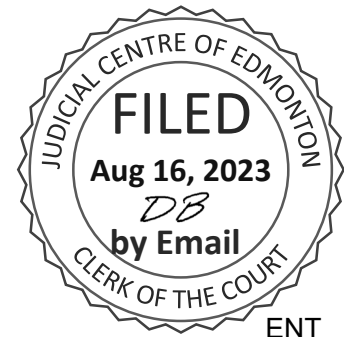


COURT FILE NUMBER 2303 – 06543

COURT COURT OF KING'S BENCH

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 COMPROMISE OR
ARRANGEMENT OF J.W. CARR HOLDINGS LTD., SPRUCE
GROVE INDUSTRIAL PARK INC., 272649 ALBERTA LTD.,
279896 ALBERTA LTD., GRANDE PRAIRIE PLACE
ENTERPRISES (1996) INC., 1170292 ALBERTA LTD. and
627612 ALBERTA LTD.

APPLICANTS J.W. CARR HOLDINGS LTD., SPRUCE GROVE INDUSTRIAL
PARK INC., 272649 ALBERTA LTD., 279896 ALBERTA LTD.,
GRANDE PRAIRIE PLACE ENTERPRISES (1996) INC.,
1170292 ALBERTA LTD. and 627612 ALBERTA LTD.

DOCUMENT **BENCH BRIEF OF THE APPLICANTS
(SALE APPROVAL & VESTING ORDER
AND SEALING ORDER)**

ADDRESS FOR
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CONTACT
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I. INTRODUCTION AND BACKGROUND

A. Introduction

1. This Brief of Law is submitted on behalf of the Applicants, J.W. Carr Holdings Ltd., Spruce Grove Industrial Park Inc., 272649 Alberta Ltd. (“**272**”), 279896 Alberta Ltd., Grande Prairie Place Enterprises (1996) Inc., 1170292 Alberta Ltd. and 627612 Alberta Ltd. (collectively, the “**Applicants**” or the “**Carr Group**”) in support of an application for a Sale Approval and Vesting Order (“**SAVO**”) regarding a Purchase & Sale Agreement (the “**PSA**”) for the proposed sale by 272 to Garmun Realty Corp. (or its nominee) (the “**Purchaser**”) of a commercial building located in Grande Prairie, Alberta, as well as an order sealing the Confidential Affidavit of Marjorie Carr sworn on August 14, 2023 (the “**Fourth Confidential Carr Affidavit**”).
2. On April 26, 2023, an Amended and Restated Initial Order (the “**ARIO**”) was granted in respect of the Applicants and their property, pursuant to the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, as amended¹ (the “**CCAA**”). Ernst & Young Inc. was appointed as the monitor of the Applicants (the “**Monitor**”).
3. A Sales and Investment Solicitation Process (“**SISP**”) Order was also granted in respect of certain of the Applicants’ real property on April 26, 2023, and an Amended and Restated Sales and Investment Solicitation Process Order was granted on July 29, 2023 (the “**Amended and Restated SISP Order**”).
4. Pursuant to the Amended and Restated SISP Order, 272 and accepted an offer to purchase a commercial property in Grande Prairie, Alberta known as the Tundra Building. The Applicants seek approval of the PSA and the transaction contemplated therein (the “**Transaction**”), and submit that all of the factors which the Court is required to consider in regard to an application for sale approval have been met in the circumstances.
5. The sales process leading to the PSA was previously approved by this Court by means of the Amended and Restated SISP Order. The Applicants have consulted with the Monitor and the affected secured creditors throughout this process. The proposed Transaction is

¹ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA], **TAB 1 of the Initial Order Brief**.

supported by the Monitor, the Interim DIP Lender and the First Charge Mortgagee.

II. **FACTS**

6. The Applicants comprise seven Alberta corporations which own a portfolio of real estate properties located in Grande Prairie, Edmonton, Fort Saskatchewan, Spruce Grove and Wetaskiwin, Alberta (the “**Real Property**”). The real property is comprised of commercial income generating properties, vacant land, and a number of residential income-generating condominiums and duplexes. The Carr Group has a total of 18 secured creditors who are secured by mortgages on the Real Property.
7. The objective of the Sales and Investment Solicitation Process (the “**SISP**”) described in the Amended and Restated SISP Order is to develop and implement an expedited, cost-effective process for the orderly sale of the Real Property in order to:
 - a. retire the secured debt owed by the Carr Group to its secured creditors (in whole or in part); and
 - b. capture the surplus equity in the assets of the Carr Group in order to fund a Plan of Arrangement whereby the Carr Group may be able to pay distributions to its unsecured creditors.
8. As a result of the Applicants’ efforts in carrying out the SISP, the Applicants have to date entered into purchase agreements and obtained Court approval of sales of ten of the Applicants’ real properties. If approved, the PSA presently before the Court will be the 11th sale approved by this Court.
9. The PSA contemplates the sale of a commercial income-generating building in Grande Prairie, being the Tundra Building, and all associated lease agreements and improvements (collectively, the “**Purchased Assets**”).
10. In accordance with the process contemplated by the SISP, the Applicants consulted with the Monitor, the Interim DIP Lender, and the first charge mortgagee on the Tundra Building, being Canadian Western Bank (“**CWB**” or the “**First Charge Mortgagee**”). All of these stakeholders support the proposed Transaction.

11. The proceeds from the Transaction will be sufficient to retire the debt owed to CWB on the Tundra Building in full, subject to verification by the Monitor of the indebtedness. Surplus equity will be paid to the Monitor in trust, and will ultimately be used to either to fund a plan of arrangement or pay down indebtedness owed by 272 to its secured creditors. This outcome is consistent with the objectives of the SISP and these CCAA proceedings generally.

III. ISSUES

12. This Application raises the following issues for determination by the Court:
- a. Is it appropriate for this Court to grant the proposed SAVO?
 - b. Is it appropriate to grant a sealing order in regard to the Fourth Confidential Carr Affidavit?

IV. LAW AND ARGUMENT

A. It is Appropriate for the Court to Grant the Proposed SAVO

13. Section 11 of the CCAA provides for broad general powers of the Court to make Orders in furtherance of the objectives of the CCAA.²

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

14. Section 36 of the CCAA precludes sales of the Applicants' assets outside of the ordinary course of business without Court approval. Section 36(6) specifically contemplates Court approval of a sale or disposition free and clear of any charges or encumbrances.

² CCAA, supra note 1 at s 11, TAB 1 of Initial Order Brief.

Restriction on disposition of business assets

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

Assets may be disposed of free and clear

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

15. Section 36(3) of the CCAA sets out six non-exhaustive factors (the “**Section 36 Factors**”), that must be considered by the Court in deciding whether to approve a sale of assets outside the normal course of business:

Factors to be considered

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

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

16. The Section 36 Factors align with the “*Soundair* factors”³ regarding the approval of sales of assets outside the ordinary course of business in receivership proceedings (which were relied upon prior to the enactment of section 36(3) of the CCAA).⁴
17. The Section 36 Factors are broadly aimed at ensuring that the sales process is conducted with integrity and that the purchase price received for those assets is reasonable.⁵ A proposed sale should not be rejected solely on the basis that there is a higher offer to purchase or that there is a possibility of a higher offer being received.⁶
18. The Applicants respectfully submit that the proposed Transaction meets the criteria outlined in section 36(3) of the CCAA, such that approval of the proposed sale of the Purchased Assets is appropriate. Specifically:
 - a. The SISP which lead to the negotiation, formalization and execution of the PSA was developed in consultation with the Monitor and secured creditors, and previously approved by the Court in the Amended & Restated SISP Order;
 - b. The Applicants have consulted with the Monitor, the First Charge Mortgagee and the Interim DIP Lender, and all of these stakeholders support the Transaction;
 - c. All other affected creditors have been provided with notice of this Application;
 - d. The effect of the Transaction will be to retire the indebtedness owed to the First Charge Mortgagee and pay down the indebtedness owed to other creditors; and
 - e. The Monitor is of the opinion that the consideration to be received is reasonable and fair, taking into account market value.
19. For the foregoing reasons, the Applicants respectfully submit that it is just and appropriate for this Court to approve the sale and vesting of the Purchased Assets on the terms of the

³ See [Royal Bank v Soundair Corp.](#) (1991), 83 DLR (4th) 76 at para 16 (Ont CA), **TAB A**.

⁴ The [Soundair](#) factors and the jurisprudence decided pursuant to those factors continue to be relevant to the approval of sales pursuant to section 36 of the CCAA. See [Re Sanjel Corp.](#), 2016 ABQB 257, 36 CBR (6th) 239 at paras 54-57, **TAB B** and [Bellatrix Exploration Ltd.](#), 2020 ABQB 332, 80 CBR (6th) 97 at paras 36-37, **TAB C** where the court considered proposed sales in light of the factors set out in section 36 of the CCAA and the [Soundair](#) factors.

⁵ See [Bank of Montreal v River Rentals Group Ltd.](#), 2010 ABCA 16 at para 12-18, **TAB D** where the Alberta Court of Appeal, while noting that the Court should consider whether the best price was obtained, held that it favoured an approach that preserves the integrity of the sales process over one focused on price.

⁶ [Ibid.](#), **TAB D**, and [Soundair](#), *supra* note 3 at paras 22-29, **TAB A**.

PSA.

B. It is Appropriate for the Court to Grant a Sealing Order in Regard to the Confidential Realtor Affidavits

20. In *Sherman Estate v Donovan*⁷, the Supreme Court of Canada modified the Sierra Club test for a sealing order, reframing the previous two-step inquiry into three steps. In order for the Court to grant a sealing order, it must be established that:⁸
- a. court openness poses a serious risk to an important public interest;
 - b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
 - c. as a matter of proportionality, the benefits of the order outweigh its negative effects.
21. In its recent decision in *Yukon (Government of) v Yukon Zinc Corporation*⁹, the Yukon Supreme Court stated that, in the insolvency context, it is standard practice to keep all aspects of the bidding confidential and that Courts have found that doing so appropriately satisfies the Sierra Club test, as modified by *Sherman Estate*. The Court found that sealing this information ensures the integrity of the sales and marketing process, and avoids the misuse of information by bidders in a subsequent process to obtain an unfair advantage.¹⁰
22. In *Yukon*, the important public interest at stake was found to be the commercial interests of the receiver, bidders, creditors and stakeholders in maintaining the integrity of the sales process. In that case, the receiver had represented to bidders that the process would be confidential until completion and the bidders all signed non-disclosure agreements before receiving access to the data. These interests were found to outweigh the negative effects of the sealing order.¹¹
23. In this case, the Applicants respectfully submit that all three steps of the *Sherman Estate*

⁷ [*Sherman Estate v Donovan*](#), 2021 SCC 25 [*Sherman Estate*], **TAB E**.

⁸ [*Sherman Estate*](#), at para 38, **TAB E**.

⁹ [*Yukon \(Government of\) v Yukon Zinc Corporation*](#), 2022 YKSC 2 [*Yukon*], **TAB F**.

¹⁰ [*Yukon*](#), at para 39, **TAB F**.

¹¹ [*Yukon*](#) at para 44, **TAB F**.

test have been satisfied.

24. First, the important public interest at stake is the need to maintain the integrity of the SISP process.
25. Second, public disclosure of the value of the Purchased Assets, as defined and disclosed in the PSA, attached to the Fourth Confidential Carr Affidavit, would undermine this important public interest. The ability of the Applicants, the Selling Agents and the Monitor to obtain the highest and best price for the Tundra Building (if the proposed sale fails to close, for whatever reason) would be compromised if the contents of the Fourth Confidential Carr Affidavit were made public.
26. Third, as a matter of proportionality, the benefit of sealing the Fourth Confidential Carr Affidavit until October 31, 2023 in order to protect the integrity of the SISP outweighs any potential negative effect of sealing the purchase price until the terms of the SISP are carried out.

V. REQUESTED RELIEF

27. For the foregoing reasons, the Applicant respectfully requests that this Honourable Court grant the proposed SAVO and Sealing Order substantially in the forms attached to the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of August, 2023.

MLT AIKINS LLP

For:



Jeffrey M. Lee, K.C. / Mandi Deren-Dube
Counsel for the Applicants, J.W. Carr
Holdings Ltd., Spruce Grove Industrial Park
Inc., 272649 Alberta Ltd., 279896 Alberta Ltd.,
Grande Prairie Place Enterprises (1996) Inc.,
1170292 Alberta Ltd. and 627612 Alberta Ltd.

VI. INDEX OF AUTHORITIES

TAB	DESCRIPTION
A.	<i>Royal Bank v Soundair Corp.</i> (1991), 83 DLR (4th) 76 (Ont CA)
B.	<i>Re Sanjel Corp.</i>, 2016 ABQB 257, 36 CBR (6th) 239
C.	<i>Bellatrix Exploration Ltd.</i>, 2020 ABQB 332, 80 CBR (6th) 97
D.	<i>Bank of Montreal v River Rentals Group Ltd.</i>, 2010 ABCA 16
E.	<i>Sherman Estate v Donovan</i>, 2021 SCC 25
F.	<i>Yukon (Government of) v Yukon Zinc Corporation</i>, 2022 YKSC 2

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

Judgment: July 3, 1991

Docket: Doc. CA 318/91

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

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

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

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

W.G. Horton , for Ontario Express Limited.

N.J. Spies , for Frontier Air Limited.

Subject: Corporate and Commercial; Insolvency

Headnote

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

Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

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

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

The court must exercise extreme caution before it interferes with the process adopted by a receiver to sell an unusual asset. It is important that prospective purchasers know that, if they are acting in good faith, bargain seriously with a receiver and enter into an agreement with it, a court will not lightly interfere with the commercial judgment of the receiver to sell the assets to them. Per McKinlay J.A. (concurring in the result): It is most important that the integrity of procedures followed by court-appointed receivers be protected in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers. In all cases, the court should carefully scrutinize the procedure followed by the receiver. While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the asset involved, it may not be a procedure that is likely to be appropriate in many receivership sales.

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. :

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

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

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

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

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

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

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

5 Over a period of several weeks following that order, negotiations directed towards the sale of Air Toronto took place between the receiver and Air Canada. Air Canada had an agreement with the receiver that it would have exclusive negotiating rights during that period. I do not think it is necessary to review those negotiations, but I note that Air Canada had complete

access to all of the operations of Air Toronto and conducted due diligence examinations. It became thoroughly acquainted with every aspect of Air Toronto's operations.

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

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

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

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

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

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

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

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

If the court were to reject the recommendation of the Receiver in any but the most exceptional circumstances, it would materially diminish and weaken the role and function of the Receiver both in the perception of receivers and in the

perception of any others who might have occasion to deal with them. It would lead to the conclusion that the decision of the Receiver was of little weight and that the real decision was always made upon the motion for approval. That would be a consequence susceptible of immensely damaging results to the disposition of assets by court-appointed receivers.

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

2016 ABQB 257

Alberta Court of Queen's Bench

Sanjel Corp., Re

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

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

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

B.E. Romaine J.

Heard: April 28, 2016

Judgment: May 16, 2016

Docket: Calgary 1601-03143

Counsel: Chris Simard, Alexis Teasdale, for Sanjel Group

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Sale of assets — Debtor companies were severely impacted by economic downturn, and breached covenants under credit agreement with secured creditors — Debtors agreed with secured creditors to implement Sales and Investment Solicitation Process (SISP), which resulted in proposed asset sales that would provide no recovery for unsecured creditors — Debtors were granted Initial Order under [Companies' Creditors Arrangement Act](#) — Debtors brought application for order approving sales transactions generated through SISP — Trustee of bonds brought application for order dismissing debtors' application, and allowing bondholders to propose plan of arrangement, among other relief — Debtors' application granted; trustee's application dismissed — As result of enactment of s. 36 of Act, there was no jurisdictional impediment to sale of assets where such sales met requisite tests, even in absence of plan of arrangement — Fact that SISP occurred before seeking protection under Act did not amount to abuse of Act — Despite speed and economic environment, SISP was reasonable, competitive and robust, and generated range of bids significantly above liquidation value — Allegations of bad faith were not supported by evidence — Bondholders were aware of SISP and intention to obtain protection under Act, and were not improperly denied access to information — Factors in s. 36(3) of Act favoured approval of proposed sales — Further allegations raised after hearing were duly investigated by monitor and shown to be groundless [Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s 36](#).

APPLICATION by debtor companies for orders approving sales of assets generated through Sales and Investment Solicitation Process; APPLICATION by trustee of the bonds for order dismissing debtors' application, allowing bondholders to propose plan of arrangement, and other relief.

B.E. Romaine J.:

I. Introduction

1 The Sanjel debtors seek orders approving certain sales of assets generated through a SISP that was conducted prior to the debtors filing under the [Companies' Creditors Arrangement Act](#). The proceeds of the sales will be insufficient to fully payout the secured creditor, and will generate no return to unsecured creditors, including the holders of unsecured Bonds.

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

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

III. Applicable Law

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

- (a) whether the process leading to the proposed sale was reasonable in the circumstances;
- (b) whether the Monitor approved the process leading to the proposed sale;
- (c) whether the Monitor filed with the court a report stating that in its opinion the sale would be more beneficial to creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;
- (e) the effects of the proposed sale on creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

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

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

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

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

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

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

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

2020 ABQB 332

Alberta Court of Queen's Bench

Bellatrix Exploration Ltd., Re

2020 CarswellAlta 966, 2020 ABQB 332, [2020] A.W.L.D. 2058, 318 A.C.W.S. (3d) 537, 80 C.B.R. (6th) 97

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

And In the Matter of the Plan of Compromise or Arrangement of Bellatrix Exploration Ltd.

M.H. Hollins J.

Heard: May 7, 2020

Judgment: May 21, 2020

Docket: Calgary 1901-13767

Counsel: Robert J. Chadwick, Caroline Descours, Andrew Harmes, for Bellatrix Exploration Ltd.

Sean F. Collins, for Winslow Resources Inc.

Tom Cumming, Caireen Hanert, Warren Foley, Ram Sankaran, for Yangarra Resources Ltd.

Kelly Bourassa, James Reid, Peter Bychawski, for First Lien Lenders

Michael Hanlon, Adam Maerov, Kourtney Rylands, for U.S. Bank National Association, in its capacities as Second Lien Notes Trustee and Third Lien Notes Trustee

Ed Halt, for First Lien Lenders

Josef G. A. Kruger, Robyn Gurofsky, for Monitor

Maria Lavelle, for Alberta Energy Regulator

Howard A. Gorman, Q.C., Gunnar Benediktsson, for BP Canada Energy Group ULC

Guy Martel & Danny Vu, for EIG/KKR

Michael Shakra, Kevin J. Zych, Chris Simmard, Kristopher Hanc, for Ad Hoc Committee of Second Lien and Third Lien Noteholders

Alexis Teasdale, Karen Dawson, for Bull Moose Capital Ltd.

Randal Van de Mossalaer, Emily Paplawski, for Keyera Patnership

Brad Angove, for Nelson Brothers Oilfield Services 1997 Ltd. and Gen7 Environmental Solutions Ltd.

Joseph Reynaud, Leland Corbett, for Stream Asset Financial Lumos LP, by its General Partner Stream Asset Financial Lumos Corp

Kelsey Meyer, for SCCP Ferrier Facility LP

Louis Belzil, for Jo-Anne Reynolds

Shane King, for Bidell Gas Compression

Marian Baldwin Fuerst, for Delaware Trust Company

Mikkel Arnston, for Thomas Group Inc.

Jennie Buchanan, Frankie Deni, for Mark Stephen

Christa Nicholson, Andrew MacGregor, for TAQA North Ltd

Colin Feasby, for Bank of Montreal

Jordan Milne, Lori Williams, for Indian Oil and Gas Canada (IOGC)

Jeffrey Poole, Ian Carruthers, for O'Chiese First Nation

Subject: Insolvency

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

32 And practically speaking, while Bellatrix does have access to interim financing, whatever additional costs and losses are incurred over the next few weeks would come directly from the residue of the purchase price going to the first lien noteholders because that financing is a priority charge. They are the ones financing the adjournment and they object to doing so.

33 I am balancing the ongoing costs, not just in Bellatrix' operations but in the continued involvement in this litigation of these many parties, their executives, lawyers and the third-party advisors, as well as the risk, small but serious in consequence, of losing the one Binding Bid made against the chance for EIG/KKR to finalize a proposal in a matter of weeks that has not crystallized in months and still seems somewhat fluid and uncertain.

34 As difficult as the decision is, in my view, the sales process must continue as scheduled. The adjournment request is denied.

Approval of the Asset Purchase Agreement

35 Apart from dismissing the application by EIG/KKR for an adjournment, this Court must still review the Spartan Bid against the statutory and common law criteria for approval. EIG/KKR and the remaining second lien noteholders opposed the sale to Spartan because it provides no recovery to them or any subsequent creditors. Although some parties reserved their rights to argue about the form of Order and their inclusion or exclusion on the anticipated s.11.3 application, no other parties opposed the Spartan Bid.

36 Although the *CCAA* itself contains no description of its objectives, a number of purposes of this legislation have been identified in case law. For our purposes, the most germane include the goal of permitting a company to stay in business and thereby avoid the social and economic costs of liquidation and the goal of giving the company the chance of finding an arrangement acceptable to its creditors or which, at least, seeks to balance the interests of the company's stakeholders.

37 Section 36(3) of the *CCAA* sets out a non-exhaustive list of factors to consider on an application to approve a sale. The related criteria from the common law are included in this list where relevant.

A. Whether the Sales Process was Reasonable

38 There was no real complaint at this application about the form of the SISP approved by this Court in October, 2019. As is often the case, much of the work necessary to proffer the assets for sale had been done prior to the court order. BMO was appointed as the Sale Advisor to assist Bellatrix in soliciting and developing potential bids. The process was to be overseen by the Monitor, as appointed in the Initial Order.

39 The first phase, as mentioned, was just over one month. The deadline for binding bids in Phase II was not included in the SISP or in the SISP Order but was to be set by Bellatrix with the Monitor's consent.

40 The process as envisioned was reasonable. It was also designed to be efficient; *Soundair* at para.16. Bellatrix set the deadline for binding bids at January 13, 2020 and then extended that deadline to February 7, 2020. There was no suggestion that this information was not communicated in a proper and timely way. The period of time between October 9, 2019 and February 7, 2020 was short enough to protect the value of the company assets for sale and long enough to provide Bellatrix with a good look at the market prospects, as discussed *infra*.

41 Not only was there no dispute about the reasonability of the SISP before me, there had been no dispute about the final form of the SISP before the issuing Justice on October 9, 2019. As is often the case, the parties had negotiated their own concessions which were represented in that Order. Indeed, even EIG/KKR made the point that they had negotiated certain concessions in the form of the SISP before it was approved by the Court.

42 I will also address the implementation of the sales process at this juncture, although I realize that is often done separately from a review of the mechanics of the process itself. The relevant cases make it clear, and it is completely intuitive, that the process must not only be designed to be fair but must be fairly implemented.

2010 ABCA 16
Alberta Court of Appeal

Bank of Montreal v. River Rentals Group Ltd.

2010 CarswellAlta 57, 2010 ABCA 16, [2010] A.J. No. 12, 184 A.C.W.S. (3d)
686, 18 Alta. L.R. (5th) 201, 469 A.R. 333, 470 W.A.C. 333, 63 C.B.R. (5th) 26

Bank of Montreal (Not a Party To the Appeal / Plaintiff) and River Rentals Group Ltd., Taves Contractors Ltd. and McTaves Inc. (Respondent / Defendant) and Hutterian Brethren Church of Codesa (Appellant / Other) and Bill McCulloch and Associates Inc. (Respondent / Other) and Don Warkentin (Respondent / Other)

Ronald Berger, Patricia Rowbotham JJ.A., R. Paul Belzil J. (ad hoc)

Heard: January 7, 2010

Judgment: January 18, 2010

Docket: Edmonton Appeal 0903-0191-AC, 0903-0236-AC

Counsel: D.R. Bieganek for Respondent, River Rentals Group, Taves Contractors Ltd., McTaves Inc., Bill McCulloch and Associates Inc.

G.D. Chrenek for Appellant, Hutterian Brethren Church of Codesa

T.M. Warner for Respondent, Don Warkentin

Subject: Corporate and Commercial; Insolvency

Headnote

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

Court-appointed receiver of group of companies called for offers to purchase property — Tender closing date was May 7 — H offered \$2,205,000 — W tendered offer of \$2,100,000 on understanding that he would receive possession of property in fall — On May 21, W learned that he would get possession of property earlier and increased bid to \$2,300,000 — Receiver brought application to approve sale of property to H — Chambers judge granted order extending deadline to submit revised offers to purchase property, with submissions restricted to H and W — During extension period, W submitted highest bid — Chambers judge granted order directing that property be sold to W — H appealed — Appeal allowed — Chambers judge erred in principle and on insufficient evidence ordered that property be subject of extended re-tendering process — Chambers judge made no finding that price in H's offer was so unreasonably low as to demonstrate that receiver was improvident in accepting it — Chambers judge did not consider interests of H as highest bidder nor interests of others who made compliant bids — There was no cogent evidence before chambers judge of any unfairness to W — Chambers judge's order conferred advantage upon W who then knew price that had previously been offered by H.

APPEAL by bidder from orders extending deadline to submit revised offers to purchase property and approving sale of property to another bidder.

Per curiam:

1 At the hearing of this appeal, we announced that the appeal is allowed with reasons to follow.

2 Bill McCulloch and Associates Inc. is the court-appointed Interim Receiver and/or Receiver Manager of the corporate Respondents ("the Taves Group") by order dated March 5, 2009. Prior to that date, the Receiver had become Trustee in Bankruptcy of the Taves Group.

3 The Receiver issued an information package and called for offers to purchase the assets of the Taves Group which included a property known as the Birch Hills Lands. The call for offers was dated April 17, 2009. The deadline for submission of offers was on or before May 7, 2009 (the tender closing date).

4 On June 2, 2009, the Receiver brought an application before Wachowich C.J.Q.B. to approve the sale of the Birch Hills Lands to the Appellant. The Appellant's offer was \$2,205,000. An appraisal concluded that the most probable sale price was \$1,560,000. Counsel for the Receiver explained that "the Receiver did effect wide advertizing in local and national newspapers. Sent out 160 tender packages and made the tender package available on the Receiver's website." (A.B. Record Digest, 3/30-33)

5 Fifteen offers were received on the Birch Hills Lands, six of which were for the entirety of the parcel.

6 In his submission to the Chief Justice, counsel for the Receiver stated:

Now, what we have advised the party that we're looking to accept is that we can't put them in possession yet until the Court approves the offer. That has caused some angst given the time of year and it is agricultural land, but we're not in a position to put people on the land before we get court approval to do so. So — and that's fine, they're still — they're still at the table so we're good with that.

The offer that the Receiver is recommending acceptance of is — was from the Hutterite Church of Codesa. That offer was for \$2,205,000 ... the offer is very significant ... it was an excellent offer.

(A.B. Record Digest, 5/46 -6/19)

7 In considering other tenders with respect to other portions of the property of the Taves Group, the Chief Justice expressed his views regarding the importance of adhering to the integrity of the tender process:

You know, we ran a tender process, tender process is meant to be — there are certain rules. It is like, you do not change the rules of baseball or football during the middle of the game. This is the same thing except in this particular case the Court is prepared to exercise the — its inherent jurisdiction to extend the time in Mr. Taves' position. But I — you know, I could be the person who says no, Mr. Taves, you were late, I am sorry. Next time use Fed Ex. (Appeal Record Digest, 12/11-19)

And further:

We could be coming back right and left. I am inclined, you know, to grant the applications as submitted on these tenders because the tender process was followed properly. That was the market at the time, this is the people that — this is how they bid. You know, circumstances change and when circumstances change, somebody is the beneficiary of it, some — somebody is the loser on this. But the rules were adhered to and having the rules adhered to if, you know — if you want to — if you want to go to the Court of Appeal after the order is entered and say to the Court of Appeal, guess what, oil is now at \$90, we want this one resubmitted. And if those five people are wise enough to accept that argument, then good luck to you but — but you know, I am inclined to say we follow a process, the law has to be certain. The law has to be definite. This is what we did and we complied. (Appeal Record Digest, 12/40-13/8)

8 One of the persons who had tendered an offer to purchase the Birch Hills Lands was the Respondent Don Warkentin. Counsel for the guarantor, Mr. Orrin Toews, addressed the Court. He explained that Mr. Warkentin had submitted an offer of \$2.1 million "on the understanding that he would be receiving possession of the property sometime in the fall." Counsel further explained that "I believe it was the Receiver while during the initial auction, that it was brought to his attention on May 21st that he would in fact get possession of the property much earlier than he was anticipating. And on that basis he increased his bid by 200,000 which brings his offer to 2.3 million dollars cash." (A.B. Record Digest, 13/27-36) He submitted that Mr. Warkentin's offer be accepted.

9 In response, counsel for the Receiver advised the Court that he had been in written communication with counsel for Mr. Warkentin "and there was no indication in that correspondence that he thought he would get [possession of the lands] in the

fall." (Appeal Record Digest, 14/18-20) He added: "I think the tender package is clear that the way it was supposed to close is after the appeal periods on any order has expired. ... So how anybody could reasonably conceive that possession wouldn't be granted until the fall based on that escapes me." (Appeal Record Digest, 14/20-25) He further added: "But the bottom line was at the time tenders closed, Mr. [Warkentin]'s offer was found wanting." (Appeal Record Digest, 14/36-38)

10 On the basis of that information, the Court ruled as follows:

Well, you know, rather than adjourning it to hear from Mr. Carter, what I am — what I am inclined to do with that piece of property, because of — is — because of an uncertainty as to occupation, dates of occupation or potential lease or whatever it may be, it is too late to put in the crop right now anyway so — ... Retender on this one and make it clear in the tender.

(Appeal Record Digest, 15/7-19)

11 Wachowich, C.J. then granted an order extending the deadline to submit revised offers to purchase the Birch Hills Lands; with submissions restricted to the Appellant and Warkentin. During this extension period, Warkentin submitted a bid higher than the Appellant's. The Appellant did not increase its original offer. Subsequently, on June 17, 2009, Wachowich, C.J. granted an order directing that the Birch Hills Lands be sold to Warkentin. An application by the Appellant to reconsider the June 17, 2009 order was dismissed. The Court also granted a stay order for parts of the June 2 order and the entirety of its June 17 order, pending the determination of the appeal of the June 2 order. The Appellant appealed the June 2 order on July 22, 2009; and appealed the June 17 order on August 13, 2009 (the appeals were consolidated on August 20, 2009).

12 On applications by a Receiver for approval of a sale, the Court should consider whether the Receiver has acted properly. Specifically, the Court should consider the following:

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

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

Royal Bank v. Soundair Corp. (1991), 4 O.R. (3d) 1 (Ont. C.A.) at para. 16

13 The Court should consider the following factors to determine if the Receiver has acted improvidently or failed to get the best price:

(a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic;

(b) whether the circumstances indicate that insufficient time was allowed for the making of bids;

(c) whether inadequate notice of sale by bid was given; or

(d) whether it can be said that the proposed sale is not in the best interest of either the creditors or the owner.

Cameron v. Bank of Nova Scotia (1981), 45 N.S.R. (2d) 303 (N.S. C.A.)

Salima Investments Ltd. v. Bank of Montreal (1985), 65 A.R. 372 (Alta. C.A.) at para. 12.

14 The central issue in this appeal is whether the chambers judge, mindful of the record before him, should have permitted rebidding and whether he should have thereafter entertained and accepted the higher offer of \$2.51 million plus GST tendered by Mr. Warkentin during the extension period.

15 The relevance of higher offers after the close of process was considered by the Ontario Court of Appeal in *Royal Bank v. Soundair Corp.*, *supra*. Upon review of the jurisprudence, the Court stated at para. 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. ...

16 The chambers judge made no such finding. Indeed, he made no assessment whatever of the conduct of the Receiver. The only evidence before the Court at the June 2, 2009 application was the Receiver's fifth report and the affidavit of Orrin Toews who proffered no evidence that the Receiver acted improvidently in accepting the offer of the Appellant.

17 Moreover, the June 2, 2009 order neither considers the interests of the Appellant as the highest bidder nor the interests of others who made compliant, but unsuccessful, bids to purchase the Birch Hills Lands pursuant to the call for offers.

18 This Court has consistently favoured an approach that preserves the integrity of the process. See *Salima Investments Ltd.*, *supra*, and *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93 (Alta. C.A.).

19 That was also the view of the Nova Scotia Supreme Court (Appeal Division) in *Cameron v. Bank of Nova Scotia*, *supra*, at para. 35:

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

20 In addition, there was no cogent evidence before the chambers judge of any unfairness to Warkentin. On the contrary, the impugned order of June 2 conferred an advantage upon Warkentin who then knew the price that had previously been offered by the Appellant when re-tendering his offer.

21 In cases involving the Court's consideration of the approval of the sale of assets by a court-appointed Receiver, decisions made by a chambers judge involve a measure of discretion and "are owed considerable deference". The Court will interfere only if it concludes that the chambers judge acted unreasonably, erred in principle, or made a manifest error.

22 In our opinion, the chambers judge erred in principle and on insufficient evidence ordered that the property in question be the subject of an extended re-tendering process. The appeal is allowed. An order will go setting aside paras. 26 through 32 of the June 2, 2009 and the June 17, 2009 orders, and approving the tender of the Appellant on the terms and conditions upon which the Receiver originally sought approval.

Appeal allowed.

2021 SCC 25, 2021 CSC 25

Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, [2021] S.C.J. No. 25, 331 A.C.W.S. (3d) 489, 458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate (Appellants) and Kevin Donovan and Toronto Star Newspapers Ltd. (Respondents) and Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee (Interveners)

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

Heard: October 6, 2020

Judgment: June 11, 2021

Docket: 38695

Proceedings: affirming *Donovan v. Sherman Estate* (2019), 56 C.P.C. (8th) 82, 47 E.T.R. (4th) 1, 2019 CarswellOnt 6867, 2019 ONCA 376, C.W. Hourigan J.A., Doherty J.A., Paul Rouleau J.A. (Ont. C.A.); reversing *Toronto Star Newspapers Ltd. v. Sherman Estate* (2018), 41 E.T.R. (4th) 126, 2018 CarswellOnt 13017, 2018 ONSC 4706, 28 C.P.C. (8th) 102, 417 C.R.R. (2d) 321, S.F. Dunphy J. (Ont. S.C.J.)

Counsel: Chantelle Cseh, Timothy Youdan, for Appellants

Iris Fischer, Skye A. Sepp, for Respondents

Peter Scrutton, for Intervener, Attorney General of Ontario

Jacqueline Hughes, for Intervener, Attorney General of British Columbia

Ryder Gilliland, for Intervener, Canadian Civil Liberties Association

Ewa Krajewska, for Intervener, Income Security Advocacy Centre

Robert S. Anderson, Q.C., for Interveners, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc. and Citytv, a division of Rogers Media Inc.

Adam Goldenberg, for Intervener, British Columbia Civil Liberties Association

Khalid Janmohamed, for Interveners, HIV & AIDS Legal Clinic Ontario, the HIV Legal Network and the Mental Health Legal Committee

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

Headnote

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

Wealthy couple were found dead in their home and deaths generated intense public interest and press scrutiny — Estates and estate trustees sought to stem press scrutiny — When applications to obtain certificates of appointment of estate trustees were made, trustees sought sealing order — Application judge granted sealing order — Journalist and newspaper successfully appealed and sealing order was set aside — Trustees appealed — Appeal dismissed — Court of Appeal was right to set aside sealing order — Information in court files was not of highly sensitive character that it could be said to strike at core identity of affected persons — Trustees had failed to show how lifting of sealing orders engaged dignity of affected individuals — It

would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

V. Analysis

29 The outcome of the appeal turns on whether the application judge should have made the sealing orders pursuant to the test for discretionary limits on court openness from this Court's decision in *Sierra Club*.

30 Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23; *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 23-26). Reporting on court proceedings by a free press is often said to be inseparable from the principle of open justice. "In reporting what has been said and done at a public trial, the media serve as the eyes and ears of a wider public which would be absolutely entitled to attend but for purely practical reasons cannot do so" (*Khuja v. Times Newspapers Ltd*, 2017 UKSC 49, [2019] A.C. 161 (U.K. S.C.), at para. 16, citing *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1326-39, per Cory J.). Limits on openness in service of other public interests have been recognized, but sparingly and always with an eye to preserving a strong presumption that justice should proceed in public view (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 878; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, at paras. 32-39; *Sierra Club*, at para. 56). The test for discretionary limits on court openness is directed at maintaining this presumption while offering sufficient flexibility for courts to protect these other public interests where they arise (*Mentuck*, at para. 33). The parties agree that this is the appropriate framework of analysis for resolving this appeal.

31 The parties and the courts below disagree, however, about how this test applies to the facts of this case and this calls for clarification of certain points of the *Sierra Club* analysis. Most centrally, there is disagreement about how an important interest in the protection of privacy could be recognized such that it would justify limits on openness, and in particular when privacy can be a matter of public concern. The parties bring two settled principles of this Court's jurisprudence to bear in support of their respective positions. First, this Court has often observed that privacy is a fundamental value necessary to the preservation of a free and democratic society (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 25; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at paras. 65-66, per La Forest J. (dissenting but not on this point); *New Brunswick*, at para. 40). Courts have invoked privacy, in some instances, as the basis for an exception to openness under the *Sierra Club* test (see, e.g., *R. v. Henry*, 2009 BCCA 86, 270 B.C.A.C. 5, at paras. 11 and 17). At the same time, the jurisprudence acknowledges that some degree of privacy loss — resulting in inconvenience, even in upset or embarrassment — is inherent in any court proceeding open to the public (*New Brunswick*, at para. 40). Accordingly, upholding the presumption of openness has meant recognizing that neither individual sensibilities nor mere personal discomfort associated with participating in judicial proceedings are likely to justify the exclusion of the public from court (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 185; *New Brunswick*, at para. 41). Determining the role of privacy in the *Sierra Club* analysis requires reconciling these two ideas, which is the nub of the disagreement between the parties. The right of privacy is not absolute; the open court principle is not without exceptions.

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy

that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

34 This public interest in privacy appropriately focuses the analysis on the impact of the dissemination of sensitive personal information, rather than the mere fact of this dissemination, which is frequently risked in court proceedings and is necessary in a system that privileges court openness. It is a high bar — higher and more precise than the sweeping privacy interest relied upon here by the Trustees. This public interest will only be seriously at risk where the information in question strikes at what is sometimes said to be the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service of open proceedings.

35 I hasten to say that applicants for an order making exception to the open court principle cannot content themselves with an unsubstantiated claim that this public interest in dignity is compromised any more than they could by an unsubstantiated claim that their physical integrity is endangered. Under *Sierra Club*, the applicant must show on the facts of the case that, as an important interest, this dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

36 In the present case, the information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons; the Trustees have failed to show how the lifting of the sealing orders engages the dignity of the affected individuals. I am therefore not convinced that the intrusion on their privacy raises a serious risk to an important public interest as required by *Sierra Club*. Moreover, as I shall endeavour to explain, there was no serious risk of physical harm to the affected individuals by lifting the sealing orders. Accordingly, this is not an appropriate case in which to make sealing orders, or any order limiting access to these court files. In the circumstances, the admissibility of the Toronto Star's new evidence is moot. I propose to dismiss the appeal.

A. The Test for Discretionary Limits on Court Openness

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

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

- (1) court openness poses a serious risk to an important public interest;

(2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,

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

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

39 The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the *Charter* (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*, at paras. 23-26). In *New Brunswick*, La Forest J. explained the presumption in favour of court openness had become "one of the hallmarks of a democratic society" (citing *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113 (C.A.), at p. 119), that "acts as a guarantee that justice is administered in a non-arbitrary manner, according to the rule of law ... thereby fostering public confidence in the integrity of the court system and understanding of the administration of justice" (para. 22). The centrality of this principle to the court system underlies the strong presumption — albeit one that is rebuttable — in favour of court openness (para. 40; *Mentuck*, at para. 39).

40 The test ensures that discretionary orders are subject to no lower standard than a legislative enactment limiting court openness would be (*Mentuck*, at para. 27; *Sierra Club*, at para. 45). To that end, this Court developed a scheme of analysis by analogy to the *Oakes* test, which courts use to understand whether a legislative limit on a right guaranteed under the *Charter* is reasonable and demonstrably justified in a free and democratic society (*Sierra Club*, at para. 40, citing *R. v. Oakes*, [1986] 1 S.C.R. 103; see also *Dagenais*, at p. 878; *Vancouver Sun*, at para. 30).

41 The recognized scope of what interests might justify a discretionary exception to open courts has broadened over time. In *Dagenais*, Lamer C.J. spoke of a requisite risk to the "fairness of the trial" (p. 878). In *Mentuck*, Iacobucci J. extended this to a risk affecting the "proper administration of justice" (para. 32). Finally, in *Sierra Club*, Iacobucci J., again writing for a unanimous Court, restated the test to capture any serious risk to an "important interest, including a commercial interest, in the context of litigation" (para. 53). He simultaneously clarified that the important interest must be expressed as a public interest. For example, on the facts of that case, a harm to a particular business interest would not have been sufficient, but the "general commercial interest of preserving confidential information" was an important interest because of its public character (para. 55). This is consistent with the fact that this test was developed in reference to the *Oakes* jurisprudence that focuses on the "pressing and substantial" objective of legislation of general application (*Oakes*, at pp. 138-39; see also *Mentuck*, at para. 31). The term "important interest" therefore captures a broad array of public objectives.

42 While there is no closed list of important public interests for the purposes of this test, I share Iacobucci J.'s sense, explained in *Sierra Club*, that courts must be "cautious" and "alive to the fundamental importance of the open court rule" even at the earliest stage when they are identifying important public interests (para. 56). Determining what is an important public interest can be done in the abstract at the level of general principles that extend beyond the parties to the particular dispute (para. 55). By contrast, whether that interest is at "serious risk" is a fact-based finding that, for the judge considering the appropriateness of an order, is necessarily made in context. In this sense, the identification of, on the one hand, an important interest and, on the other, the seriousness of the risk to that interest are, theoretically at least, separate and qualitatively distinct operations. An order may therefore be refused simply because a valid important public interest is not at serious risk on the facts of a given case or, conversely, that the identified interests, regardless of whether they are at serious risk, do not have the requisite important public character as a matter of general principle.

43 The test laid out in *Sierra Club* continues to be an appropriate guide for judicial discretion in cases like this one. The breadth of the category of "important interest" transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause (see, e.g., P. M. Perell and J. W. Morden, *The Law of Civil Procedure in Ontario* (4th ed. 2020), at para. 3.185; J. Bailey and J. Burkell, "Revisiting the Open Court Principle in an Era of Online Publication: Questioning Presumptive Public Access to Parties' and Witnesses' Personal Information" (2016), 48 *Ottawa L. Rev.* 143, at pp. 154-55). At the same time, however, the requirement that a serious risk to an important interest be demonstrated imposes a meaningful threshold necessary to maintain the presumption of openness. Were it merely a matter of weighing the benefits of the limit on court openness against its negative effects, decision-makers confronted with concrete impacts on the individuals appearing before them may struggle to put adequate weight on the less immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

44 Finally, I recall that the open court principle is engaged by all judicial proceedings, whatever their nature (*MacIntyre* at pp. 185-86; *Vancouver Sun*, at para. 31). To the extent the Trustees suggested, in their arguments about the negative effects of the sealing orders, that probate in Ontario does not engage the open court principle or that the openness of these proceedings has no public value, I disagree. The certificates the Trustees sought from the court are issued under the seal of that court, thereby bearing the imprimatur of the court's authority. The court's decision, even if rendered in a non-contentious setting, will have an impact on third parties, for example by establishing the testamentary paper that constitutes a valid will (see *Otis v. Otis*, (2004), 7 E.T.R. (3d) 221 (Ont. S.C.), at paras. 23-24). Contrary to what the Trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. Obtaining a certificate of appointment of estate trustee in Ontario is a court proceeding and the fundamental rationale for openness — discouraging mischief and ensuring confidence in the administration of justice through transparency — applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action.

45 It is true that other non-probate estate planning mechanisms may allow for the transfer of wealth outside the ordinary avenues of testate or intestate succession — that is the case, for instance, for certain insurance and pension benefits, and for certain property held in co-ownership. But this does not change the necessarily open court character of probate proceedings. That non-probate transfers keep certain information related to the administration of an estate out of public view does not mean that the Trustees here, by seeking certificates from the court, somehow do not engage this principle. The Trustees seek the benefits that flow from the public judicial probate process: transparency ensures that the probate court's authority is administered fairly and efficiently (*Vancouver Sun*, at para. 25; *New Brunswick*, at para. 22). The strong presumption in favour of openness plainly applies to probate proceedings and the Trustees must satisfy the test for discretionary limits on court openness.

B. The Public Importance of Privacy

46 As mentioned, I disagree with the Trustees that an unbounded interest in privacy qualifies as an important public interest under the test for discretionary limits on court openness. Yet in some of its manifestations, privacy does have social importance beyond the person most immediately concerned. On that basis, it cannot be excluded as an interest that could justify, in the right circumstances, a limit to court openness. Indeed, the public importance of privacy has been recognized by this Court in various settings, and this sheds light on why the narrower aspect of privacy related to the protection of dignity is an important public interest.

47 I respectfully disagree with the manner in which the Court of Appeal disposed of the claim by the Trustees that there is a serious risk to the interest in protecting personal privacy in this case. For the appellate judges, the privacy concerns raised by the Trustees amounted to "[p]ersonal concerns" which cannot, "without more", satisfy the requirement from *Sierra Club* that an important interest be framed as a public interest (para. 10). The Court of Appeal in our case relied, at para. 10, on *H. (M.E.) v. Williams*, 2012 ONCA 35, 108 O.R. (3d) 321, in which it was held that "[p]urely personal interests cannot justify non-publication or sealing orders" (para. 25). Citing as authority judgments of this Court in *MacIntyre* and *Sierra Club*, the court continued by observing that "personal concerns of a litigant, including concerns about the very real emotional distress and embarrassment that can be occasioned to litigants when justice is done in public, will not, standing alone, satisfy the necessity

SUPREME COURT OF YUKON

Citation: *Yukon (Government of) v
Yukon Zinc Corporation*,
2022 YKSC 2

Date: 20220121
S.C. No. 19-A0067
Registry: Whitehorse

BETWEEN:

GOVERNMENT OF YUKON
as represented by the Minister of the Department of
Energy, Mines and Resources

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner

John T. Porter and
Kimberly Sova (by video)

No one appearing

Yukon Zinc Corporation

Counsel for Welichem Research
General Partnership

H. Lance Williams and
Forrest Finn (by video)

Counsel for
PricewaterhouseCoopers Inc.

Tevia Jeffries and
Emma Newbery (by video)

REASONS FOR DECISION

Introduction

[1] The court-appointed Receiver, PricewaterhouseCoopers Inc., brings two applications: one for Orders approving the sale of certain mineral claims and related

Sealing Order

[34] The Receiver seeks an order sealing its Confidential Supplemental Eighth Report to the Court containing the results of the SISP and attached documents. The report sets out details of the process including:

- (a) the names of the bidders, and the kind of work the Receiver engaged in over the summer of 2021 to advance the bids according to the evaluation criteria;
- (b) the details of each bid, including price and conditions;
- (c) the challenges of each bid;
- (d) the Receiver's review and application of the evaluation criteria; and
- (e) the reasons why certain bidders withdrew or were eliminated from the process.

[35] The documents attached to the report include unredacted:

- (a) expressions of interest;
- (b) binding bids;
- (c) Removal Letters;
- (d) Termination Letters;
- (e) Almaden's bid; and
- (f) Almaden's Purchase Agreement.

[36] The Receiver argues that the information in this report disclosing its application of the evaluation criteria and the challenges and problems with the bids, as well as the documents themselves, contain sensitive commercial information that would cause harm to any future efforts to market the Mine. Information about the identity of bidders, the proposed purchase prices, the proposed terms and conditions, the reasons for the

bidders' withdrawal or rejection would affect the possibility of free and open negotiation in any future sale process.

[37] The two-part test for a sealing order was set out in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 ("*Sierra Club*") at 543-44:

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the [sealing] 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.

[38] The recent Supreme Court of Canada decision of *Sherman Estate v Donovan*, 2021 SCC 25 ("*Sherman Estate*") confirmed the test set out in *Sierra Club* continues to be an appropriate guide for judicial discretion (at para.43), and added the following three core prerequisites to be met before the imposition of a sealing order at para. 38:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[39] In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club* test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing

process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.

[40] This requirement for confidentiality no longer exists when the sale process is completed and as a result any sealing order is generally lifted at that time. As noted by the court in the insolvency proceeding of *GE Canada Real Estate Financing Business Property Co v 1262354 Ontario Inc*, 2014 ONSC 1173 at paras. 33-34:

The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.

To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place. [emphasis added].

[41] *Look Communications Inc v Look Mobile Corp* (2009), 183 ACWS (3d) 736 (Ont Sup Ct) (“*Look*”) was decided not in the insolvency context but in the context of a court-approved sales process requiring the appointment of a monitor, and a plan of arrangement under the *Business Corporations Act*, R.S.C. 1985, c. C.44. The facts

were like those of the case at bar in that only two of the five assets were sold through the initial sales process. The court ordered the monitor file an unredacted version of its report after the sale was completed and the monitor's certificate filed with the court. However, the company requested a further sealing of the report and documents for six months because it was continuing its efforts to sell the remaining assets and was in discussion with some of the same parties who submitted bids under the initial completed sales process. The court applied the principles in *Sierra Club*, noting that the "important commercial interest" must be more than the specific interest of the party requesting the confidentiality order, such as loss of business or profits. There must be a general principle at stake, such as a breach of a confidentiality agreement through the disclosure of the information.

[42] The court in *Look* noted at para. 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.

[43] The court in *Look* granted the company's request for a sealing order for a further six months, finding that even though the remaining sales would not occur under the original sale process, the commercial interest in ensuring the assets were sold for the benefit of all stakeholders was the same.

[44] Here, I acknowledge the importance of sealing the Receiver's Confidential Supplemental Eighth Report to the Court and attached documents during the sale process and until any ongoing sale process is complete. The important interest is the commercial interests of the bidders, the creditors, the stakeholders and maintaining the integrity of the sales process. The Receiver's counsel advised they represented to the bidders that the process would be confidential until completion. The bidders all signed non-disclosure agreements before they received access to the data. These interests outweigh the negative effects of a sealing order. Redaction of the documents or reports is not a reasonable alternative as virtually all of the information contained in the report and documents (other than the parts that are already public) is confidential for the reasons noted.

[45] The issue of a future sales process of some kind however, is far less certain than it was in *Look*, where the new sales process was underway at the time of the court application. All parties in this case agree that the current Receiver-led SISP process is exhausted, and the unopposed or supported request for court approval of its termination confirms this. The Receiver has no intention of starting a new sales process.

[46] Counsel for Yukon government indicated that they would be open to discussing the sale of some or all of the Yukon Zinc assets in future if approached by a potential purchaser. Yukon government confirmed it had no intention of commencing a similar

sales process to the SISP in the near future, as their priority will be care and maintenance of the Mine when this responsibility is transitioned from the Receiver to them, likely in the fall of 2022.

[47] The Receiver noted in its public reports several of the ongoing issues affecting a potential sale. These include the regulatory complexities of obtaining a new water licence, the uncertainty of the responsibilities and costs of restoring the Mine to an operable state, the uncertain value of the mineral claims, and the possibility of ongoing litigation over the Welichem assets if a settlement is not achieved. Unless one or more of these factors changes, the possibility of a future sale is unlikely, in the Receiver's view. This is different from *Look*, where the new sales process had commenced at the time the sealing order was requested.

[48] The Supreme Court of Canada has emphasized the importance of the fundamental principle of open and accessible court proceedings. Court openness is protected by the constitutional guarantee of freedom of expression and is essential to the proper functioning of our democracy (*Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1996] 3 SCR 480 at para. 23 ("*New Brunswick*"); *Vancouver Sun (Re)*, 2004 SCC 43 at paras. 23-26). Public and media access to the courts is the way in which the judicial process is scrutinized and criticized. "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). There is a strong presumption in favour of court openness. Judicial discretion in determining confidentiality or sealing orders must be exercised against this backdrop.

[49] Given these unique factual circumstances, and applying the legal principles described above, I conclude the following in relation to sealing the materials.

[50] Once the Almaden sale is complete, and the Receiver's certificate has been filed with the Court, the redacted material related to Almaden's purchase of the Logan Interests will be unsealed. The Receiver has disclosed most of the information related to this purchase and sale but some information such as the purchase price remains redacted. As the sale of this portion of the assets will be over once this transaction is completed, there is no reason to continue to seal the Almaden documents contained in the Confidential Supplemental Eighth Report to Court that have not already been disclosed.

[51] The remoteness of a future sale of the remaining assets evident from the Receiver's materials and submissions means that the length of a sealing order could be indefinite. As noted in *Sierra Club* at 545, a court is to restrict the sealing order as much as is reasonably possible while preserving the important interest in question. While it is still in the public interest to maintain the sealing order where a future sale is a possibility, at some point that possibility may no longer be realistic. Or, so much time will have passed that the information in the original bids may have little relationship to the actual situation so the importance of the interest to be protected is diminished.

[52] The Receiver in this case advised that some of the current circumstances that prevented the success of the sales process would have to change before a sale is likely. Yukon government confirmed that their focus in the near term will be on care and maintenance issues and not on the longer term issues related to remediation, reconstruction, or water licence. It is possible, however, over the next few years, that

some of these circumstances may change. For example, the litigation between Welichem and the Receiver over its assets will either be settled or judicially determined, more clarity on the responsibilities for remediation or even further steps taken towards remediation and reconstruction may occur, or more work may be done to value the mineral claims. Some or all of these changes could lead to a successful sale.

[53] I will grant the sealing order over the Receiver's Confidential Supplemental Eighth Report to the Court, and attached documents, except for the documents related to the Almaden purchase once the Receiver's certificate is filed with the Court, for a period of three years, or until further order of this Court. The report shall be filed as of the date of these Reasons.

[54] The draft sealing order filed by the Receiver on this application should be modified to reflect the terms set out in these reasons and to reflect the presence of all counsel.

DUNCAN C.J.