

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

**B E T W E E N:**

**CENTURION MORTGAGE CAPITAL CORPORATION**

Applicant

- and -

**TERRASAN 327 ROYAL YORK RD. LIMITED**

Respondent

**BOOK OF AUTHORITIES**  
**(Motion returnable August 25, 2017)**

DATE: August 22, 2017

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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

**Table of Authorities**

**Cases considered:**

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

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

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

Appeal from order approving sale of assets by receiver.

**Galligan J.A. :**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

16 As did Rosenberg J., I adopt as correct the statement made by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 67 C.B.R. (N.S.) 320n, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.), at pp. 92-94 [O.R.], of the duties which a court must perform when deciding whether a receiver who has sold a property acted properly. When he set out the court's

duties, he did not put them in any order of priority, nor do I. I summarize those duties as follows:

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

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

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

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

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

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

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

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

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

[Emphasis added.]

22 I also agree with and adopt what was said by Macdonald J.A. in *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R.

(N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , at p. 11 [C.B.R.]:

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

[Emphasis added.]

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

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

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

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

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

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

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

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

If, for example, in this case there had been a second offer of a substantially higher amount, then the court would have to



take that offer into consideration in assessing whether the receiver had properly carried out his function of endeavouring to obtain the best price for the property.

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

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

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

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

[Emphasis added.]

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

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

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

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

34 The 922 offer provided for \$6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto

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

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

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

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

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

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

## 2. Consideration of the Interests of all Parties

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

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

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

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

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

43 The importance of a court protecting the integrity of the process has been stated in a number of cases. First, I refer to

*Re Selkirk*, supra, where Saunders J. said at p. 246 [C.B.R.]:

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

#### 4. Was there unfairness in the process?

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

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

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

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

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

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

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

the court that it needed more information before it would be able to make a bid.

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

62 The first reason is related to the fact that the creditors chose to have a receiver appointed by the court. It was open to them to appoint a private receiver pursuant to the authority of their security documents. Had they done so, then they would have had control of the process and could have sold Air Toronto to whom they wished. However, acting privately and controlling the process involves some risks. The appointment of a receiver by the court insulates the creditors from those risks. But, insulation from those risks carries with it the loss of control over the process of disposition of the assets. As I have

attempted to explain in these reasons, when a receiver's sale is before the court for confirmation, the only issues are the propriety of the conduct of the receiver and whether it acted providently. The function of the court at that stage is not to step in and do the receiver's work, or change the sale strategy adopted by the receiver. Creditors who asked the court to appoint a receiver to dispose of assets should not be allowed to take over control of the process by the simple expedient of supporting another purchaser if they do not agree with the sale made by the receiver. That would take away all respect for the process of sale by a court-appointed receiver.

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

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

65 The support by the Royal Bank requires more consideration and involves some reference to the circumstances. On March 6, 1991, when the first 922 offer was made, there was in existence an inter-lender agreement between the Royal Bank and CCFL. That agreement dealt with the share of the proceeds of the sale of Air Toronto which each creditor would receive. At the time, a dispute between the Royal Bank and CCFL about the interpretation of that agreement was pending in the courts. The unacceptable condition in the first 922 offer related to the settlement of the inter-lender dispute. The condition required that the dispute be resolved in a way which would substantially favour CCFL. It required that CCFL receive \$3,375,000 of the \$6 million cash payment and the balance, including the royalties, if any, be paid to the Royal Bank. The Royal Bank did not agree with that split of the sale proceeds.

66 On April 5, 1991, the Royal Bank and CCFL agreed to settle the inter-lender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only \$1 million, and the Royal Bank would receive \$5 million plus any royalties which might be paid. It was only in consideration of that settlement that the Royal Bank agreed to support the 922 offer.

67 The Royal Bank's support of the 922 offer is so affected by the very substantial benefit which it wanted to obtain from the settlement of the inter-lender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

68 While there may be circumstances where the unanimous support by the creditors of a particular offer could conceivably override the proper and provident conduct of a sale by a receiver, I do not think that this is such a case. This is a case where the receiver has acted properly and in a provident way. It would make a mockery out of the judicial process, under which a mandate was given to this receiver to sell this airline if the support by these creditors of the 922 offer were permitted to carry the day. I give no weight to the support which they give to the 922 offer.

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act*, R.S.O. 1980, c. 137, and the *Environmental Protection Act*, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in

entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

71 I would, accordingly, dismiss the appeal. I would award the receiver, OEL and Frontier Airlines Limited their costs out of the Soundair estate, those of the receiver on a solicitor-client scale. I would make no order as to the costs of any of the other parties or intervenors.

**McKinlay J.A. :**

72 I agree with Galligan J.A. in result, but wish to emphasize that I do so on the basis that the undertaking being sold in this case was of a very special and unusual nature. 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. Consequently, in all cases, the court should carefully scrutinize the procedure followed by the receiver to determine whether it satisfies the tests set out by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 67 C.B.R. (N.S.) 320n, 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526 (H.C.) . While the procedure carried out by the receiver in this case, as described by Galligan J.A., was appropriate, given the unfolding of events and the unique nature of the assets involved, it is not a procedure that is likely to be appropriate in many receivership sales.

73 I should like to add that where there is a small number of creditors who are the only parties with a real interest in the proceeds of the sale (i.e., where it is clear that the highest price attainable would result in recovery so low that no other creditors, shareholders, guarantors, etc., could possibly benefit therefore), the wishes of the interested creditors should be very seriously considered by the receiver. It is true, as Galligan J.A. points out, that in seeking the court appointment of a receiver, the moving parties also seek the protection of the court in carrying out the receiver's functions. However, it is also true that in utilizing the court process, the moving parties have opened the whole process to detailed scrutiny by all involved, and have probably added significantly to their costs and consequent shortfall as a result of so doing. The adoption of the court process should in no way diminish the rights of any party, and most certainly not the rights of the only parties with a real interest. Where a receiver asks for court approval of a sale which is opposed by the only parties in interest, the court should scrutinize with great care the procedure followed by the receiver. I agree with Galligan J.A. that in this case that was done. I am satisfied that the rights of all parties were properly considered by the receiver, by the learned motions court judge, and by Galligan J.A.

**Goodman J.A. (dissenting):**

74 I have had the opportunity of reading the reasons for judgment herein of Galligan and McKinlay JJ.A. Respectfully, I am unable to agree with their conclusion.

75 The case at bar is an exceptional one in the sense that upon the application made for approval of the sale of the assets of Air Toronto, two competing offers were placed before Rosenberg J. Those two offers were that of OEL and that of 922, a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by CCFL and Air Canada. It was conceded by all parties to these proceedings that the only persons who had any interest in the proceeds of the sale were two secured creditors, viz., CCFL and the Royal Bank of Canada. Those two creditors were unanimous in their position that they desired the court to approve the sale to 922. We were not referred to, nor am I aware of, any case where a court has refused to abide by the unanimous wishes of the only interested creditors for the approval of a specific offer made in receivership proceedings.

76 In *British Columbia Developments Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28, 5 B.C.L.R. 94 (S.C.) , Berger J. said at p. 30 [C.B.R.]:

Here all of those with a financial stake in the plant have joined in seeking the court's approval of the sale to Fincas. This court does not have a roving commission to decide what is best for investors and businessmen when they have agreed among themselves what course of action they should follow. It is their money.

77 I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of

approximately \$50 million. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J. that the offer of 922 is superior to that of OEL. He concluded that the 922 offer is marginally superior. If by that he meant that mathematically it was likely to provide slightly more in the way of proceeds, it is difficult to take issue with that finding. If, on the other hand, he meant that having regard to all considerations it was only marginally superior, I cannot agree. He said in his reasons:

I have come to the conclusion that knowledgeable creditors such as the Royal Bank would prefer the 922 offer even if the other factors influencing their decision were not present. No matter what adjustments had to be made, the 922 offer results in more cash immediately. Creditors facing the type of loss the Royal Bank is taking in this case would not be anxious to rely on contingencies especially in the present circumstances surrounding the airline industry.

78 I agree with that statement completely. It is apparent that the difference between the two offers insofar as cash on closing is concerned amounts to approximately \$3 million to \$4 million. The bank submitted that it did not wish to gamble any further with respect to its investment, and that the acceptance and court approval of the OEL offer in effect supplanted its position as a secured creditor with respect to the amount owing over and above the down payment and placed it in the position of a joint entrepreneur, but one with no control. This results from the fact that the OEL offer did not provide for any security for any funds which might be forthcoming over and above the initial down payment on closing.

79 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.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

Here we are dealing with a receiver appointed at the instance of one major creditor, who chose to insert in the contract of sale a provision making it subject to the approval of the court. This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval. In these circumstances the court would not consider itself bound by the contract entered into in good faith by the receiver but would have to look to the broader picture to see that that contract was for the benefit of the creditors as a whole. When there was evidence that a higher price was readily available for the property the chambers judge was, in my opinion, justified in exercising his discretion as he did. Otherwise he could have deprived the creditors of a substantial sum of money.

80 This statement is apposite to the circumstances of the case at bar. I hasten to add that in my opinion it is not only price which is to be considered in the exercise of the judge's discretion. It may very well be, as I believe to be so in this case, that the amount of cash is the most important element in determining which of the two offers is for the benefit and in the best interest of the creditors.

81 It is my view, and the statement of Hart J.A. is consistent therewith, that the fact that a creditor has requested an order of the court appointing a receiver does not in any way diminish or derogate from his right to obtain the maximum benefit to be derived from any disposition of the debtor's assets. I agree completely with the views expressed by McKinlay J.A. in that regard in her reasons.

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

83 I am satisfied that the interests of the creditors are the prime consideration for both the receiver and the court. In *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.) , Saunders J. said at p. 243:

This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no



unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

84 I agree with that statement of the law. In *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), Saunders J. heard an application for court approval of the sale by the sheriff of real property in bankruptcy proceedings. The sheriff had been previously ordered to list the property for sale subject to approval of the court. Saunders J. said at p. 246:

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

85 I am in agreement with that statement as a matter of general principle. Saunders J. further stated that he adopted the principles stated by Macdonald J.A. in *Cameron*, supra, quoted by Galligan J.A. in his reasons. In *Cameron*, the remarks of Macdonald J.A. related to situations involving the calling of bids and fixing a time limit for the making of such bids. In those circumstances the process is so clear as a matter of commercial practice that an interference by the court in such process might have a deleterious effect on the efficacy of receivership proceedings in other cases. But Macdonald J.A. recognized that even in bid or tender cases where the offeror for whose bid approval is sought has complied with all requirements, a court might not approve the agreement of purchase and sale entered into by the receiver. He said at pp. 11-12 [C.B.R.]:

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

86 The deficiency in the present case is so large that there has been no suggestion of a competing interest between the owner and the creditors.

87 I agree that the same reasoning may apply to a negotiation process leading to a private sale, but the procedure and process applicable to private sales of a wide variety of businesses and undertakings with the multiplicity of individual considerations applicable and perhaps peculiar to the particular business is not so clearly established that a departure by the court from the process adopted by the receiver in a particular case will result in commercial chaos to the detriment of future receivership proceedings. Each case must be decided on its own merits, and it is necessary to consider the process used by the receiver in the present proceedings and to determine whether it was unfair, improvident or inadequate.

88 It is important to note at the outset that Rosenberg J. made the following statement in his reasons:

On March 8, 1991 the trustee accepted the OEL offer subject to court approval. The Receiver at that time had no other offer before it that was in final form or could possibly be accepted. The Receiver had at the time the knowledge that Air Canada with CCFL had not bargained in good faith and had not fulfilled the promise of its letter of March 1st. The Receiver was justified in assuming that Air Canada and CCFL's offer was a long way from being in an acceptable form and that Air Canada and CCFL's objective was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada.

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual

obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing “hardball,” as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

90 Furthermore, there was no evidence before Rosenberg J. or this court that the receiver had assumed that Air Canada and CCFL’s objective in making an offer was to interrupt the finalizing of the OEL agreement and to retain as long as possible the Air Toronto connector traffic flowing into Terminal 2 for the benefit of Air Canada. Indeed, there was no evidence to support such an assumption in any event, although it is clear that 922, and through it CCFL and Air Canada, were endeavouring to present an offer to purchase which would be accepted and/or approved by the court in preference to the offer made by OEL.

91 To the extent that approval of the OEL agreement by Rosenberg J. was based on the alleged lack of good faith in bargaining and improper motivation with respect to connector traffic on the part of Air Canada and CCFL, it cannot be supported.

92 I would also point out that rather than saying there was no other offer before it that was final in form, it would have been more accurate to have said that there was *no unconditional* offer before it.

93 In considering the material and evidence placed before the court, I am satisfied that the receiver was at all times acting in good faith. I have reached the conclusion, however, that the process which he used was unfair insofar as 922 is concerned, and improvident insofar as the two secured creditors are concerned.

94 Air Canada had been negotiating with Soundair Corporation for the purchase from it of Air Toronto for a considerable period of time prior to the appointment of a receiver by the court. It had given a letter of intent indicating a prospective sale price of \$18 million. After the appointment of the receiver, by agreement dated April 30, 1990, Air Canada continued its negotiations for the purchase of Air Toronto with the receiver. Although this agreement contained a clause which provided that the receiver “shall not negotiate for the sale ... of Air Toronto with any person except Air Canada,” it further provided that the receiver would not be in breach of that provision merely by receiving unsolicited offers for all or any of the assets of Air Toronto. In addition, the agreement, which had a term commencing on April 30, 1990, could be terminated on the fifth business day following the delivery of a written notice of termination by one party to the other. I point out this provision merely to indicate that the exclusivity privilege extended by the receiver to Air Canada was of short duration at the receiver’s option.

95 As a result of due diligence investigations carried out by Air Canada during the months of April, May and June of 1990, Air Canada reduced its offer to \$8.1 million conditional upon there being \$4 million in tangible assets. The offer was made on June 14, 1990, and was open for acceptance until June 29, 1990.

96 By amending agreement dated June 19, 1990, the receiver was released from its covenant to refrain from negotiating for the sale of the Air Toronto business and assets to any person other than Air Canada. By virtue of this amending agreement, the receiver had put itself in the position of having a firm offer in hand, with the right to negotiate and accept offers from other persons. Air Canada, in these circumstances, was in the subservient position. The receiver, in the exercise of its judgment and discretion, allowed the Air Canada offer to lapse. On July 20, 1990, Air Canada served a notice of termination of the April 30, 1990 agreement.

97 Apparently as a result of advice received from the receiver to the effect that the receiver intended to conduct an auction for the sale of the assets and business of the Air Toronto division of Soundair Corporation, the solicitors for Air Canada advised the receiver by letter dated July 20, 1990, in part as follows:

Air Canada has instructed us to advise you that it does not intend to submit a further offer in the auction process.

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a

proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between \$10 million and \$12 million.

99 In August 1990, the receiver contacted a number of interested parties. A number of offers were received which were not deemed to be satisfactory. One such offer, received on August 20, 1990, came as a joint offer from OEL and Air Ontario (an Air Canada connector). It was for the sum of \$3 million for the good will relating to certain Air Toronto routes, but did not include the purchase of any tangible assets or leasehold interests.

100 In December 1990, the receiver was approached by the management of Canadian Partner (operated by OEL) for the purpose of evaluating the benefits of an amalgamated Air Toronto/Air Partner operation. The negotiations continued from December of 1990 to February of 1991, culminating in the OEL agreement dated March 8, 1991.

101 On or before December 1990, CCFL advised the receiver that it intended to make a bid for the Air Toronto assets. The receiver, in August of 1990, for the purpose of facilitating the sale of Air Toronto assets, commenced the preparation of an operating memorandum. He prepared no less than six draft operating memoranda with dates from October 1990 through March 1, 1991. None of these were distributed to any prospective bidder despite requests having been received therefor, with the exception of an early draft provided to CCFL without the receiver's knowledge.

102 During the period December 1990 to the end of January 1991, the receiver advised CCFL that the offering memorandum was in the process of being prepared and would be ready soon for distribution. He further advised CCFL that it should await the receipt of the memorandum before submitting a formal offer to purchase the Air Toronto assets.

103 By late January, CCFL had become aware that the receiver was negotiating with OEL for the sale of Air Toronto. In fact, on February 11, 1991, the receiver signed a letter of intent with OEL wherein it had specifically agreed not to negotiate with any other potential bidders or solicit any offers from others.

104 By letter dated February 25, 1991, the solicitors for CCFL made a written request to the receiver for the offering memorandum. The receiver did not reply to the letter because he felt he was precluded from so doing by the provisions of the letter of intent dated February 11, 1991. Other prospective purchasers were also unsuccessful in obtaining the promised memorandum to assist them in preparing their bids. It should be noted that, exclusivity provision of the letter of intent expired on February 20, 1991. This provision was extended on three occasions, viz., February 19, 22 and March 5, 1991. It is clear that from a legal standpoint the receiver, by refusing to extend the time, could have dealt with other prospective purchasers, and specifically with 922.

105 It was not until March 1, 1991, that CCFL had obtained sufficient information to enable it to make a bid through 922. It succeeded in so doing through its own efforts through sources other than the receiver. By that time the receiver had already entered into the letter of intent with OEL. Notwithstanding the fact that the receiver knew since December of 1990 that CCFL wished to make a bid for the assets of Air Toronto (and there is no evidence to suggest that at that time such a bid would be in conjunction with Air Canada or that Air Canada was in any way connected with CCFL), it took no steps to provide CCFL with information necessary to enable it to make an intelligent bid, and indeed suggested delaying the making of the bid until an offering memorandum had been prepared and provided. In the meantime, by entering into the letter of intent with OEL, it put itself in a position where it could not negotiate with CCFL or provide the information requested.

106 On February 28, 1991, the solicitors for CCFL telephoned the receiver and were advised for the first time that the receiver had made a business decision to negotiate solely with OEL and would not negotiate with anyone else in the interim.

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada, jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its

agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

108 The fact of the matter is that by March 7, 1991, the receiver had received the offer from OEL which was subsequently approved by Rosenberg J. That offer was accepted by the receiver on March 8, 1991. Notwithstanding the fact that OEL had been negotiating the purchase for a period of approximately 3 months, the offer contained a provision for the sole benefit of the purchaser that it was subject to the purchaser obtaining "a financing commitment within 45 days of the date hereof in an amount not less than the Purchase Price from the Royal Bank of Canada or other financial institution upon terms and conditions acceptable to them. In the event that such a financing commitment is not obtained within such 45 day period, the purchaser or OEL shall have the right to terminate this agreement upon giving written notice of termination to the vendor on the first Business Day following the expiry of the said period." The purchaser was also given the right to waive the condition.

109 In effect, the agreement was tantamount to a 45-day option to purchase, excluding the right of any other person to purchase Air Toronto during that period of time and thereafter if the condition was fulfilled or waived. The agreement was, of course, stated to be subject to court approval.

110 In my opinion, the process and procedure adopted by the receiver was unfair to CCFL. Although it was aware from December 1990 that CCFL was interested in making an offer, it effectively delayed the making of such offer by continually referring to the preparation of the offering memorandum. It did not endeavour during the period December 1990 to March 7, 1991, to negotiate with CCFL in any way the possible terms of purchase and sale agreement. In the result, no offer was sought from CCFL by the receiver prior to February 11, 1991, and thereafter it put itself in the position of being unable to negotiate with anyone other than OEL. The receiver then, on March 8, 1991, chose to accept an offer which was conditional in nature without prior consultation with CCFL (922) to see whether it was prepared to remove the condition in its offer.

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that 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 it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

112 In my opinion the procedure adopted by the receiver was unfair to CCFL in that, in effect, it gave OEL the opportunity of engaging in exclusive negotiations for a period of 3 months, notwithstanding the fact that it knew CCFL was interested in making an offer. The receiver did not indicate a deadline by which offers were to be submitted, and it did not at any time indicate the structure or nature of an offer which might be acceptable to it.

113 In his reasons, Rosenberg J. stated that as of March 1, CCFL and Air Canada had all the information that they needed, and any allegations of unfairness in the negotiating process by the receiver had disappeared. He said:

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

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand, he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them.*"

114 It should be noted that on March 13, 1991, the representatives of 922 first met with the receiver to review its offer of March 7, 1991, and at the request of the receiver, withdrew the inter-lender condition from its offer. On March 14, 1991, OEL removed the financing condition from its offer. By order of Rosenberg J. dated March 26, 1991, CCFL was given until April 5, 1991, to submit a bid, and on April 5, 1991, 922 submitted its offer with the inter-lender condition removed.

115 In my opinion, the offer accepted by the receiver is improvident and unfair insofar as the two creditors are concerned. It is not improvident in the sense that the price offered by 922 greatly exceeded that offered by OEL. In the final analysis it may not be greater at all. The salient fact is that the cash down payment in the 922 offer constitutes proximately two thirds of the contemplated sale price, whereas the cash down payment in the OEL transaction constitutes approximately 20 to 25 per cent of the contemplated sale price. In terms of absolute dollars, the down payment in the 922 offer would likely exceed that provided for in the OEL agreement by approximately \$3 million to \$4 million.

116 In *Re Beauty Counsellors of Canada Ltd.*, supra, Saunders J. said at p. 243 [C.B.R.]:

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. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

117 I accept that statement as being an accurate statement of the law. I would add, however, as previously indicated, that in determining what is the best price for the estate, the receiver or court should not limit its consideration to which offer provides for the greater sale price. The amount of down payment and the provision or lack thereof to secure payment of the balance of the purchase price over and above the down payment may be the most important factor to be considered, and I am of the view that is so in the present case. It is clear that that was the view of the only creditors who can benefit from the sale of Air Toronto.

118 I note that in the case at bar the 922 offer in conditional form was presented to the receiver before it accepted the OEL offer. The receiver, in good faith, although I believe mistakenly, decided that the OEL offer was the better offer. At that time the receiver did not have the benefit of the views of the two secured creditors in that regard. At the time of the application for approval before Rosenberg J., the stated preference of the two interested creditors was made quite clear. He found as fact that knowledgeable creditors would not be anxious to rely on contingencies in the present circumstances surrounding the airline industry. It is reasonable to expect that a receiver would be no less knowledgeable in that regard, and it is his primary duty to protect the interests of the creditors. In my view, it was an improvident act on the part of the receiver to have accepted the conditional offer made by OEL, and Rosenberg J. erred in failing to dismiss the application of the receiver for approval of the OEL offer. It would be most inequitable to foist upon the two creditors, who have already been seriously hurt, more unnecessary contingencies.

119 Although in other circumstances it might be appropriate to ask the receiver to recommence the process, in my opinion, it would not be appropriate to do so in this case. The only two interested creditors support the acceptance of the 922 offer, and the court should so order.

120 Although I would be prepared to dispose of the case on the grounds stated above, some comment should be addressed to the question of interference by the court with the process and procedure adopted by the receiver.

121 I am in agreement with the view expressed by McKinlay J.A. in her reasons that the undertaking being sold in this case was of a very special and unusual nature. As a result, the procedure adopted by the receiver was somewhat unusual. At the outset, in accordance with the terms of the receiving order, it dealt solely with Air Canada. It then appears that the receiver contemplated a sale of the assets by way of auction, and still later contemplated the preparation and distribution of an offering memorandum inviting bids. At some point, without advice to CCFL, it abandoned that idea and reverted to exclusive negotiations with one interested party. This entire process is not one which is customary or widely accepted as a general practice in the commercial world. It was somewhat unique, having regard to the circumstances of this case. In my opinion, the refusal of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

122 Rosenberg J. stated that the Royal Bank was aware of the process used and tacitly approved it. He said it knew the terms of the letter of intent in February 1991, and made no comment. The Royal Bank did, however, indicate to the receiver that it was not satisfied with the contemplated price, nor the amount of the down payment. It did not, however, tell the receiver to adopt a different process in endeavouring to sell the Air Toronto assets. It is not clear from the material filed that

at the time it became aware of the letter of intent that it knew that CCFI was interested in purchasing Air Toronto.

123 I am further of the opinion that a prospective purchaser who has been given an opportunity to engage in exclusive negotiations with a receiver for relatively short periods of time which are extended from time to time by the receiver, and who then makes a conditional offer, the condition of which is for his sole benefit and must be fulfilled to his satisfaction unless waived by him, and which he knows is to be subject to court approval, cannot legitimately claim to have been unfairly dealt with if the court refuses to approve the offer and approves a substantially better one.

124 In conclusion, I feel that I must comment on the statement made by Galligan J.A. in his reasons to the effect that the suggestion made by counsel for 922 constitutes evidence of lack of prejudice resulting from the absence of an offering memorandum. It should be pointed out that the court invited counsel to indicate the manner in which the problem should be resolved in the event that the court concluded that the order approving the OEL offer should be set aside. There was no evidence before the court with respect to what additional information may have been acquired by CCFL since March 8, 1991, and no inquiry was made in that regard. Accordingly, I am of the view that no adverse inference should be drawn from the proposal made as a result of the court's invitation.

125 For the above reasons I would allow the appeal one set of costs to CCFL-922, set aside the order of Rosenberg J., dismiss the receiver's motion with one set of costs to CCFL-922 and order that the assets of Air Toronto be sold to numbered corporation 922246 on the terms set forth in its offer with appropriate adjustments to provide for the delay in its execution. Costs awarded shall be payable out of the estate of Soundair Corporation. The costs incurred by the receiver in making the application and responding to the appeal shall be paid to him out of the assets of the estate of Soundair Corporation on a solicitor-client basis. I would make no order as to costs of any of the other parties or intervenors.

*Appeal dismissed.*

# TAB 2

2004 CarswellOnt 2653  
Ontario Court of Appeal

Regal Constellation Hotel Ltd., Re

2004 CarswellOnt 2653, [2004] O.J. No. 2744, 132 A.C.W.S. (3d) 215, 188 O.A.C. 97, 23 R.P.R. (4th) 64, 242 D.L.R. (4th) 689, 35 C.L.R. (3d) 31, 50 C.B.R. (4th) 258, 71 O.R. (3d) 355

## **In the Matter of the Receivership of Regal Constellation Hotel Limited, of the City of Toronto, in the Province of Ontario**

And In the Matter of s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40

HSBC Bank of Canada (Applicant) and Deloitte & Touche Inc. (Receiver / Respondent in Appeal) and Regal Pacific (Holdings) Limited (Respondent / Appellant) and 2031903 Ontario Inc. (Purchaser / Respondent in Appeal) and Aareal Bank A.G. (Intervenor)

Laskin, Feldman, Blair JJ.A.

Heard: May 13, 14, 2004  
Judgment: June 28, 2004  
Docket: CA C41258, C41257

Proceedings: affirming *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428 (Ont. S.C.J. [Commercial List])

Counsel: J. Brian Casey, John J. Pirie for Deloitte & Touche Inc.  
Robert Rueter, A. Chan for Regal Pacific (Holdings) Limited  
Tim Gilbert, Sandra Barton for 2031903 Ontario Inc.  
James P. Dube for Aareal Bank A.G.

Subject: Contracts; Property; Corporate and Commercial; Insolvency

### **Table of Authorities**

#### **Cases considered by Blair J.A.:**

*Boucher v. Public Accountants Council (Ontario)* (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

*Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 2000 CarswellOnt 4836, 51 O.R. (3d) 641, 195 D.L.R. (4th) 135, 139 O.A.C. 201, 41 R.P.R. (3d) 1, [2001] 1 C.N.L.R. 56 (Ont. C.A.) — considered

*Durrani v. Augier* (2000), 2000 CarswellOnt 2807, 190 D.L.R. (4th) 183, 50 O.R. (3d) 353, 36 R.P.R. (3d) 261 (Ont. S.C.J.) — considered

*Foulis v. Robinson* (1978), 21 O.R. (2d) 769, 92 D.L.R. (3d) 134, 8 C.P.C. 198, 1978 CarswellOnt 466 (Ont. C.A.) —



referred to

*National Life Assurance Co. of Canada v. Brucefield Manor Ltd.* (February 23, 1999), Doc. C24863, M20859 (Ont. C.A.) — followed

*R.A. & J. Family Investment Corp. v. Orzech* (1999), 121 O.A.C. 312, 1999 CarswellOnt 1829, 44 O.R. (3d) 385, 27 R.P.R. (3d) 230 (Ont. C.A.) — referred to

*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.) — referred to

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

*Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 1998 CarswellAlta 959, 231 A.R. 101, 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]) — referred to

*Toronto Dominion Bank v. Usarco Ltd.* (2001), 2001 CarswellOnt 525, 196 D.L.R. (4th) 448, 17 M.P.L.R. (3d) 57, 142 O.A.C. 70, 24 C.B.R. (4th) 303 (Ont. C.A.) — considered

**Statutes considered:**

*Courts of Justice Act*, R.S.O. 1990, c. C.43  
s. 100 — considered

*Land Titles Act*, R.S.A. 2000, c. L-4  
s. 191 — referred to

*Land Titles Act*, R.S.O. 1990, c. L.5  
Generally — referred to

Pt. IX — referred to

Pt. X — referred to

s. 25 — referred to

s. 57 — referred to

s. 57(13) — referred to

s. 69 — referred to

s. 69(1) — considered

s. 78 — referred to

s. 78(4) — considered

ss. 155-157 — referred to

**Regulations considered:**

*Land Titles Act*, R.S.O. 1990, c. L.5  
*General*, O. Reg. 26/99

Generally

s. 4

APPEAL by company from judgment reported at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 428, 50 C.B.R. (4th) 253 (Ont. S.C.J. [Commercial List]), approving conduct of receiver.

**Blair J.A.:**

1 Regal Pacific (Holdings) Limited is the 100% shareholder of Regal Constellation Hotel Limited, the company that operated the Regal Constellation Hotel near Pearson Airport in Toronto. The hotel is bankrupt and in receivership.<sup>1</sup>

2 Deloitte & Touche Inc., the receiver, has agreed to sell the assets of the hotel to 2031903 Ontario Inc. ("203"). The sale was approved, and a vesting order issued, by Sachs J. on December 19, 2003. Following a hearing on January 15, 2004, Farley J. approved the payment of \$23,500,000 from the sale proceeds to the hotel's secured creditor, HSBC Bank of Canada ("HSBC"), and as well approved the conduct of the receiver in the receivership and passed its accounts.

3 This appeal involves an attempt by Regal Pacific, in its capacity as shareholder of the bankrupt hotel, to set aside the orders of Sachs J. and Farley J., and thus to set aside the sale transaction between the receiver and 203. It is based upon the argument that the receiver failed to disclose to Regal Pacific and to Sachs J. the name of one of the members of the consortium lying behind the purchaser, 203, and that this failure to disclose tainted the fairness and integrity of the receivership process to such an extent that it must be set aside. Farley J. was made aware of the information. However, his failure to grant an adjournment of the hearing respecting approval of the receiver's conduct in the face of Regal Pacific's fresh discovery of the information, and his conclusion that the information was irrelevant to the receiver's duties with respect to the sale process, are said to constitute reversible error.

4 In a separate motion 203 also seeks to quash the appeal on the ground it is moot.

5 For the reasons that follow, I would quash the appeal from the vesting order and I would otherwise dismiss the appeals.

**Facts**

6 The hotel has been in financial difficulties for some time. It is old and in need of repair and renovation. Because the premises no longer comply with the requisite fire code regulations, and because liability insurance is difficult to obtain, they have been closed for some time. In addition, the hotel has suffered from the decrease in air passenger traffic following the events of September 11, 2001, and the aftermath of the SARS outbreak in Toronto in early 2003. It is thus an asset of declining value.

7 At the time of the appointment of the receiver, the hotel was in default in its payments to HSBC, which was owed \$33,850,000. In fact, HSBC had made demand for repayment in November 2001 and as a result Regal Pacific and the hotel had commenced searching for a purchaser. They retained Colliers International Hotels ("Colliers") to market the hotel.

8 Several bids were received, and in the fall of 2002 a share-purchase transaction was entered into between Regal Pacific and a company controlled by the Orenstein Group. The purchase price was \$45 million and included the purchase of Regal Pacific's shares in the hotel together with other assets. The transaction was not completed, however, and Regal Pacific and the Orenstein Group are presently in litigation as a result. The existence of this litigation is not without significance in these proceedings.

9 When the foregoing transaction failed to close, in June 2003, the bank commenced its application for the appointment of a receiver. On July 4, 2003, Cumming J. granted the receivership order [*Regal Constellation Hotel Ltd., Re* (July 4, 2003), Cumming J. (Ont. S.C.J.)].

10 The receiver and Colliers continued the efforts to market the hotel. The receiver's supplemental report indicates that "an investment profile of the hotel was distributed to more than five hundred potential investors, a Confidential Information Memorandum was distributed to eighty potential purchasers, tours of the Hotel were conducted for twenty-three parties, and a Standard Offer to Purchase Form was provided to 42 purchasers". As of August 28, 2003, the deadline for the submission of binding offers, 13 offers had been received. After reviewing these offers with HSBC, the receiver accepted an offer from 203 to purchase the assets of the hotel for \$25 million, subject to court approval (the "First 203 Offer").

11 A summary of the thirteen bids setting out their proposed purchase prices, the deposits made with them, and their conditions, is set out in Appendix 1 of the receiver's supplemental report. Five of the bids were not accompanied by a deposit, as required by the terms of the sale process approved by the court. The receiver went back to each of the bidders who had not provided a deposit and gave them a few more days to submit the deposit. None of them did so.

12 The First 203 Offer was for the fourth highest purchase price. It was accompanied by a \$1 million deposit, as required, and it was unconditional. The second and third highest bids were not accompanied by the requisite deposit. The highest bid, by Hospitality Investors Group LLC ("HIG") was for \$31 million. While the HIG bid was accompanied by a \$1 million non-certified deposit cheque, however, the receiver was advised that the deposit cheque submitted could not be honoured if presented for payment, and the offer was withdrawn by HIG.

13 HIG is a company controlled by the Orenstein Group. The withdrawal of its \$31 million offer is the subject of some controversy in the proceedings, and I shall return to that turn of events in a moment.

14 Of the remaining bids, one was rejected as inordinately low. Three of the remaining six were for the same \$25 million purchase price as that offered by 203. They were rejected because they were subject to conditions and the First 203 Offer was not. The rest were rejected because their proposed purchase price was lower.

15 On September 9, 2003, Cameron J. approved the sale to 203. At this hearing Regal Pacific expressed a concern that 203 might be connected to the Orenstein Group. Counsel for Regal Pacific states that Cameron J. was advised by counsel for the receiver that there was no such connection. It is not clear on the record whether this statement was accurate in fact, but there is no suggestion that counsel for the receiver was at that time aware of any Orenstein Group connection to 203. Mr. Orenstein's personal involvement did not seem to come until sometime later in October, following the failure of the First 203 Offer to close.

16 At the receiver's request Cameron J. also granted an order sealing the receiver's supplemental report respecting the sale process in order to protect the confidential information regarding the pricing and terms of the other bids outlined above, in case the First 203 Offer did not close and it proved necessary for the receiver to renegotiate with the other offerors. This meant that Regal Pacific was not privy to the information contained in it.

17 The First 203 Offer did not close, as scheduled, on October 10. This led to proceedings by the receiver to terminate the agreement and for the return of the \$2 million in deposit funds that had been submitted by 203. These proceedings were

settled, with the commercial list assistance of Farley J. But the settled transaction did not close either. As a result of the minutes of settlement, the First 203 Offer was terminated and 203 forfeited a \$2.5 million deposit plus \$500,000 in carrying costs.

18 The receiver renewed its efforts to find a purchaser for the hotel. In what was intended to be a second round of bidding, it instructed Colliers to continue its search. Between Colliers and the receiver all thirteen of the original bidders referred to above, including 203, were canvassed again in an effort to generate new offers. Except for a second proposal from 203 ("the Second 203 Offer"), none was forthcoming.

19 The Second 203 Offer was for \$24 million. It was again unconditional and this time was buttressed by a \$20 million credit facility provided by the intervenor, Aareal Bank A.G. It was also accompanied by a certified and non-refundable deposit cheque for \$2 million. The receiver was concerned that the market for the hotel was in a state of steady decline and that the creditors' positions would only worsen if a sale could not be completed expeditiously. With a purchase price of \$24 million, HSBC would be suffering a shortfall on its secured debt of approximately \$9 million; in addition there are unsecured creditors of the hotel with claims exceeding \$2 million. As the receiver had not been able to generate any other new offers at a price comparable to the \$24 million, and Colliers had not been able to identify any new purchasers, the receiver accepted the Second 203 Offer and entered into a new agreement with 203 on December 9, 2003, with a projected closing date of January 5, 2004. Given the \$3 million in deposits that 203 had previously forfeited, the receiver views the purchase price as being the equivalent of \$27 million.

20 On December 19, 2003, Sachs J. approved the sale of the hotel to 203. She also granted a vesting order pursuant to which title to the hotel would be conveyed to 203 on closing. The transaction closed on January 6, 2004. 203 paid the receiver \$24 million and registered the vesting order on title. Aareal Bank's \$20 million advance is secured on title based on that vesting order. The hotel's indebtedness to HSBC Bank of Canada has been paid down by \$20.5 million from the sale proceeds.

21 A few days later Regal Pacific learned from an article in the Toronto Star newspaper that the hotel had been sold "to the Orenstein Group". A motion was pending before Farley J. on January 15, 2004, for approval of the receiver's conduct and related relief. Regal sought an adjournment of that motion on the basis of the prior non-disclosure of the Orenstein Group's involvement in the 203 offers. When the adjournment request was taken under advisement, Regal Pacific opposed approval of the receiver's conduct on the basis that the failure to advise it and Sachs J. of the Orenstein Group's involvement tainted the fairness and integrity of the process. Farley J. refused the adjournment request, and approved the receiver's conduct and accounts. He concluded that the identity of the principals behind the purchaser was not material. In this regard he said:

While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.

.....

It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

### Standard of Review

22 The orders appealed from are discretionary in nature. An appeal court will only interfere with such an order where the judge has erred in law, seriously misapprehended the evidence, or exercised his or her discretion based upon irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations.

23 Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances - particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.).

24 In *Soundair*, at p. 6, Galligan J.A. outlined the duties of a court when deciding whether a receiver who has sold a property has acted properly. Those duties, in no order of priority, are to consider and determine:

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

25 In *Soundair* as well, McKinlay J.A. emphasized the importance of protecting the integrity of the procedures followed by a court-appointed receiver “in the interests of both commercial morality and the future confidence of business persons in their dealings with receivers”.

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor’s property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to a court-appointed receiver’s standard of care that the receiver “must act with meticulous correctness, but not to a standard of perfection”: *Bennett on Receiverships*, 2nd ed. (Toronto: Carswell, 1999) at p. 181, cited in *Toronto Dominion Bank v. Usarco Ltd.*, *supra*, at p. 459.

27 The foregoing principles must be kept in mind when considering the exercise of discretion by the motions judges in the context of these proceedings.

## Analysis

### *The Vesting Order and the Motion to Quash*

28 Aareal Bank A.G. and 203 sought to quash the appeal on the basis that it is moot. They argue that once the vesting order granted by Sachs J. was registered on title - no stay having been obtained - its effect was spent, the court’s power to set it aside is extinguished, and no appeal can lie from it. Because all the parties were prepared to argue the appeal, we heard the submissions on the motion to quash during the argument of the appeal on the merits.

29 In my opinion the appeal from the vesting order should be quashed because the appeal is moot.

30 Sachs J.’s order of December 19, 2003 granted a vesting order directing the land registrar at Toronto, in the land titles system, to record 203 as the owner of the hotel. The order was subject to two conditions, namely, that 203 pay the purchase price and comply with all of its obligations on closing of the transaction and that the vesting order be delivered to 203. These conditions were complied with on January 6, 2004, and the vesting order was registered on title on that date. Aareal Bank registered its \$20 million mortgage against the title to the hotel property following registration of the vesting order.

31 In Ontario, the power to grant a vesting order is conferred by the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 100, which provides as follows:

A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.

32 The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 195 D.L.R. (4th) 135 (Ont. C.A.), at 227, where it was observed that:

Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made *in personam* orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. *The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly*: see McGhee, *Snell's Equity* 30th ed., (London: Sweet and Maxwell, 2000) at 41-42 [emphasis added].

33 A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order). This duality has important ramifications for an appeal of the original court decision granting the vesting order because, in my view, once the vesting order has been registered on title its attributes as a conveyance prevail and its attributes as an order are spent; the change of title has been effected. Any appeal from it is therefore moot.

34 I reach this conclusion for the following reasons.

35 In its capacity as an order, a vesting order is in the ordinary course subject to appeal. In Ontario, however, the filing of a notice of appeal does not automatically stay the order and, in the absence of such a stay, it remains effective and may be registered on title under the land titles system - indeed, the land registrar is required to register it on a proper application to do so: see the *Land Titles Act*, R.S.O. 1990, c. L.5, ss.25 and 69. In this respect, an application for registration based on a judgment or court order need only be supported by an affidavit of a solicitor deposing that the judgment or order is still in full force and effect and has not been stayed; there is no requirement - as there is in some other jurisdictions<sup>2</sup> - to show that no appeal is pending and that all appeal rights have terminated: see *Ontario Land Titles Regulations*, O. Reg 26/99, s. 4.

36 Appeal rights may be protected by obtaining a stay, which precludes registration of the vesting order on title pending the disposition of the appeal. Do those appeal rights remain alive, however, where no stay has been obtained and the order has been registered?

37 In answering that question I start with the provisions of ss. 69 and 78 of the *Land Titles Act*, which deal, respectively, with vesting orders (specifically) and the effect of registration (generally). They state in part, as follows:

69(1) Where by order of a court of competent jurisdiction ... registered land or any interest therein is stated by the order ... to vest, be vested or become vested in, or belong to ... any person other than the registered owner of the land, the registered owner shall be deemed for the purposes of this Act to remain the owner thereof,

(a) until an application to be registered as owner is made by or on behalf of the ... other person in or to whom the land is stated to be vested or to belong; or

(b) until the land is transferred to the ... person by the registered owner, as the case may be, in accordance with the order or Act.

78 (4) *When registered, an instrument shall be deemed to be embodied in the register and to be effective according to its nature and intent, and to create, transfer, charge or discharge, as the case requires, the land or estate or interest therein mentioned in the register* [italics added].

38 Upon registration, then, a vesting order is deemed “to be embodied in the register and to be effective according to its nature and intent”. Here the nature and effect of Sachs J.’s vesting order is to transfer absolute title in the hotel to 203, free and clear of encumbrances.<sup>3</sup> When it is “embodied in the register” it becomes a creature of the land titles system and subject to the dictates of that regime.

39 Once a vesting order that has not been stayed is registered on title, therefore, it is effective as a registered instrument and its characteristics as an order are, in my view, overtaken by its characteristics as a registered conveyance on title. In a way somewhat analogous to the merger of an agreement of purchase and sale into the deed on the closing of a real estate transaction, the character of a vesting order as an “order” is merged into the instrument of conveyance it becomes on registration. It cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under the land titles system. Those means no longer include an attempt to impeach the vesting order by way of appeal from the order granting it because, as an order, its effect is spent. Any such appeal would accordingly be moot.

40 This interpretation of the effect of registration of a vesting order is consistent with the purpose of the land titles regime and the philosophy lying behind it. It ensures that disputes respecting the registered title are resolved under the rubric of that regime and within the scheme provided by the *Land Titles Act*. This promotes confidence in the system and enhances the certainty required in commercial and real estate transactions that must be able to rely upon the integrity of the register.

41 Donald H.L. Lamont described the purposes of the land titles system very succinctly in his text, *Lamont on Real Estate Conveyancing*, 2nd ed. looseleaf (Toronto: Carswell, 1991) vol. 1 at 1-10, as follows:

The basis of the system is that the Act authoritatively establishes title by declaring, under a guarantee of indemnity, that a certain parcel of land is vested in a named person, subject to some special circumstances. Early defects are cured when the land is brought under the land titles system, and thenceforth investigation of the prior history of the title is not necessary.

*No transfer is effective until recorded; once recorded, however, the title cannot, apart from fraud, be upset* [italics added].

42 Epstein J. elaborated further on the origins, purpose and philosophy behind the regime in *Durrani v. Augier* (2000), 50 O.R. (3d) 353 (Ont. S.C.J.). At paras. 40 - 42 she observed:

[40] The land titles system was established in Ontario in 1885, and was modeled on the English Land Transfer Act of 1875. It is currently known as the Land Titles Act, R.S.O. 1990, c. L.5. Most Canadian provinces have similar legislation.

[41] The essential purpose of land titles legislation is to provide the public with the security of title and facility of transfer: Di Castri, *Registration of Title to Land*, vol. 2 looseleaf (Toronto: Carswell, 1987) at p. 17-32. The notion of title registration establishes title by setting up a register and guaranteeing that a person named as the owner has perfect title, subject only to registered encumbrances and enumerated statutory exceptions.

[42] The philosophy of land titles system embodies three principles, namely, the mirror principle, where the register is a perfect mirror of the state of title; the curtain principle, which holds that a purchaser need not investigate the history of past dealings with the land, or search behind the title as depicted on the register; and the insurance principle, where the state guarantees the accuracy of the register and compensates any person who suffers loss as the result of an inaccuracy. These principles form the doctrine of indefeasibility of title and is the essence of the land titles system: Marcia Neave,

”Indefeasibility of Title in the Canadian Context” (1976), 26 U.T.L.J. 173 at p. 174.

43 Certainty of title and the ability of a bona fide purchaser for valuable consideration to rely upon the title as registered, without going behind it to examine the conveyance, are, therefore, the hallmarks of the land titles system. The transmogrification of a vesting order into a conveyance upon registration is consistent with these hallmarks. It does not mean that such an order, once registered on title, is absolutely immune from attack. It simply means that any such attack must be made within the parameters of the *Land Titles Act*.

44 That legislation does present a scheme of remedies in circumstances where there has been a wrongful entry on the registry by reason of fraud or of misdescription or because of other errors of certification of title or entry on the registry. The remedies take the form of damages or compensation from the assurance fund established under the Act or, in some instances, rectification of the register by the Director of Titles and/or the court: see, for example, s. 57 (Claims against the Fund), Part IX (Fraud) and Part X (Rectification). In this scheme, good faith purchasers or mortgagees who have taken an interest in the land for valuable consideration and in reliance on the register, are protected,<sup>4</sup> in keeping with the motivating principles underlying the land titles system. It has been held that there is no jurisdiction to rectify the register if to do so would interfere with the registered interest of a *bona fide* purchaser for value in the interest as registered: see *R.A. & J. Family Investment Corp. v. Orzech* (1999), 44 O.R. (3d) 385 (Ont. C.A.); and *Durrani v. Augier*, *supra*, at paras. 49, 75 and 76.

45 Vesting orders properly registered on title, then - like other conveyances - are not immune from attack. However, any such attack is limited to the remedies provided under the *Land Titles Act* and no longer may lie by way of appeal from the original decision granting the vesting order. Title has effectively been changed and innocent third parties are entitled to rely upon that change. The effect of the vesting order *qua* order has been spent.

46 Johnstone J., of the Alberta Court of Queens Bench, came to a similar conclusion -although not based upon the same reasoning - in *Royal Trust Corp. of Canada v. Karenmax Investments Inc.* (1998), 71 Alta. L.R. (3d) 307 (Alta. Q.B. [In Chambers]). She refused to interfere with a vesting order granted by the master in the context of a receivership sale, stating (at para. 22, as amended):

Accordingly, because the Order of Master Funduk has been entered, and no stay of execution was sought nor granted, the Order acts as a transfer of title, which having been registered at the Land Titles Office, extinguishes my ability to set aside the Order, absent any error [*sic*] in fact or law by the learned Master. ....

47 In a brief three-paragraph endorsement this court granted an unopposed motion to quash an appeal from an order approving a sale by a receiver in *National Life Assurance Co. of Canada v. Brucefield Manor Ltd.*, [1999] O.J. No. 1175 (Ont. C.A.). While a vesting order was involved, it does not appear to have been the subject of the appeal. The appeal was quashed. The sale order had been made in May 1996, a motion to stay the order pending appeal had been dismissed in August, and the sale had closed and a vesting order had been granted in November of that year. The proceeds of sale had been distributed. "Against this background", Catzman J.A. noted, "we agree with [the] submission that the order under appeal is spent".

48 This decision was based on the global situation before the court, not on the narrower premise that the vesting order had been registered and the appeal was therefore moot. I am satisfied, based on the foregoing analysis, however, that the narrower premise is sound.

49 I do not mean to suggest by this analysis that a litigant's legitimate rights of appeal from a vesting order should be prejudiced simply because the successful party is able to run to the land titles office and register faster than the losing party can run to the appeal court, file a notice of appeal and a stay motion and obtain a stay. These matters ought not to be determined on the basis that "the race is to the swiftest". However, there is no automatic stay of such an order in this province, and a losing party might be well advised to seek a stay pending appeal from the judge granting the order, or at least seek terms that would enable a speedy but proper appeal and motion for a stay to be launched. Whether the provisions of s. 57 of the *Land Titles Act* (Remedy of person wrongfully deprived of land), or the rules of professional conduct, would provide a remedy in situations where a successful party registers a vesting order immediately and in the face of knowledge that the unsuccessful party is launching an appeal and seeking a timely stay, is something that will require consideration should the occasion arise. It may be that the appropriate authorities should consider whether the Act should be amended to



bring its provisions in line with those contained in the Alberta legislation, and referred to in footnote 2 above.

50 The foregoing concerns do not change the legal analysis of the effect of registration of a vesting order outlined above, however, and I conclude that the appeal from the vesting order is moot.

### *The Appeals on the Merits*

51 Even if I am in error respecting the mootness of the appeal from the vesting order, the appeal from it and from the approval orders must be dismissed on their merits. On behalf of Regal Pacific, Mr. Rueter highlights the facts concerning the Orenstein Group's involvement in the failed \$45 million share purchase transaction, which was followed by the receivership, the sudden withdrawal by HIG (also an Orenstein company) of its \$31 million bid on September 2, 2003 - just the day before the First 203 Offer for \$25 million was submitted - and the involvement of the Orenstein Group in that First (and subsequent) 203 Offer. He forcefully argues that the Orenstein participation in the 203 Offers should have been disclosed to Regal Pacific and to Sachs J., and submits that had that disclosure been made Sachs J. may have declined to approve the Second 203 Offer. The non-disclosure tainted the receivership sale process to the extent that its fairness and integrity have been jeopardized, he concludes, and accordingly the sale must be set aside.

52 On behalf of the receiver, Mr. Casey acknowledges that the Orenstein involvement was not disclosed, even after the receiver became aware of it (which, he submits, was not until the time of the Second 203 Offer). He concedes that "it would have been nice" if the receiver had disclosed the information, but submits it was under no legal obligation to do so as, in his view, the information was not material to the sale process. The sale process was carried out in good faith in accordance with the duties and obligations of the receiver, and both of the 203 Offers represented the best offers available at the time of their acceptance - and, in the case of the Second 203 Offer, the *only* offer available. The transaction is in the best interests of all concerned, he contends. The orders should not be set aside.

53 203 and the intervenor, Aareal Bank A.G., support the receiver's position. On behalf of 203 Mr. Gilbert argues in addition that 203 is a *bona fide* purchaser of the hotel for value, that it has paid its deposit and purchase price and registered its interest through the vesting order on title, and that \$20 million has been advanced by Aareal Bank A.G. on the strength of the registered vesting order. The transaction cannot be overturned because once the vesting order has been registered it is spent and any appeal from the order is therefore moot. Mr. Dube advanced a similar argument on behalf of Aareal Bank A.G.

54 I do not accept the argument advanced by the appellant.

55 In my view, the fact that the Orenstein Group is involved in the 203 bid is not material to the sale process conducted by the receiver. I agree with the conclusions of Farley J., recited above, in that regard.

56 Whatever may be the rights and obligations between Regal Pacific and the Orenstein Group with respect to the \$45 million share purchase transaction, as determined in the pending litigation between them, the facts relating to that transaction are of little more than historical interest in the context of the receivership sale. The hotel was not bankrupt and in receivership, or closed, at that time. For the various reasons outlined earlier, the hotel is an asset progressively declining in value, and it is not surprising that the business may have attracted a higher offer in mid-2002 than it did in mid-2003. Moreover, the \$45 million transaction involved the purchase of the shares of Regal Pacific rather than the assets of the hotel and, as well, the acquisition of certain other assets. None of the thirteen bids elicited by the receiver remotely approached a purchase price of \$45 million. Apart from its indication that the Orenstein Group has an interest in acquiring the hotel, I do not see the significance of this earlier transaction to the sale process conducted by the receiver.

57 I turn, then, to the \$31 million HIG bid. It, too, confirms an interest by the Orenstein Group in the Hotel. Mr. Rueter argues that the withdrawal of that bid the day before the First 203 Offer was presented at the lower \$25 million price is suspicious, and that the court should have been apprised of what exchange of information occurred between the receiver, HIG and 203 that resulted in the HIG bid being withdrawn and the lower 203 offer going forward as the offer recommended by the receiver. In my view, however, this argument does not assist Regal Pacific.

58 First, there is not a scintilla of evidence to suggest that the receiver participated in any such discussions. Secondly, when the receiver inquired whether the deposit cheque that had been submitted with the HIG offer - and which had not been

certified, as required by the court-approved bidding process - could be cashed, the receiver was told the cheque would not be honoured if presented for payment. The receiver would have been derelict in its duties if it had accepted the HIG bid in those circumstances. Finally, in the absence of some provision in an offer or the terms of the bidding process to the contrary - which was not the case here - a potential purchaser is entitled to withdraw its offer at any time prior to acceptance for any reason, including the belief that the purchaser may be able to obtain the property at a better price by another means. Mr. Rueter conceded that the receiver was not obliged to accept the HIG offer and that he was not asserting a kind of improvident-sale claim for damages based upon the difference in price between the HIG offer and the 203 bid.

59 The stark reality is that after nearly two years of marketing efforts by Colliers, and latterly by Colliers and the receiver, there were no other offers available to the receiver that were superior to the unconditional \$25 million First 203 Offer at the time of its acceptance by the receiver and approval by the court. After the failure of the First 203 Offer to close, and in spite of renewed efforts by both Colliers and the receiver, there were *no other* offers available apart from the \$24 million Second 203 Offer, which was accepted by the receiver and approved by Sachs J.

60 A persuasive measure of the realistic nature of the 203 offers is the fact that they are supported by HSBC, which stands to incur a shortfall on its security of \$9 million. In addition, there are outstanding unsecured creditors with over \$2 million in claims. No one except Regal Pacific has opposed the sale.

61 There is simply nothing on the record to suggest that the hotel assets are likely to fetch a price that will come anywhere close to providing any recovery for Regal Pacific in its capacity as shareholder of the hotel. Regal Pacific, therefore, has little, if anything, to gain from re-opening the sale process. Apart from a liability to make some interest payments as part of an earlier agreement in the proceedings, Regal Pacific is not liable under any guarantees for the indebtedness of the hotel. It therefore has little, if anything to lose from opposing the sale, as well. This lends some credence to the respondents' argument that Regal Pacific's opposition to the sale, and this appeal, are driven by tactical motives extraneous to these proceedings and relating to the separate litigation between it and the Orenstein Group concerning the aborted \$45 million share purchase transaction.

62 In the circumstances of this case, then, and given the principles courts must apply when reviewing a sale by a court-appointed receiver, as outlined above, I can find no error on the part of Sachs J. or Farley J. in the exercise of their discretion when granting the orders under appeal.

63 I would dismiss the appeals for the foregoing reasons.

## **Disposition**

### ***The Appeals***

64 For all of the foregoing reasons, the appeal from the vesting order granted by Sachs J. is quashed, and the appeals from the orders of Sachs J. dated December 19, 2003 approving the sale, and the order of Farley J. dated January 14, 2004, are dismissed.

### ***Costs***

65 The respondents and the intervenor are entitled to their costs of the appeal, including the motion to quash, which was included in the argument of the appeal.

66 The receiver and 203 requested that costs be fixed on a substantial indemnity basis - the receiver on the ground that the allegations raised impugned its integrity in the conduct of the receivership, and 203 on the ground that the appeal was futile and brought solely for tactical purposes in an attempt to extract a settlement and at great expense to 203 in terms of uncertainty and carrying costs. I would not accede to these requests. Without in any way questioning the integrity of the receiver in the conduct of the receivership, it seems to me that some of the problems could have been avoided had the receiver revealed the involvement of the Orenstein Group in the 203 transactions when it first learned that was the case. While I understand 203's frustration at the delay in finalizing the results of the transaction, it cannot be said that the appeal

was frivolous and there is nothing in the circumstances to justify an award of costs on the higher scale: see *Foulis v. Robinson* (1978), 21 O.R. (2d) 769 (Ont. C.A.). I would therefore award costs on a partial indemnity scale.

67 Counsel provided us with bills of costs. Regal Constellation sought \$57,123.25 on a partial indemnity basis if successful. The receiver asks for \$61,919.00 and Aareal Bank requests \$12,224.75. These amounts are inclusive of fees, disbursements and GST and seem somewhat high to me. The draft bill submitted by 203 appears to me to be exceedingly high, given the amounts sought by other parties who carried a similar burden, and notwithstanding the importance of the case for 203. 203 asks us to fix its costs in the amount of \$137,444.68. Such an award is not justified and would simply not be fair and reasonable in the circumstances, in my view, given the nature and length of the appeal and the issues involved: see *Boucher v. Public Accountants Council (Ontario)*, [2004] O.J. No. 2634 (Ont. C.A.).

68 Costs are awarded, on a partial indemnity basis, as follows:

- a) To the receiver, in that amount of \$40,000;
- b) To 203, in the amount of \$40,000; and,
- c) To Aareal Bank, in the amount of \$12,225.

69 These amounts are inclusive of fees, disbursements and GST.

**Laskin J.A.:**

I agree.

**Feldman J.A.:**

I agree.

*Appeal dismissed.*

#### Footnotes

- <sup>1</sup> I shall refer to Regal Constellation Hotel Limited as “the Hotel” throughout these reasons.
- <sup>2</sup> See, for example, the Alberta *Land Titles Act* R.S.A. 2000, c. L-4, s. 191, which precludes registration of a judgment or order in the absence of consent, an undertaking not to appeal, or proof that all appeal rights have expired.
- <sup>3</sup> Except certain encumbrances that must remain on title by virtue of the *Land Titles Act*.
- <sup>4</sup> For instance, where an instrument would have been absolutely void if unregistered and rectification is ordered, a person suffering by the rectification is entitled to compensation as provided: s. 57(13). Persons fraudulently procuring an entry on the registry may be convicted of an offence under the Act, and where an innocent purchaser has acquired a charge or interest in the lands while the wrongful entry was subsisting on the lands the land registrar may revest the lands in the rightful owner but subject to the interests so acquired: ss 155-157.

# TAB 3

1999 CarswellOnt 3641  
Ontario Superior Court of Justice [Commercial List]

Skyepharma PLC v. Hyal Pharmaceutical Corp.

1999 CarswellOnt 3641, [1999] O.J. No. 4300, [2000] B.P.I.R. 531, 12 C.B.R. (4th) 87, 92 A.C.W.S. (3d) 455, 96  
O.T.C. 172

**Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant**

Farley J.

Heard: October 20, 1999  
Judgment: October 24, 1999  
Docket: 99-CL-3479

Counsel: *Steven Golick* and *Robin Schwill*, for Receivers of Hyal Pharmaceutical Corp., Pricewaterhouse Coopers  
Incorporation.

*Berl Nadler* and *James Doris*, for Skyepharma PLC.

*S.L. Secord*, for Cangene Corporation.

*Robert J. Chadwick*, for Bioglan Pharma PLC.

Subject: Insolvency; Corporate and Commercial

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

### Receivers --- Conduct and liability of receiver — Duties

Receiver obtained order directing process for purchase and sale of assets and shares of debtor, including authorization of exclusive parties permitted to make offers — Receiver accepted offer from one of two exclusive parties — Receiver brought motion for order approving agreement of purchase and sale, for issuance of vesting order to effect closing of transaction, and for grant of authority to take steps necessary to complete transaction — Rejected exclusive party and company not selected as exclusive party raised objections to granting motion — Motion granted — Receiver acted properly in accepting agreement — Receiver took reasonable time to analyse offers — Deadline for making offers to receiver was not also deadline for receiver to sign accepted agreement — Creditors had priority over shareholders in liquidation process and offers made to receiver not obligated to include favourable offer to shareholders — Rejected offer had unacceptable conditions that prevented it from being selected by receiver — Receiver's failure to reveal potential claim for damages to rejected bidder did not materially prejudice bidder — Company not selected as exclusive party voluntarily exited from competition and chose not to attempt to re-enter.

## Table of Authorities

### Cases considered by *Farley J.*:

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

*Central Capital Corp., Re* (1996), 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88, 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.*) 88 O.A.C. 161 (Ont. C.A.) — applied

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

*Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) — applied

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

MOTION by receiver for order approving agreement of purchase and sale of debtor's assets and shares.

### *Farley J.*:

## Endorsement

1 PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to understand that Ground, J. did not have available to him the Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context — as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

2 Ground J. ordered that the Confidential Supplement to the Receiver's Third Report be distributed forthwith to the service list. It appears this treatment was also accorded the Confidential Supplement to the Fourth Report. These Confidential Supplements contained specific details of the bids, discussions and the analysis of same by the Receiver and were intended to be sealed pending the completion of the sale process at which time such material would be unsealed. If the bid, auction or other sale process were to be reopened, then while from one aspect the potential bidders would all be on an equal footing, knowing what everyone's then present position was as of the Receiver's motion before Ground J., but from a practical point of view, one or more of the bidders would be put at a disadvantage since the Receiver was presenting what had been advanced as "the best offer" (at least to just before the subject motion) whereas now the others would know what they had as a realistic target. The best offer would have to be improved from a procedural point of view. Conceivably, Skye has shot its bolt completely; Bioglan on the other hand, in effect, declined to put its "best intermediate offer" forward, anticipating that it would be favoured with an opportunity to negotiate further with the Receiver and it now appears that it is willing to up the ante. The Receiver's views of the present offers is now known which would hinder its negotiating ability for a future deal in this case. Unfortunately, this engenders the situation of an unruly courthouse auction with some parties having advantages and others disadvantages in varying degrees, something which is the very opposite of what was advocated in *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.) as desirable.

3 Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a receiver, the court should place a great deal of confidence in the receiver's expert business judgement particularly where the assets (as here) are "unusual" and the process used to sell these is complex. In order to support the role of any receiver and to avoid commercial chaos in receivership sales, it is extremely desirable that perspective participants in the sale process know that a court will not likely interfere with a receiver's dealings to sell to the selected participant and that the selected participant have the confidence that it will not be back-doored in some way. See *Royal Bank v. Soundair* at pp 5, 9-10, 12 and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.). The court should assume that the receiver has acted properly unless the contrary is clearly demonstrated: see *Royal Bank v. Soundair* of pp.5 and 11. Specifically the court's duty is to consider as per *Royal Bank v. Soundair* at p.6:

- (a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;
- (b) the interests of all parties;
- (c) the efficacy and integrity of the process by which the receiver obtained offers; and

(d) whether the working out of the process was unfair.

4 As to the providence of the sale, a receiver's conduct is to be reviewed in light of the (objective) information a receiver had and not with the benefit of hindsight: *Royal Bank v. Soundair* at p.7. A receiver's duty is not to obtain the best possible price but to do everything reasonably possible in the circumstances with a view to obtaining the best price: see *Greyvest Leasing Inc. v. Merkur* (1994), 8 P.P.S.A.C. (2d) 203 (Ont. Gen. Div.) at para. 45. Other offers are irrelevant unless they demonstrate that the price in the proposed sale was so unreasonably low that it shows the receiver as acting improvidently in accepting it. It is the receiver's sale not the sale by the court: *Royal Bank v. Soundair* at pp. 9-10.

5 In deciding to accept an offer, a receiver is entitled to prefer a bird in the hand to two in the bush. The receiver, after a reasonable analysis of the risks, advantages and disadvantages of each offer (or indication of interest if only advanced that far) may accept an unconditional offer rather than risk delay or jeopardize closing due to conditions which are beyond the receiver's control. Furthermore, the receiver is obviously reasonable in preferring any unconditional offer to a conditional offer: See *Crown Trust Co. v. Rosenberg* at p. 107 where Anderson J. stated:

The proposition that conditional offers would be considered equally with unconditional offers is so palpably ridiculous commercially that it is difficult to credit that any sensible businessman would say it, or if said, that any sensible businessman would accept it.

See also *Royal Bank v. Soundair* at p. 8. Obviously if there are conditions in offers, they must be analyzed by the receiver to determine whether they are within the receiver's control or if they appear to be in the circumstances as minor or very likely to be fulfilled. This involves the game theory known as mini-max where the alternatives are gridded with a view to maximizing the reward at the same time as minimizing the risk. Size and certainty does matter.

6 Although the interests of the debtor and purchaser are also relevant, on a sale of assets, the receiver's primary concern is to protect the interests of the debtor's creditors. Where the debtor cannot meet statutory solvency requirements, then in accord with the Plimsoil line philosophy, the shareholders are not entitled to receive payments in priority or partial priority to the creditors. Shareholders are not creditors and in a liquidation, shareholders rank below the creditors. See *Royal Bank v. Soundair* at p. 12 and *Re Central Capital Corp.* (1996), 38 C.B.R. (3d) 1 (Ont. C.A.) at pp.31-41 (per Weiler, J.A.) and pp. 50-53 (Laskin, J.A.).

7 Provided a receiver has acted reasonably, prudently and not arbitrarily, a court should not sit as in an appeal from a receiver's decision, reviewed in detail every element of the procedure by which the receiver made the decision (so long as that procedure fits with the authorized process specified by the court if a specific order to that affect has been issued). To do so would be futile and duplicative. It would emasculate the role of the receiver and make it almost inevitable that the final negotiation of every sale would take place on the motion for approval. See *Royal Bank v. Soundair* at p. 14 and *Crown Trust Co. v. Rosenberg* at p. 109.

8 Unsuccessful bidders have no standing to challenge a receiver's motion to approve the sale to another candidate. They have no legal or proprietary right as technically they are not affected by the order. They have no interest in the fundamental question of whether the court's approval is in the best interest of the parties directly involved. See *Crown Trust Co. v. Rosenberg* at pp. 114-119 and *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) at pp. 30-31. The corollary of this is that no weight should be given to the support offered by a creditor *qua* creditor as to its offer to purchase the assets.



9 It appears to me that on first blush the Receiver here conducted itself appropriately in all regards as to the foregoing concerns. However, before confirming that interim conclusion, I will take into account the objections of Bioglan and Cangene as they have shoehorned into this approval motion. I note that Skye and Cangene are substantial creditors of Hyal and this indebtedness preceded the receivership; Bioglan has acquired by assignment since the receivership a relatively modest debt of approximately \$40,000.

10 On September 28, 1999, I granted an order with respect to the sale process from thereon in. In para. 3 of the order there is reference to October 8, 1999 but it appears to me that this is obviously an error and should be the same October 6, 1999 as in para. 2 as in my endorsement I felt "the deadline should not be 5:00 p.m. Friday, October 8/99 but rather 5:00 p.m. Wednesday, October 6/99." Bioglan had not been as forthcoming as Skye and Cangene and it was the Receiver's considered opinion (which I felt was well grounded and therefore accepted) that the Receiver should negotiate with the Exclusive Parties as identified to the court in the Confidential Supplement to the Third Report (with Skye and Cangene as named in the Confidential Supplement). These negotiations were to be with a view to attempting to finalizing with one of these two parties an agreement which the Receiver could recommend to the court. While perhaps inelegantly phrased, the deadline of 5:00 p.m. on October 6, 1999 was as to the offerers putting forward their best and irrevocable offer as to one or more of the combinations and permutations available. Both Cangene and Skye submitted their offers (Cangene one deal and Skye three independent alternatives — all four of which were detailed and complex) immediately before the 5:00 p.m. October 6, 1999 time. It would not seem to me that either of them was under a misimpression as to what was to be accomplished by that time. It would be unreasonable from every business angle to expect that the Receiver would have to rather instantly choose in minutes and therefore without the benefit of reflection as to which of the proposals would be the best choice for acceptance subject to court approval; the Receiver was merely stating the obvious in para. 10 of its Confidential Supplement to the Fourth Report. Para. 31 should not be interpreted as completely boxing in the Receiver; the Receiver could reject all three Skye offers if it felt that appropriate. The Receiver must have a reasonable period to do its analysis and it did (with the intervening Thanksgiving weekend) by October 13, 1999. In my view, it is reasonable and obvious in the context of the receivership and the various proceedings before this court that the finalizing of the agreement by 5:00 p.m. October 6, 1999 did not mean that the Receiver had to select its choice and execute (in the sense of "sign") the agreement by that deadline. Rather the reasonable interpretation of that deadline is as set out above. Bioglan, not being one of the selected and authorized Exclusive Parties did not, of course, present any offer. It had not got over the September 21, 1999 hurdle as a result of the Receiver's reasonable analysis of its proposal before that date. The September 28, 1999 order, authorized and directed the Receiver to go with the two parties which looked as if they were the best bets as candidates to come up with the most favourable deal. As for the question of "realizing the superior value inherent in the respective Exclusive Parties' offers", when viewed in context brings into play the aforesaid concerns about creditors having priority over shareholders and that in a liquidation the creditors must be paid in full before any return to the shareholders can be considered. It was possible that the exclusive parties or one of them may have made an offer which would have discharged all debts and in an "attached" share deal offered something to the shareholders, especially in light of the significant tax losses in Hyal. That did not happen. No one could force the Exclusive Parties to make such a favourable offer if they chose not to. The Receiver operated properly in selecting the Skye C Plan as the most appropriate one in light of the short fall in the total debts. I note that a share deal over and above the Skye C Plan has not been ruled out for future negotiations as such would not be in conflict with that recommended deal and if structured appropriately. Bioglan in my view has in essence voluntarily exited the race and notwithstanding that it could have made a further (and better) offer even in light of the September 28, 1999 order, it chose not to attempt to re-enter the race.

11 I would also note that in the fact situation of this case where Skye is such a substantial creditor of Hyal that the \$1 million letter of credit it proposes as a full indemnity as to any applicable clawback appears reasonable in the circumstances as what we are truly looking at is this indemnity to protect the minority creditors. Thus Skye's substantial creditor position in essence supplements the letter of credit amount (or substitutes for a part of the full portion).

12 It is obvious that it would only have been appropriate for the Receiver to have gone back to the well (and canvassed Bioglan) if none of the offers from the Exclusive Parties had been acceptable. However the Skye Plan C one was acceptable and has been recommended by the Receiver for approval by this court.

13 As for Cangene, it has submitted that the Receiver has misunderstood one of its conditions. I note that the Receiver noted that it felt that Cangene may have made an error in too hastily composing its offer. However, the Cangene offer had other unacceptable conditions which would prevent it on the Receiver's analysis from being the Receiver's first choice.

14 Then Cangene submitted that the Receiver erred in not revealing the Nadler letter which threatened a claim for damages in certain circumstances. Clearly it would have been preferable for the Receiver to have made complete disclosure of such a significant contingent liability. However, it seems to me that Cangene can scarcely claim that it was disadvantaged since it was previously directly informed by Mr. Nadler as counsel for Skye of their counterclaim. There being no material prejudice to Cangene, I do not see that this results in the Receiver having blotted its copybook so badly as to taint the process so that it is irretrievably flawed.

15 I therefore see no impediment, and every reason, to approve the Skye Plan C deal and I understand that, notwithstanding the (interim) negative news from the United States FDA process, Skye is prepared to close forthwith. The Receiver's recommendation as to the Skye Plan C is accepted and I approve that transaction.

16 It does not appear that the other aspects of the motion were intended to be dealt with on the Wednesday, October 20, 1999 hearing date. They should be rescheduled at a convenient date.

17 Order to issue accordingly.

*Motion granted.*

# TAB 4

2010 ONCA 340  
Ontario Court of Appeal

National Trust Co. v. 1117387 Ontario Inc.

2010 CarswellOnt 2869, 2010 ONCA 340, 188 A.C.W.S. (3d) 332, 262 O.A.C. 118, 52 C.E.L.R. (3d) 163, 67 C.B.R. (5th) 204

**1117387 Ontario Inc. and Antonios ("Tony") Ishac (Applicants / Appellants / Respondents by way of cross-appeal) and National Trust Company (Respondent / Respondent / Appellant by way of cross-appeal)**

National Trust Company (Applicant / Respondent / Appellant by way of cross-appeal) and 1117387 Ontario Inc. and Antonios ("Tony") Ishac (Respondents / Appellants / Respondents by way of cross-appeal)

M.J. Moldaver, Russell Juriansz, Gloria Epstein JJ.A.

Heard: November 30, 2009  
Judgment: May 10, 2010\*\*\*  
Docket: CA C49609, C50315

Proceedings: additional reasons at *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 ONCA 492, 2010 CarswellOnt 4839 (Ont. C.A.); reversing in part *National Trust Co. v. 1117387 Ontario Inc.* (2008), 48 C.B.R. (5th) 95, 2008 CarswellOnt 6350 (Ont. S.C.J.)

Counsel: Earl A. Cherniak, Q.C., Brian Radnoff for Appellants, 1117387 Ontario Inc., Antonios Ishac  
John P. O'Toole for Respondent, National Trust Company  
R. Aaron Rubinoff, Joël M. Dubois for Respondent, Deloitte & Touche Inc.

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

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## **Headnote**

### **Bankruptcy and insolvency --- Bankruptcy and receiving orders — Miscellaneous**

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

### **Debtors and creditors --- Receivers — General principles — Miscellaneous principles**

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

### **Debtors and creditors --- Receivers — Actions by and against receiver — Actions against receiver**

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

### **Real property --- Mortgages — Sale — Contractual power of sale — Miscellaneous**

Creditor was unable to collect debt secured by mortgage on commercial property — Creditor served notice of intent to enforce security, although parties entered into forbearance agreement — Directing mind of debtor was also director of N Inc., which held second mortgage — Debtor corporation was made subject to receiver as per Bankruptcy and Insolvency Act — Land subject to mortgage was contaminated by actions of vendor — Disagreement regarding remediation of environmental damage was arbitrated, with award being vested in receiver as well as any right of action against vendor — Receiver sought to sell property to creditor — Receiver and mortgagee brought motions for approval of report and

for sale of land to creditor, and directing mind of debtor brought motion to allow action against receiver and continue action against vendor of property — Motion of mortgagee and receiver granted, motion of debtor allowed in part — Mortgagor appealed and mortgagee cross-appealed — Appeal dismissed and cross-appeal allowed, setting aside order granting leave to sue receiver — Motion judge's decision to approve sale on basis of receiver's recommendation was unassailable — However, motion judge used wrong test in granting leave to commence action against receiver.

## Table of Authorities

### Cases considered by *Gloria Epstein J.A.*:

*Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98, 1993 CarswellOnt 249 (Ont. Gen. Div.) — considered

*Baud Corp., N.V. v. Brook* (1978), 1978 CarswellAlta 268, 1978 CarswellAlta 302, [1979] 1 S.C.R. 633, [1978] 6 W.W.R. 301, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.*) 89 D.L.R. (3d) 1, (sub nom. *Asamera Oil Corp. v. Sea Oil & General Corp.*) 23 N.R. 181, 12 A.R. 271, 5 B.L.R. 225 (S.C.C.) — considered

*Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 1986 CarswellOnt 235, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note) (Ont. H.C.) — followed

*Dusk v. Malone* (2003), 167 O.A.C. 333, 2003 CarswellOnt 5304 (Ont. C.A.) — considered

*Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership* (2008), 2008 ONCA 463, 2008 CarswellOnt 3475, 237 O.A.C. 81, 90 O.R. (3d) 561 (Ont. C.A.) — followed

*National Trust Co. v. 1117387 Ontario Inc.* (2003), 2003 CarswellOnt 3881, 6 P.P.S.A.C. (3d) 301 (Ont. S.C.J.) — referred to

*R. v. Palmer* (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.) — referred to

*R. v. Rajaeefard* (1996), 1996 CarswellOnt 73, 46 C.R. (4th) 111, 104 C.C.C. (3d) 225, 87 O.A.C. 356, 27 O.R. (3d) 323 (Ont. C.A.) — followed

*Regal Constellation Hotel Ltd., Re* (2004), 23 R.P.R. (4th) 64, 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, (sub nom. *Regal Constellation Hotel Ltd. (Receivership), Re*) 188 O.A.C. 97, 71 O.R. (3d) 355, (sub nom. *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of)*) 242 D.L.R. (4th) 689 (Ont. C.A.) — followed

*Royal Bank v. Rose Park Wellesley Investments Ltd.* (1995), 1995 CarswellOnt 3701 (Ont. Gen. Div. [Commercial List]) — followed

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

*Selkirk, Re* (1986), 1986 CarswellOnt 172, 58 C.B.R. (N.S.) 245 (Ont. S.C.) — referred to

*Semelhago v. Paramadevan* (1996), 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415 (S.C.C.) — considered

APPEAL by mortgagor and CROSS-APPEAL by mortgagee from judgment reported at *National Trust Co. v. 1117387 Ontario Inc.* (2008), 48 C.B.R. (5th) 95, 2008 CarswellOnt 6350 (Ont. S.C.J.).

**Gloria Epstein J.A.:**

### Overview

1 In this action, the mortgagor and guarantor of the mortgage debt challenge the fairness of the conduct of the court-appointed receiver appointed by the mortgagee under the terms of the mortgage in relation to its actions pertaining to the mortgaged property.

2 The appellant, 1117387 Ontario Inc. (the “company”), owns property (the “property”) in Bells Corners, Ottawa. The property contains a 12,000 square foot building divided into two restaurant facilities. The appellant, Antonios Ishac, is the chief executive officer of the company. He personally guaranteed a portion of the first mortgage on the property given by the respondent, the National Trust Company.

3 In 2001, contamination was discovered on the property. Petro-Canada, the owner of the adjoining land, admitted responsibility for the contamination. Ultimately the parties entered into an agreement (the “remediation agreement”) under which Petro-Canada would pay for the remediation of the property and for other losses the company suffered as a result of the contamination. The remediation did not proceed as planned and the company sued to enforce Petro-Canada’s obligations under the remediation agreement and for damages.

4 By this time, the mortgage had fallen into arrears and National Trust obtained a court order appointing Deloitte & Touche as receiver and manager. Eventually, the receiver was given authority over the claim against Petro-Canada and gave National Trust permission to try to resolve the matter directly with Petro-Canada. In September 2005, these two parties negotiated an agreement (the “settlement agreement”) whereby the damage claim would be settled, the property sold to Petro-Canada, and the company’s mortgage debt partially recovered and partially forgiven. The receiver issued a report recommending the sale and settlement and moved for court approval.

5 The appellants appeal the motions judge’s order of October 10, 2008, in which, among other things, he approved the report and thereby the sale of the property to, and the settlement of the damage claim with, Petro-Canada. The appellants’ primary contentions are that the property will be sold for less than the “best price” that could have been obtained, and that the settlement is improvident because it would settle the company’s claims for a fraction of its actual entitlement under the remediation agreement. The receiver cross-appeals that part of the order granting the appellants leave to commence an action against the receiver based on its handling of the sale and settlement. National Trust adopts and supports the receiver’s position in the appeal from the judicial approval of the sale and settlement.

6 The appellants are clearly unhappy with how matters pertaining to the property have played out. However, the issues raised on appeal involve an analysis of the motions judge's findings of fact applied to well-established legal principles applicable to the exercise of his discretion. In my view, this analysis discloses no reviewable error on the part of the motions judge. Accordingly, I would dismiss the appeal. For the reasons set out in paras. 93 and 94, I would allow the cross-appeal.

7 The appellants also move to introduce fresh evidence concerning events that took place during the period that the decision was under reserve by the motions judge. While, in the particular circumstances of this case, I would admit the fresh evidence, in my view, it does not assist the appellants.

## **Facts**

8 The company purchased the property in 1995, in part with money borrowed from National Trust. The loan was secured by a first mortgage in the amount of \$650,000, registered against the property. In 1997, additional funds were advanced for renovations and the mortgage was increased to \$905,000. This work was necessary as deficiencies in the building and equipment were interfering with the company's ability to attract sufficient rental income to keep the mortgage in good standing.

9 The mortgage fell into arrears in 1999 after the renovations were completed. As a result of these difficulties, National Trust exercised rights under the mortgage that allowed it to appoint an agent to collect and remit rents. At that time, the approximate principal balance of the mortgage was \$884,000.

10 In February 2001, National Trust served a notice of intention to enforce security. On October 30, 2001, the parties entered into a six-month forbearance agreement, crystallizing the obligations of the mortgagor and mortgagee as of that date. By agreement, for the purposes of the forbearance agreement, the debt was fixed at \$1,095,909.89, with the mortgage maturing on April 30, 2002.

11 The property had not been properly maintained and the company was having difficulty attracting sufficient rent to meet expenses. As a result, the company decided to sell the property. The company received a conditional offer of \$1,450,000 with a closing date of February 1, 2002. The offer was conditional, in part, on a satisfactory environmental assessment. This assessment, completed in December 2001, demonstrated that the property was contaminated by petroleum hydrocarbons that had escaped from a neighbouring property owned by Petro-Canada. When the purchaser learned of the contamination, the sale was lost.

12 For some time after the contamination was found, commercial tenants continued to lease the property. Under the terms of the forbearance agreement the company agreed to lease the property to Vox Lounge. In March 2002, Vox renewed its lease for five years but only for part of the premises. In April 2002, the remainder of the building was leased to Dianne Dang, carrying on business as Buffet Place. Vox vacated in October 2003 and Ms. Dang, despite having been granted several reductions in rent, left in March 2004. Since then, the building has been empty and has fallen into disrepair.

13 The parties agreed to arbitrate the company's claims arising from Petro-Canada's acceptance of responsibility for the contamination. On February 3, 2003, just prior to the arbitration, the parties entered into the remediation agreement, the terms



of which are as follows:

1. [Petro-Canada] will proceed with the remediation action plan set out in its report at a time convenient to both [the company] and [Petro-Canada's] consultants, but in any event not later than June, 2003, for the commencement of such work;
2. All work and investigations will be carried out in a manner so as to minimize to the greatest extent possible any interference with [the company's] lands and the ongoing operations by its tenants thereon;
3. The remediation of [the company's] lands is to be at no cost whatsoever to [the company] and all reasonable costs incurred by [the company] in the context of, or as a result of, the clean-up will be paid by [Petro-Canada];
4. Where the remediation interferes with the ongoing tenant businesses such that the tenant is required to either vacate the premises or is justified in not paying full rental during such remediation operations, then [Petro-Canada] will reimburse [the company] for any reasonable loss of tenant revenue including all costs incurred in obtaining alternative tenants, if a tenant is lost as a result of ongoing remediation operations;
5. [Petro-Canada] will pay [the company's] reasonable consultant costs incurred by its consultants in supervising the remediation and testing to determine that appropriate remediation levels have been reached;
6. All work forces and equipment will be employed in such a manner and in such a way as to minimize the visual impact of the ongoing clean-up operation to the greatest extent possible.

14 For the purposes of the arbitration, the parties agreed that the fair value of the property was \$1,735,000 based on a compromise between appraisals prepared by the appellants' valuator, Ron Juteau, and the receiver's valuator, David Atlin.

15 The arbitration continued on issues unresolved in the remediation agreement. On March 10, 2003, the arbitrator, the Honourable Mr. Rosenberg, awarded the company \$208,200 to compensate for potential devaluation of the property due to stigma and \$100,000 for future development costs. Petro-Canada paid the total award of \$308,200 to the company.

16 On June 19, 2003, Mackinnon J., on consent of all parties, appointed Deloitte & Touche as the receiver over all matters relating to the property except for Petro-Canada's remediation obligations. These were left to the company.

17 In August 2003, because Petro-Canada had not started remediation in accordance with the agreed-upon schedule, the company sued Petro-Canada for breach of the remediation agreement. This claim was dismissed for want of prosecution and subsequently reinstated at the request of the appellants.

18 Various disputes arose between the parties over the remediation and related issues. As a result, by order dated October 9, 2003, Morin J. [*National Trust Co. v. 1117387 Ontario Inc.*, 2003 CarswellOnt 3881 (Ont. S.C.J.)] transferred the claim against Petro-Canada to the receiver and ordered the company to pay the \$308,200 it received from Petro-Canada to the receiver on the basis that this money formed part of National Trust's security. The company has not complied with that order.

19 On November 6, 2003, the receiver listed the property for sale at a price of \$1,380,000.

20 The remediation finally started in December 2003. It was anticipated that the process would take approximately three months. Exterior remediation was completed in March 2004. However, contamination was discovered under the building, necessitating excavation through the floor of the building and underpinning of the structure. This interior excavation started in August 2004 but was delayed later in the month as a result of the Ministry of Labour's concern about work-safety conditions. Excavation resumed on September 20 but was again suspended a month later over a dispute about which Ministry of Environment guidelines applied.

21 The clean-up came to a complete halt in December 2004. The principal dispute at that time involved whether the building had to be demolished to facilitate remediation or whether the structure could remain in place while remediation - more costly remediation - could be carried out.

22 On December 8, 2004, the receiver wrote to Petro-Canada demanding that it complete the remediation work and pay the damages owed under the remediation agreement. The receiver sought payment of \$488,000 in compensation for lost revenues, property taxes and insurance incurred as a result of the remediation delay. The receiver also took the position that damages for ongoing delay were accruing at \$35,000 per month. Petro-Canada took the position that these claims were "completely unrealistic".

23 On February 10, 2005, a meeting was held at Mr. Ishac's request. Representatives of National Trust and the receiver concluded that their differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties. Beginning in February 2005, with the concurrence of the receiver, direct settlement discussions began between National Trust and Petro-Canada.

24 By August 31, 2005, the outstanding amount owed under the mortgage was just over \$2,000,000. In September 2005, the settlement agreement was reached between National Trust and Petro-Canada.

25 The receiver provided three reports to the court; two within the first six months of the receivership. The third was provided on November 29, 2005. It was in this report that the receiver recommended the approval of the settlement agreement that contained the following terms:

- 1) Petro-Canada would purchase the property from National Trust for \$1,187,500.
- 2) Petro-Canada would demolish the building and complete the remediation of the property in accordance with current Ministry of the Environment standards.
- 3) Petro-Canada would pay the receiver an additional \$200,000 in full satisfaction of its claims for lost rent and delay costs in the remediation.
- 4) The remaining mortgage debt owed by the company and Mr. Ishac to National Trust, approximately \$600,000, would be forgiven.
- 5) Petro-Canada would offer the property to the company or its nominee at fair market value once the remediation has been completed.<sup>1</sup>

26 The report also states that the receiver will not seek to recover the \$308,200 that Morin J. ordered the company to pay to the receiver.

27 With the exception of the appellants, all parties supported the proposed settlement agreement. This state of affairs generated three motions before the motions judge. The appellants sought orders prohibiting the sale of the property, permitting the appellants to prosecute the action against Petro-Canada and for leave to commence an action against the receiver arising out of the administration of the receivership. As an alternative, the appellants sought an order replacing the receiver and instructing the new receiver to prosecute all claims of the appellants “with dispatch”. National Trust brought a cross-motion to approve the settlement agreement. The receiver brought a cross-motion for the same relief and for approval of its third report.

### **The Reasons of the Motions Judge**

28 The motions judge approved the settlement agreement on the basis that the materials provided were sufficient to determine that the settlement was reasonable. He did not find it necessary to address the appellants’ alternative request to replace the receiver.

29 Specifically, the motions judge found that the value proposed by the respondents for Petro-Canada’s purchase of the land was reasonable. There was substantial evidence before the court, expert and otherwise, concerning the value of the property at the relevant times. The motions judge expressed specific concerns about the evidence upon which the appellants relied. He ultimately concluded that he preferred the receiver’s evidence that the property, *in a completely remediated state*, was properly valued between \$600,000 and \$1,200,000. Based on that finding, the motions judge held that the price Petro-Canada agreed to pay for the property actually exceeded its value.

30 In terms of the other major contentious area, the claim against Petro-Canada for damages resulting from the contamination, there were two issues. First, the parties were divided over who should bear the responsibility for the loss of revenue and additional costs associated with the delay in the remediation work. Second, the appellants argued before the motions judge, as they did before this court, that the remediation agreement required Petro-Canada to remediate the property despite the difficulties arising from excavating beneath the floor of the building.

31 With respect to delay, the motions judge noted that Petro-Canada, citing difficulties in obtaining access to the property and in obtaining permission to remove soil through the building floor, blamed the company and the receiver for the delays. The receiver blamed the company for interfering with both the commencement and the scope of the remediation work. The appellants blamed the receiver for generally failing to take all proper steps to protect their rights under the remediation agreement. The motions judge did not make a direct finding with regard to the ultimate cause of the delay.

32 In terms of complexity of the remediation work, the discovery of contamination under the building gave rise to a dispute over how to deal with it. After reviewing the evidence and arguments on that issue, the motions judge concluded that the building was beyond financially reasonable repair and had to be demolished to effect remediation of the contamination that had migrated through much of the property.

33 Against the background of the recommendations of the receiver in its third report, the parties' submissions, his findings, and the applicable law, the motions judge concluded that the process followed by the receiver in the complicated circumstances leading up to the request for approval of the sale and settlement was prudent and that the terms of sale and settlement recommended by the receiver were reasonable.

34 Having approved the settlement agreement, the motions judge dismissed the appellants' motion for an order returning the claim against Petro-Canada to their control, and declared the claims to be extinguished by the settlement agreement.

35 However, the motions judge did, somewhat curiously, grant the appellants leave to commence or continue proceedings against the receiver for "negligence or a failure to act with a fiduciary's due regard to the interests of a debtor" on the basis that if the allegations contained in Mr. Ishac's affidavits were proven, it would not be "perfectly clear that there was no foundation for the claim or the action is frivolous and vexatious". He made clear that he was "not deciding the merits of the owner's claims that the receiver failed to win all of the benefits the owner believes he could have won from Petro-Canada", despite his explicit finding that the "settlement is reasonable."

#### **The Application to Introduce Fresh Evidence**

36 The proposed fresh evidence discloses the following.

37 The motions were argued over a period of four days between November 21, 2006 and April 5, 2007, at which point, the motions judge took the matter under reserve. He released his decision on October 10, 2008.

38 On May 28, 2008, counsel for the receiver unilaterally contacted the motions judge requesting that he expedite the release of his decision. On July 15, 2008, a meeting among counsel and the motions judge took place in the motions judge's chambers. Several months later, counsel for the receiver, again unilaterally, contacted the motions judge and the Regional Senior Justice in another attempt to expedite the release of the decision. Shortly thereafter, the reasons were released.

39 At the meeting in his chambers, the motions judge indicated that he was not prepared to approve the settlement. Then, eighteen months following argument and three months following the chambers meeting, the motions judge released his decision in which he approved the recommended settlement and, at the same time, gave leave to the appellants to commence an action against the receiver.

40 Counsel for the appellants submits that the proposed fresh evidence will demonstrate that the receiver brought pressure to bear upon the motions judge to release his decision. Relying on this court's decisions in *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (Ont. C.A.), at 325, and in *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership* (2008), 90 O.R. (3d) 561 (Ont. C.A.), at 571, counsel for the appellants argues that this evidence should be admitted as it demonstrates that the judicial process was fundamentally unfair and brings the administration of justice into disrepute.

41 I agree with the appellants that in these circumstances the fresh evidence ought to be admitted. The authorities the appellants cite make it clear that where the proposed fresh evidence raises issues of the validity of the process of the hearing, the interests of justice require its admission. In such cases, the traditional criteria for the admission of fresh evidence, found in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), do not apply. Here, the issues raised in the proposed fresh evidence implicate the integrity of the administration of justice.

## Issues

42 The issues raised in the appeal and cross-appeal can be grouped into the following two main categories:

1. Whether the motions judge erred in approving the sale of the property to Petro-Canada and the settlement of the company's claim for breach of the remediation agreement.
2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.

## Standard of Appellate Review of Orders Approving Receivers' Reports

43 The principles to be applied in reviewing a sale or proposed sale by a court-appointed receiver are set out in this Court's decision in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.) [hereinafter *HSBC*]. A court-appointed receiver has a fiduciary duty to act honestly and fairly on behalf of all who have an interest in the debtor's property. The receiver, as an officer of the court, is obliged to make full and fair disclosure to the court in all of its applications: *HSBC* at para. 26. The court should rely on the receiver's expertise in arriving at its recommendations and is entitled to assume that the receiver is acting properly unless the contrary is clearly shown.

44 Particularly where, as in this case, the receiver is dealing with an "unusual or difficult asset", the court will only interfere in special circumstances: *HSBC* at para. 23. While the court must carefully scrutinize the procedure the receiver followed, it must be remembered that the receiver must act "with meticulous correctness, but not to a standard of perfection": *HSBC* at para. 26.

45 Finally, I note that the orders appealed from are discretionary in nature. As in the case of all discretionary decisions, this court will only interfere where the judge has erred in law, seriously misapprehended the evidence, or exercised discretion based on irrelevant or erroneous considerations or failed to give any or sufficient weight to relevant considerations: *HSBC* at para. 22.

46 In *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.), at p. 6, four factors are identified as considerations for the court in considering "whether a receiver who has sold a property acted properly". In my view, with appropriate modifications, the same factors can be applied in considering the providence of this settlement, where the values of both a property and a claim for damages are in issue:

- (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 sale process.

47 Finally, at p. 7., *Soundair Corp.* affirmed the principle first stated in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), that a court “ought not sit as on appeal from the decision of the receiver, reviewing in minute detail every element of the process by which the decision is reached.”

## **Analysis**

### ***1. Whether the motion judge erred in approving the sale of the property to Petro-Canada and the settlement of the company’s claim for breach of the remediation agreement.***

#### ***A. The Receiver’s Efforts to Obtain a Good Price***

48 I turn to the first *Soundair* factor, whether the receiver has made sufficient efforts to obtain the best price, both for the property and the claim against Petro-Canada. Counsel for the appellants submits that the settlement agreement substantially undervalues not only the property but also the company’s claim arising out of Petro-Canada’s breach of the remediation agreement. What the receiver should have done, say the appellants, is force Petro-Canada to honour its obligations under the remediation agreement, both in terms of the remediation itself and the compensation that it agreed to pay as a result of the contamination, and then sell the remediated property at fair market value. This course of action, according to the appellants, would have resulted in National Trust’s recovering its mortgage debt, with leftover equity value for the appellants. The motions judge’s approval of the settlement agreement as reasonable, according to the appellants, is unsupportable. Rather, they argue, the settlement agreement is improvident.

49 I disagree. In my view, the motions judge’s conclusion that the receiver met its obligations, both in terms of the value of both components of the proposed settlement and in terms of the process by which it was arrived at, is amply supported by the application of the relevant legal principles to the motions judge’s findings of fact.

50 The law requires the receiver to pursue the debtor’s rights. It is up to the receiver to carefully consider the available information and use its expertise to determine how to maximize the value of those rights. In relation to a cause of action, this responsibility can be met by settling the matter as long as the proposed compromise is commercially reasonable.

#### **i. The sale of the property**

51 In terms of the proposed sale of the property, the appellants take issue with the fact that the motions judge approved the receiver’s recommendation of a sale at a price, which assumed the land was remediated, but was determined when the property was in an unremediated state. They contend that the receiver should have sought specific performance of Petro-Canada’s obligations to remediate the property, or damages in the alternative, and then sold the property for fair market value in a remediated state.

52 I do not accept that argument.

53 First, it is highly unlikely that the receiver would have been successful in obtaining an order against Petro-Canada for specific performance of its remediation obligations. As the considerations set out in *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.) at para. 14, demonstrate, the principles of specific performance are mainly related to the transfer of property (either personal or real) and even then only when the property is unique in some way. As Estey J. wrote in *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.), at p. 668, “[b]efore a plaintiff can rely on a claim to specific performance...some fair, real and substantial justification for his claim to performance must be found.” There was nothing unique about this property. Indeed, the only reason the company wanted it remediated was for the purpose of immediately selling it. There is no justification for forcing Petro-Canada to go to the expense of remediating the land, when the appellants’ only interest is in the value of the land rather than the land itself.

54 The alternative remedy for breach of contract is damages such that the affected party is put in a position as though the contract had been fulfilled. To establish these so-called “expectation damages”, the appellants relied on an affidavit of Philip Augustine, an experienced civil litigator.

55 Counsel for the appellants argues that the damage claim, (putting aside for the moment the claim for loss of rental income) is either \$1,735,000, using the “reduction in value” method, or \$3,980,468, using the “cost of performance” method. The “cost of performance” method of valuing damages from breach of contract, which Augustine takes to include the cost of destroying the building, remediating the property, and reconstructing the building, raises substantially the same issues as specific performance. I have already explained why this basis for damages is unavailable to the appellants. Since the purpose of damages is to recover value that the appellants would have obtained under the contract, and since it is known that they intended to sell the property in order to pay their mortgage debt, the proper valuation method of damages is the “reduction in value” method. See Swan, A., *Canadian Contract Law*, 2nd ed., (Markham: LexisNexis Canada, 2009), at pp. 370 - 379.

56 The question of the value of the land in a pristine state is critical for measuring the reduction in value of the property caused by the contamination. The appellants are wrong, however, to argue that the only way to determine this value is to remediate the land and try to sell it on the open market. The receiver utilized a commercially reasonable alternative method; it requested and received appraisals from several appraisers for the property, appraisals that assumed the property to be in an uncontaminated state. The motions judge approved this method as legitimate and I agree.

57 So much for the method of determining value. As for the value itself, based on his preference of the receiver’s evidence concerning the value of the property over that of the appellants, the motions judge found that the proposed sale price of \$1,187,000 represented a fair value for the property. This finding is sound.

58 The motions judge rejected the property value the appellants advanced through the Augustine affidavit - and properly so. The Augustine analysis in support of a “reduction in value” of \$1,735,000 was deficient. Augustine accepted the 2003 Juteau valuation of the property notwithstanding its obvious flaws. The motions judge noted that Mr. Juteau acknowledged on cross-examination that he was “unaware of serious deficiencies in the premises and substantial rent reductions (and vacancies) resulting from them.” The valuation was therefore based on a capitalization of rental income that did not take into account existing rental arrears or the high turnover in tenants.

59 I note that Mr. Augustine made no attempt to reconcile or otherwise address the receiver's expert and market evidence that supported the receiver's position that the property in a remediated state, at the time it recommended the comprehensive settlement, had a value of between \$900,000 and \$1,050,000. I refer to the receiver's four comprehensive market value appraisals, the listing price recommended by real estate agents and the results of the listing agent's attempts to sell the property.

60 The appellants also argued that, by reason of its mismanagement, the receiver was responsible for the property's low value. This is not supported by the evidence. The evidence before the motions judge, including the appraisal reports, demonstrated that when the receiver was appointed in June 2003, it inherited a rundown property struggling to attract and maintain tenants willing to pay rent sufficient to cover operating costs.

61 The appellants' position is not assisted by the tender of an offer to purchase the property for \$1,320,000 that the company received in January 2006, after the receiver sought approval of the proposed sale and settlement. The offer, never delivered to the receiver, was unsigned and contained conditions unfavourable to the vendor concerning remediation and the nature of the tenants. As well, the receiver had no obligation to consider this offer, given its timing. Moreover, the offer does not show that the price the receiver was recommending was so unreasonably low as to demonstrate that the receiver was acting improvidently in recommending it: see *Soundair*, at p. 9.

62 I conclude that the motions judge's decision to approve the sale to Petro-Canada for \$1,187,500, on the basis of the receiver's recommendation is unassailable. The receiver made appropriate efforts to obtain reliable information as to the value of the property. It secured an agreement with Petro-Canada based on this value that was provident and in fact advantageous to the creditors and the appellants. The fact that this agreement is with the polluter of the property, is, in my view, of no relevance.

## **ii. The acceptance of \$200,000 in damages**

63 I will now turn to the settlement of the loss of rental income claim for \$200,000.

64 Counsel for the appellants forcefully argues that the \$200,000 does not come close to adequate compensation for the loss of rent, asserted to be \$838,000, based on \$488,000<sup>2</sup> to December 2004, plus \$35,000 per month after that to the date of Petro-Canada's acceptance of the offer.

65 Once again, I would not agree with this argument. It completely ignores the weaknesses of the claim, and the risks and costs associated with pursuing it.

66 The appellants approach the claim from the perspective that the receiver will be successful in demonstrating that the contamination was the sole cause of the loss of rental income. As previously indicated, the record demonstrates quite clearly that this is not the case. Before the further contamination was discovered in the spring of 2004, Vox Lounge had abandoned the property and was in arrears of rent in the amount of \$70,000, and the Buffet Palace's rent arrears, part of which Mr. Ishac had forgiven due to its complaints about the state of the building, had reached \$140,000.



67 Further, the delay in the commencement of the remediation and the conflict over the reasons for that delay, added to the uncertainty over the amount that might be awarded against Petro-Canada. The receiver claimed loss of rent from October 2003 to December 2004 in the amount of \$214,262 and carrying costs including property management fees, property taxes, property insurance, legal fees and the receiver's fees and utilities. However, Petro-Canada denied many of these claims on the basis that the appellants bore responsibility for some, if not all, of the delay in the commencement of the remediation work from May until November 2003.

68 Then, there was further delay resulting from the dispute over how to remediate the soil under the building. The remediation agreement did not address who would be required to bear the burden of the loss of rental income caused by that delay.

69 Finally, Petro-Canada not only resisted the claim for loss of rental income, but also indicated it was going to launch a counter-claim for the costs caused by the appellants' delay.

70 The evidence available to the receiver about the claim for loss of rental income demonstrated that the amount of Petro-Canada's ultimate liability for damages was far from certain. Furthermore, the receiver was well aware of the other costs associated with litigation of this complexity such as ongoing carrying costs and unrecoverable legal costs. The receiver did not know, therefore, the exact value of this claim. What it did know was that Petro-Canada and National Trust supported a comprehensive resolution of the mortgage debt, in addition to the \$200,000 Petro-Canada agreed to pay. Petro-Canada had already paid \$318,000 to the company for damages arising from the contamination of the property pursuant to the arbitration award, and the receiver agreed to leave that amount with the company.<sup>3</sup> National Trust had also agreed to forgive the remaining mortgage debt of \$600,000 owed by the appellants to National Trust.

71 Against this background the receiver made a realistic appraisal of value of the company's ancillary claims against Petro-Canada. It had to evaluate the risks and costs associated with litigation. This court must defer to the assessment and judgment of its independent receiver and to the exercise of discretion of the motions judge. In my view, the receiver's appraisal and the motions judge's review of the receiver's recommendations based on that appraisal are, in all of the circumstances, perfectly sound.

### *B. The Interests of All the Parties*

72 The next part of the *Soundair* test requires that the judge conduct an examination of the interests of all the parties.

73 The secured creditor, National Trust, supports the settlement. It does so with the knowledge that it will realize a significant shortfall. Petro-Canada also supports the settlement, and the interests of a party that has negotiated a settlement with a court-appointed receiver are very important: see *Soundair* at p. 12.

74 It is only the appellants, the debtors, who opposed the proposal. They argue that the receiver's dereliction of duty has deprived them of equity they had in the property at the time of the receivership. They will recover nothing from this settlement.

75 The appellants contend that the acceptance of the receiver's recommendations results in a loss to the company of approximately \$400,000 in equity. They base their argument on an alleged offer to purchase the property for \$1,500,000 submitted before the contamination was discovered.

76 However, the offer is not in evidence and the respondent argues that it was far from certain. The reliable evidence that is in the record places the value of the property in an uncontaminated state between \$900,000 and \$1,200,000, roughly the amount of the mortgage debt at that time. In my view, the record does not support the appellants' position that the company had equity in the property at the time the contamination was discovered.

77 Clearly, the receiver owes a duty to the appellants to treat them fairly. However, its primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors: *Soundair* at p. 12. The duty of fairness also requires that it maximize the return to the debtors, but such a return is not always commercially feasible. As Farley J. recognized in *Royal Bank v. Rose Park Wellesley Investments Ltd.*, [1995] O.J. No. 147 (Ont. Gen. Div. [Commercial List]), at para. 9, there will frequently be a point below which certain interested parties will be adversely affected by the receiver's decision. If the receiver's decision is otherwise reasonable, it is entitled to determine, in the words of Farley J. "where the cusp will lie".

78 Here, the cusp lies at a place that is to no party's clear advantage; the amount satisfies neither the appellants nor National Trust. I further note that given that \$2,016,466 was owing under the mortgage at the time the settlement was reached, the appellants would only stand to benefit if a purchaser could be found that was willing to pay almost twice the value of the property, or if Petro-Canada consented to pay out several times the amount it has indicated a willingness to pay in response to the damage claim for loss of rental income.

79 The losses these parties will suffer are unfortunate but are the reality of the circumstances that plagued this property with these issues in this market. Also, it is important to bear in mind that no payments had been made under the mortgage since 2001. As time goes by, the receiver's costs constitute a priority charge on the property and therefore continue to reduce the amount available to pay National Trust and ultimately the appellants.<sup>4</sup> In this case, Petro-Canada was the only purchaser that would be reasonably expected to purchase the property in its current state as though it were pristine. Without the sale, it would have been impossible for National Trust otherwise to recover any significant portion of the debt. The value of the claims against Petro-Canada was, as I have explained, uncertain, and the receiver could not have relied solely upon them in the discharge of its duties. In considering the interests of those involved, and especially the receiver's primary duty to recover the mortgage debt from the appellants, the balance is clearly in favour of endorsing the settlement, and the motions judge considered these factors in making his ruling.

### *C. The Process Through Which the Sale and Settlement were Obtained*

80 I now turn to *Soundair* factors (c) and (d) - the efficacy and integrity of the process and the fairness in the implementation of the process. The motions judge was required to consider the integrity of the process by which the receiver determined the fair value of the sale and the settlement and the fairness in the working out of that process.

81 The process under which the sale agreement is arrived at should be consistent with commercial efficiency and integrity. See *Selkirk, Re* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C.), at p. 286.

82 The appellants' complaint about the process appears to be that National Trust and Petro-Canada negotiated the price between them, essentially behind closed doors. However, the receiver gave National Trust and Petro-Canada permission to negotiate a sale, if one could be reached, only after it proved impossible to continue with the appellants' involvement. The receiver's conduct until this point was open and transparent. It obtained various professional opinions as to the market value of the property independent of the contamination. These values were tested through the results of the listing and marketing initiatives. The appellants sought and obtained a meeting for the purposes of negotiating a settlement. They participated in that process until their demands threatened to interfere with any possibility that the negotiations would be successful. The receiver was entitled to make the determination that, as the motions judge put it, "[the respondents'] differences with Mr. Ishac were too great to continue attempting to find a resolution acceptable to all parties."

83 The motions judge clearly put his mind to the difficulty the receiver faced in valuing the property including the costs of remediation to current standards and the law suit with all of its costs and risks. In the light of the evidence before him and due consideration to the uncertainties, the motions judge quite properly held that "the process [of arriving at the settlement] was reasonable and prudent".

***2. Whether, in the light of what is contained in the fresh evidence, the process involving the motions judge's decision was compromised.***

84 Counsel for the appellants argues that the fresh evidence of events that took place while the matter was under reserve, together with the decision itself, give his clients a legitimate reason to doubt that they have been fairly treated within the context of the judicial process. The submission is based on the letters the receiver wrote to the motions judge asking about the status of the release of his reasons and on the decision itself in relation to comments the motions judge is alleged to have made in the course of the in-chambers meeting. On the basis of the pressure brought to bear on the motions judge by the receiver and the contradictions in the motions judge's thinking between the meeting and the decision and within the decision itself, there is good reason to be concerned that the process was not fair.

85 I disagree with this submission.

86 Concerning the letters, I agree that it may have been preferable for the receiver to have consulted with counsel for the appellants before writing the two letters inquiring about the status of the release of the decision. However, I am not persuaded that these letters, which were purely of an administrative nature, are any cause for concern about the integrity of the judicial process. I also note that the appellants' stated concern about those letters in the context of this appeal was not brought to the attention of the motions judge.

87 This takes me to the appellants' other argument that the fresh evidence demonstrates uncertainty in the motions judge's mind about whether to approve the receiver's recommendations. This uncertainty is demonstrated, they say, by the length of time the matter was under reserve, the comments the motions judge made during the in-chambers meeting and the contradiction in the decision itself of approving the receiver's recommendations and granting the appellants leave to commence an action against the receiver for breach of duty relating to its recommendations.

88 First, as this court has said in *Dusk v. Malone* (2003), 167 O.A.C. 333 (Ont. C.A.), at para. 3, "a lengthy delay in...releasing reasons, without more, will not automatically amount to a denial of a fair trial. The fairness of a trial must be determined by the particular circumstances of each case so that generally some evidence of active prejudice must be shown."

89 Second, the evidence of what was said at the meeting, namely the notes produced by lawyers who attended the meeting, is inconclusive in terms of what the motions judge said or was thinking. He may have indicated some ambivalence about his view of the case at the time. Regardless, he was entitled to go off and wrestle further with the decision. He was entitled to make up his mind after that meeting and prepare reasons that support his decision to approve the settlement.

90 Despite approving the receiver's third report, the motions judge granted leave to the appellants to commence an action against the receiver on the basis that the receiver failed to perform its obligations in relation to the property, including recommending the sale and settlement. The appellants submit that granting leave to bring such an action cannot be reconciled with approving the receiver's third report. It therefore shows the motions judge's doubts about whether the receiver had acted properly in relation to the sale.

91 The motions judge was very clear in his reasons that he did not think the receiver had acted improperly. He granted leave because "[h]owever difficult, [the appellants] might succeed in demonstrating negligence..." He later reiterated that he was granting leave because it was not "perfectly clear that there is no foundation for the claim or that the action is frivolous or vexatious." It would appear that this concern motivated the motions judge to grant leave to the appellants to take proceedings against the receiver, in the light of the possibility that the receiver may not have acted "with a fiduciary's due regard to the interests of the debtor". However, he obviously thought this was a long shot.

92 In my view, the motions judge, in granting leave, applied the wrong test. Rather than applying the low threshold he did, he should have been satisfied that the appellants had established a strong *prima facie* case, before granting leave. The conduct that the appellants wish to impugn is exactly the same conduct approved by the motions judge: see *Bank of America Canada v. Willann Investments Ltd.* (1993), 23 C.B.R. (3d) 98 (Ont. Gen. Div.). As Blair J. put it at paras. 9 - 10:

In my opinion the "normal" test referred to above sets a threshold which is too low in cases where the activities of the Receiver, including the conduct sought to be impugned by the creditor seeking leave to proceed, have already been approved by the Court...Were it otherwise there would be little point in a receiver or receiver/manager seeking an Order approving its conduct and activities in the exercise of its duties as an officer of the Court. The very purpose of the granting of such an Order is to afford the receiver some measure of judicial protection. To say that that shield may be readily pierced unless the receiver can show that "it is perfectly clear" there is no foundation to the proposed claim, or that it is frivolous or vexatious, is to render such protection virtually meaningless in situations where the approved conduct and the conduct subject to the proposed attack are in substance the same.

93 The motions judge thought that this case did not apply because the receiver's actions had not been the subject of previous court approval. He did not consider that he had just approved the receiver's actions in this very instance, and that the *Bank of America* rationale applies here as well. It is contradictory and provides meaningless protection to a receiver, to grant an order approving its recommendations and simultaneously granting leave to bring an action for negligence or breach of fiduciary duty in arriving at these recommendations.

94 No matter which test the motions judge used, granting leave in these circumstances does not necessarily reflect an uncertainty in his mind regarding the receiver's recommendation of the overall appropriateness of the comprehensive settlement.

95 Based on this analysis, there is nothing in the evidence that supports the conclusion that there was any unfairness in the judicial process.

### **Conclusion Regarding the Appeal**

96 In the circumstances of this case and given the principles courts must apply when reviewing the receiver's recommendations, I can find no error on the part of the motions judge in the exercise of his discretion when granting the orders under appeal.

### **The Cross-Appeal**

97 As discussed above, the motions judge used the wrong test in granting leave to commence an action against the receiver. For the reasons given there, I would allow the cross-appeal.

### **Disposition**

98 For the foregoing reasons, I would dismiss the appeal from the order approving the receiver's third report approving the sale of the property and the settlement. I would allow the cross-appeal and set aside the order granting leave to sue the receiver.

99 At the conclusion of the hearing, it was agreed that the parties would make submissions as to costs following the release of this decision. Failing agreement as to costs both of the appeal and the cross-appeal, submissions are to be made according to the following timetable. The receiver and National Trust may make written submissions, no longer than three pages, to be received by the senior legal officer, no later than May 17. The appellants will make their submissions, again, no longer than three pages, to be received no later than May 25. The receiver and National Trust may deliver a brief reply, no longer than two pages, to be received no later than May 28.

***M.J. Moldaver J.A.:***

I agree.

***Russell Juriansz J.A.:***

I agree.

*Appeal dismissed; cross-appeal allowed.*

Footnotes

\* A corrigendum issued by the court on May 14, 2010 has been incorporated herein.

\*\* Additional reasons at *National Trust Co. v. 1117387 Ontario Inc.* (2010), 2010 ONCA 492, 2010 CarswellOnt 4839 (Ont. C.A.).

1 The forgiveness of the mortgage and the offer of the property to the company post-remediation (items 4. and 5.) were offered in exchange for the company's support of the settlement agreement upon presentation to court for approval.

2 Adjusted for a mathematical error made by the appellants.

3 Given that the property would ultimately be sold to Petro-Canada on a pristine basis, the damages paid to the company for stigma and loss of future development costs were no longer warranted and could properly be considered additional consideration.

4 This court was informed, though it was not in evidence, that as of July 2009, the amount owing under the mortgage exceeded \$3.1 million, including principal, interest, property taxes and other receivership expenses.

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**End of Document**

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# TAB 5

**Most Negative Treatment:** Distinguished

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

2002 SCC 41, 2002 CSC 41  
Supreme Court of Canada

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

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

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

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

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

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

Counsel: *J. Brett Ledger* and *Peter Chapin*, for appellant

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

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

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

**Related Abridgment Classifications**



For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

### **Evidence --- Documentary evidence — Privilege as to documents — Miscellaneous documents**

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

### **Practice --- Discovery — Discovery of documents — Privileged document — Miscellaneous privileges**

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### **Practice --- Discovery — Examination for discovery — Range of examination — Privilege — Miscellaneous privileges**

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

### **Preuve --- Preuve documentaire — Confidentialité en ce qui concerne les documents — Documents divers**

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

### **Procédure --- Communication de la preuve — Communication des documents — Documents confidentiels — Divers types de confidentialité**

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

### **Procédure --- Communication de la preuve — Interrogatoire préalable — Étendue de l'interrogatoire —**

### Confidentialité — Divers types de confidentialité

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

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

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

**Held:** The appeal was allowed.

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

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

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

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par

une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production des documents avant de procéder au contre-interrogatoire du cadre supérieur. Après avoir obtenu l'autorisation des autorités chinoises de communiquer les documents à la condition qu'ils soient protégés par une ordonnance de confidentialité, la société d'État a cherché à les introduire en invoquant la r. 312 des *Règles de la Cour fédérale, 1998*, et elle a aussi demandé une ordonnance de confidentialité. Selon les termes de l'ordonnance de confidentialité, les documents seraient uniquement mis à la disposition des parties et du tribunal, mais l'accès du public aux débats ne serait pas interdit.

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

**Arrêt:** Le pourvoi a été accueilli.

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

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. Épurier les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

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

## Table of Authorities

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

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

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

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

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

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

**Statutes considered:**

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

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

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

Generally — considered

s. 5(1)(b) — referred to

s. 8 — referred to

s. 54 — referred to

s. 54(2)(b) — referred to

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

s. 486(1) — referred to

**Rules considered:**

*Federal Court Rules, 1998*, SOR/98-106

R. 151 — considered

R. 312 — referred to

APPEAL from judgment reported at 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (Fed. C.A.), dismissing appeal from judgment reported at 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (Fed. T.D.), granting application in part.

POURVOI à l'encontre de l'arrêt publié à 2000 CarswellNat 970, 2000 CarswellNat 3271, [2000] F.C.J. No. 732, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 187 D.L.R. (4th) 231, 256 N.R. 1, 24 Admin. L.R. (3d) 1, [2000] 4 F.C. 426, 182 F.T.R. 284 (note) (C.A. Féd.), qui a rejeté le pourvoi à l'encontre du jugement publié à 1999 CarswellNat 2187, [2000] 2 F.C. 400, 1999 CarswellNat 3038, 179 F.T.R. 283 (C.F. (1re inst.)), qui avait accueilli en partie la demande.

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

**I. Introduction**

1 In our country, courts are the institutions generally chosen to resolve legal disputes as best they can through the application of legal principles to the facts of the case involved. One of the underlying principles of the judicial process is public openness, both in the proceedings of the dispute, and in the material that is relevant to its resolution. However, some

material can be made the subject of a confidentiality order. This appeal raises the important issues of when, and under what circumstances, a confidentiality order should be granted.

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

## II. Facts

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

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

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

6 In the course of the application by Sierra Club to set aside the funding arrangements, the appellant filed an affidavit of Dr. Simon Pang, a senior manager of the appellant. In the affidavit, Dr. Pang referred to and summarized certain documents (the "Confidential Documents"). The Confidential Documents are also referred to in an affidavit prepared by Dr. Feng, one of AECL's experts. Prior to cross-examining Dr. Pang on his affidavit, Sierra Club made an application for the production of the Confidential Documents, arguing that it could not test Dr. Pang's evidence without access to the underlying documents. The appellant resisted production on various grounds, including the fact that the documents were the property of the Chinese authorities and that it did not have authority to disclose them. After receiving authorization by the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the appellant sought to introduce the Confidential Documents under R. 312 of the *Federal Court Rules, 1998*, SOR/98-106, and requested a confidentiality order in respect of the documents.

7 Under the terms of the order requested, the Confidential Documents would only be made available to the parties and the court; however, there would be no restriction on public access to the proceedings. In essence, what is being sought is an order preventing the dissemination of the Confidential Documents to the public.

8 The Confidential Documents comprise two Environmental Impact Reports on Siting and Construction Design (the "EIRs"), a Preliminary Safety Analysis Report (the "PSAR"), and the supplementary affidavit of Dr. Pang, which

summarizes the contents of the EIRs and the PSAR. If admitted, the EIRs and the PSAR would be attached as exhibits to the supplementary affidavit of Dr. Pang. The EIRs were prepared by the Chinese authorities in the Chinese language, and the PSAR was prepared by the appellant with assistance from the Chinese participants in the project. The documents contain a mass of technical information and comprise thousands of pages. They describe the ongoing environmental assessment of the construction site by the Chinese authorities under Chinese law.

9 As noted, the appellant argues that it cannot introduce the Confidential Documents into evidence without a confidentiality order; otherwise, it would be in breach of its obligations to the Chinese authorities. The respondent's position is that its right to cross-examine Dr. Pang and Dr. Feng on their affidavits would be effectively rendered nugatory in the absence of the supporting documents to which the affidavits referred. Sierra Club proposes to take the position that the affidavits should therefore be afforded very little weight by the judge hearing the application for judicial review.

10 The Federal Court of Canada, Trial Division, refused to grant the confidentiality order and the majority of the Federal Court of Appeal dismissed the appeal. In his dissenting opinion, Robertson J.A. would have granted the confidentiality order.

### III. Relevant Statutory Provisions

11 *Federal Court Rules, 1998, SOR/98-106*

151.(1) On motion, the Court may order that material to be filed shall be treated as confidential.

(2) Before making an order under subsection (1), the Court must be satisfied that the material should be treated as confidential, notwithstanding the public interest in open and accessible court proceedings.

### IV. Judgments below

#### A. *Federal Court of Canada, Trial Division, [2000] 2 F.C. 400*

12 Pelletier J. first considered whether leave should be granted pursuant to R. 312 to introduce the supplementary affidavit of Dr. Pang to which the Confidential Documents were filed as exhibits. In his view, the underlying question was that of relevance, and he concluded that the documents were relevant to the issue of the appropriate remedy. Thus, in the absence of prejudice to the respondent, the affidavit should be permitted to be served and filed. He noted that the respondents would be prejudiced by delay, but since both parties had brought interlocutory motions which had contributed to the delay, the desirability of having the entire record before the court outweighed the prejudice arising from the delay associated with the introduction of the documents.

13 On the issue of confidentiality, Pelletier J. concluded that he must be satisfied that the need for confidentiality was greater than the public interest in open court proceedings, and observed that the argument for open proceedings in this case was significant given the public interest in Canada's role as a vendor of nuclear technology. As well, he noted that a confidentiality order was an exception to the rule of open access to the courts, and that such an order should be granted only where absolutely necessary.

14 Pelletier J. applied the same test as that used in patent litigation for the issue of a protective order, which is essentially a confidentiality order. The granting of such an order requires the appellant to show a subjective belief that the information is confidential and that its interests would be harmed by disclosure. In addition, if the order is challenged, then the person claiming the benefit of the order must demonstrate objectively that the order is required. This objective element requires the party to show that the information has been treated as confidential, and that it is reasonable to believe that its proprietary, commercial and scientific interests could be harmed by the disclosure of the information.

15 Concluding that both the subjective part and both elements of the objective part of the test had been satisfied, he nevertheless stated: "However, I am also of the view that in public law cases, the objective test has, or should have, a third component which is whether the public interest in disclosure exceeds the risk of harm to a party arising from disclosure" (para. 23).

16 A very significant factor, in his view, was the fact that mandatory production of documents was not in issue here. The fact that the application involved a voluntary tendering of documents to advance the appellant's own cause as opposed to mandatory production weighed against granting the confidentiality order.

17 In weighing the public interest in disclosure against the risk of harm to AECL arising from disclosure, Pelletier J. noted that the documents the appellant wished to put before the court were prepared by others for other purposes, and recognized that the appellant was bound to protect the confidentiality of the information. At this stage, he again considered the issue of materiality. If the documents were shown to be very material to a critical issue, "the requirements of justice militate in favour of a confidentiality order. If the documents are marginally relevant, then the voluntary nature of the production argues against a confidentiality order" (para. 29). He then decided that the documents were material to a question of the appropriate remedy, a significant issue in the event that the appellant failed on the main issue.

18 Pelletier J. also considered the context of the case and held that since the issue of Canada's role as a vendor of nuclear technology was one of significant public interest, the burden of justifying a confidentiality order was very onerous. He found that AECL could expunge the sensitive material from the documents, or put the evidence before the court in some other form, and thus maintain its full right of defence while preserving the open access to court proceedings.

19 Pelletier J. observed that his order was being made without having perused the Confidential Documents because they had not been put before him. Although he noted the line of cases which holds that a judge ought not to deal with the issue of a confidentiality order without reviewing the documents themselves, in his view, given their voluminous nature and technical content as well as his lack of information as to what information was already in the public domain, he found that an examination of these documents would not have been useful.

20 Pelletier J. ordered that the appellant could file the documents in current form, or in an edited version if it chose to do so. He also granted leave to file material dealing with the Chinese regulatory process in general and as applied to this project, provided it did so within 60 days.

***B. Federal Court of Appeal, [2000] 4 F.C. 426***

*(1) Evans J.A. (Sharlow J.A. concurring)*



21 At the Federal Court of Appeal, AECL appealed the ruling under R. 151 of the *Federal Court Rules, 1998*, and Sierra Club cross-appealed the ruling under R. 312.

22 With respect to R. 312, Evans J.A. held that the documents were clearly relevant to a defence under s. 54(2)(b), which the appellant proposed to raise if s. 5(1)(b) of the CEEA was held to apply, and were also potentially relevant to the exercise of the court's discretion to refuse a remedy even if the Ministers were in breach of the CEEA. Evans J.A. agreed with Pelletier J. that the benefit to the appellant and the court of being granted leave to file the documents outweighed any prejudice to the respondent owing to delay and thus concluded that the motions judge was correct in granting leave under R. 312.

23 On the issue of the confidentiality order, Evans J.A. considered R. 151, and all the factors that the motions judge had weighed, including the commercial sensitivity of the documents, the fact that the appellant had received them in confidence from the Chinese authorities, and the appellant's argument that without the documents it could not mount a full answer and defence to the application. These factors had to be weighed against the principle of open access to court documents. Evans J.A. agreed with Pelletier J. that the weight to be attached to the public interest in open proceedings varied with context and held that, where a case raises issues of public significance, the principle of openness of judicial process carries greater weight as a factor in the balancing process. Evans J.A. noted the public interest in the subject matter of the litigation, as well as the considerable media attention it had attracted.

24 In support of his conclusion that the weight assigned to the principle of openness may vary with context, Evans J.A. relied upon the decisions in *AB Hassle v. Canada (Minister of National Health & Welfare)*, [2000] 3 F.C. 360 (Fed. C.A.), where the court took into consideration the relatively small public interest at stake, and *Ethyl Canada Inc. v. Canada (Attorney General)* (1998), 17 C.P.C. (4th) 278 (Ont. Gen. Div.), at p. 283, where the court ordered disclosure after determining that the case was a significant constitutional case where it was important for the public to understand the issues at stake. Evans J.A. observed that openness and public participation in the assessment process are fundamental to the CEEA, and concluded that the motions judge could not be said to have given the principle of openness undue weight even though confidentiality was claimed for a relatively small number of highly technical documents.

25 Evans J.A. held that the motions judge had placed undue emphasis on the fact that the introduction of the documents was voluntary; however, it did not follow that his decision on the confidentiality order must therefore be set aside. Evans J.A. was of the view that this error did not affect the ultimate conclusion for three reasons. First, like the motions judge, he attached great weight to the principle of openness. Secondly, he held that the inclusion in the affidavits of a summary of the reports could go a long way to compensate for the absence of the originals, should the appellant choose not to put them in without a confidentiality order. Finally, if AECL submitted the documents in an expunged fashion, the claim for confidentiality would rest upon a relatively unimportant factor, i.e., the appellant's claim that it would suffer a loss of business if it breached its undertaking with the Chinese authorities.

26 Evans J.A. rejected the argument that the motions judge had erred in deciding the motion without reference to the actual documents, stating that it was not necessary for him to inspect them, given that summaries were available and that the documents were highly technical and incompletely translated. Thus, the appeal and cross-appeal were both dismissed.

(2) *Robertson J.A. (dissenting)*

27 Robertson J.A. disagreed with the majority for three reasons. First, in his view, the level of public interest in the case, the degree of media coverage, and the identities of the parties should not be taken into consideration in assessing an application for a confidentiality order. Instead, he held that it was the nature of the evidence for which the order is sought that must be examined.

28 In addition, he found that without a confidentiality order, the appellant had to choose between two unacceptable options: either suffering irreparable financial harm if the confidential information was introduced into evidence or being denied the right to a fair trial because it could not mount a full defence if the evidence was not introduced.

29 Finally, he stated that the analytical framework employed by the majority in reaching its decision was fundamentally flawed as it was based largely on the subjective views of the motions judge. He rejected the contextual approach to the question of whether a confidentiality order should issue, emphasizing the need for an objective framework to combat the perception that justice is a relative concept, and to promote consistency and certainty in the law.

30 To establish this more objective framework for regulating the issuance of confidentiality orders pertaining to commercial and scientific information, he turned to the legal rationale underlying the commitment to the principle of open justice, referring to *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.). There, the Supreme Court of Canada held that open proceedings foster the search for the truth, and reflect the importance of public scrutiny of the courts.

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

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

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

relevant consideration.

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

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

## V. Issues

35

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

B. Should the confidentiality order be granted in this case?

## VI. Analysis

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

#### (1) *The General Framework: Herein the Dagenais Principles*

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

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

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

37 A discussion of the general approach to be taken in the exercise of judicial discretion to grant a confidentiality order

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

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

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

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

A publication ban should only be ordered when:

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

41 In *New Brunswick, supra*, this Court modified the *Dagenais* test in the context of the related issue of how the discretionary power under s. 486(1) of the *Criminal Code* to exclude the public from a trial should be exercised. That case dealt with an appeal from the trial judge's order excluding the public from the portion of a sentencing proceeding for sexual assault and sexual interference dealing with the specific acts committed by the accused on the basis that it would avoid "undue hardship" to both the victims and the accused.

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

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

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

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

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

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

A publication ban should only be ordered when:

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

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

information. Third, the test requires the judge ordering the ban to consider not only whether reasonable alternatives are available, but also to restrict the ban as far as possible without sacrificing the prevention of the risk.

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

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

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

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

## (2) *The Rights and Interests of the Parties*

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

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

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

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

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

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

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

- (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
- (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

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

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

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

57 Finally, the phrase “reasonably alternative measures” requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

## **B. Application of the Test to this Appeal**

### **(1) Necessity**

58 At this stage, it must be determined whether disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and whether there are reasonable alternatives, either to the order itself or to its terms.

59 The commercial interest at stake here relates to the objective of preserving contractual obligations of confidentiality. The appellant argues that it will suffer irreparable harm to its commercial interests if the confidential documents are disclosed. In my view, the preservation of confidential information constitutes a sufficiently important commercial interest to pass the first branch of the test as long as certain criteria relating to the information are met.

60 Pelletier J. noted that the order sought in this case was similar in nature to an application for a protective order which arises in the context of patent litigation. Such an order requires the applicant to demonstrate that the information in question has been treated at all relevant times as confidential and that on a balance of probabilities its proprietary, commercial and scientific interests could reasonably be harmed by the disclosure of the information: *AB Hassle v. Canada (Minister of National Health & Welfare)* (1998), 83 C.P.R. (3d) 428 (Fed. T.D.), at p. 434. To this I would add the requirement proposed by Robertson J.A. that the information in question must be of a “confidential nature” in that it has been “accumulated with a reasonable expectation of it being kept confidential” (para. 14) as opposed to “facts which a litigant would like to keep confidential by having the courtroom doors closed” (para. 14).

61 Pelletier J. found as a fact that the *AB Hassle* test had been satisfied in that the information had clearly been treated as confidential both by the appellant and by the Chinese authorities, and that, on a balance of probabilities, disclosure of the information could harm the appellant’s commercial interests (para. 23). As well, Robertson J.A. found that the information in question was clearly of a confidential nature as it was commercial information, consistently treated and regarded as confidential, that would be of interest to AECL’s competitors (para. 16). Thus, the order is sought to prevent a serious risk to an important commercial interest.

62 The first branch of the test also requires the consideration of alternative measures to the confidentiality order, as well as an examination of the scope of the order to ensure that it is not overly broad. Both courts below found that the information contained in the Confidential Documents was relevant to potential defences available to the appellant under the CEAA and



this finding was not appealed at this Court. Further, I agree with the Court of Appeal's assertion (para. 99) that, given the importance of the documents to the right to make full answer and defence, the appellant is, practically speaking, compelled to produce the documents. Given that the information is necessary to the appellant's case, it remains only to determine whether there are reasonably alternative means by which the necessary information can be adduced without disclosing the confidential information.

63 Two alternatives to the confidentiality order were put forward by the courts below. The motions judge suggested that the Confidential Documents could be expunged of their commercially sensitive contents, and edited versions of the documents could be filed. As well, the majority of the Court of Appeal, in addition to accepting the possibility of expungement, was of the opinion that the summaries of the Confidential Documents included in the affidavits could go a long way to compensate for the absence of the originals. If either of these options is a reasonable alternative to submitting the Confidential Documents under a confidentiality order, then the order is not necessary, and the application does not pass the first branch of the test.

64 There are two possible options with respect to expungement, and, in my view, there are problems with both of these. The first option would be for AECL to expunge the confidential information without disclosing the expunged material to the parties and the court. However, in this situation the filed material would still differ from the material used by the affiants. It must not be forgotten that this motion arose as a result of Sierra Club's position that the summaries contained in the affidavits should be accorded little or no weight without the presence of the underlying documents. Even if the relevant information and the confidential information were mutually exclusive, which would allow for the disclosure of all the information relied on in the affidavits, this relevancy determination could not be tested on cross-examination because the expunged material would not be available. Thus, even in the best case scenario, where only irrelevant information needed to be expunged, the parties would be put in essentially the same position as that which initially generated this appeal in the sense that at least some of the material relied on to prepare the affidavits in question would not be available to Sierra Club.

65 Further, I agree with Robertson J.A. that this best case scenario, where the relevant and the confidential information do not overlap, is an untested assumption (para. 28). Although the documents themselves were not put before the courts on this motion, given that they comprise thousands of pages of detailed information, this assumption is at best optimistic. The expungement alternative would be further complicated by the fact that the Chinese authorities require prior approval for any request by AECL to disclose information.

66 The second option is that the expunged material be made available to the Court and the parties under a more narrowly drawn confidentiality order. Although this option would allow for slightly broader public access than the current confidentiality request, in my view, this minor restriction to the current confidentiality request is not a viable alternative given the difficulties associated with expungement in these circumstances. The test asks whether there are *reasonably* alternative measures; it does not require the adoption of the absolutely least restrictive option. With respect, in my view, expungement of the Confidential Documents would be a virtually unworkable and ineffective solution that is not reasonable in the circumstances.

67 A second alternative to a confidentiality order was Evans J.A.'s suggestion that the summaries of the Confidential Documents included in the affidavits "may well go a long way to compensate for the absence of the originals" (para. 103). However, he appeared to take this fact into account merely as a factor to be considered when balancing the various interests at stake. I would agree that at this threshold stage to rely on the summaries alone, in light of the intention of Sierra Club to argue that they should be accorded little or no weight, does not appear to be a "reasonably alternative measure" to having the underlying documents available to the parties.

68 With the above considerations in mind, I find the confidentiality order necessary in that disclosure of the Confidential Documents would impose a serious risk on an important commercial interest of the appellant, and that there are no reasonably alternative measures to granting the order.

*(2) The Proportionality Stage*

69 As stated above, at this stage, the salutary effects of the confidentiality order, including the effects on the appellant's right to a fair trial, must be weighed against the deleterious effects of the confidentiality order, including the effects on the right to free expression, which, in turn, is connected to the principle of open and accessible court proceedings. This balancing will ultimately determine whether the confidentiality order ought to be granted.

*(a) Salutary Effects of the Confidentiality Order*

70 As discussed above, the primary interest that would be promoted by the confidentiality order is the public interest in the right of a civil litigant to present its case or, more generally, the fair trial right. Because the fair trial right is being invoked in this case in order to protect commercial, not liberty, interests of the appellant, the right to a fair trial in this context is not a *Charter* right; however, a fair trial for all litigants has been recognized as a fundamental principle of justice: *Ryan, supra*, at para. 84. It bears repeating that there are circumstances where, in the absence of an affected *Charter* right, the proper administration of justice calls for a confidentiality order: *Mentuck, supra*, at para. 31. In this case, the salutary effects that such an order would have on the administration of justice relate to the ability of the appellant to present its case, as encompassed by the broader fair trial right.

71 The Confidential Documents have been found to be relevant to defences that will be available to the appellant in the event that the CEAA is found to apply to the impugned transaction and, as discussed above, the appellant cannot disclose the documents without putting its commercial interests at serious risk of harm. As such, there is a very real risk that, without the confidentiality order, the ability of the appellant to mount a successful defence will be seriously curtailed. I conclude, therefore, that the confidentiality order would have significant salutary effects on the appellant's right to a fair trial.

72 Aside from the salutary effects on the fair trial interest, the confidentiality order would also have a beneficial impact on other important rights and interests. First, as I discuss in more detail below, the confidentiality order would allow all parties and the court access to the Confidential Documents, and permit cross-examination based on their contents. By facilitating access to relevant documents in a judicial proceeding, the order sought would assist in the search for truth, a core value underlying freedom of expression.

73 Second, I agree with the observation of Robertson J.A. that, as the Confidential Documents contain detailed technical information pertaining to the construction and design of a nuclear installation, it may be in keeping with the public interest to prevent this information from entering the public domain (para. 44). Although the exact contents of the documents remain a mystery, it is apparent that they contain technical details of a nuclear installation, and there may well be a substantial public security interest in maintaining the confidentiality of such information.

*(b) Deleterious Effects of the Confidentiality Order*

74 Granting the confidentiality order would have a negative effect on the open court principle, as the public would be denied access to the contents of the Confidential Documents. As stated above, the principle of open courts is inextricably tied to the s. 2(b) *Charter* right to freedom of expression, and public scrutiny of the courts is a fundamental aspect of the administration of justice: *New Brunswick, supra*, at paras. 22-23. Although as a *general* principle, the importance of open courts cannot be overstated, it is necessary to examine, in the context of this case, the *particular* deleterious effects on freedom of expression that the confidentiality order would have.

75 Underlying freedom of expression are the core values of (1) seeking the truth and the common good, (2) promoting self-fulfilment of individuals by allowing them to develop thoughts and ideas as they see fit, and (3) ensuring that participation in the political process is open to all persons: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at p. 976, *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), *per* Dickson C.J., at pp. 762-764. *Charter* jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the *Charter*: *Keegstra, supra*, at pp. 760-761. Since the main goal in this case is to exercise judicial discretion in a way which conforms to *Charter* principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. The more detrimental the order would be to these values, the more difficult it will be to justify the confidentiality order. Similarly, minor effects of the order on the core values will make the confidentiality order easier to justify.

76 Seeking the truth is not only at the core of freedom of expression, but it has also been recognized as a fundamental purpose behind the open court rule, as the open examination of witnesses promotes an effective evidentiary process: *Edmonton Journal, supra, per* Wilson J., at pp. 1357-1358. Clearly, the confidentiality order, by denying public and media access to documents relied on in the proceedings, would impede the search for truth to some extent. Although the order would not exclude the public from the courtroom, the public and the media would be denied access to documents relevant to the evidentiary process.

77 However, as mentioned above, to some extent the search for truth may actually be *promoted* by the confidentiality order. This motion arises as a result of Sierra Club's argument that it must have access to the Confidential Documents in order to test the accuracy of Dr. Pang's evidence. If the order is denied, then the most likely scenario is that the appellant will not submit the documents, with the unfortunate result that evidence which may be relevant to the proceedings will not be available to Sierra Club or the court. As a result, Sierra Club will not be able to fully test the accuracy of Dr. Pang's evidence on cross-examination. In addition, the court will not have the benefit of this cross-examination or documentary evidence, and will be required to draw conclusions based on an incomplete evidentiary record. This would clearly impede the search for truth in this case.

78 As well, it is important to remember that the confidentiality order would restrict access to a relatively small number of highly technical documents. The nature of these documents is such that the general public would be unlikely to understand their contents, and thus they would contribute little to the public interest in the search for truth in this case. However, in the hands of the parties and their respective experts, the documents may be of great assistance in probing the truth of the Chinese environmental assessment process, which would, in turn, assist the court in reaching accurate factual conclusions. Given the nature of the documents, in my view, the important value of the search for truth which underlies both freedom of expression and open justice would be promoted to a greater extent by submitting the Confidential Documents under the order sought than it would by denying the order, and thereby preventing the parties and the court from relying on the documents in the course of the litigation.

79 In addition, under the terms of the order sought, the only restrictions on these documents relate to their public

distribution. The Confidential Documents would be available to the court and the parties, and public access to the proceedings would not be impeded. As such, the order represents a fairly minimal intrusion into the open court rule, and thus would not have significant deleterious effects on this principle.

80 The second core value underlying freedom of speech, namely, the promotion of individual self-fulfilment by allowing open development of thoughts and ideas, focuses on individual expression, and thus does not closely relate to the open court principle which involves institutional expression. Although the confidentiality order would restrict individual access to certain information which may be of interest to that individual, I find that this value would not be significantly affected by the confidentiality order.

81 The third core value, open participation in the political process, figures prominently in this appeal, as open justice is a fundamental aspect of a democratic society. This connection was pointed out by Cory J. in *Edmonton Journal*, *supra*, at p. 1339:

It can be seen that freedom of expression is of fundamental importance to a democratic society. It is also essential to a democracy and crucial to the rule of law that the courts are seen to function openly. The press must be free to comment upon court proceedings to ensure that the courts are, in fact, seen by all to operate openly in the penetrating light of public scrutiny.

Although there is no doubt as to the importance of open judicial proceedings to a democratic society, there was disagreement in the courts below as to whether the weight to be assigned to the open court principle should vary depending on the nature of the proceeding.

82 On this issue, Robertson J.A. was of the view that the nature of the case and the level of media interest were irrelevant considerations. On the other hand, Evans J.A. held that the motions judge was correct in taking into account that this judicial review application was one of significant public and media interest. In my view, although the public nature of the case may be a factor which strengthens the importance of open justice in a particular case, the level of media interest should not be taken into account as an independent consideration.

83 Since cases involving public institutions will generally relate more closely to the core value of public participation in the political process, the public nature of a proceeding should be taken into consideration when assessing the merits of a confidentiality order. It is important to note that this core value will *always* be engaged where the open court principle is engaged owing to the importance of open justice to a democratic society. However, where the political process is also engaged by the *substance* of the proceedings, the connection between open proceedings and public participation in the political process will increase. As such, I agree with Evans J.A. in the court below, where he stated, at para. 87:

While all litigation is important to the parties, and there is a public interest in ensuring the fair and appropriate adjudication of all litigation that comes before the courts, some cases raise issues that transcend the immediate interests of the parties and the general public interest in the due administration of justice, and have a much wider public interest significance.

84 This motion relates to an application for judicial review of a decision by the government to fund a nuclear energy project. Such an application is clearly of a public nature, as it relates to the distribution of public funds in relation to an issue of demonstrated public interest. Moreover, as pointed out by Evans J.A., openness and public participation are of

fundamental importance under the CEAA. Indeed, by their very nature, environmental matters carry significant public import, and openness in judicial proceedings involving environmental issues will generally attract a high degree of protection. In this regard, I agree with Evans J.A. that the public interest is engaged here more than it would be if this were an action between private parties relating to purely private interests.

85 However, with respect, to the extent that Evans J.A. relied on media interest as an indicium of public interest, this was an error. In my view, it is important to distinguish *public* interest from *media* interest, and I agree with Robertson J.A. that media exposure cannot be viewed as an impartial measure of public interest. It is the public *nature* of the proceedings which increases the need for openness, and this public nature is not necessarily reflected by the media desire to probe the facts of the case. I reiterate the caution given by Dickson C.J. in *Keegstra, supra*, at p. 760, where he stated that, while the speech in question must be examined in light of its relation to the core values, "we must guard carefully against judging expression according to its popularity."

86 Although the public interest in open access to the judicial review application *as a whole* is substantial, in my view, it is also important to bear in mind the nature and scope of the information for which the order is sought in assigning weight to the public interest. With respect, the motions judge erred in failing to consider the narrow scope of the order when he considered the public interest in disclosure, and consequently attached excessive weight to this factor. In this connection, I respectfully disagree with the following conclusion of Evans J.A., at para. 97:

Thus, having considered the nature of this litigation, and having assessed the extent of public interest in the openness of the proceedings in the case before him, the Motions Judge cannot be said in all the circumstances to have given this factor undue weight, even though confidentiality is claimed for only three documents among the small mountain of paper filed in this case, and their content is likely to be beyond the comprehension of all but those equipped with the necessary technical expertise.

Open justice is a fundamentally important principle, particularly when the substance of the proceedings is public in nature. However, this does not detract from the duty to attach weight to this principle in accordance with the specific limitations on openness that the confidentiality order would have. As Wilson J. observed in *Edmonton Journal, supra*, at pp. 1353-1354:

One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriate in the context of the case.

87 In my view, it is important that, although there is significant public interest in these proceedings, open access to the judicial review application would be only slightly impeded by the order sought. The narrow scope of the order coupled with the highly technical nature of the Confidential Documents significantly temper the deleterious effects the confidentiality order would have on the public interest in open courts.

88 In addressing the effects that the confidentiality order would have on freedom of expression, it should also be borne in mind that the appellant may not have to raise defences under the CEAA, in which case the Confidential Documents would be irrelevant to the proceedings, with the result that freedom of expression would be unaffected by the order. However, since the necessity of the Confidential Documents will not be determined for some time, in the absence of a confidentiality order, the appellant would be left with the choice of either submitting the documents in breach of its obligations or withholding the documents in the hopes that either it will not have to present a defence under the CEAA or that it will be able to mount a successful defence in the absence of these relevant documents. If it chooses the former option, and the defences under the

CEAA are later found not to apply, then the appellant will have suffered the prejudice of having its confidential and sensitive information released into the public domain with no corresponding benefit to the public. Although this scenario is far from certain, the possibility of such an occurrence also weighs in favour of granting the order sought.

89 In coming to this conclusion, I note that if the appellant is not required to invoke the relevant defences under the CEAA, it is also true that the appellant's fair trial right will not be impeded, even if the confidentiality order is not granted. However, I do not take this into account as a factor which weighs in favour of denying the order because, if the order is granted and the Confidential Documents are not required, there will be no deleterious effects on *either* the public interest in freedom of expression *or* the appellant's commercial interests or fair trial right. This neutral result is in contrast with the scenario discussed above where the order is denied and the possibility arises that the appellant's commercial interests will be prejudiced with no corresponding public benefit. As a result, the fact that the Confidential Documents may not be required is a factor which weighs in favour of granting the confidentiality order.

90 In summary, the core freedom of expression values of seeking the truth and promoting an open political process are most closely linked to the principle of open courts, and most affected by an order restricting that openness. However, in the context of this case, the confidentiality order would only marginally impede, and in some respects would even promote, the pursuit of these values. As such, the order would not have significant deleterious effects on freedom of expression.

## VII. Conclusion

91 In balancing the various rights and interests engaged, I note that the confidentiality order would have substantial salutary effects on the appellant's right to a fair trial, and freedom of expression. On the other hand, the deleterious effects of the confidentiality order on the principle of open courts and freedom of expression would be minimal. In addition, if the order is not granted and in the course of the judicial review application the appellant is not required to mount a defence under the CEAA, there is a possibility that the appellant will have suffered the harm of having disclosed confidential information in breach of its obligations with no corresponding benefit to the right of the public to freedom of expression. As a result, I find that the salutary effects of the order outweigh its deleterious effects, and the order should be granted.

92 Consequently, I would allow the appeal with costs throughout, set aside the judgment of the Federal Court of Appeal, and grant the confidentiality order on the terms requested by the appellant under R. 151 of the *Federal Court Rules, 1998*.

*Appeal allowed.*

*Pourvoi accueilli.*

# TAB 6

2014 ONSC 1173  
Ontario Superior Court of Justice [Commercial List]

GE Canada Real Estate Financing Business Property Co. v. 1262354 Ontario Inc.

2014 CarswellOnt 2113, 2014 ONSC 1173, 238 A.C.W.S. (3d) 101

**GE Canada Real Estate Financing Business Property Company, Applicant and  
1262354 Ontario Inc., Respondent**

D.M. Brown J.

Heard: February 18, 2014  
Judgment: February 24, 2014  
Docket: CV-12-9856-00CL

Counsel: L. Pillon, Y. Katirai, for Receiver

L. Rogers, for Applicant, GECanada Real Estate Financing Business Property Company

C. Reed, for Respondent and Keith Munt, principal of the Respondent, and 800145 Ontario Inc., a related subsequent encumbrancer

A. Grossi, for Proposed purchaser, 5230 Harvester Holdings Corp.

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

**Related Abridgment Classifications**



For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

### Debtors and creditors --- Executions — Sale under execution — General principles

Prior to receivership, debtor had offered primary asset, two manufacturing facilities on some 13 acres of property, for sale for \$10.9 million — Following appointment in November 2012, receiver listed property for sale for \$9.95 million — In January 2013, receiver reduced listing price to \$8.2 million — After five months of marketing, receiver received only one offer which was far below asking price — In June 2013, noting appraised value less than January listing price, receiver reduced listing price further to \$6.8 million — Prospective purchaser made offer and receiver entered agreement for purchase and sale — Purchaser unable to waive conditions and agreement came to end — After rejecting several other offers due to either price or conditions, receiver accepted offer from new purchaser and executed agreement in December 2013 — Receiver brought motion for court approval of sale, fees and distribution of net proceeds to priority claims and secured creditor — Motion granted — Commercially sensitive information kept confidential in order to protect integrity and fairness of sale process by ensuring that competitors or potential bidders did not obtain unfair advantage — Receiver acted reasonably in refusing to disclose such information without execution of confidentiality agreement — On evidence, no question receiver had exposed property to market in reasonable fashion and for reasonable period of time — Accepted offer below appraised value but superior to others received in last quarter of 2013 — Appraised value, therefore, clearly over-estimated market value of property.

## Table of Authorities

### Cases considered by *D.M. Brown J.*:

*Bank of Montreal v. Dedicated National Pharmacies Inc.* (2011), 2011 CarswellOnt 185, 2011 ONSC 346, 73 C.B.R. (5th) 13 (Ont. S.C.J. [Commercial List]) — considered

*Combined Air Mechanical Services Inc. v. Flesch* (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, (sub nom. *Hryniak v. Mauldin*) 366 D.L.R. (4th) 641 (S.C.C.) — referred to

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

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

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

MOTION by receiver for court approval of sale, fees and distribution of net proceeds to priority claims and secured creditor.

*D.M. Brown J.:*

**I. Debtor's request for disclosure of commercially sensitive information on a receiver's motion to approve the sale of real property**

1 PricewaterhouseCoopers Inc., the receiver of all the assets, undertaking and properties of the respondent debtor, 1262354 Ontario Inc., pursuant to an Appointment Order made November 5, 2012, moved for an order approving its execution of an agreement of purchase and sale dated December 27, 2013, with G-3 Holdings Inc., vesting title in the purchased assets in that purchaser, approving the fees and disbursements of the Receiver and authorizing the distribution of some of the net proceeds from the sale to the senior secured creditor, GE Canada Real Estate Financing Business Property Company ("GE").

2 The Receiver's motion was opposed by the Debtor, Keith Munt, the principal of the Debtor, and another of his companies, 800145 Ontario Inc. ("800 Inc."), which holds a subordinate mortgage on the sale property. The Debtor wanted access to the information filed by the Receiver in the confidential appendices to its report, but the Debtor was not prepared to execute the form of confidentiality agreement sought by the Receiver.

3 After adjourning the hearing date once at the request of the Debtor, I granted the orders sought by the Receiver. These are my reasons for so doing.

**II. Facts**

4 The primary assets of the Debtor were two manufacturing facilities located on close to 13 acres of land at 5230 Harvester Road, Burlington (the "Property"). Prior to the initiation of the receivership the Property had been listed for sale for \$10.9 million. Following its appointment in November, 2012, the Receiver entered into a new listing agreement with Colliers Macaulay Nicolls (Ontario) Inc. at a listing price of \$9.95 million. In January, 2013, the listing price was reduced to \$8.2 million.

5 In its Second Report dated March 14, 2013 and Third Report dated February 5, 2014, the Receiver described in detail its efforts to market and sell the Property. As of the date of the Second Report Colliers had received expressions of interest from 33 parties, conducted 8 site tours and had received 8 executed Non-Disclosure Agreements from parties to which it had provided a confidential information package. From that 5-month marketing effort the Receiver had received one offer, which it rejected because it was significantly below the asking price, and one letter of intent, to which it responded by seeking an increased price.

6 Prior to the appointment of the Receiver the Debtor had begun the process to seek permission to sever the Property into two parcels. Understanding that severing the Property might enhance its realization value, the Receiver continued the services of the Debtor's planning consultant and in July, 2013, filed a severance application with the City of Burlington. In

mid-November, 2013 the City provided the Receiver with its comments and those of affected parties. The City would not support a parking variance request. Based on discussions with its counsel, the Receiver had concerns about the attractiveness of the Property to a potential purchaser should it withdraw the parking variance request. Since the Receiver had issued its notice of a bid deadline in November, it decided to put the severance application on hold and allow the future purchaser to proceed with it as it saw fit.

7 Returning to the marketing process, following its March, 2013 Second Report the Receiver engaged Cushman & Wakefield Ltd. to prepare a narrative report form appraisal for the Property. On June 6, 2013, Cushman & Wakefield transmitted its report stating a value as at March 31, 2013. The Receiver filed that report on a confidential basis. In its Third Report the Receiver noted that the appraised value was less than the January, 2013 listing price, as a result of which on June 4, 2013 the Receiver authorized Colliers to reduce the Property's listing price to \$6.8 million. That same day the Receiver notified the secured creditors of the reduction in the listing price and the expressions of interest for the Property it had received up until that point of time.

8 One such letter was sent to Debtor's counsel. Accordingly, as of June 4, 2013, the Debtor and its principal, Munt: (i) were aware of the history of the listing price for the Property under the receivership; (ii) knew of the marketing history of the Property, including the Receiver's advice that all offers and expressions of interest received up to that time had been rejected "because they were all significantly below the Listing Price and Revised Listing Price for the Property"; (iii) knew that the Receiver had obtained a new appraisal from Cushman which valued the Property at an amount "lower than the Revised Listing Price, which is consistent with the Offers and the feedback from the potential purchasers that have toured the Property"; and, (iv) learned that the listing price had been lowered to \$6.8 million.

9 On June 18 the Receiver received an offer from an interested party (the "Initial Purchaser") and by June 24 had entered into an agreement of purchase and sale with that party. The Receiver notified new counsel for Munt and his companies of that development on July 29, 2013. The Receiver advised that the agreement contemplated a 90-day due diligence period.

10 As the deadline to satisfy the conditions under the agreement approached, the Initial Purchaser informed the Receiver that it would not be able to waive the conditions prior to the deadline and requested an extension of the due diligence period until November 5, 2013, as well as the inclusion of an additional condition in its favour that would make the deal conditional on the negotiation of a lease with a prospective tenant. The Receiver did not agree to extend the deadline. Its reasons for so doing were fully described in paragraphs 50 and 51 of its Third Report. As a result, that deal came to an end, the fact of which the Receiver communicated to the secured parties, including Munt's counsel, on September 27, 2013.

11 The Colliers listing agreement expired on September 30; the Receiver elected not to renew it. Instead, it entered into an exclusive listing agreement with CBRE Limited for three months with the listing price remaining at \$6.8 million. CBRE then conducted the marketing campaign described in paragraph 67 of the Third Report. Between October 7, 2013 and January 21, 2014, CBRE received expressions of interest from 56 parties, conducted 19 site tours and received 12 executed NDAs to whom it sent information packages.

12 In October CBRE received three offers. The Receiver rejected them either because of their price or the conditions attached to them.

13 By November, 2013, the Receiver had marketed the Property for one year, during which time GE had advanced approximately \$593,000 of the \$600,000 in permitted borrowings under the Appointment Order. The Receiver developed concerns about how long the receivership could continue without additional funding. By that point of time the Receiver had begun to accrue its fees to preserve cash.

14 The Receiver decided to instruct CBRE to distribute an email notice to all previous bidders and interested parties announcing a December 2, 2013 offer submission deadline. Emails went out to about 1,200 persons.

15 In response to the bid deadline notice, four offers were received. The Receiver concluded that none were acceptable.

16 The Receiver then received five additional offers. It engaged in negotiations with those parties in an effort to maximize the purchase price. On December 13, 2013, the Receiver accepted an offer from G-3 and on December 27 executed an agreement with G-3, subject to court approval.

17 The Receiver filed, on a confidential basis, charts summarizing the materials terms of the offers received, as well as an un-redacted copy of the G-3 APA. The G-3 offer was superior in terms of price, “clean” - in the sense of not conditional on financing, environmental site assessments, property conditions reports or other investigations — and provided for a reasonably quick closing date of February 25, 2014.

### **III. The adjournment request**

18 The only persons who opposed the proposed sale to G-3 were the Debtor, its principal, Munt, together with the related subsequent mortgagee, 800 Inc. When the motion originally came before the Court on February 13, 2014, the Debtor asked for an adjournment in order to review the Receiver’s materials. Although the Receiver had served the Debtor with its motion materials eight days before the hearing date, the Debtor had changed counsel a few days before the hearing. I adjourned the hearing until February 18, 2014 and set a timetable for the Debtor to file responding materials, which it did.

19 At the hearing the Debtor, Munt and 800 Inc. opposed the sale approval order on two grounds. First, they argued that they had been treated unfairly during the sale process because the Receiver would not disclose to them the terms of the G-3 APA, in particular the sales price. Second, they opposed the sale on the basis that the Receiver had used too low a listing price which did not reflect the true value of the land and was proposing an improvident sale. Let me deal with each argument in turn.

### **IV. Receiver’s request for approval of the sale: the disclosure issue**

#### ***A. The dispute over the disclosure of the purchase price***

20 The Debtor submitted that without access to information about the price in the G-3 APA, it could not evaluate the reasonableness of the proposed sale. In order to disclose that information to the Debtor, the Receiver had asked the Debtor to sign a form of confidentiality agreement (the “Receiver’s Confidentiality Agreement”). A dispute thereupon arose between

the Receiver and Debtor about the terms of that proposed agreement.

21 By way of background, on January 8, 2014, the Receiver had advised the secured creditors (other than GE) that it had entered into the G-3 APA and would seek court approval of the sale during the week of February 10. In that letter the Receiver wrote:

As you can appreciate, the economic terms of the Agreement, including the purchase price payable, are commercially sensitive. In order to maintain the integrity of the Sale Process, the Receiver is not in a position to disclose this information at this time.

22 On January 10, 2014, counsel for the Debtor requested a copy of the G-3 APA. Receiver's counsel replied on January 13 that it would be seeking a court date during the week of February 10 and "as is normally the custom with insolvency proceedings, we will not be circulating the Agreement in advance".

23 On January 23 Debtor's counsel wrote to the Receiver:

My clients, being both the owner, and secured and unsecured creditors of the owner, and having other interests in the outcome of the sales transaction, have a right to the production of the subject Agreement, and should be afforded a sufficient opportunity to review it and understand its terms in advance of any court hearing to approve the transaction contemplated therein. I once again request a copy of the subject Agreement as soon as possible.

According to the Receiver's Supplemental Report, in response Receiver's counsel explained that the purchase price generally was not disclosed in an insolvency sales transaction prior to the closing of the sale and that the secured claim of GE exceeded the purchase price.

24 The Receiver's motion record served on February 5 contained a full copy of the G-3 APA, save that the Receiver had redacted the references to the purchase price. An affidavit filed on behalf of the Debtor stated that "it has been Mr. Munt's position that his position on the approval motion is largely contingent upon the terms and conditions of the subject Agreement, particularly the purchase price".

25 The Debtor and a construction lien claimant, Centimark Ltd., continued to request disclosure of the G-3 APA. On February 11, 2014, Receiver's counsel wrote to them advising that the Receiver was prepared to disclose the purchase price upon the execution of the Receiver's Confidentiality Agreement which confirmed that (i) they would not be bidding on the Property at any time during the receivership proceedings and (ii) they would maintain the confidentiality of the information provided.

26 Centimark agreed to those terms, signed the Receiver's Confidentiality Agreement and received the sales transaction information. Centimark did not oppose approval of the G-3 sales transaction.

27 On February 12, the day before the initial return of the sales approval motion, counsel for the Receiver and Debtor

discussed the terms of a confidentiality agreement, but were unable to reach an agreement. According to the Receiver's Supplement to the Third Report, "[Munt's counsel] did not inform the Receiver that Munt was prepared to waive its right to bid on the Real Property at some future date".

28 At the initial hearing on February 13 the Debtor expanded its disclosure request to include all the confidential appendices filed by the Receiver - i.e. the June 6, 2013 Cushman & Wakefield appraisal; a chart summarizing the offers/letters of intent received while Colliers was the listing agent; a chart summarizing the offers/letters of intent received while CBRE had been the listing agent; and, the un-redacted G-3 APA. Agreement on the terms of disclosure could not be reached between counsel; the motion was adjourned over the long weekend until February 18.

29 The Receiver's Confidentiality Agreement contained a recital which read:

The undersigned 1262354 Ontario Inc., 800145 Ontario Inc. and Keith Munt have confirmed that it, its affiliates, related parties, directors and officers (collectively the "Recipient"), have no intention of bidding on the Property, located at 5230 Harvester Road, Burlington, Ontario.

The operative portions of the Receiver's Confidentiality Agreement stated:

1. The Recipient shall keep confidential the Confidential Information, and shall not disclose the Confidential Information in any manner whatsoever including in respect of any motion materials to be filed or submissions to be made in the receivership proceedings involving 1262354 Ontario Inc. The Recipient shall use the Confidential Information solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement and the transaction contemplated therein, and not directly or indirectly for any other purpose.
2. The Recipient will not, in any manner, directly or indirectly, alone or jointly or in concert with any other person (including by providing financing to any other person), effect, seek, offer or propose, or in any way assist, advise or encourage any other person to effect, seek, offer or propose, whether publicly or otherwise, any acquisition of some or all of the Property, during the course of the Receivership proceedings involving 1262354 Ontario Inc.
3. The Recipient may disclose the Confidential Information to his legal counsel and financial advisors (the "Advisors") but only to the extent that the Advisors need to know the Confidential Information for the purposes described in Paragraph 1 hereof, have been informed of the confidential nature of the Confidential Information, are directed by the Recipient to hold the Confidential Information in the strictest confidence, and agree to act in accordance with the terms and conditions of this Agreement. The Recipient shall cause the Advisors to observe the terms of this Agreement and is responsible for any breach by the Advisors of any of the provisions of this Agreement.
4. The obligations set out in this Agreement shall expire on the earlier of: (a) an order of the Ontario Superior Court (Commercial List) (the "Court") unsealing the copy of the Sale Agreement filed with the Court; and (b) the closing of a transaction of purchase and sale by the Receiver in respect of the Property.

30 Following the adjourned initial hearing of February 13, Debtor's counsel informed the Receiver that his client would sign the Receiver's Confidentiality Agreement if (i) paragraph 3 was removed and (ii) the last sentence of paragraph 1 was revised to read as follows:

The Recipient shall use the Confidential Information solely in connection with the Receiver's motion for an order approving the Sale Agreement and other relief, and not directly or indirectly for any other purpose.

31 By the time of the February 18 hearing the Debtor had not signed the Receiver's Confidentiality Agreement.

### **B. Analysis**

32 In *Sierra Club of Canada v. Canada (Minister of Finance)*<sup>1</sup> the Supreme Court of Canada sanctioned the making of a sealing order in respect of materials filed with a court when (i) the order was necessary to prevent a serious risk to an important interest, including a commercial interest, because reasonably alternative measures would not prevent the risk and (ii) the salutary effects of the order outweighed its deleterious effects.<sup>2</sup> As applied in the insolvency context that principle has led this Court to adopt a standard practice of sealing those portions of a report from a court-appointed officer - receiver, monitor or trustee - filed in support of a motion to approve a sale of assets which disclose the valuations of the assets under sale, the details of the bids received by the court-appointed officer and the purchase price contained in the offer for which court approval is sought.

33 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.<sup>3</sup>

34 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 sales process necessitates keeping all bids confidential until a final sale of the assets has taken place.

35 From that it follows that if an interested party requests disclosure from a receiver of the sensitive commercial information about the sales transaction, the party must agree to refrain from participating in the bidding process. Otherwise, the party would gain an unfair advantage over those bidders who lacked access to such information.

36 Applying those principles to the present case, I concluded that the Receiver had acted in a reasonable fashion in requesting the Debtor to sign the Receiver's Confidentiality Agreement before disclosing information about the transaction price and other bids received. The provisions of the Receiver's Confidentiality Agreement were tailored to address the concerns surrounding the disclosure of sensitive commercial information in the context of an insolvency asset sale:

(i) Paragraph 1 of the agreement specified that the disclosed confidential information could be used "solely to evaluate the Sale Agreement in connection with the Receiver's motion for an order approving the Sale Agreement". In other words, the disclosure would be made solely to enable the Debtor to assess whether the proposed sales transaction had met the criteria set out in *Royal Bank v. Soundair Corp.*,<sup>4</sup> specifically that (i) the Receiver had obtained the offers through a process characterized by fairness, efficiency and integrity, (ii) the Receiver had made a sufficient effort to get the best price and had not acted improvidently, and (iii) the Receiver had taken into account the interests of all parties. The Debtor was not prepared to agree to that language in the agreement and, instead, proposed more general language. The Debtor did not offer any evidence as to why it was not prepared to accept the tailored language of paragraph 1 of the Receiver's Confidentiality Agreement;

(ii) The recital and paragraphs 2 and 4 of the agreement would prevent the Debtor, its principal and related company, from bidding on the Property during the course of the receivership — a proper request. The Debtor was prepared to

agree to that term;

(iii) However, the Debtor was not prepared to agree with paragraph 3 of the Receiver's Confidentiality Agreement which limited disclosure of the confidential information to the Debtor's financial advisors only for the purpose of evaluating the Receiver's proposed sale transaction. Again, the Debtor did not file any evidence explaining its refusal to agree to this reasonable provision. Although Munt filed an affidavit sworn on February 14, he did not deal with the issue of the form of the confidentiality agreement.

37 In sum, I concluded that the form of confidentiality agreement sought by Receiver from the Debtor as a condition of disclosing the commercially sensitive sales transaction information was reasonable in scope and tailored to the objective of maintaining the integrity of the sales process. I regarded the Debtor's refusal to sign the Receiver's Confidentiality Agreement as unreasonable in the circumstances and therefore I was prepared to proceed to hear and dispose of the sales approval motion in the absence of disclosure of the confidential information to the Debtor.

#### **V. Receiver's request for approval of the sale: The Soundair analysis**

38 The Receiver filed detailed evidence describing the lengthy marketing process it had undertaken with the assistance of two listing agents, the offers received, and the bid-deadline process it ultimately adopted which resulted in the proposed G-3 APA. I was satisfied that the process had exposed the Property to the market in a reasonable fashion and for a reasonable period of time. In order to provide an updated benchmark against which to assess received bids the Receiver had obtained the June, 2013 valuation of the Property from Cushman & Wakefield.

39 The offer received from the Initial Purchaser had contained the highest purchase price of all offers received and that price closely approximated the "as is value" estimated by Cushman & Wakefield. That offer did not proceed. The purchase price in the G-3 APA was the second highest received, although it was below the appraised value. However, it was far superior to any of the other 11 offers received through CBRE in the last quarter of 2013. From that circumstance I concluded that the appraised value of the Property did not accurately reflect prevailing market conditions and had over-stated the fair market value of the Property on an "as is" basis. That said, the purchase price in the G-3 APA significantly exceeded the appraised land value and the liquidation value estimated by Cushman & Wakefield.

40 Nevertheless, Munt gave evidence of several reasons why he viewed the Receiver's marketing efforts as inadequate:

(i) Munt deposed that had the Receiver proceeded with the severance application, it could have marketed the Property as one or two separate parcels. As noted above, the Receiver explained why it had concluded that proceeding with the severance application would not likely enhance the realization value, and that business judgment of the Receiver was entitled to deference;

(ii) Munt pointed to appraisals of various sorts obtained in the period 2000 through to January, 2011 in support of his assertion that the ultimate listing price for the Property was too low. As mentioned, the June, 2013 appraisal obtained by the Receiver justified the reduction in the listing price and, in any event, the bids received from the market signaled that the valuation had over-estimated the value of the Property;

(iii) Finally, Munt complained that the MLS listing for the Property was too narrowly limited to the Toronto Real Estate Board, whereas the Property should have been listed on all boards from Windsor to Peterborough. I accepted the explanation of the Receiver that it had marketed the Property drawing on the advice of two real estate professionals as listing agents and was confident that the marketing process had resulted in the adequate exposure of the Property.



41 Consequently, I concluded that the Receiver's marketing of the Property and the proposed sales transaction with G-3 had satisfied the *Soundair* criteria. I approved the sale agreement and granted the requested vesting order.

## VI. Request to approve Receiver's activities and fees

42 As part of its motion the Receiver sought approval of its fees and disbursements, together with those of its counsel, for the period up to January 31, 2014, as well as authorization to make distributions from the net sale proceeds for Priority Claims and an initial distribution to the senior secured, GE. The Debtor sought an adjournment of this part of the motion until after any sale had closed and the confidential information had been unsealed. I denied that request.

43 As Marrocco J., as he then was, stated in *Bank of Montreal v. Dedicated National Pharmacies Inc.*,<sup>5</sup> motions for the approval of a receiver's actions and fees, as well as the fees of its counsel, should occur at a time that makes sense, having regard to the commercial realities of the receivership. For several reasons I concluded that it was appropriate to consider the Receiver's approval request at the present time.

44 First, one had to take into account the economic reality of this receivership - i.e. that given the cash-flow challenges of this receivership, the Receiver had held off seeking approval of its fees and disbursements for a considerable period of time during which it had been accruing its fees.

45 Second, the Receiver filed detailed information concerning the fees it and its legal counsel had incurred from September, 2012 until January 31, 2014, including itemized invoices and supporting dockets. The Receiver had incurred fees and disbursements amounting to \$356,301.40, and its counsel had incurred fees approximating \$188,000.00. That information was available for the Debtor to review prior to the hearing of the motion.

46 Third, with the approval of the G-3 sale, little work remained to be done in this receivership. By its terms the G-3 APA contemplated a closing date prior to February 27, 2014, and the main condition of closing in favour of the purchaser was the securing of the approval and vesting order.

47 Fourth, the Receiver reported that GE's priority secured claim exceeded the purchase price. Accordingly, GE had the primary economic interest in the receivership; it had consented to the Receiver's fees. Also, the next secured in line, Centimark, had not opposed the Receiver's motion.

48 Which leads me to the final point. Like any other civil proceeding, receiverships before a court are subject to the principle of procedural proportionality. That principle requires taking account of the appropriateness of the procedure as a whole, as well as its individual component parts, their cost, timeliness and impact on the litigation given the nature and complexity of the litigation.<sup>6</sup> In this receivership the Receiver had served this motion over a week in advance of the hearing date and the Debtor had secured an adjournment over a long weekend; the Debtor had adequate time to review, consider and respond to the motion. I considered it unreasonable that the Debtor was not prepared to engage in a review of the Receiver's accounts in advance of the second hearing date, while at the same time the Debtor took advantage of the adjournment to file

evidence in response to the sales approval part of the motion.

49 Debtor's counsel submitted that an adjournment of the fees request was required so that the Debtor could assess the reasonableness of the fees in light of the purchase price. Yet, it was the Debtor's unreasonable refusal to sign the Receiver's Confidentiality Agreement which caused its inability to access the purchase price at this point of time, and such unreasonable behavior should not be rewarded by granting an adjournment of the fees portion of the motion.

50 Further, to adjourn the fees portion of the motion to a later date would increase the litigation costs of this receivership. From the report of the Receiver the Debtor's economic position was "out of the money", so to speak, with the senior secured set to suffer a shortfall. It appeared to me that the Debtor's request to adjourn the fees part of the motion would result in additional costs without any evident benefit. I asked Debtor's counsel whether his client would be prepared to post security for costs as a term of any further adjournment; counsel did not have instructions on the point. In my view, courts should scrutinize with great care requests for adjournments that will increase the litigation costs of receivership proceeding made by a party whose economic interests are "out of the money", especially where the party is not prepared to post security for the incremental costs it might cause.

51 For those reasons, I refused the Debtor's second adjournment request.

52 Having reviewed the detailed dockets and invoices filed by the Receiver and its counsel, as well as the narrative in the Third Report and its supplement, I was satisfied that its activities were reasonable in the circumstances, as were its fees and those of its counsel. I therefore approved them.

## **VII. Partial distribution**

53 Given that upon the closing of the sale to G-3 the Receiver will have completed most of its work, I considered reasonable its request for authorization to make an interim distribution of funds upon the closing. In its Third Report the Receiver described certain Priority Claims which it had concluded ranked ahead of GE's secured claim, including the amounts secured by the Receiver's Charge, the Receiver's Borrowing Charge and an H.S.T. claim. As well, it reported that it had received an opinion from its counsel about the validity, perfection and priority of the GE security, and it had concluded that GE was the only secured creditor with an economic interest in the receivership. In light of those circumstances, I accepted the Receiver's request that, in order to maximize efficiency and to avoid the need for an additional motion to seek approval for a distribution, authorization should be given at this point in time to the Receiver to pay out of the sale proceeds the priority claims and a distribution to GE, subject to the Receiver maintaining sufficient reserves to complete the administration of the receivership.

## **VIII. Summary**

54 For these reasons I granted the Receiver's motion, including its request to seal the Confidential Appendices until the closing of the sales transaction.

*Motion granted.*

Footnotes

<sup>1</sup> 2002 SCC 41 (S.C.C.)

<sup>2</sup> *Ibid.*, para. 53.

<sup>3</sup> *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]).

<sup>4</sup> (1991), 4 O.R. (3d) 1 (Ont. C.A.)

<sup>5</sup> 2011 ONSC 346 (Ont. S.C.J. [Commercial List]), para. 7.

<sup>6</sup> *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.), para. 31.

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# TAB 7

2009 CarswellOnt 9415  
Ontario Superior Court of Justice [Commercial List]

SkyPower Corp., Re

2009 CarswellOnt 9415

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

In the Matter of a Plan of Compromise or Arrangement of SkyPower Corp.

Morawetz J.

Judgment: October 27, 2009

Docket: 09-8321-00CL

Counsel: Robert Chadwick, Fred Myers, Cathy Costa, for Applicant

G. Smith & C. Costa, for Applicant

M. McNaughton, for KPMG Inc.

R. Askew, for Cad-Fairview

J. Bunting, for Nordback

J. MacDonald, for HSH Nordback Syndicate

K. Mak, for Lehman Bros.

S. Laubman, for Sean Edison

M. Weinczoh, for Golden Assoc.

R. Stabile, for CIM Group

K. McEachern, for West L.B.

Subject: Insolvency

**Related Abridgment Classifications**

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

## Headnote

**Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Initial application — Grant of stay — Extension of order**

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

## Table of Authorities

### Cases considered by *Morawetz J.*:

*Sierra Club of Canada v. Canada (Minister of Finance)* (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada*) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

### *Morawetz J.*:

1 Counsel to the Applicant advised that two orders were being sought namely the stay extension to November 30/09 and the approval of the sale of the Applicants Solar business to 1495359 Alberta ULC (the “Purchaser”), an affiliate of CIM Group, the Applicant’s DIP lender. The motions were not opposed.

2 The portion of the motion relating to an authorization to draw an increased amount under the DIP facility did not proceed.

### Stay Extension

3 A sales process was authorized on Aug 25/09. The sales process is progressing.

4 The third report of the Monitor provides a summary of the process to date. The Monitor has been actively involved in the process, in part due to the fact that the proposed transaction on the solar business is between the Applicant and an affiliate of the DIP lender.

5 I am satisfied having reviewed the record and having heard submission that the applicant continues to work in good faith and with due diligence such that the extension to November 30, 2009 is awarded. The projected cash flow did contemplate an increase in DIP facility.

6 The Court was advised that the Applicant has decided that the Development Expense of \$3.318 million scheduled for the week of Nov 29/09 will not be incurred. In the event the situation changes, counsel advised that a further court application will be made. Based on this representation I am satisfied that there should be sufficient availability in the DIP Facility to permit operations to continue during the extension period.

7 Accordingly an order shall issue in the form presented extends the stay to November 30, 2009.

#### **Approval of Sale to Purchase**

8 The details of the proposed transaction relating to the Solar Business are set out in the Adler affidavit and the Third Report of the Monitor.

9 In addition, the Applicant filed separately a copy of the Sale purchase Agreement which disclosed the purchase price. The Monitor also filed a 2 page summary of the various offers received for the sales Business. This summary also contained comments of the Monitor which composed the various offers and the reasons why the Monitor recommended approval of the transactions with the purchaser. Having reviewed the complete record and having heard submissions and upon being advised that the secured creditors support the proposed transaction.

10 I am satisfied that the transaction provides for a reasonable outcome for affected stakeholders in the circumstances. I am also satisfied that the parties have conducted the sales process in accordance with guidelines set forth in *Royal Bucks v. Soundarin*. I specifically note that, with one exception, all competing offers to that of the purchaser, were significantly lower. With respect to the one offer that was not substantially lower, I accept the Monitor's recommendation and that of the Applicant that the offer of the purchaser is preferable and should be accepted.

11 The proposed schedules to the agreement have been amended in non-material areas. These proposed changes are acceptable.

12 I am also satisfied that proposed amendments to the draft order relating to landlord issues and secured creditors issues are acceptable.

13 The proposed transaction with the purchaser for the Sales Business is approved. It goes without further comment that nothing in this endorsement is intended to impact on any parties rights with respect to any sale approval motion relating to other assets of the Applicant.

14 The Applicant has also requested that Sale Agreement be sealed on the basis that it contains sensitive price information, the disclosure of which could be harmful to the stakeholders. Likewise, the Monitor has requested that the 2 page summary of offers also be sealed for the same reason. I am satisfied that the disclosure of this informations could be harmful to the stakeholders. Having considered the "sealing tests" as set out ion the *Sierra Club of Canada v. Canada (Minister of Finance)* [2002 CarswellNat 822 (S.C.C.)] decision of the S.C.C., I am satisfied that these two documents should be sealed pending further order.

15 An order giving effect to the foregoing is to be issued in the form presented.

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CENTURION MORTGAGE CAPITAL CORPORATION

- and -

TERRASAN 327 ROYAL YORK RD. LIMITED

Applicant

Respondent

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

PROCEEDING COMMENCED AT TORONTO

**BOOK OF AUTHORITIES  
(Motion returnable August 25, 2017)**

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