets values is considered by the Monitor to be in the best interests of the stakeholders respecting the remaining real estate assets in an effort to preserve the value and therefore requests that the Confidential Supplement to the 31st Report be sealed in the interest of those stakeholders.

17) The Monitor has prepared the 31st Report and the Confidential Supplement to the 31st Report in good faith and its activities have been done in accordance with the directions of the Court and its duties and obligations under the *Companies' Creditors Arrangement Act* ("CCAA") and accordingly its activities as outlined in the 31st Report and the Confidential Supplement to the 31st Report ought to be approved.

18) Such further and other grounds as counsel may advise and the Court permit.

Material or evidence to be relied on:

19) The 31st Report of the Monitor, filed.

20) Confidential Supplement to the Monitor's 31st Report (not filed).

21) The pleadings and proceedings, including prior Monitor's Reports, taken in this Action to date.

22) Such further and other materials as previously filed in this matter as counsel may advise and this Honourable Court permits.

Applicable rules:

23) *Alberta Rules of Court* AR 124/2010, including Rules 1.2, 1.4, 6.1, 6.2, 6.3 and 9.12 and Division 4 of Part 6.

Applicable Acts and regulations:

24) *Companies' Creditors Arrangement Act*, R.S.C. 1985, c C-36, as amended, including ss. 9, 11, 23, and 25 thereof.

25) Such further other Acts and regulations as counsel may advise.

Any irregularity complained of or objection relied on:

26) N/A.

How the application is proposed to be heard or considered:

27) Before the Honourable Associate Chief Justice K.G. Nielsen, by way of WebEx.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

TAB 1

Atomic Energy of Canada Limited *Appellant*

v.

Sierra Club of Canada *Respondent*

and

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

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

Neutral citation: 2002 SCC 41.

File No.: 28020.

2001: November 6; 2002: April 26.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

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

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

Énergie atomique du Canada Limitée *Appelante*

c.

Sierra Club du Canada *Intimé*

et

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

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

Référence neutre : 2002 CSC 41.

N^{o} du greffe : 28020.

2001 : 6 novembre; 2002 : 26 avril.

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

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

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

Un organisme environnemental, Sierra Club, demande le contrôle judiciaire de la décision du gouvernement fédéral de fournir une aide financière à Énergie atomique du Canada Ltée (« ÉACL »), une société de la Couronne, pour la construction et la vente à la Chine de deux réacteurs CANDU. Les réacteurs sont actuellement en construction en Chine, où ÉACL est l'entrepreneur principal et le gestionnaire de projet. Sierra Club soutient que by the government triggered s. 5(1)(*b*) of the *Canadian Environmental Assessment Act* ("*CEAA*"), requiring an environmental assessment as a condition of the financial assistance, and that the failure to comply compels a cancellation of the financial arrangements. AECL filed an affidavit in the proceedings which summarized confidential documents containing thousands of pages of technical information concerning the ongoing environmental assessment of the construction site by the Chinese authorities. AECL resisted Sierra Club's application for production of the confidential documents on the ground, *inter alia*, that the documents were the property of the Chinese authorities and that it did not have the authority to disclose them. The Chinese authorities authorized disclosure of the documents on the condition that they be protected by a confidentiality order, under which they would only be made available to the parties and the court, but with no restriction on public access to the judicial proceedings. AECL's application for a confidentiality order was rejected by the Federal Court, Trial Division. The Federal Court of Appeal upheld that decision.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

Jurisprudence

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

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

Canada (Ministre de la Santé nationale et du Bien-être social), [2000] 3 C.F. 360, conf. [1998] A.C.F. n° 1850 (QL); *Ethyl Canada Inc. c. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. O.N.E.*, [2001] 3 R.C.S. 478, 2001 CSC 77; *F.N. (Re)*, [2000] 1 R.C.S. 880, 2000 CSC 35; *Eli Lilly and Co. c. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 437.

Statutes and Regulations Cited

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

Lois et règlements cités

Charte canadienne des droits et libertés, art. 1, 2*b*).
Loi canadienne sur l'évaluation environnementale, L.C. 1992, ch. 37, art. 5(1)*b*), 8, 54, 54(2) [abr. & rempl. 1993, ch. 34, art. 37].
Règles de la Cour fédérale (1998), DORS/98-106, règles 151, 312.

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

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

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

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

The judgment of the Court was delivered by

POURVOI contre un arrêt de la Cour d'appel fédérale, [2000] 4 C.F. 426, 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] A.C.F. n° 732 (QL), qui a confirmé une décision de la Section de première instance, [2000] 2 C.F. 400, 178 F.T.R. 283, [1999] A.C.F. n° 1633 (QL). Pourvoi accueilli.

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

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

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

Version française du jugement de la Cour rendu par

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

LE JUGE IACOBUCCI —

I. Introduction

Dans notre pays, les tribunaux sont les institutions généralement choisies pour résoudre au mieux les différends juridiques par l'application de principes juridiques aux faits de chaque espèce. Un des principes sous-jacents au processus judiciaire est la transparence, tant dans la procédure suivie que dans les éléments pertinents à la solution du litige. Certains de ces éléments peuvent toutefois faire l'objet d'une ordonnance de confidentialité. Le accused to a fair and public hearing, and freedom of expression weighed in favour of denying the publication ban. These rights were balanced against interests relating to the proper administration of justice, in particular, protecting the safety of police officers and preserving the efficacy of undercover police operations.

droit de l'accusé à un procès public et équitable tout autant que la liberté d'expression militent en faveur du rejet de la requête en interdiction de publication. Ces droits ont été soupesés avec l'intérêt de la bonne administration de la justice, en particulier la protection de la sécurité des policiers et le maintien de l'efficacité des opérations policières secrètes.

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

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

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

> Une ordonnance de non-publication ne doit être rendue que si :
>
> a) elle est nécessaire pour écarter le risque sérieux pour la bonne administration de la justice, vu l'absence d'autres mesures raisonnables pouvant écarter ce risque;
>
> b) ses effets bénéfiques sont plus importants que ses effets préjudiciables sur les droits et les intérêts des parties et du public, notamment ses effets sur le droit à la libre expression, sur le droit de l'accusé à un procès public et équitable, et sur l'efficacité de l'administration de la justice.

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

La Cour souligne que dans le premier volet de l'analyse, trois éléments importants sont subsumés sous la notion de « nécessité ». En premier lieu, le risque en question doit être sérieux et bien étayé par la preuve. En deuxième lieu, l'expression « bonne administration de la justice » doit être interprétée allow the concealment of an excessive amount of information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

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

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

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

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

judicieusement de façon à ne pas empêcher la divulgation d'un nombre excessif de renseignements. En troisième lieu, le critère exige non seulement que le juge qui prononce l'ordonnance détermine s'il existe des mesures de rechange raisonnables, mais aussi qu'il limite l'ordonnance autant que possible sans pour autant sacrifier la prévention du risque.

Au paragraphe 31, la Cour fait aussi l'importante observation que la bonne administration de la justice n'implique pas nécessairement des droits protégés par la *Charte*, et que la possibilité d'invoquer la *Charte* n'est pas une condition nécessaire à l'obtention d'une interdiction de publication :

> Elle [la règle de common law] peut s'appliquer aux ordonnances qui doivent parfois être rendues dans l'intérêt de l'administration de la justice, qui englobe davantage que le droit à un procès équitable. Comme on veut que le critère « reflète [. . .] l'essence du critère énoncé dans l'arrêt *Oakes* », nous ne pouvons pas exiger que ces ordonnances aient pour seul objectif légitime les droits garantis par la *Charte*, pas plus que nous exigeons que les actes gouvernementaux et les dispositions législatives contrevenant à la *Charte* soient justifiés exclusivement par la recherche d'un autre droit garanti par la *Charte*. [Je souligne.]

La Cour prévoit aussi que, dans les cas voulus, le critère de *Dagenais* pourrait être élargi encore davantage pour régir des requêtes en interdiction de publication mettant en jeu des questions autres que l'administration de la justice.

Mentuck illustre bien la souplesse de la méthode *Dagenais*. Comme elle a pour objet fondamental de garantir que le pouvoir discrétionnaire d'interdire l'accès du public aux tribunaux est exercé conformément aux principes de la *Charte*, à mon avis, le modèle *Dagenais* peut et devrait être adapté à la situation de la présente espèce, où la question centrale est l'exercice du pouvoir discrétionnaire du tribunal d'exclure des renseignements confidentiels au cours d'une procédure publique. Comme dans *Dagenais*, *Nouveau-Brunswick* et *Mentuck*, une ordonnance de confidentialité aura un effet négatif sur le droit à la liberté d'expression garanti par la *Charte*, de même que sur le principe de la publicité des débats judiciaires et, comme dans ces affaires, les tribunaux doivent veiller à ce que le

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

(2) <u>The Rights and Interests of the Parties</u>

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

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

pouvoir discrétionnaire d'accorder l'ordonnance soit exercé conformément aux principes de la *Charte*. Toutefois, pour adapter le critère au contexte de la présente espèce, il faut d'abord définir les droits et intérêts particuliers qui entrent en jeu.

(2) <u>Les droits et les intérêts des parties</u>

L'objet immédiat de la demande d'ordonnance de confidentialité d'ÉACL a trait à ses intérêts commerciaux. Les renseignements en question appartiennent aux autorités chinoises. Si l'appelante divulguait les documents confidentiels, elle manquerait à ses obligations contractuelles et s'exposerait à une détérioration de sa position concurrentielle. Il ressort clairement des conclusions de fait du juge des requêtes qu'ÉACL est tenue, par ses intérêts commerciaux et par les droits de propriété de son client, de ne pas divulguer ces renseignements (par. 27), et que leur divulgation risque de nuire aux intérêts commerciaux de l'appelante (par. 23).

Indépendamment de cet intérêt commercial direct, en cas de refus de l'ordonnance de confidentialité, l'appelante devra, pour protéger ses intérêts commerciaux, s'abstenir de produire les documents. Cela soulève l'importante question du contexte de la présentation de la demande. Comme le juge des requêtes et la Cour d'appel fédérale concluent tous deux que l'information contenue dans les documents confidentiels est pertinente pour les moyens de défense prévus par la *LCÉE*, le fait de ne pouvoir la produire nuit à la capacité de l'appelante de présenter une défense pleine et entière ou, plus généralement, au droit de l'appelante, en sa qualité de justiciable civile, de défendre sa cause. En ce sens, empêcher l'appelante de divulguer ces documents pour des raisons de confidentialité porte atteinte à son droit à un procès équitable. Même si en matière civile cela n'engage pas de droit protégé par la *Charte*, le droit à un procès équitable peut généralement être considéré comme un principe de justice fondamentale : *M. (A.) c. Ryan*, [1997] 1 R.C.S. 157, par. 84, le juge L'Heureux-Dubé (dissidente, mais non sur ce point). Le droit à un procès équitable intéresse directement l'appelante, mais le public a aussi un intérêt général à la protection du droit à un procès équitable. À vrai dire, le principe demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

général est que tout litige porté devant les tribunaux doit être tranché selon la norme du procès équitable. La légitimité du processus judiciaire n'exige pas moins. De même, les tribunaux ont intérêt à ce que toutes les preuves pertinentes leur soient présentées pour veiller à ce que justice soit faite.

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.

Ainsi, les intérêts que favoriserait l'ordonnance de confidentialité seraient le maintien de relations commerciales et contractuelles, de même que le droit des justiciables civils à un procès équitable. Est lié à ce dernier droit l'intérêt du public et du judiciaire dans la recherche de la vérité et la solution juste des litiges civils. 51

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 <u>seen</u> to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner: *New Brunswick*, at para. 22.

Milite contre l'ordonnance de confidentialité le principe fondamental de la publicité des débats judiciaires. Ce principe est inextricablement lié à la liberté d'expression constitutionnalisée à l'al. 2*b*) de la *Charte* : *Nouveau-Brunswick*, précité, par. 23. L'importance de l'accès du public et des médias aux tribunaux ne peut être sous-estimée puisque l'accès est le moyen grâce auquel le processus judiciaire est soumis à l'examen et à la critique. Comme il est essentiel à l'administration de la justice que justice soit faite et soit <u>perçue</u> comme l'étant, cet examen public est fondamental. Le principe de la publicité des procédures judiciaires a été décrit comme le « souffle même de la justice », la garantie de l'absence d'arbitraire dans l'administration de la justice : *Nouveau-Brunswick*, par. 22. 52

(3) <u>Adapting the *Dagenais* Test to the Rights and Interests of the Parties</u>

(3) <u>Adaptation de l'analyse de *Dagenais* aux droits et intérêts des parties</u>

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:

Pour appliquer aux droits et intérêts en jeu en l'espèce l'analyse de *Dagenais* et des arrêts subséquents précités, il convient d'énoncer de la façon suivante les conditions applicables à une ordonnance de confidentialité dans un cas comme l'espèce : 53

A confidentiality order under Rule 151 should only be granted when:

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

Une ordonnance de confidentialité en vertu de la règle 151 ne doit être rendue que si :

a) elle est nécessaire pour écarter un risque sérieux pour un intérêt important, y compris un intérêt commercial, dans le contexte d'un litige, en l'absence d'autres options raisonnables pour écarter ce risque;

TAB 2

COURT FILE NO.: 08-CL-7877
DATE: 20091218

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: IN THE MATTER OF LOOK COMMUNICATIONS INC.

Applicant

LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P.

Respondent

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

BEFORE: Justice Newbould

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

Aubrey E. Kauffman, for Inukshuk Wireless Partnership

DATE HEARD: December 17, 2009

ENDORSEMENT

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

Circumstances of Sealing Order

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

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

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

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

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

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> Underlying freedom of expression are <u>the core values of (1) seeking the truth and the common good; (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit; and (3) ensuring that participation in the political process is open to all persons</u>: Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, [page551] at p. 976; R. v. Keegstra, [1990] 3 S.C.R. 697, at pp. 762-64, per Dickson C.J. Charter jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the Charter: Keegstra, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to Charter principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. <u>The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the</u>

core values will make the confidentiality order easier to justify. (underlining added)

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

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

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

NEWBOULD J.

DATE: December 18, 2009

TAB 3

Court of Queen's Bench of Alberta

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

Date: 20140611
Docket: 1103 02937
Registry: Edmonton

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

Between:

Alberta Treasury Branches

Plaintiff

- and -

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

Defendants

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

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

I. Introduction

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

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

II. Background

[3] Alco held a second mortgage (the Mortgage) in the amount of $1,075,000 on, *inter alia*, property (the Condo) owned by Elaborate Homes Ltd., legally described as:

> Condominium Plan 0520263
> Unit 4
> and 905 undivided 1/10,000 shares in the common property
> Excepting thereout all mines and minerals.

[4] Alberta Treasury Branches was a secured creditor of Elaborate. It held, *inter alia*, a first mortgage on the Condo.

[5] PWC was appointed as the receiver of Elaborate Homes Ltd. pursuant to a Consent Receivership Order dated February 22, 2011 (the Receivership Order). Pursuant to a separate Receivership Order, also dated February 22, 2011, PWC was named as receiver of Elaborate Developments Inc., a company related to Elaborate Homes Ltd.

[6] On March 3, 2011, PWC sent notice to Alco, pursuant to ss. 245 and 246 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3 (*BIA*) of the receivership of Elaborate. This was sent by regular mail to the address indicated on the registration of the Mortgage on the Certificate of Title to the Condo. In the Brief filed in this application on behalf of Alco, it is acknowledged that Alco was served with a copy of the Receivership Order.

[7] On or about April 5, 2011, an assistant with legal counsel for PWC (not the counsel for PWC on this application) obtained certain contact information with respect to Alco. While the assistant could not recall with whom she spoke at Alco or the exact conversation, she deposed that she believed she followed her typical practice when speaking to creditors which was as follows:

(a) she identified herself to the creditor and advised that she was calling from counsel for the receiver with respect to the receivership of the debtor company;

(b) she advised the creditor that the receiver required certain information from the creditor with respect to the receivership; and

(c) she requested contact information for the individual within the creditor's organization who would be best suited to receive correspondence with respect to the receivership.

[8] In the discussions that ensued with the individual at Alco following this typical practice, she was advised that the owner of Alco was Bob Taubner and she was given his email address. This information is confirmed in a handwritten note made by the assistant. At all material times, Mr. Taubner was the President of Alco.

[9] PWC took steps to market Elaborate's assets and property pursuant to the provisions of the Receivership Order. As a result of the marketing efforts, a number of offers were received for individual assets of Elaborate. PWC also received a number of "*en bloc* offers" to purchase all of Elaborate's assets. One of those *en bloc* offers was received from 1601812 Alberta Ltd. (the 160 Offer).

[10] In accordance with its obligations, PWC reported to the Court with respect to the offers received in its Second Report, filed May 26, 2011. The Second Report contained a Bid Summary of all of the offers. PWC wished to keep the information in the Bid Summary confidential, and to release it to the public only after the Court had approved a sale. However, parties could obtain a copy of the Bid Summary on signing and sending to PWC a Confidentiality Letter, which provided that anyone signing it would be provided with the Bid Summary, but would be barred from acting as a purchaser in any way in respect of Elaborate's assets.

[11] As outlined in the Second Report, PWC was of the opinion that the 160 Offer would lead to the highest net recovery for the creditors of Elaborate, as opposed to accepting other offers for specified or individual assets. PWC formed this view based on the combined value of the cash and assumption of liabilities components of the 160 Offer.

[12] PWC accepted the 160 Offer subject to Court approval. PWC recommended to the Court that the 160 Offer be approved on the basis that it was higher than other offers and was preferable from the perspective of all of the creditors of Elaborate as a whole. Compared to all of the other *en bloc* offers, the 160 Offer would produce the highest net recovery on the Condo. Based on its analysis of the 160 Offer, PWC concluded that accepting the 160 Offer would allow for recovery of all of the indebtedness of Elaborate to Alberta Treasury Branches, but would not allow for the full recovery of the indebtedness of Elaborate to another secured creditor, Servus Credit Union. Following discussions with PWC, Servus Credit Union agreed with PWC's recommendation to accept the 160 Offer. PWC had no discussions with Alco with respect to the offers received.

[13] The 160 Offer required Court approval by June 3, 2011. By an email dated May 26, 2011, counsel for PWC forwarded to Elaborate's creditors, including Alco, copies of the following:

(a) the Application for an Order Approving Sale and Vesting Order returnable June 3, 2011 (the Application);

(b) the Second Report;

(c) a copy of a letter directed to the Court; and

(d) a copy of the Confidentiality Letter.

[14] On June 3, 2011, Belzil J. heard the application for approval of the sale of Elaborate's assets and property pursuant to the 160 Offer. Belzil J. granted a Sale Approval and Vesting Order approving the acceptance of the 160 Offer by PWC (the Sale Order). Belzil J. also granted a Sealing Order which sealed the Bid Summary until such time as the sale transaction had closed and a letter had been filed with the Clerk of the Court confirming that fact (the Sealing Order).

[15] On June 3, 2011, counsel for PWC served the Sale Order and the Sealing Order by email on the listed creditors, including Alco.

[16] Mr. Taubner, the President of Alco, has deposed that while he received the email of May 26, 2011 enclosing the Application, and 19 other emails with respect to this receivership, he did not use the email address which had been given to counsel for PWC or any other email address at the material time. He deposed that he was unfamiliar with computers and he did not anticipate that he might receive communications from PWC in such a fashion.

[17] On cross-examination on his Affidavit, Mr. Taubner testified that he would occasionally request email communications, some of his employees would communicate with him by email, he would read such emails, and the group accountant for Alco had access to his emails. There is no evidence that any of the emails forwarded to Alco with respect to the Elaborate receivership at the address given, were rejected or returned as undeliverable.

[18] The sale of Elaborate's assets and property proceeded pursuant to the 160 Offer, and Alco ultimately received the sum of $90,553.09 net of costs in relation to the security which it held on the Condo. This recovery was insufficient to pay out the Mortgage.

[19] PWC reported in its First Report, filed April 20, 2011, that an appraisal of the Condo had been conducted in August 2010, reflecting a market value of $785,000. The Bid Summary indicated that the appraised value of the Condo on a forced liquidation was $505,750. The value assigned to the Condo pursuant to the 160 Offer was $432,000. This was the highest value assigned to the Condo in any of the *en bloc* offers. An offer had been received on the Condo only. This offer was in the amount of $529,444.

[20] The value assigned to the Condo in the 160 Offer represented 85% of the forced liquidation valuation. Only two other assets had higher returns compared to their valuations. The lowest allocation to an asset in the offers received was 24% of that asset's valuation.

[21] Andrew Burnett, Vice President of PWC, was involved in this receivership. He filed an Affidavit in response to Alco's Application and was examined on it. With respect to the 160 Offer, Mr. Burnett deposed as follows:

> Page 30, lines 17 to 22:
>
> Q Was there ever any conversation with the offeror about modifying its offer in respect of the office condo [the Condo] because of the position of Alco?
>
> A No, there was never discussion with them about changing their position on any of the other pieces of property other than the Althen One [unrelated to the Condo].
>
> Page 33, lines 25 to 27 and Page 34, lines 1 to 11:
>
> Q One of the bids that PWC did receive for the office condo alone was over $500,000, correct?
>
> A Correct.
>
> Q When that bid came in, do I take it that the sole consideration was that it was a standalone bid whereas you wanted to have *en bloc* bids?
>
> A No.
>
> Q What consideration was given to possibly accepting that bid?
>
> A We went back to all the purchasers that had more than one item on there and asked them whether we could carve out pieces, saying okay, you're the highest on

this, but you're lower on this, can we just take that?

Page 36, lines 15 to 20:

Q What did Studio Homes [formerly 1601812 Alberta Ltd.] specifically advise with respect to their position on the office condo at the time, not in January of 2014, but at the time?

A At the time, and I won't say it's just on the office condo, we asked whether they would pull any of their other parcels out and they advised no.

III. Terms of the Orders

A. Receivership Order

[22] The following provisions of the Receivership Order are relevant to this application:

...2. Pursuant to sections 243(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-03 (the "*BIA*"), 13(2) of the *Judicature Act*, RSA 2000, c. J-2, 99(a) of the *Business Corporations Act*, RSA 2000, c. B-9 and 65(7) of the *Personal Property Security Act*, RSA 2000, c. P-7, PriceWaterhouseCoopers Inc. is hereby appointed Receiver (the "Receiver"), without security, of all of the Debtor current and future assets, undertakings and properties real and personal of every nature and kind whatsoever, and wherever situate, including all proceeds thereof ("the Property").

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

...(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

(l) To sell, convey, transfer, lease or assign the Property (the "Disposition") or any part or parts thereof: ...

7. No proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

...

16. The Receiver shall incur no liability or obligation as a result of its appointment or carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the WEPPA. Nothing in this order shall derogate from the

protection afforded to the Receiver by s. 14.06 of the BIA or any other applicable legislation.

B. Sale Order

[23] The following provisions of the Sale Order are relevant to this application:

> 1. Service of the notice of this application and supporting materials is hereby declared to be good and sufficient, and no other person is required to have been served with notice of this application, and time for service is abridged to that actually given.
>
> 2. The Receiver's acceptance of the Purchaser's offer to purchase the Lands and Personal Property dated May 6th, 2011 as clarified and extended by the letter from the Receiver dated May 13, 2011, the e-mail from the Purchaser's legal counsel to the Receiver's legal counsel dated May 19, 2011, the letter from legal counsel for the Receiver to legal counsel for the Purchaser dated May 20, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 24, 2011, the letter from legal counsel for the Purchaser to legal counsel for the Receiver dated May 25, 2011, and the letter from the Receiver to the Purchaser dated May 26, 2011 (the "Offer"), which Offer is summarized at paragraphs 20 to 32 of the Receiver's Second Report, and [sic] is hereby approved and ratified.
>
> ...
>
> 15. Service of this Order may be effected upon those persons (directly or through legal counsel) on the Service List by facsimile or electronic mail, and such service shall constitute good and sufficient service. Service on any person other than as specified in the Service List is hereby dispensed with.

C. Sealing Order

[24] The following provision of the Sealing Order is relevant to this application:

> 1. ... the Clerk of the Court is hereby directed to seal the Bid Summary (the "Confidential Documents") on the Court file until the sale of the Lands and Personal Property to 1601812 Alberta Ltd. has been closed in accordance with the Offer Terms and the filing of a letter with the Clerk of the Court from PriceWaterhouseCoopers Inc. confirming the sale of the Lands and Personal Property has been closed. ...

IV. Positions of the Parties

[25] Alco argues that leave should be granted to file the Statement of Claim appended to its Application. Alco submits that it has a claim against PWC for gross negligence or wilful misconduct in serving the Application by email on May 26, 2011, and selling the Condo for less than its appraised value, thereby preferring the interests of other creditors to those of Alco.

[26] PWC argues that there is no basis for a claim against it, as all documents were properly served on Alco by email, and all steps taken by it were in accordance with its obligations to act in the best interests of the creditors of Elaborate as a whole. Therefore, it was neither grossly negligent, nor did it wilfully misconduct itself.

V. Issue

[27] The sole issue before the Court is whether Alco should be granted leave to file the Statement of Claim against PWC.

VI. Applicable Rules

A. *Alberta Rules of Court*, Alta Reg 124/2010

[28] The following Rules of the *Alberta Rules of Court* are relevant to this application:

> **9.15(1)** On application, the Court may set aside, vary or discharge a judgment or an order, whether final or interlocutory, that was made
>
> (a) without notice to one or more affected persons, or
>
> (b) following a trial or hearing at which an affected person did not appear because of an accident or mistake or because of insufficient notice of the trial or hearing.
>
> **(2)** Unless the Court otherwise orders, the application must be made within 20 days after the earlier of
>
> (a) the service of the judgment or order on the applicant, and
>
> (b) the date the judgment or order first came to the applicant's attention.
>
> ...
>
> **11.21(1)** A document, other than a commencement document, may be served by electronic method on a person who has specifically provided an address to which information or data in respect of an action may be transmitted, if the document is sent to the person at the specified address, and
>
> (a) the electronic agent receiving the document at that address receives the document in a form that is usable for subsequent reference, and
>
> (b) the sending electronic agent obtains or receives a confirmation that the transmission to the address of the person to be served was successfully completed.
>
> **(2)** Service is effected under subrule (1) when the sending electronic agent obtains or receives confirmation of the successfully completed transmission.

(3) In this rule, "electronic" and "electronic agent" have the same meanings as they have in the *Electronic Transactions Act*.

B. *Bankruptcy and Insolvency General Rules*, CRC, c 368

[29] The following *BIA* Rules are relevant to this application:

> **3.** In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> ...
>
> **6.(1)** Unless otherwise provided in the Act or these Rules, every notice or other document given or sent pursuant to the Act or these Rules must be served, delivered personally, or sent by mail, courier, facsimile or electronic transmission.

VII. Law

A. Threshold Test for Leave

[30] The Supreme Court of Canada in ***GMAC Commercial Credit Corp – Canada v TCT Logistics Inc***, 2006 SCC 35, [2006] 2 SCR 123 confirmed that the threshold is low on an application for leave to commence an action against a receiver or trustee:

> 55 For almost 150 years, courts and commentators have been universally of the view that the threshold for granting leave to commence an action against a receiver or trustee is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact...
>
> ...
>
> 57 In the leading case of ***Mancini***, the Court of Appeal summarized the accepted principles as being the following:
>
>> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>>
>> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>>
>> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

[31] Conrad J. (as she then was) considered this issue in her decision in ***RoyNat Inc v Allan*** (1988), 90 AR 173 at 177-78, [1988] 6 WWR 156 (QB):

> ...In ***Royal Bank of Canada v. Vista Homes Ltd. et al*** (1985) 63 B.C.L.R. 366 (B.C.S.C.), Mr. Justice MacDonald stated at p. 374:
>
> > ...the obtaining of an order to sue should not be a perfunctory process... The court should examine with some care the foundation of the alleged claim with a bias against exposing its appointed officer to unnecessary or unwarranted litigation. On the other hand, there is not an onus on the applicant to prove its case against the receiver-manager at this stage.
>
> ...
>
> I am satisfied the test to be applied by this court is to determine whether it is perfectly clear that there is no foundation for the claim or whether the action is frivolous or vexatious. It is not for this court to deal with the merits of either party's position or to gauge the probability of success should the action proceed to trial. Leave should be granted if the evidence presented discloses that there is some foundation for the claim and that the claim is not merely frivolous nor vexatious.
>
> Indeed, while the Court may by its order want to protect its appointed officer from unnecessary and unwarranted litigation, I do not take that to mean they are entitled to protection against proper actions simply because they are court appointed.

[32] Therefore, the proposed plaintiff must have supplied "facts to support the claim sought to be asserted", or "some foundation for the claim". Both of these cases make it clear that there must be some factual basis for the claim, a court should not grant leave for frivolous, vexatious or unmeritorious claims, and it is not appropriate at the leave stage for the court to make a final assessment of the merits of the claim or possible defences to the claim.

[33] While the threshold for granting leave is low, the process of reviewing the proposed claim is not to be perfunctory. Therefore, I will analyze in some detail the basis for the claims alleged by Alco against PWC.

B. Gross Negligence and Wilful Misconduct

[34] Clause 16 of the Receivership Order provides that PWC will incur liability only in circumstances of "gross negligence or wilful misconduct on its part". The starting point, therefore, is to consider what constitutes gross negligence or wilful misconduct.

[35] *Black's Law Dictionary*, 9th ed (St Paul, MN: West, 2009) defines gross negligence as, *inter alia*:

> A conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.

> ...As it originally appeared, this was very great negligence, or the want of even slight or scant care. It has been described as a failure to exercise even that care which a careless person would use. Several courts, however, dissatisfied with a term so nebulous...have construed gross negligence as requiring willful, wanton, or reckless misconduct, or such utter lack of all care as will be evidence thereof...But it is still true that most courts consider that 'gross negligence' falls short of a reckless disregard of the consequences, and differs from ordinary negligence only in degree, and not in kind...

[36] The *Dictionary of Canadian Law*, 4th ed (Scarborough, Ont: Thomson Carswell, 2011) provides the following definition:

> Conduct in which if there is not conscious wrongdoing, there is a very marked departure from the standard by which responsible and competent people...habitually govern themselves...a high or serious degree of negligence...

[37] The Supreme Court of Canada has considered these terms in the context of tort litigation. In ***McCulloch v Murray***, [1942] SCR 141 at 145, [1942] SCJ No 7, Duff C.J. observed:

> ... All these phrases, gross negligence, wilful misconduct, wanton misconduct, imply conduct in which, if there is not conscious wrong doing, there is a very marked departure from the standards by which responsible and competent people in charge of motor cars habitually govern themselves. ...

[38] In ***Peracomo Inc v Telus Communications Co***, 2014 SCC 29, [2014] SCJ No 29, Cromwell J. for the majority commented on "wilful misconduct":

> 57 In other contexts, "wilful misconduct" has been defined as "doing something which is wrong knowing it to be wrong or with reckless indifference"; "recklessness" in this context means "an awareness of the duty to act or a subjective recklessness as to the existence of the duty": ***R. v. Boulanger***, 2006 SCC 32, [2006] 2 S.C.R. 49, at para. 27, citing ***Attorney General's Reference (No. 3 of 2003)***, 2004 EWCA Crim 868, [2005] Q.B. 73. Similarly, in an insightful article, Peter Cane states that "[a] person is reckless in relation to a particular consequence of their conduct if they realize that their conduct may have that consequence, but go ahead anyway. The risk must have been an unreasonable one to take": "*Mens Rea* in Tort Law" (2000), 20 *Oxford J. Legal Stud*. 533, at p. 535.
>
> 58 These formulations capture the essence of wilful misconduct as including not only intentional wrongdoing but also conduct exhibiting reckless indifference in the face of a duty to know...

[39] Therefore, in order for Alco to establish PWC's liability arising from the receivership at an eventual trial, it must show that PWC demonstrated a very marked departure from the standards by which responsible and competent people in such circumstances would have acted or conducted themselves, or in a manner such that it knew what it was doing was wrong or was recklessly indifferent in its conduct.

[40] Against this backdrop, I will consider Alco's complaints regarding PWC's conduct.

VIII. Analysis

A. Email Service

[41] Alco argues that service of the Application was not effective, as Alco had not specifically provided an address to which information or data in respect of the receivership action might be transmitted to it.

[42] Nothing in the material before the Court supports this allegation. Clearly, the assistant for counsel at PWC contacted a representative of Alco who provided an email address for the president of Alco. It is reasonable to infer that whoever provided the email address to the assistant for counsel at PWC was not aware that Mr. Taubner would not access his email account. PWC cannot be deemed to have known this. Indeed, it appears from Mr. Taubner's testimony that he did access the email account when he wished to do so. It is also reasonable to infer that Mr. Taubner would not have had an email account if he been totally computer illiterate, and if he was, that fact, presumably, would have been well known within the company.

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

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

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

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

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

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

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

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

B. Sale Transaction

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

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

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

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

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

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

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

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

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

[58] The obligations of a receiver in carrying out a sales transaction have been considered in numerous cases. In ***Royal Bank v Soundair Corp*** (1991), 7 CBR (3d) 1, [1991] OJ No 1137 at paras 27-29 (CA), Galligan J.A. cited with approval case law for the proposition that if a receiver's decision to enter into an agreement of sale, subject to court approval, is reasonable and sound under the circumstances at the time, it should not be set aside simply because a later and higher bid is made. Otherwise, chaos would result in the commercial world, and receivers and purchasers would never be sure they had a binding agreement. Galligan J.A. concluded:

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

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

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

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

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

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

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

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

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

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

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

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

IX. Conclusion

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

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

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

X. Costs

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

Heard on the 14th day of May, 2014.
Dated at the City of Edmonton, Alberta this 11th day of June, 2014.

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

Appearances:

Robert M. Curtis, Q.C.
McCuaig Desrochers LLP
for Alco Industrial Inc.

Michael J. McCabe, Q.C.
Reynolds Mirth Richards & Farmer LLP
for PriceWaterhouseCoopers Inc.

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

Please note that the word “willful” has been replaced with “wilful” in the heading on page 9, in paras. 34, 50 and 56.

TAB 4

CITATION: Pinnacle v. Kraus, 2012 ONSC 6376
COURT FILE NO.: CV-12-9731-00CL
DATE: 20121109

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: Pinnacle Capital Resources Limited in its capacity as general partner of Red Ash Capital Partners II Limited Partnership, Applicant

AND:

Kraus Inc., Kraus Canada Inc., Strudex Fibres Limited and 538626 B.C. Ltd., Respondents

BEFORE: L.A. Pattillo J.

COUNSEL: *Linc Rogers* and *Jenna Willis*, for the Receiver

Larry Ellis, for the Applicant

Raymond Slattery and *David Ullmann*, for Equistar Chemicals, LP

HEARD: November 7, 2012

ENDORSEMENT

Introduction

[1] This matter involves two motions.

[2] The first is by PricewaterhouseCoopers Inc. ("PwC") in its capacity as Court-appointed receiver (the "Receiver") of the respondents Kraus Inc. ("Kraus"), Kraus Canada Inc. ("Kraus Canada"), Strudex Fibres Limited ("Strudex") and 538626 B.C. Ltd. (collectively, the "Companies") for, among other things, an order discharging it and releasing it from any and all further obligations as Receiver, upon filing its discharge certificate.

[3] The second is a motion by Equistar Chemicals, LP ("Equistar") for a) An order varying paragraph 8 of the Sale and Approval and Vesting Order dated June 11, 2012 by unsealing the confidential appendices; b) An order directing PwC to provide answers to questions posed by Equistar; and c) An order directing PwC to pay Equistar $35,425.25.

Background

[4] Red Ash Capital Partners II Limited Partnership was a secured creditor of the Companies.

[5] The applicant Pinnacle Capital Resources Limited, in its capacity as general partner of Red Ash Capital Partners II Limited Partnership ("Red Ash"), obtained an order of the Court dated May 28, 2012 appointing PwC Interim Receiver of Kraus, Kraus Canada and Strudex (collectively the "Operating Companies") In that capacity, PwC filed two reports, the first dated May 29, 2012 and the second June 10, 2012.

[6] On June 11, 2012, again on Red Ash's application, PwC was appointed trustee in bankruptcy of each of the Operating Companies. On the same day, and pursuant to Red Ash's receivership application, PwC was appointed as Receiver of the Companies.

[7] Also on June 11, 2010, the Court issued a Sale Approval and Vesting Order approving a going concern sale transaction (the "Sale Transaction") of substantially all of the assets of the Companies (the "Purchased Assets") contemplated by an asset purchase agreement between the Receiver and Kraus Brands LP (the "Purchaser"), a party related to Red Ash, dated as of June 11, 2012 (the "Sale Agreement").

[8] Paragraph 8 of the Sale Approval and Vesting Order provides that the documents marked as Confidential Appendices A, B and C to the Receiver's First Report contain confidential information and shall remain confidential and shall not form part of the permanent court record pending further order of the Court.

[9] The Sale Transaction closed on June 11, 2012.

[10] The reasons for the interim receivership were set out in the material filed in support of the initial application. The Interim Receiver monitored the receipts and disbursements of the Companies but did not take possession of the assets of the Operating Companies nor did it manage or operate their businesses. The Interim Receivership ended when the Receivership Order became effective on June 11, 2012.

[11] Pursuant to the Receivership Order, the Receiver had a very narrow mandate. It was appointed specifically to complete the Sale Transaction in accordance with the Sale Agreement and convey the Purchased Assets "without taking possession or control thereof".

[12] During the period of the Interim Receivership, and as suppliers received notice of the application to appoint a receiver of the Companies, the Interim Receiver and/or the Companies received claims for the repossession of property pursuant to s. 81.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"). As at June 11, 2012, the date of the Sale Approval and Vesting Order became effective, a total of nine claimants, including Equistar, had delivered 81.1 claims totalling $2,248,734.

[13] Because certain of the Purchased Assets were subject to the s. 81.1 claims (the s. 81.1 Assets), the Sale Approval and Vesting Order provided in paragraph 6 thereof that the s. 81.1 Assets do not vest in the Purchaser until such time as the applicable s. 81.1 claim is determined by agreement of the parties or by further order of the Court. The Sale Approval and Vesting Order further provides that, notwithstanding the foregoing, the Purchaser is entitled to use and consume any s. 81.1 Asset, provided the Purchaser pays to the Receiver, in trust, the invoice amount of any s. 81.1 Asset used and consumed by the Companies or the Purchaser.

[14] Paragraph 6 of the Sale Approval and Vesting Order required that the Receiver file a report advising as to the s. 81.1 Assets in the possession of the Companies as at June 11, 2012 and "to the extent ascertainable, as at May 28, 2012."

[15] In satisfaction of the requirement in paragraph 6 of the Sale Approval and Vesting Order, the Receiver filed its Third Report dated June 14, 2012. The Third Report contained a list of the s. 81.1 claimants, the steps by the Receiver to determine the s. 81.1 Assets in the possession of the Companies on June 11, 2012, the steps taken to segregate and preserve those assets and the inspections by s. 81.1 claimants. It also detailed the Receiver's attempts to determine the s. 81.1 Assets in the possession of the Companies on May 28, 2012.

Equistar's s. 81.1 Claim

[16] On June 8, 2012, the Receiver received a s. 81.1 claim in the amount of $551,951.00 from Equistar. Equistar supplied poly resin to the Companies.

[17] On June 12, 2012, a representative of Equistar attended at Strudex's premises and was shown the silos where Equistar's goods were normally delivered. The representative did a visual inspection of the goods remaining in the applicable silo and was provided production records for that silo. A digital meter reading of the silo was also taken in the presence of Equistar's representative.

[18] Subsequently, the Receiver assessed the s. 81.1 claims using the criteria set out in s. 81.1 of the BIA. The Receiver assessed the eligible value of Equistar's claim to be $35,425.25. On June 19, 2012, the Receiver advised Equistar of its assessment.

[19] On July 31. 2012, Equistar's US attorney sent a letter to the Receiver taking issue with the Receiver's determination of value. Equistar's position was that its claim should include all goods Equistar delivered within 30 days prior to May 28, 2012. It took issue with the challenges the Receiver reported it had faced in respect of assessing the status of the s. 81.1 Assets as at May 28, 2012 and requested further analysis.

[20] The Receiver responded to Equistar's attorney's letter on August 7, 2012. It provided further details as to Strudex's inventory system, records, tracking, etc. as well as specific detail in respect of the use of product supplied by Equistar to Strudex in the period between May 28 and June 11, 2012, according to the records available to the Receiver. The letter further stated that if Equistar wished to conduct further investigation of the matter, the Receiver would attempt to facilitate such investigation with the Purchaser. The Receiver heard nothing further from Equistar.

[21] In the period since June 11, 2012, the Purchaser used or consumed the s. 81.1 Assets subject to Equistar's claim that were in the Companies possession on June 11, 2012. In accordance with paragraph 6 of the Sale Approval and Vesting Order, the Purchaser paid to the Receiver, in trust, the invoice amount of the s. 81.1 Assets subject to Equistar's s. 81.1 claim that it used or consumed subsequent to June 11, 2012 in the amount of $35,425.25. The Receiver continues to hold such funds in trust pending agreement amongst the Purchaser and Equistar or further order of the Court.

Equistar's Motion

[22] The Receiver's discharge motion was originally returnable on October 16, 2012. At the request of counsel for Equistar who were retained on October 9, 2012, the motion was adjourned to November 5, 2012 "to permit further review by creditor". Equistar had been previously represented in the receivership proceedings.

[23] On October 24, 2012, Equistar's counsel sent a letter to the Receiver's counsel enclosing a list of 114 questions "for response by the Receiver in connection with the Receiver's impending motion for discharge."

[24] The questions cover a very broad range of topics, including:

a. the relationship between the Receiver and Red Ash and the extent of Red Ash's control over the actions and decisions of the Receiver and the funding of the receivership;

b. information available to proposed purchasers about the existence of s. 81.1 claims and the goods supplied by them;

c. the extent of the relationship between PwC and the Companies and the extent of control exercised by PwC in that capacity prior to its appointment;

d. the extent of PwC's control over the sale process;

e. any advice given by PwC to the directors and officers of the Companies related to their obligations with respect to trading while insolvent;

f. the decision to sell the cash gleaned from suppliers products as part of the assets on closing;

g. the Liquidation Analysis (Confidential Appendices C) and whether or not the Receiver considered the impact on unsecured creditors in evaluating same;

h. the decision to use the interim receivership structure and its impact on suppliers;

i. forecasts of consumption of supplier goods available to or relied upon by the Receiver; investigations conducted by the Receiver, as described in the Third Report, which relate to the extent of goods supplied by Equistar;

j. specific questions related to the quantities of the goods supplied by Equistar;

k. general questions about how the Receiver perceived the treatment of unsecured creditors and the suppliers, and what steps, if any it took to advise the relevant parties in connection with same.

[25] On October 31, 2012, the Receiver replied to the October 24, 2012 letter and advised that it had reviewed and considered Equistar's questions and in the Receiver's view, the questions were inappropriate, irrelevant to Equistar's s. 81.1 claim, had been dealt with in the Receiver's prior communications with Equistar and/or related to activities already approved by the Court. Accordingly, it advised that it would not be answering any of the questions.

[26] On November 5, 2012, the Receiver's discharge motion was put over to November 7, 2012 to enable Equistar to bring its motion to obtain the answers to the questions and unseal the Confidential Appendices. It further amended its notice of motion to also seek payment of $35,425.25

Law and Analysis

(a) The Questions

[27] A court-appointed receiver is an officer of the court and is in a fiduciary capacity to all stakeholders: *Nash v. C.I.B.C. Trust Corp.*, 1996 CarswellOnt 2185 (O.C.J. Gen Div.) at para. 6. The fact that the receiver owes fiduciary duties to stakeholders does not, however, entitle a stakeholder to go on a fishing expedition for information: *Turbo Logistics Canada Inc. v. HSBC Bank Canada* (2009), 81 C.B.R. (5th) 169 (Ont. S.C.J.) at para. 18.

[28] A court-appointed receiver is required to respond to reasonable requests for information from parties with an interest in the receivership: *Battery Plus Inc., Re* (2002), 31 C.B.R. (4th) 196 (Ont. S.C.J. [Commercial List]). What is reasonable must be determined, in my view, having regard to the interest of the requesting party and the relevance of the information sought based on the issue or issues. In addition, and as noted by Farley J. in *Bell Canada International Inc., Re* [2003] O.J. No. 4738 (S.C.J. [Commercial List]} at para. 9, the objectivity and neutrality of the officer of the court is also a factor to consider.

[29] Equistar submits that it is entitled to the answers to its questions in order to determine the correct amount of its s. 81.1 claim; who the directing minds were that caused the claim to arise; and whether or not any claim exists against any of the parties, including the Receiver for their actions in creating an unpaid debt owing to Equistar.

[30] The vast majority of the 114 questions relate to the Receiver's relationship with Red Ash and the Companies prior to and during the receivership as well as various steps during the receivership. Those questions have nothing to do with Equistar's s. 81.1 claim. Those questions are nothing more, in my view, than a fishing expedition to see if Equistar can uncover some sort of impropriety which it suspects may have occurred but of which it has no proof. In that regard, it is instructive that Equistar has provided no evidence of impropriety before or during the receivership. All it has are suspicions of impropriety which is not sufficient to elevate its questions into the reasonable category.

[31] Questions 12 and 13 and 75 to 97 relate for the most part to Equistar's s. 81.1 claim. The problem is that the Receiver has already answered Equistar's questions concerning its claim and provided it with all of its information. The Receiver duly and thoroughly investigated and provided all relevant facts it was able to obtain to Equistar. I would have thought that if Equistar

had any follow up questions, it would have contacted the Receiver directly with them. Equistar provided no evidence that it requires further information or that to its knowledge, the information is available and the Receiver has failed to provide it. In fact, it is a reasonable inference from a number of the questions that Equistar already knows the answer.

[32] The Receiver has no further information or documents relating to Equistar's claim. In my view, in responding as it has to Equistar's questions relating to its s. 81.1 claim, the Receiver has acted reasonably and in accordance with its duty. In the circumstances, it is not required, in my view, to answer Equistar's further questions which in the circumstances, are either irrelevant or unreasonable and in most cases, both.

[33] Equistar's motion in respect of the 114 questions is therefore dismissed.

(b) Unsealing the Confidential Appendices

[34] Equistar also seeks an order unsealing the Confidential Appendices as provided in paragraph 8 of the Sale Approval and Vesting Order.

[35] The First Report describes the three Appendices. Appendix A is a Confidential Information Memorandum prepared by PricewaterhouseCooper Corporate Finance with the assistance of the Companies management for the sale process in the fall of 2011. It describes the Companies business in significant detail. Appendix B is a detailed summary of the four highest offers received in December 2011 and the three revised offers received in January 2012 in respect of the sale of the Operating Companies. Appendix C is a Liquidation Analysis of assets and business of the Companies based on net book values as of March 31, 2012.

[36] In the First Report, the Receiver requested the sealing of the three Appendices from the public record until after closing of the Sale Transaction or further order of the court. As noted, paragraph 9 of the Sale Approval and Vesting Order provides that the Appendices contain confidential information and shall remain confidential and shall not form part of the permanent record pending further order of the court.

[37] Equistar submits that because the Sale Transaction is complete, there is no reason to continue with the sealing order and the documents should be unsealed. It submitted that the two circumstances justifying a sealing order as set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.) are no longer present here.

[38] Counsel for Red Ash opposed Equistar's request to unseal the documents. It submits that given the Court determined, as part of the Sale Approval and Vesting Order, that the Appendices were confidential, Equistar's motion for unsealing should fail as it has not established that the documents are no longer confidential. In the alternative, it submits that the documents remain confidential. In respect of that submission, because it was only served with Equistar's motion material on the eve of the motion, Red Ash requests an adjournment in order that it can file material to establish that the documents in question still remain confidential.

[39] As Newbould J. pointed out in *Look Communications Inc. v. Look Mobile Corp.*, 2009 CarswellOnt 7952 at para. 17, it is often the case that on the Commercial List sensitive

documents concerning an asset sale are sealed in order to protect the sale process. Once that process has been completed, it follows that the information in the documents is no longer confidential.

[40] I am mindful of the importance of public disclosure in the courts as discussed in *Sierra Club*. I therefore think, given the circumstances in which the Appendices were sealed, that Red Ash should be required to establish that the documents in issue still remain confidential. Accordingly, I intend to adjourn that portion of Equistar's motion, to be brought back on with proper notice to Red Ash in order to allow it to properly respond.

(c) The $35,425.25

[41] The final relief requested by Equistar is the payment by the Receiver of the $35,425.25 it is holding in trust in respect of its s. 81.1 claim.

[42] The Sale Approval and Vesting Order provide in paragraph 6(b) that a s. 81.1 claim is to be determined "by court order or by agreement amongst the Receiver, the applicable claimant to the s. 81.1 Asset and the Purchaser". Paragraph 6 (e) provides that where the Purchaser pays the Receiver in trust for the s. 81.1 assets its used or consumed, the cash payment "shall stand in place and stead of the s. 81.1 Asset, with such cash to be disposed of in accordance with" the determination as provided in paragraph 6(b).

[43] There has been no court order or agreement with respect to Equistar's s. 81.1 claim. Equistar has not yet sought such determination. Accordingly, pursuant to paragraph 6 of the Sale Approval and Vesting Order, the $35,425.25 being held by the Receiver in trust cannot be disposed of until such determination.

[44] Equistar's request for payment of $35,425.25 is therefore dismissed.

The Receiver's Motion

[45] The Receiver's appointment was for the narrow purposes of completing the sale of the assets of the Companies and certain miscellaneous post-closing matters and reporting on the s. 81.1 assets in possession of the Companies at the time of its appointment and if possible, on May 28, 2012. Those purposes have been completed.

[46] All s. 81.1 claims except for Equistar's have been resolved. The Receiver proposes that it pay the $35,425.25 it is holding in trust on account of Equistar's s. 81.1 claim to be paid to the Trustee in Bankruptcy of the Operating Companies to permit Equistar's claim to be settled or resolved by court order in the bankruptcy. In my view, given that PwC is also the Trustee, this is a reasonable solution.

[47] The Receiver seeks a release and discharge from any and all claims arising out of its actions as Receiver save and except for gross negligence or wilful misconduct on its part. It is that request which prompted Equistar's list of questions. The release is a standard term in the Commercial List model order of discharge. In my view, in the absence of any evidence of

improper or negligent conduct on the part of the Receiver, the release should issue. A receiver is entitled to close its file once and for all. There is no such evidence here.

Conclusion

[48] Based on the material filed, the discharge order as requested by the Receiver should issue.

[49] Equistar's motion is dismissed except for the portion relating to the unsealing of the Confidential Appendices which shall be adjourned to be brought back on, if so desired, on proper notice to Red Ash and the Receiver.

[50] There will be no order of costs in respect of the Receiver's discharge motion. The Receiver is entitled, however, to costs in respect of Equistar's motion. In the absence of agreement, brief submissions of no more than two pages along with a cost outline shall be made by the Receiver within ten days. Equistar shall respond within ten days of receipt of the Receiver's submissions.

L. A. Pattillo J.

Released: November 9, 2012

TAB 5

Court of Queen’s Bench of Alberta

Citation: R v Steiert, 2018 ABQB 211

Date: 20180320
Docket: 170155246S1
Registry: Edmonton

Between:

Her Majesty the Queen

Respondent/Crown

- and -

Michael Steven Steiert

Appellant

Reasons for Judgment
of the
Honourable Madam Justice D.C. Read

---

[1] Michael Steiert appeals his conviction for uttering a death threat or a threat to cause bodily harm to the complainant, his former common law partner and the mother of his eight year old child.

[2] The relevant facts are these. On January 4, 2017, the Appellant texted the Complainant about access to their child. The Complainant told him that she would not permit access to the child unless she knew where the Appellant was living. On the evening of January 5, 2017, the Appellant and the Complainant spoke on the phone. The Complainant continued to say he could not see his child unless she knew where he lived. he Appellant told her she had no right to this information and became very upset.

[3] The Complainant had installed an application on her telephone that permitted her to record the call and a portion of the recording was played at trial.

[4] The trial judge concluded that the operative words were "Your fucking life is going to be destroyed. I am going to end it, you piece of shit, fucking whore, fucking cunt. You're dead".

[5] Three grounds of appeal were raised by the Appellant:

> i. That the trial was unfair because the trial judge restricted cross-examination, rendering the Appellant unable to make full answer and defence;
>
> ii. That the Crown misstated the evidence and asked the Appellant improper questions, thereby rendering the trial unfair;
>
> iii. The trial judge's reasons for judgment show he ignored relevant evidence and failed to properly apply the law.

[6] The standard of review in a summary conviction appeal is dependent on the characterization of the ground of appeal. The Supreme Court in ***Housen v Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33 (S.C.C.), indicated that there are four grounds: pure questions of law, findings of fact, inferences of fact, and questions of mixed law and fact.

[7] The standard of review for pure questions of law is correctness: ***Nikolaisen*** at para. 8. Questions of law are those where the interpretation of a legal principle or statute is being challenged by the appellant. A correctness standard means that an appellate court may replace the opinion of the trial judge with his or her own.

[8] The standard of review for findings of fact is palpable and overriding error: ***Nikolaisen*** at para. 10. Findings of fact are inherently within the jurisdiction of the trial judge who was in the courtroom during the testimony, and a reviewing court should not interfere with these findings unless an error is plainly apparent.

[9] The standard of review on inferences of fact is palpable and overriding error: ***Nikolaisen*** at para. 22. This review requires two questions to be answered: first, is there a palpable and overriding error with respect to the underlying facts relied upon by the Trial Judge? If not, is the inference drawing process itself palpably in error such that an appellate court can interfere with the factual conclusion?

[10] The standard of review on questions of mixed law and fact is palpable and overriding error: ***Nikolaisen*** at para. 27). Generally, these are questions involving the application of a legal standard to a set of facts.

[11] In this appeal, the first two grounds of appeal, engage questions of law. Therefore, the standard is correctness. The third ground, engages a question of mixed law and fact. The trial judge first had to determine what the Appellant said and then to determine whether those words constituted a threat at law. The standard of review is therefore that of palpable and overriding error.

I. *Ground 1: The trial was unfair because the trial judge restricted cross-examination, rendering the Appellant unable to make full answer and defence*

[12] The Appellant argues that his counsel's cross-examination of the Complainant was unfairly curtailed. Specifically, after the Complainant answered a question on cross examination by explaining that her lawyer had advised her not to release her daughter for a Father's Day visit with the Appellant because the Appellant was driving with a suspended license. Defence counsel took the position that, by saying she had done this on her lawyer's advice, the witness had waived solicitor-client privilege and opened up to questioning all the advice given to her by her lawyer. Defence counsel was then interrupted by Crown counsel who disagreed that solicitor-client privilege had been waived by the witness's reply.

[13] The trial judge concluded that the Complainant had not completely waived privilege and allowed only limited cross-examination about the lawyer's advice.

[14] It is the position of the Appellant that Crown Counsel at trial misstated the law and that it was this misstatement that led the trial judge into the error of improperly restricting cross-examination of the Complainant with respect to other advice given to her by her lawyer.

[15] Solicitor-client privilege can only be waived by the client: ***Geffen v Goodman Estate*** [1991] 2 SCR 353. Waiver may be voluntarily undertaken by the party who enjoys the privilege. Alternatively, waiver can occur by implication in certain circumstances: Sopinka, Lederman & Bryant: *The Law of Evidence in Canada (4TH ed)* para 14.143-14.157 ("*Sopinka*").

[16] Most courts considering the matter have concluded that a party waives the protection of the attorney-client privilege when he voluntarily injects into the action legal advice he has received. Privilege is also waived when a party, by his testimony or pleading, voluntarily raises a defence or asserts a claim which makes his knowledge of the law relevant: ***Alberta Wheat Pool v Estrin***, 49 Alta. L.R. (2d) 176, [1987] 2 W.W.R. 532, 14 C.P.C. (2d) 242.

[17] Waiver cannot be forced on a party through questions raised by the opposing side on cross-examination: ***R v Creswell*** 2000 BCCA 583 at 37. However, assertion of the communication may amount to a waiver if the witness voluntarily raises it, even in cross-examination, unless the witness did not understand that the assertion would amount to a waiver: *Sopinka* at para 14.140

[18] An exception to the rule of confidentiality of solicitor-client privilege may also arise where adherence to that rule would have the effect of preventing the accused from making full answer and defence.

[19] The underlying rationale for finding implied waiver in such circumstances is based on fairness. It would be unfair to permit a party who has set up a claim or defence based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege. If privilege were successfully raised, the opponent would be left with no reasonable method of exploring the validity of the claim or defence: ***Petro Can Oil & Gas Corp. v Resource Service Group Ltd.*** (1988), 59 Alta. L.R. (2d) 34, at p. 54.

[20] I conclude that while the trial judge may have erred in determining that the waiver of privilege was limited in these circumstances, the error was harmless. He did not err in restricting cross-examination related to any and all communications made to the lawyer in this instance.

[21] The Complainant was a witness under cross-examination when she was asked about her refusal to permit the Appellant to pick up their child. She answered that she did so because the Appellant was driving with a suspended driver's license and her lawyer had advised her not to permit the Appellant to take the child in these circumstances.

[22] In saying this, she was neither raising a defence nor asserting a claim. Although she did put her state of mind into issue in her response, she was explaining her reason for a course of action she took in June 2017. However, her state of mind was put in issue with respect to a course of action she took several months after January 2017, when the Appellant was alleged to have uttered the threat that was the subject of the proceeding.

[23] What else her lawyer might have advised her in June about restricting access by the Appellant to the child is simply irrelevant to the question of whether the alleged threat had been made by the Appellant months earlier.

[24] Counsel is permitted wide-ranging cross-examination to test a witness's credibility and memory. However, the court retains the common law discretion to limit cross-examination where it extends solely to credibility and the relevance is tenuous: ***R v Meddoui*** [1991] 3 SCR 320.

[25] The discretion was properly exercised here. The relevance to the incident was at most tenuous. This ground of appeal fails.

II. *Ground 2: The Crown misstated the evidence and asked the Appellant improper questions, thereby rendering the trial unfair*

[26] The Appellant's objections to the Crown's trial actions fall into two categories. Firstly, he says that some of the questions posed by the Crown to the Appellant were improper and should not have been permitted.

[27] For example, Crown counsel cross-examining the Appellant asked the following question;

> Q Why are you being dishonest right now?
>
> A I am not being dishonest.

[28] This question was asked immediately after a series of questions respecting exactly what the Appellant had said during the recorded conversation containing the alleged threat. The Crown had just played a portion of the DVD containing this recording and then asked the Appellant if he had said "You're dead" and hung up the phone.

[29] Thereafter, the following exchange took place (transcript page 44, lines 30-40, page 45, lines 1-6):

> A You're dead to me, is what I actually said.
>
> Q Okay, let's play it again.
>
> A Just because she didn't record that part or because she erased it doesn't mean that that's all I said.

Q So now you're saying that there's portions of this that have been erased?

A That's possible .

Q ..now that you've been caught ..

A ..or when I've been hanging up, when I am slamming the shut ..the phone shut.

Q But you understand she's the one recording it, not you?

A Yes

Q So even after you hang up the phone, it's still recording; so that doesn't make any sense, does it?

A Well, sure.

[30] Cross-examination of an accused by a Crown may be vigorous; however, if the cross-examination prejudices an accused's defences or brings the administration of justice into disrepute, then an appellate court must intervene: ***R v M.A.J*** 2015 ONCA 725 at 26.

[31] A reviewing court must distinguish between questions that are merely improper and those that compromise trial fairness. The improper question(s) must be assessed in the context of the complete cross-examination and the trial as a whole: ***R v A.G.*** 2015 ABCA 159, at 22.

[32] Cross-examination of an accused by a prosecutor can be improper where a Crown interjects his or her personal views or editorial comment into questions or if, for example, the accused is repeatedly referred to as a 'barefaced liar': ***R v Bouhsass*** , [2002] O.J. No 4177 (Ont CA).

[33] Doubtless, the question Crown asked here was based upon the personal opinion of the Crown and, to that extent, improper. However, the use of the word 'dishonest' is a far cry from calling an accused a 'bare faced liar', the term used for the accused in ***Bouhsass***. Further, the question must be viewed in context. It was asked after a series of questions regarding the actual words the Appellant had used as had been recorded. The Appellant had argued the veracity or completeness of what had just been heard.

[34] In the context, the question is not objectionable.

[35] The Appellant also argues that it was improper for the Crown to conduct a rather lengthy cross-examination of him respecting his criminal record. The impugned cross-examination appears to be that found in the transcript beginning at page 40, line 10 and extending to page 41, line 7.

[36] Credibility was a central issue in this trial. Thus, it was appropriate for the Crown to cross-examine on the Appellant's criminal record. This is particularly the case where, as here, the Appellant mounted an attack on the credibility of the Complainant: ***R v P (N.A)*** [2002] O.J. No. 4829 para 26.

[37] That said, in my view, the Crown went too far here in asking the Appellant his opinion respecting whether he was a liar and dishonest. How the Appellant would characterize his record is hardly the point. The questions asked were improper.

[38] A review of the transcript in its entirety shows an aggressive Crown counsel and a degree of personal animosity between crown and defence counsel that is unfortunate. Occasionally, the Crown made editorial comment in his questions and that was also unfortunate. I note for example that at one point in their exchange, the Crown asked the Appellant “Why are you giving me attitude, sir? I am just asking you some very simply questions” (transcript page 47, lines 10-11).

[39] However, this was a judge alone trial so there is no concern about such animosity improperly influencing a jury and, although the Crown did insert personal opinion into some of the questions, there is nothing in the Crown’s questioning of the Appellant, that went so far as to make the trial unfair.

[40] Secondly, the Appellant also asserts that the Crown misstated the evidence in argument.

[41] The Appellant says that the Crown mischaracterized questions asked by defence counsel as “softball” questions and argued the Defence Counsel asked leading questions on the important issue of whether or not the Appellant intended to intimidate the Complainant. For the Appellant, it is denied that the questions were leading or “softball”.

[42] Defence counsel does not suggest that the ‘mischaracterization’ of the evidence had any negative effect upon the reasoning of the trial judge. He argues, that along with the other points he makes, the mischaracterization of the evidence in argument contributed to the unfairness of the trial.

[43] Without deciding the issue of whether or not what the Crown said in argument could be termed a ‘mischaracterization’ of the evidence, I cannot conclude that any such summary affected the fairness of the trial. This was a short trial that lasted for one day. Submissions by counsel and a decision by the trial judge were later in that same week. In this situation, the trial judge would be very likely to have a clear memory of the evidence himself so he was unlikely to have been misled by any mischaracterization of the evidence by the Crown. The trial judge did not mischaracterize any of the evidence in his decision. The ‘softball’ questions referred to the Appellant’s subjective intent. The only reference the trial judge makes to this evidence is to say this:

> Despite the accused’s allegations that such threatening words were not by him intended to be taken seriously by the complainant, in the context of the telephone conversation where the accused admitted he was very, very angry and was in his words, freaking out, I do not see how such words were meant by the accused at the time to be taken by the complainant other than seriously.

III. *Ground 3: The trial judge’s reasons for judgment show he ignored relevant evidence and failed to properly apply the law*

[44] The argument raised by the Appellant as to alleged errors in the trial judge's reasons for judgment is with respect to his analysis of the evidence of the *actus reus* of the offence – the threat itself. The Appellant argues that the trial judge 'skated over' the context in which the words he found were uttered, ignoring that the Appellant had qualified the statement by saying he would "kill" the Complainant "in court". In context, it is argued the judge should have concluded that he had a reasonable doubt about whether the Appellant meant the offending words to be taken literally.

[45] The recording was done by the Complainant herself and is not of particularly good quality. It is further marred by the fact that both parties were speaking at once in certain parts. Lastly, it is marred by the fact that the Appellant was very angry during the relevant portion of the recording and was yelling. It is sometimes difficult to understand exactly what he was saying. A DVD of the recording was available to me and I have listened to it a number of times. Early in the recording, the Appellant does mention court a number of times. He says this, however, at the relevant point:

> ...after I am done with you in court, because I fucking know the law. After I am done with you in court ahh fuck, I cannot wait .. cause your fucking life is going to be destroyed and them I am going to fucking end it you fucking piece of shit cunt. Fucking fuck you. You fucking whore. Fucking cunt. You are dead.

[46] He does not qualify the statement that her life will be destroyed 'in court'. Nor does he qualify the next comment, that he is going to 'end it' with any reference to court. In context, he is clearly referring to her life. He also does not qualify the last comment 'You are dead' with any words such as 'in court' or 'to me'. The judge did not err in concluding what was said constituted a threat.

[47] It is evident that the Appellant was exceedingly angry during this conversation. The words, themselves, are shocking. The trial judge made several references to having considered them in the context of the entire conversation. He did not 'skate over' the context in which the comments were made. Notwithstanding that the Appellant said he did not mean the words to be taken literally, the trial judge concluded that the words were meant to be taken literally and a reasonable person fully aware of the circumstances in which the words were uttered would perceive them to be a threat of death or bodily harm.

[48] The trial judge correctly stated the law and came to a reasonable conclusion, amply supported by the evidence.

[49] The appeal is dismissed.

Heard on the 22nd day of February, 2018.
Dated at the City of Edmonton, Alberta this 20th day of March, 2018.

D.C. Read
J.C.Q.B.A.

Appearances:

M. Naeem Rauf
for the Appellant

Brandy L. Shaw, Crown Prosecutor
for the Respondent/Crown

TAB 6

In the Court of Appeal of Alberta

Citation: Goodswimmer v Canada (Attorney General), 2015 ABCA 253

Date: 20150727
Docket: 1503-0003-AC
Registry: Edmonton

Between:

Chief Melvin Goodswimmer and Jerry Goodswimmer,
Walter Goodswimmer, Francis Goodswimmer,
Pierre Chowace, Mildred Chowace and Donald Badger,
Councillors of the Sturgeon Lake Indian Band
and on behalf of the Sturgeon Lake Indian Band
and the Sturgeon Lake Indian Band

Appellants
(Plaintiffs)

- and -

Her Majesty the Queen In Right of Alberta

Respondent
(Defendant)

- and -

The Attorney General of Canada

Respondent by Order
(Third Party Defendant)

The Court:

The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall
The Honourable Mr. Justice Thomas W. Wakeling

Memorandum of Judgment of the Honourable Madam Justice Rowbotham and the Honourable Mr. Justice Wakeling

Dissenting Memorandum of Judgment of the Honourable Mr. Justice O'Ferrall

Appeal from the Order by
The Honourable Madam Justice D.A. Sulyma
Dated the 4th day of December, 2014
Filed the 6th day of January, 2015
(2014 ABQB 726, Docket: 9703 06332)

Memorandum of Judgment

The Majority:

I. Introduction

[1] The appellants appeal the case management judge's order requiring the Band's representative to "provide responses to [13] undertakings … that relate to legal advice". The appeal is dismissed.

II. Background

[2] In January 1990, Her Majesty the Queen in Right of Canada (Canada) and the Sturgeon Lake Band of Indians as represented by the Chief and Councillors of the Sturgeon Lake Band (Band) entered into a Treaty Land Entitlement Agreement. The Agreement purported to settle a 1987 lawsuit between the Band and Her Majesty the Queen in Right of Alberta (Alberta). The Agreement contained a release by the Band of all obligations of Canada relating to certain lands that formed part of Treaty 8. The Agreement was in "total satisfaction of all obligations of Canada relating to the land at issue." The Band was represented by two law firms during the negotiations that led to the Agreement. Clause 11 of the Agreement acknowledged that the Band had received independent legal advice. One of the lawyers was the Band's negotiator. A referendum was part of the process that led to the Agreement. There is also an agreement between Canada and Alberta.

[3] In 1997, the appellants commenced this action against the Attorney General of Canada, making additional land claims and asserting that the Attorney General of Canada had obtained the Band's consent to the Agreement through breach of trust, breach of fiduciary duty, equitable fraud, deceit or negligent misrepresentation, and without fully informing the Band of the impact of the Agreement on its members' rights. Her Majesty the Queen in Right of Alberta is also a party to this lawsuit.

III. Decision on Appeal: *Goodswimmer v Canada (Attorney General)*, 2014 ABQB 726 (available on CanLII)

[4] The appellants refused to answer 13 undertakings on the basis that the information sought was protected as privileged communication between solicitor and client. The undertakings relate to communication between the Band and its lawyers (primarily Messrs. Potts and Champion), the lawyers' roles, copies of documents they authored, and details of their engagement in the period leading up to and after the signing of the Agreement. The respondents applied to compel answers to the undertakings.

[5] The case management judge, who has been managing this litigation since 2000, rejected the appellants' submission that the legal advice referred to in these undertakings was protected by solicitor-client privilege. She concluded that the appellants effectively lost the protection of

solicitor-client privilege by directly putting into issue their "knowledge of the legal issues and the circumstances" that led them to enter into the Agreement: para 32. She concluded that the statement of claim asserted a claim which made the appellants' knowledge of the law relevant, and fairness required the disclosure. She further noted that the appellants specifically pleaded lack of informed consent. Further, as regards the Attorney General of Canada, the appellants pleaded reliance on adverse representation and disclosed, by affidavit, some of their communications with the law firm.

[6] In the course of her decision the case management judge referred to the governing authorities. First, solicitor-client privilege may be waived when a party brings into issue the advice that persuaded it to act as it did: *Rogers v Bank of Montreal*, [1985] 4 WWR 508, 62 BCLR 387 (CA). She relied on *Ed Miller Sales & Rentals Ltd. v Caterpillar Tractor Co.*, [1992] 5 WWR 531, 3 Alta LR (3d) 210 (QB), which established that: solicitor-client privilege does not extend to the very issue of an action; a party may waive privilege by a pleading as well as by actually giving evidence of a privileged communication; privilege is waived when a party, by testimony or pleading, voluntarily raises a defence or asserts a claim which makes knowledge of the law relevant; and a party asserting reliance upon legal advice will not be permitted to engage in selective waiver: para 7. Fairness may also require privilege to be waived when parties make their knowledge of the law relevant: *O'Scolai v Antrajenda*, 2008 ABQB 77, 447 AR 357; *Lax Kw'alaams Indian Band v Canada (Attorney Canada)*, 2011 SCC 56, 338 DLR (4th) 193.

IV. The Grounds of Appeal and Standards of Review

[7] The main ground of appeal is that the case management judge erred in determining that the statement of claim raised issues that expressly or impliedly waived the solicitor-client privilege. The appellants also contend that she erred in finding that the 13 undertakings were material and relevant to the claims advanced. Finally, they assert that the chambers judge failed to consider the respondents' 11 year delay in seeking production of the solicitor- client information.

[8] Case management judges are owed deference. Absent an error in law, this Court will not interfere with a chambers judge's exercise of discretion unless the result was unreasonable. This is particularly so when many competing factors must be balanced: *Mikisew Cree First Nation v Canada*, 2004 ABCA 279 at para 10, 354 AR 279. Whether solicitor-client privilege applies is a discretionary determination and should only be interfered with on appeal if it is based on an error in principle, a misapprehension of the facts or is unreasonable: *Dow Chemical Canada v Nova Chemicals Corporation*, 2014 ABCA 244 at para 11, 577 AR 335, see also *Adderley v 1400467 Alberta Ltd*, 2014 ABCA 291 at para 16 (available on CanLII).

V. Discussion

[9] The appellants referred us to *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 (available on CanLII), which discusses the specially protected nature of the solicitor-client relationship. There is no dispute that the relationship is special and warrants

protection absent unusual circumstances. However, there are exceptions, some of which are set out in *Ed Miller*. The case management judge did not misapprehend the governing principles.

[10] The appellants raise two issues that were not argued before the case management judge: whether Canada and Alberta discharged their constitutional duty to consult; and, having regard to the Agreement's release and indemnity provisions, whether individuals may waive or contract out of individual constitutional rights. The appellants now assert that the individual Band members did not provide informed consent to the release. Alberta responds that this is an attempt by the appellants to re-cast the pleadings and raise issues not argued before the case management judge. These new issues include that Alberta breached a duty to consult; the Band or individual members contracted out or waived constitutional rights by entering into releases; and Alberta had a duty in respect of the referendum. Canada further points out that while the appellants now claim the legal advice at issue was not provided to the Band's members but instead to the Chief and Council, this is not relevant to the issue raised on the application.

[11] We decline to decide this appeal on the basis of the recast theory of the litigation, and upon the assertion that the Chief and Council could not waive the privilege of the individual Band members. We observe that the same legal counsel continues to act for all of the appellants although it appears that there may now be a dispute among them as to what information was given prior to the execution of the Agreement. We note that the statement of claim as amended pleads that "the plaintiffs bring this action on their own behalf, on behalf of the Sturgeon Lake Cree Nation and on behalf of all of the members of the Sturgeon Lake Cree Nation, all of whom have the same interest in these proceedings." There is no pleading that the Chief and Council acted without the authority of the individual Band members.

[12] It is clear that the issue argued before the case management judge was limited to whether or not the refused undertakings were relevant and material to the pleadings and, if so, whether solicitor-client privilege was waived.

[13] Notwithstanding the clause in the Agreement that "the Band had received independent legal advice", the pleadings state that the Band's consent to the Agreement and to the release was not "informed": paras 68 and 69 of the statement of claim as amended. Nor was the Band "fully informed with respect to the effect or impact of the [Agreement] on their Treaty rights": para 70. In short, the pleadings assert that, notwithstanding the independent legal advice received, the Band's consent was not informed. To establish that privilege has been waived, it must be shown that: (i) the presence or absence of the legal advice is material to the lawsuit; and (ii) the party who received the legal advice must make the receipt of it an issue in the claim or defence: *Leggat v Jennings*, 2015 ONSC 237 at para 46, aff'd 2014 ONCA 754.

[14] The appellants say that as they did not specifically plead the "legal advice", they did not put it into issue. In our view, this submission treats the issue too narrowly. A significant aspect of this case concerns the enforceability of the Agreement. The issue raised by the pleadings is whether the appellants' consent to the Agreement, including the release, was informed. In other words, what information did the appellants have at the relevant time? The appellants had legal

advice before they signed the Agreement. The respondents rely upon the Agreement in defence of the allegations in the amended statement of claim, and upon the clause in the Agreement that specifically states that the appellants had legal advice. This case is on all fours with decisions such as *Conlon v Conlon*, [1952] 2 All ER 462, [1952] 2 TLR 343 (CA) and *Nowak v Sanyshyn* (1979), 23 OR (2d) 797, 9 CPC 303 (HCJ) where plaintiffs unsuccessfully asserted privilege over the legal advice given to them prior to a settlement agreement and that settlement agreement was later challenged.

[15] Moreover, the appellants have disclosed documents relating to that advice. For example, the statements of account of the law firm who advised the appellants have been produced. The appellants rely on some of the legal advice they received. As the case management judge observed, this selective approach to waiver means fairness issues arise.

[16] The appellants assert that Alberta waited many years before challenging the privileged nature of the solicitor-client records. They rely on Rule 5.3(1)(b) of the *Alberta Rules of Court* which permits variation of an applicant's right to production of records when delay is "grossly disproportionate to the likely benefit". This rule applies to document production, whereas the issue in this application whether the appellants should respond to undertakings arising on questioning. This ground of appeal is dismissed.

VI. Conclusion

[17] The case management judge's conclusions that the privilege was waived by the pleadings and that fairness dictated the undertakings be answered was reasonable. She made no reviewable error.

[18] As regards the issues that were not expressly before the case management judge but are argued throughout the Band's factum, we are of the view that they should not be considered for the first time on appeal.

[19] Accordingly, the appeal is dismissed.

Appeal heard on March 30, 2015

Memorandum filed at Edmonton, Alberta
this 27th day of July, 2015

Rowbotham J.A.

Wakeling J.A.

O'Ferrall J.A. (dissenting):

I. Introduction

[20] In my view, the court below erred in finding that the appellants had, by their pleadings, waived solicitor-client privilege over certain communications their Chief and Council had with their lawyers leading up to the execution of a 1990 treaty land entitlement agreement. This conclusion led to the order on appeal: directing the appellants to provide responses to undertakings previously refused that relate to legal advice (see Appendix 1).

[21] In issuing these dissenting reasons, I have confined my consideration to the pleadings and the issues raised by those pleadings because the case management judge's decision is premised on what she found to be a waiver of privilege in the pleadings. In my view, the case management judge may have misunderstood the pleadings and that misunderstanding may have led to her finding of waiver.

[22] In fairness to the case management judge, crafting a proper pleading proved a challenge for the plaintiffs' counsel. The case management judge was dealing with an "Amended Amended Amended Amended Statement of Claim" (the so-called "Fourth" Statement of Claim). But, properly analyzed, that Statement of Claim discloses that the central issue in this case is whether the Sturgeon Lake Cree are entitled to further treaty entitlements. The entitlements claimed include entitlements to more land, mines and minerals, compensation for loss of treaty rights and compensation for an alleged failure to adequately provide and index certain alleged treaty annuity payments. Damages are also sought for alleged prior treaty breaches and breaches of alleged fiduciary duties owed.

[23] The basis for these claims lies in alleged unfulfilled promises made to the Sturgeon Lake Cree when Treaty 8 was signed in 1899. The basis for these claims is not founded, as the case management judge appears to have understood it to be founded, on a failure by Her Majesty to properly inform the appellants of their entitlements when the 1990 treaty land entitlement agreement was executed. This is not a case of a party trying to avoid an agreement it made on the basis of a misrepresentation or a failure to inform. Nor is it a case of a party seeking damages for such a misrepresentation. It is a case of parties seeking what they claim they were promised over a century ago.

[24] Also, contrary to what the case management judge (at para 3) and the majority have stated, the Sturgeon Lake Indian Band did not release and forever discharge Her Majesty from all Treaty 8 obligations when it executed the 1990 treaty land entitlement agreement. That agreement only purports to settle "part" of the obligations imposed on and the promises made by Her Majesty at the time of signing Treaty 8. And the release contained in the treaty land entitlement agreement is likewise expressly limited.

[25] The issue of whether the appellants are entitled to further treaty entitlements will be determined on the basis of what the Crown promised and on what the Crown has already delivered

by way of treaty entitlements. The prior treaty land entitlement agreement will, of course, be an important consideration in determining what, if any, further treaty entitlements the plaintiffs have coming. But it will not be the only consideration.

[26] Anticipating that the Crown might plead the prior agreement as a defence to the appellants' additional land claims (which are only one of a number of claims), the appellants alleged that the Crown failed to disclose certain material facts which it had a duty to disclose in negotiating the prior treaty land entitlement agreement. Because it is Her Majesty who seeks to rely on the prior treaty land entitlement agreement, the appellants' anticipatory pleading that the Crown failed to properly inform them of material facts could not, without more, have the effect of waiving the privilege which would otherwise attach to communications between a Chief and Council and their solicitors. The Crown is the defendant, not the client, and as such cannot cause solicitor-client privilege to be waived by putting in issue the legal advice that the client and the other party to the agreement received.

II. Standard of Review

[27] I agree with my colleagues that the case management judge's decision can only be reviewed for an error in principle, a misapprehension, or because it is unreasonable. In my view, the case management judge erred in principle and misapprehended the pleadings.

[28] The Crown cites the following quote from *Wesley First Nation v Alberta*, 2015 ABCA 76:

> In *Demb v. Valhalla Group Ltd*., 2015 ABCA 29 at para. 26, this Court discusses aboriginal case law where deference to the case management judge should be afforded because a case management judge must balance competing interests.

[29] I do not disagree, but in *Wesley First Nation*, solicitor-client privilege was not at stake. In *R v McClure*, 2001 SCC 14, [2001] 1 SCR 445 when solicitor-client privilege was in play, Major J. stated that solicitor-client privilege is considered a "class" privilege and does not involve a balancing of interests on a case-by-case basis. Solicitor-client privilege, though not absolute, will ordinarily prevail over other interests.

III. Dissent Summarized

[30] The essence of this dissent may be summarized as follows:

1. Solicitor-client privilege is fundamental to our system of justice. To quote Major J in *McClure* at para 31, "The important relationship between a client and his or her lawyer stretches beyond the parties and is integral to the workings of the legal system itself." That is, solicitor-client privilege has been elevated from a fundamental civil and legal right to a principle of fundamental justice.

2. Because it is a "class" privilege as opposed to a "case-by-case" privilege, once it has been established that the relationship falls within the class of solicitor-client relationships, communications are *prima facie* inadmissible and the burden is on the party seeking disclosure to justify why the privileged communication should be disclosed.

3. Solicitor-client privilege may be waived, but only by the client; and, ordinarily, only by a voluntary, express, deliberate conscious decision by the client.

4. In certain "rare" or limited circumstances courts may imply that solicitor-client privilege has been waived.

5. A court may imply that solicitor-client privilege has been waived when a party clearly puts reliance on legal advice in issue.

6. On a proper interpretation of the pleadings in this case, the appellants have not <u>clearly</u> put reliance on legal advice in issue. The pleadings do not <u>clearly</u> disclose a conscious, deliberate waiver by the clients. Merely alleging that the parties opposite acted in bad faith cannot defeat solicitor-client privilege: *Davies v American Home Assurance Co* (2002), 60 OR (3d) 512 (Sup Ct).

7. But regardless, when there is <u>doubt</u> about whether reliance on legal advice has been put in issue by the holder of the privilege, because solicitor-client privilege is so fundamental to our legal system, it would be an error on the part of a court to not then engage in analysis to determine whether the information or evidence sought to be disclosed might not be obtained by a means which did not involve deeming the privilege waived. Any interference with privilege must only be "to the extent necessary": *Descôteaux v Mierzwinski*, [1982] 1 SCR 860 at 875, 141 DLR (3d) 590.

8. When a party puts in issue his or her knowledge, questions as to what that knowledge was would be legitimate. However, questions as to how that knowledge was obtained would not be permitted if it involved a breach of solicitor-client privilege. When, as in this case, the issue is the absence of a party's knowledge, questioning becomes more difficult. Questions as to why the party's knowledge was lacking would be legitimate, but questions about what was communicated to them by his or her solicitor would not. That is why parties, when they make agreements, often include clauses whereby they acknowledge that they have received independent legal advice. Acknowledgment of receipt of independent legal advice is sought because the party opposite knows that he or she will not be able to ascertain what that advice was, but nevertheless wishes to forestall arguments about the other party's understanding of the agreement.

9. Three reasons to be particularly cautious in this case are as follows:

a. The fact that the 1990 treaty land entitlement agreement was on its face only a partial settlement suggests that the parties may be negotiating further matters. To allow either party at this point to access the other's privileged communications could prejudice those future settlement negotiations.

b. There is doubt in this case about whose privilege is deemed to have been waived: that of the appellants or that of the Chief and Council at the time the 1990 treaty land entitlement agreement was negotiated. The privilege alleged to have been waived may or may not be that of the appellants.

c. Should it be determined that there was a duty on the Crown to consult or inform members of the Sturgeon Lake Cree who were not consulted or informed prior to the execution of the 1990 treaty land entitlement agreement, then the information ordered to be provided may be irrelevant or immaterial to the issue of informed consent.

IV. Analysis

[31] In this case, the case management judge found the privilege had been waived because the appellants had put their legal knowledge in issue by alleging they had not provided their informed consent to the 1990 treaty land entitlement agreement. The pleadings referring to informed consent are found in paragraphs 68 and 69 in the Statement of Claim:

> 68. In accepting the 1990 Agreement by referendum, the Plaintiffs did not provide informed consent regarding extinguishment of land entitlement and their rights to the mines and minerals of vast areas of land. Canada obtained the consent of the Plaintiffs through breach of trust, breach of fiduciary duty, equitable fraud, deceit or negligent misrepresentation, and without fully informing the Plaintiffs of the impact of the 1990 Agreement on their rights.
>
> 69. The Releases given by the Plaintiffs in the 1990 Agreement were given without informed consent with respect to the rights being ceded to Canada and Alberta, and as such, are not binding on the Plaintiffs.

[32] So, what the appellants allege is misrepresentation and a failure to inform in circumstances where the appellants allege that there were fiduciary duties owed, including a duty of inform.

[33] The judge concluded the lack of informed consent allegation related to the legal effect of the signed documents which called into question the advice the appellants received from their lawyers. Thus, she stated, at paragraphs 29 and 32 of her reasons:

> I am of the view, as submitted by Alberta and Canada, that here, the Plaintiffs by their pleadings have voluntarily asserted a claim which makes the Plaintiffs' knowledge of the law relevant. As stated by Mason J. in *Petro Can Oil & Gas*

> *Corp. v Resource Service Group Ltd.* (1988), 32 CPC (2d) 50 and adopted by Berger J. in *Ed Miller*, it would be unfair to permit a party who has set up a claim based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege. Further, that indeed fairness would dictate disclosure here.
>
> ...
>
> In my view, the pleadings in their entirety do put the Plaintiffs' knowledge of legal issues and the circumstances of their entering into the 1990 TLE and associated releases as being executed with informed consent or not, into issue.

[34] I would agree that if the allegation of lack of informed consent was based on the advice the appellants received from their lawyers when the documents were signed, this could amount to a waiver of solicitor-client privilege. However, in my view, the allegation was based on the Crown's failure to provide members of the Sturgeon Lake Cree with the **material facts** necessary to make an informed decision about whether to enter into the treaty land entitlement agreement. The appellants argue that the obligation to disclose these material facts arose from the fiduciary duty owed by the Crown to Canada's First Nations. These allegations are found in the paragraphs immediately preceding and immediately following the paragraphs which the case management judge held constituted a waiver of solicitor-client privilege. They are paragraphs 63 to 67 and paragraphs 70 and 71 of the Statement of Claim and are set forth below:

> 63. The 1990 Agreement was then entered into between Canada and the Plaintiffs, and between Canada and Alberta.
>
> 64. The 1990 Agreement set aside some land for the Plaintiffs, but was far short of what the Plaintiffs were entitled to pursuant to Treaty No. 8. Canada breached its fiduciary duty to the Plaintiffs in supporting the land entitlement provided for in the 1990 Agreement knowing that the Plaintiffs were being defrauded of the land owed to them pursuant to Treaty No.8.
>
> 65. Canada further breached its fiduciary duty owning to the Plaintiffs by failing to disclose material facts to the Plaintiffs, such as the fact that the Plaintiffs were entitled to select land on the basis of current population in perpetuity and that the Plaintiffs were entitled to the mineral rights to whatever land they selected in any event. Rather, Canada led the Plaintiffs to believe that the ownership of the mineral rights to the land selected was open to negotiation, and used this misrepresentation to limit the amount of land the Plaintiffs ultimately selected under the 1990 Agreement.
>
> 66. Canada further breached its fiduciary duty owing to the Plaintiffs by failing to disclose material facts to the Plaintiffs, such as the fact that, based on Crown policy on previous selections of reserve lands, the Plaintiffs were entitled to select lands

> containing existing mineral leases, and revenue from such leases would then be payable to the Plaintiffs rather than the Province.
>
> 67. Canada further breached its fiduciary duty owing to the Plaintiffs by failing to inform the Plaintiffs that prior to entering into Treaty No. 8 with First Nations, the Crown was aware that there existed vast amounts of mineral wealth in the land surrendered under Treaty No. 8 but failed to inform the First Nations. This was a material fact of which the Plaintiffs were entitled to be informed prior to settling their land entitlement under the Treaty, and prior to releasing the Crown from any further claims with respect to Treaty land entitlement.
>
> ...
>
> 70. The Plaintiffs were never fully informed with respect to the effect or the impact of the 1990 Agreement on their Treaty rights to land on the basis of current population in perpetuity.
>
> 71. Alberta and Canada were aware or should have been aware of the fact that lands should be provided to the Plaintiffs on the basis of the Plaintiffs' current population or their current population in perpetuity. Canada and Alberta willfully and intentionally failed to disclose or discuss this obligation with the Plaintiffs in breach of their duties of utmost fidelity.

[35] In these paragraphs, the appellants are asserting that the Crown had a fiduciary obligation to inform them of relevant material facts that could or would affect their position during the negotiation of the treaty land entitlement agreement. Without this information, the appellants allege they could not have given informed consent when they entered into the treaty land entitlement agreement. In effect, the appellants argue that the Crown treated them like any other ordinary third party negotiating a commercial agreement when the Crown's fiduciary obligations precluded this approach.

[36] The appellants' claim is that the Crown failed to inform them of what the appellants argue were historical entitlements (the right to select land on the basis of current population in perpetuity, mineral rights, etc.) The appellants did plead that the Crown failed to inform them of the impact of the proposed treaty land entitlement agreement on their rights; but by so doing (and the words chosen by their lawyers may have been unfortunate) the appellants were not putting the legal advice they obtained from their solicitors in issue. They were putting what the Crown failed to inform them of, and the legal significance of that failure, in issue.

[37] While the following analogy is far from perfect, it may provide insight into the view that the pleadings in this case did not clearly amount to a waiver of solicitor-client privilege. A doctor has a duty of care to ensure that his or her patients are properly advised of the risks of treatment before they give consent to be treated. In a negligence action against a doctor for injury arising from medical treatment, a patient might plead that he or she was not advised of the risks, thus

giving rise to a pleading of a lack of informed consent. But such a pleading, alleging a lack of informed consent, would not entitle the defendant doctor to discover conversations which took place between the patient and his or her lawyer concerning a release the doctor sought to have the patient sign prior to conducting the medical treatment.

[38] Nor does it change my view that the Band's lawyer was appointed the Band's negotiator when the treaty land entitlement agreement was being negotiated. The allegation is a failure to inform. If the Crown did inform the Band's negotiator of facts of which the Sturgeon Lake Cree say they weren't informed, the Crown can adduce that evidence. If need be, the Crown may be able to question the lawyer on what he was told by the Crown's negotiator or negotiators. And although the lawyer may not be asked what he communicated to his clients, a court would certainly have the evidence it needed to decide the issue of informed consent if the negotiator was found to be the appellants' agent.

[39] The fact that the 1990 agreement, which purported to be an agreement settling all outstanding claims of treaty land entitlement, contained an acknowledgment by the Band that it had "independent legal advice on all aspects of this Settlement Agreement" may be all the Crown needs to resist aspects of the appellants' claims. But the acknowledgment of receipt of independent legal advice does not mean that the confidentiality of that advice has been waived. The fact that the Band received independent legal advice may be a complete answer to the failure to inform allegation, in which event there would be no need to know what that legal advice was, and no need to imply a waiver of privilege.

[40] My colleagues point out that the appellants have already disclosed privileged documents relating to the legal advice received from their lawyers at the time the 1990 agreement was executed. They suggest parties are not entitled to "a selective approach to waiver" as "fairness issues arise" [para 15]. In coming to this conclusion they are referring to the principle articulated by Berger J (as he then was) in *Ed Miller Sales & Rentals Ltd v. Caterpillar Tractor Co*, [1992] 5 WWR 531, 3 Alta LR (3d) 210 at para 7 (QB):

> A party asserting reliance upon legal advice will not be permitted to engage in selective waiver. Such an assertion places in issue all of the party's knowledge of the relevant law, however derived.

[41] However, firstly, the appellants, in pleading a lack of informed consent, are not a party asserting reliance upon legal advice. That is, they are not asserting deficiencies in the legal advice they received. This is not a case where the plaintiffs have set up a claim based on privileged communications and then have attempted to rely on privilege to preclude the respondents from discovering that claim. Here the appellants are alleging the Crown failed to discharge a fiduciary duty to inform them of material facts about their treaty entitlements. That does not make the solicitor's file admissible or discoverable.

[42] Furthermore, while the appellants during the course of this litigation have waived privilege with respect to many privileged documents, this does not amount to selective waiver, thereby

raising issues of fairness. When a party has not waived solicitor-client privilege generally, it may still disclose documents that might otherwise be cloaked in solicitor-client privilege in an effort to be co-operative. In this regard, I would adopt the reasoning of Sharpe J in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co* (1995), 27 OR (3d) 291, [1995] OJ No 3886 (QL) (Gen Div), where he stated:

> It is plainly not the law that production of one document from a file waives the privilege attaching to other documents in the same file. It must be shown that without the additional documents, the document produced is somehow misleading: *Nova Aqua Salmon Ltd. Partnership (Receiver of) v. Non-Marine Underwriters of Lloyd's of London* (1994), 28 C.P.C. (3d) 269, 135 N.S.R. (2d) 71 (S.C.). There is nothing before me to suggest that the disclosed documents are misleading.
>
> ...
>
> The waiver rule must be applied if there is an indication that a party is attempting to take unfair advantage or present a misleading picture by selective disclosure. However, a party should not be penalized or inhibited from making the fullest possible disclosure. In my view, too ready application of the waiver rule will only serve to inhibit parties to litigation from making the fullest possible disclosure.

[43] Finally, I believe the case management judge may have erred when she stated "the Plaintiffs have not met the onus upon them of making out the privilege or that it applies here": para 32. That may have been simply a case of unclear wording; the law is clear that once it has been established that the relationship was one of solicitor and client, the burden is on the party seeking disclosure to demonstrate why the privileged communication should be disclosed. If the reason is that the privilege has been waived, the onus is on the party seeking disclosure to establish waiver. As Chief Justice Moore stated: "the onus lies on the Defendants to demonstrate a compelling need to see the privileged documents based on considerations of fundamental adjudicative fairness": *Husky Oil Operations Ltd v MacKimmie Matthews*, 1999 ABQB 54 at para 5, 241 AR 115. The same principle applies to answers to undertakings relating to privileged legal advice.

[44] And beyond demonstrating an implied waiver, the Crown's onus in this case is one of satisfying the court that disclosure of the communication is important to resolving the issue and that no other form of evidence is available which would serve the same purpose: *Metcalfe v Metcalf*, 2001 MBCA 35 at para 26, 198 DLR (4th) 318; *Descôteaux; McClure* at 464. None of that analysis appears in the case management judge's reasons.

[45] Assuming that an implied waiver of solicitor-client privilege has been demonstrated, the party seeking disclosure cannot rely on mere speculation or a "fishing expedition" without establishing the relevance and the materiality of the sought-after records. The party seeking disclosure must show that there is some evidentiary basis for its claim that there exists in the otherwise privileged communication documents relevant to the issue of informed consent. The case management judge's reasons do not address this issue.

V. Conclusion

[46] In conclusion, a party may impliedly waive privilege when it has clearly put reliance on legal advice in issue. On a proper interpretation of the pleadings in this case, the appellants have not clearly put reliance on legal advice in issue. Nor has Her Majesty satisfied the onus of establishing that answers to the undertakings relating to legal advice are necessary and that no other evidence is available on the issue of whether the Crown discharged its fiduciary obligation to inform the appellants of their historical entitlements under Treaty 8 prior to the signing of the treaty land entitlement agreement.

[47] I would have allowed the appeal and set aside the case management judge's order directing the appellants to provide responses to those undertakings which involve disclosure of communications between the Sturgeon Lake Indian Band and its solicitors.

Appeal heard on March 30, 2015

Memorandum filed at Edmonton, Alberta
this 27th day of July, 2015

O'Ferrall J.A.

Appearances:

J.R.W. Rath
M.C. Freeman
D. Khan
for the Appellants

K.D. Epton
for the Respondent Her Majesty the Queen In Right of Alberta

L.A. Maj
for the Respondent The Attorney General of Canada

TAB 7

Marion v. Wawanesa Mutual Insurance Company, 2003 ABQB 767

Date: 20030908
Action No. 0001-08548

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

BETWEEN:

GLEN MARION and COLLEEN M. MARION

Plaintiffs

\- and -

WAWANESA MUTUAL INSURANCE COMPANY and
PRIME INSURANCE LTD. Carrying on business as
WESTERN GENERAL INSURANCE SERVICES and KRIS VADAN

Defendants

AND BETWEEN:

WAWANESA MUTUAL INSURANCE COMPANY

Plaintiff by Counterclaim
(Defendant)

\- and -

GLEN MARION, COLLEEN M. MARION
and MARC ALBERT DAUVIN

Defendants by Counterclaim
(Plaintiffs)

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE P. A. ROWBOTHAM

APPEARANCES:

Byron W. Nelson, McGuigan Nelson
for Glen Marion and Colleen Marion

David J. Wachowich, Fraser Milner Casgrain
for Wawanesa Mutual Insurance Company

INTRODUCTION

[1] This is an appeal from a decision of Master Floyd who dismissed two applications brought by Glen and Colleen Marion. One application was for the provision of a further Affidavit of Documents by Wawanesa Mutual Insurance Co. (Wawanesa) and compelling Wawanesa to disclose the name of a witness. Wawanesa claims privilege over the documents and the identity of the witness. The second application was for summary judgment.

BACKGROUND

[2] Marions were insured under a policy of insurance issued by Wawanesa. That policy insured real property and structures owned by the Marions. On May 24, 1999 a fire damaged the property.

[3] Marions made a claim under the policy. Wawanesa paid out approximately $186,000.00 to contractors, suppliers and the Marions. Later, Wawanesa says it learned that the Marions and a Mr. Dauvin were operating an auto repair shop and mechanical shop business in an outbuilding on the property for some time prior to the fire. It declared the policy void *ab initio* on the basis that the insured had made misrepresentations to Wawanesa.

[4] Marions issued a Statement of Claim against Wawanesa, Prime Insurance Services and Kris Vadan, for payment under the policy. Wawanesa counterclaimed against Marions and Marc Dauvin. The issues subject of this appeal relate solely to the counterclaim.

[5] Wawanesa prepared an Affidavit of Records which asserted a claim of privilege over certain investigative reports. Wawanesa’s officer, Ms. Kramer, was examined for discovery and the claim of privilege was maintained. The Marions then brought an application for summary judgment.

[6] Ms. Kramer, on behalf of Wawanesa, swore an affidavit in opposition to the summary judgment application. The relevant parts of that affidavit are:

> 3. During the course of investigating and adjusting the reported fire loss, in-house at Wawanesa, a telephone call was received on or about the 17th day of August, 1999, by the assigned Wawanesa adjuster from a third party which

raised suspicions that one of the buildings destroyed in the fire, and the tools within it, were not owned by the insureds Glen and Colleen Marion, or either or both of them, but by another party, the Defendant by Counterclaim in this action Mark Dauvin.

4. Since the said telephone call on the 17th day of August, 1999, Wawanesa's investigations and adjustment of this fire loss claim, which forms the subject matter of this litigation, have been directed and instructed with a recognition that there were justifiable suspicions of the validity of the claim, which might ultimately result in a denial, raising the real prospect of litigation.

5. As a result of these suspicions, Wawanesa contacted counsel for advice on August 27, 1999, and ultimately contacted its present solicitors at Fraser Milner Casgrain on September 8, 1999, retaining them on September 10, 1999.

6. Private investigations services from Ritter Investigation Services Ltd. were first retained, in furtherance of legal advice, on August 30, 1999, after first contact on August 27, 1999.

7. Wawanesa has denied the claim for indemnity on the policy advanced by or on behalf of the Plaintiffs for the reasons set out in paragraph 29 of the Statement of Defence filed in this action, and will rely upon the Marions' breach of policy therein in furtherance of the claims against the Marions, and Dauvin, in the Counterclaim conjoined in this action.

9. The contents of investigations reports prepared by Ritter Investigation Services Ltd., over which a claim for both solicitor/client privilege and litigation privilege are expressly maintained and specifically not intended to be waived, establish that, at the very least, there is a genuine issue to be tried as to the entitlement of Wawanesa to deny the claim and recover back monies paid in partial indemnity on the alleged loss, on the grounds set out in paragraph 29 of the Statement of Defence filed in this action, as referred to above and as set out in the pleadings.

Ms. Kramer was examined on that affidavit. She refused to produce the five investigative reports or to provide the name of the individual who telephoned Wawanesa.

[7] Ms. Kramer swore a supplemental affidavit on February 26, 2003:

9. While expressly maintaining the privilege claims noted above, I can elaborate upon my statement in paragraph 9 so as to identify with greater particularity the genuine issues of fact to be tried in this matter, as set out below. The source and grounds of the following statements are contained within the

Ritter Investigation Services Ltd. reports listed 2(d) through 2(h) above, and I do verily believe the following to be true:

(a) At the time of the loss, and for some time prior, a motor vehicle restoration business had been operating on the property insured by the Marions, a use for which their policy with Wawanesa was not underwritten, and which use the Marions have denied.

(b) The Marions have claimed indemnity on their policy with Wawanesa, asserting their alleged sole and unconditional ownership of items lost in the subject-matter fire, including the buildings and tools within them, when in fact many of the tools, and likely the metal shop building, were owned by Marc Dauvin, who was a proprietor in the motor vehicle restoration business operated on-site.

[8] Master Floyd found that the items sought were privileged. He dismissed the summary judgment application on the basis that there was a conflict between the affidavits of Ms. Kramer and the Marions.

STANDARD OF REVIEW

[9] The decision of the Master should not be reversed on findings of fact unless the appellant can demonstrate palpable or overriding error. With respect to errors of law the standard is one of correctness.

INVESTIGATIVE REPORTS

[10] The main issue on this appeal is whether Wawanesa may maintain its claim of privilege in the face of a summary judgment application. If the matter were still at the stage of an affidavit of records or an examination for discovery, it is clear that the reports were prepared for the dominant purpose of submission to a legal advisor for advice and use in litigation.

[11] The Marions maintain that by relying on the reports in Ms. Kramer’s affidavit, Wawanesa has waived its claim of privilege. A party may impliedly waive privilege where it relies on the privileged communication to ground its defence. This principle has been applied by this court in many circumstances. Typically, a party relies on the opinion of its counsel in the context of a commercial transaction, the transaction does not close and one party sues. The opposing party in its defence relies upon the opinion of its solicitor but claims privilege over the opinion. This was the circumstance in ***Petro Can Oil & Gas Corporation Ltd. v. Resource Service Group Ltd.*** (1988), 59 Alta. L.R. (2d) 34, (Q.B.). Mason J. directed production of the opinion. He stated at para. 18:

> 18. The defendant also objected to the production of the Macleod Dixon opinions on the basis of solicitor-client privilege. In my view, any solicitor-client privilege which may have attached to the Macleod Dixon opinions was clearly waived by the defendant. It is well accepted that a party may impliedly waive solicitor-client privilege where it relies in part upon the privileged communications to either ground its claim or base its defence to a claim made against it: see ***Rogers v. Bank of Montreal,*** [1985] 4 W.W.R. 503, 61 B.C.L.R. 239, 57 C.B.R. (N.S.) 251 (S.C.), affirmed [1985] 4 W.W.R. 508, 62 B.C.L.R. 387, 57 C.B.R. (N.S.) 256 (C.A.); ***Alta. Wheat Pool v. Estrin,*** 49 Alta. L.R. (2d) 176, [1987] 2 W.W.R. 532, 14 C.P.C. (2d) 242, (sub nom. ***Alta. Wheat Pool v. Dawson Resources Ltd.***) 75 A.R. 348 (Q.B.). The underlying rationale for finding implied waiver in such circumstances is based on fairness. It would be unfair to permit a party who has set up a claim or defence based on privileged communications to preclude his opponent from discovering against that claim by relying upon the privilege. If privilege were successfully raised, the opponent would be left with no reasonable method for exploring the validity of the claim or defence: see Wigmore on Evidence (McNaughton revision), vol. 8, at paras. 2327 and 2388; and J.N. Craig, "Privilege in Discovery of Documents" (1985), 23 Alta. L.Rev. 388 at p. 393. In the case at bar, by alleging that cls. 9.1(v) and 9.1(xii) had not been fulfilled, the defendant put the opinions of Macleod Dixon referred to in those clauses in issue. In other words, the defendant is relying in part on communications that might be privileged to base its defence that cls.9.1(v) and 9.1(xii) had not been fulfilled. Consequently, the defendant must be taken to have waived any privilege attaching to the Macleod Dixon opinions. To hold otherwise would in effect amount to providing the defendant with an unfair advantage in this litigation which the plaintiffs would quite likely be unable to overcome.

[12] These principles were applied by Justice Clackson in the context of a summary judgment application. In ***Sovereign General Insurance Co. v. Tanar Industries Ltd.***, [2002] A.J. No. 107 (A.B.) an officer of American Home Insurance, the applicant on a summary judgment application, swore an affidavit which deposed that its legal counsel had undertaken investigations and that it relied upon those investigations. The deponent also deposed that he knew of no facts which would support the claim of the opposing party, (the standard requirement of Rule 159(2)). Justice Clackson found at paras 57 and 58:

> 57 American Home has voluntarily injected its state of mind into the action by making the claim of reliance. The evidence suggests that the Defendant's state of mind may have been influenced by the investigations, if any, undertaken by Parlee McLaws or by their advice. In these circumstances, American Home must be taken to have waived its privilege. The fruits of the investigations conducted are discoverable. The application of Sovereign General is granted, although the effect of my Order will be stayed until the contractual claim has been resolved.

> 58 In any event, American Home has waived its privilege by filing the affidavit of Mark Pessolano in which he deposes that he knows of no facts that would support the Plaintiff's claim. The Plaintiff's application is granted, although, again, the effect of my Order is stayed until the contractual issues have been resolved.

[13] These cases considered waiver in the context of the solicitor-client communications branch of the privilege. The present case is concerned with the other branch, the litigation documents privilege. However, in my view the principles are the same. This is particularly so in the context of a summary judgment application. The effect of a summary judgment is that it ends the litigation, subject of course to any appeal. It has the same effect as a trial of the action. Surely, it would not be open to Wawanesa to come to trial and say I have a defence but my defence is based on privileged reports which I refuse to disclose. Rule 197(1) prohibits the use of a document in evidence at trial if it has not been previously produced.

[14] In these circumstances, I find that Ms. Kramer's reliance on the investigative reports as described in her first affidavit constituted a waiver of the privilege over those reports. I conclude this despite the attempt in paragraph 9 of her first affidavit to state that there was no waiver.

[15] Wawanesa submits that to permit disclosure of the reports in this manner is tantamount to allowing the Marions to do indirectly what they could not do directly. Wawanesa chose to put the reports in issue by the manner in which it responded to the application. If its only defence to the action arose as a result of the investigative reports, then in response to the summary judgment application the reports ought to be disclosed. In this context, the interests of litigation favour disclosure over the maintenance of a claim of privilege. Accordingly, the investigative reports must be disclosed.

IDENTITY OF THE WITNESS

[16] Wawanesa also refused to disclose the identity of the individual who telephoned on August 17, 1999. This information is surely not privileged as there was no contemplation of litigation at that point. In fact, according to paragraphs 4 and 5 of Ms. Kramer's first affidavit, it was the telephone call which triggered the litigation. In ***Hailmichael v. Roodzant*** (1998), 72 Alta. L.R. (3d) 350 (Q.B.) Master Waller directed a party to disclose the name of a witness. He found that the rule against disclosure of the names of witnesses has no place in modern jurisprudence. He relied upon the following passage from the Saskatchewan Court of Appeal decision in ***Soke Farm Equipment Ltd. v. New Holland of Canada Ltd.***, [1990] 2 W.W.R. 762:

> Accordingly, neither of the two traditional reasons supporting the rule of non-disclosure of names of potential witnesses with knowledge of material facts should now be accepted as valid. The "sporting theory" is now considered to be, at best, a game of "hide and seek" and, at worst, "trial by ambush." The prevalent view is that broad discovery is to be encouraged as protecting from

> surprise, uncovering relevant evidence, encouraging settlement, focusing the issues, pinning witnesses down, permitting counsel to size up the case and ensuring a decision of the case after a full consideration of all relevant issues. The risk of permitting fabrication of evidence or tampering with potential witnesses applies equally to persons refusing to disclose their names to the other party and, indeed, broad discovery by both parties limits the opportunities to do these things.
>
> There may be cases where other good reason exists for non-disclosure of the name of a witness, as, for example, evidence of potential violence to a prospective witness. Since no such exceptional reason was shown in this case, it is sufficient to say that such cases may be dealt with on an individual basis through the order of a judge.

I agree. This is particularly so when the information disclosed by the caller was not secured in contemplation of litigation. Wawanesa must disclose the name of the caller.

SUMMARY JUDGMENT

[17] Given my conclusion on the issues of disclosure, I decline to address the appeal of the Master's refusal to grant summary judgment. The contents of the investigative reports will affect whether summary judgment ought to be granted. If the Marions choose to continue with the appeal, they may seek my leave to do so after the materials have been disclosed.

[18] The Marions submitted that the affidavit filed in response to the summary judgment application must be based upon personal knowledge. Rule 159(1) and (2) require that the applicant (plaintiff or defendant) apply to the court for judgment "on an affidavit made by him or some other person who can swear positively to the facts". Rule 305 provides:

> 305(1) Affidavits shall be confined to the statement of fact within the knowledge of the deponent.
>
> (2) In an action or proceeding to which a corporation is a party any affidavit required by these Rules to be made by a party may be made by an officer, servant or agent of the corporation having knowledge of the facts required to be deposed to, who shall state therein that he has that knowledge.
>
> (3) On interlocutory motions affidavits containing statements as to the belief of the deponent with the source and grounds thereof may be admitted.

Rule 305(2) permits an officer of Wawanesa who has knowledge of the facts to swear to that knowledge. Ms. Kramer has done so and identified the source of her knowledge.

[19] I do not read Rules 159 and 305 as requiring anything further of Ms. Kramer. That was the conclusion reached by our Court of Appeal in ***Scandinavian American National Bank of Minneapolis v. Shuman, Melvik and Bell***, [1917] 3 W.W.R. 745 (Alta. S.C.A.D.) and followed by Master Quinn in ***Federal Business Development Bank v. Clements***, [1982] A.J. No. 589 (Q.B.)

CONCLUSION

[20] 1. The appeal is allowed in part.

2. Ms. Kramer is directed to respond to the question, "What was the name of the third party that called Wawanesa on August 17, 1999?"

3. Wawanesa is directed to produce the five reports prepared by Ritter Investigation Services referred to in paragraph 9 of Ms. Kramer's affidavit of October 16, 2000.

4. The appeal of the summary judgment is adjourned.

5. The Marions shall have the costs of the appeal.

HEARD on the 16th day of June, 2003.

DATED at Calgary, Alberta this 8th day of September, 2003.

J.C.Q.B.A.