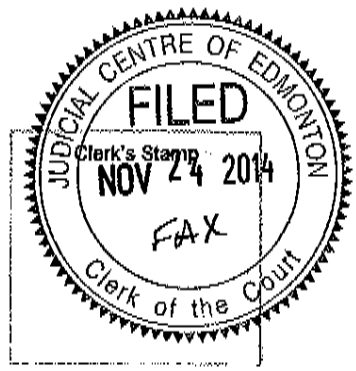

COURT FILE NUMBER:	1303 15731
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	RIDGE DEVELOPMENT CORPORATION
DEFENDANT	1324206 ALBERTA LTD.
DOCUMENT	**BENCH BRIEF OF LAW AND BOOK OF AUTHORITIES OF THE APPLICANT ALVAREZ & MARSAL CANADA INC.** **RETURNABLE AT 2:00 ON NOVEMBER 28, 2014**
PARTY FILING THIS DOCUMENT	**ALVAREZ & MARSAL CANADA INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**McMillan LLP** 421 7th Avenue SW, Suite 1700 Calgary, Alberta T2P 4K9 **Attention:** **Marc-Elie Scott/Adam C. Maerov** Phone: 403.531.4703 Fax: 403.531.4720 Email: Marc-Elie.Scott@mcmillan.ca File No. 222630

INDEX

BRIEF OF LAW

TABLE OF CONTENTS

I INTRODUCTION

1. On November 13, 2013, Alvarez & Marsal Canada Inc. was appointed Receiver and Manager (the "**Receiver**") of all current and future assets, undertakings and properties (the "**Property**") of 1324206 Alberta Ltd. ("**132**") pursuant to the provisions of a Receivership Order granted by Justice D.R.G Thomas of the Court of Queen's Bench of Alberta (the "**Order**").

2. The Order authorized the Receiver, among other things, to market any or all the property; to sell, convey, transfer, lease or assign the Property or any part or parts thereof with the approval of this Court in respect of any transaction in which the purchase price exceeds $10,000.00; and to apply for any vesting order or other order necessary to convey the Property or any part or parts thereof to a purchaser free and clear of any liens and encumbrances affecting the Property.

3. The Receiver applies to this Honorable Court for the following relief:

   (a) an Order abridging the time for service and deeming service good and sufficient upon all interested parties;

   (b) an Approval and Vesting Order substantially in the form attached as Schedule "A" to the Receiver's Application, or on such further and other terms as this Honourable Court may direct;

   (c) an Order temporarily treating as confidential, sealing and not forming part of the public record Confidential Appendix "B" and Confidential Appendix "C" to the First Report of the Receiver until the earlier of (i) the closing of the Sale Agreement (as subsequently defined), (ii) May 28, 2015, and (iii) such later date as may be ordered further by this Honourable Court;

   (d) an Order authorizing the Receiver (as subsequently defined) to distribute the proceeds of the transaction contemplated in the Sale Agreement in repayment of the Receiver's Borrowings Charge together with interest and charges thereon (as defined in the Receivership Order), and that the Receiver shall hold the remaining proceeds until further order of this Honourable Court; and

   (e) such further and other relief as this Honourable Court may grant.

II FACTS

A. Background

4. 132 was incorporated on May 22, 2007 and its primary business is development of a condominium complex, commonly referred to as Whitemud Heights, on the Stony Plain Reserve No. 135 (the "**Whitemud Heights Project**" or the "**Project**").

5. The property of the Whitemud Heights Project is legally described as follows:

   STONY PLAIN INDIAN RESERVE NO. 135
   (BEING LANDS OCCUPIED BY ENOCH CREE NATION 440)

CANADA LANDS SURVEY SYSTEM PLAN NO. 96507
WITHIN LOT 186, PLAN 92619 CLSP
WITHIN THE NE ¼ 25-52-26 W4M

6. As per the Notice of Statement of Receiver filed by the Receiver on November 22, 2013 (the "**Statement of the Receiver**"), 132 owed to its secured and unsecured creditors the following amounts:

Name	Claim Amount
Secured Creditors	$ 28, 026, 326.59
Unsecured Creditors	$7, 340, 785.42
Total	$ 35, 367, 112.01

Alvarez & Marsal Canada Inc., Notice of Statement of Receiver in the matter of the Receivership of 1324206 Alberta Ltd. Dated November 22, 2013 [*Notice of Statement*]

7. Royal Bank of Canada is the senior secured creditor of 132, and appears to have first-ranking security over all present and after acquired personal property and real property owned by 132.

Notice of Statement, supra para 6.

B. The Sale Process

8. After its appointment the Receiver made the decision to terminate negotiations with a potential purchaser who could not produce a sufficient deposit.

9. The Receiver then considered a number of options for the sale of the Project and decided to engage the services of a commercial realtor to market the Project. The Receiver contacted approximately ten national commercial realtors and requested proposals for the marketing and sale of the Whitemud Heights Project (the "**Sale Process**").

10. The Receiver took the realtors on tours of the Project and conducted interviews. The Receiver received five proposals from commercial realtors which were to include a marketing plan and a suggested listing and sale price. After reviewing the five proposals, CBRE Limited ("**CBRE**") was selected as the listing agent.

11. As part of the Sale Process, CBRE sent out a mass market email to over 3000 approved investors and outside commercial realtors. CBRE also advertised the Whitemud Heights Project on its website and on Loopnet, an online commercial real estate marketing website.

12. CBRE showed the property to numerous prospective buyers.

13. CBRE did not receive any offers near the listing price, but was able to generate five offers for the Property.

C. The Sale Agreement

14. As part of its review of the offers, the Receiver considered the following factors:

    (a) the extent to which the purchase price in the Sale Agreement was consistent with independent appraisals available during the receivership;

    (b) the overall execution risk associated with closing the transaction with the prospective purchaser;

    (c) the extent to which the purchaser complied with the Sale Process;

    (d) the receipt of a $1.0 million non-refundable deposit from the prospective purchaser; and

    (e) the extent to which the purchaser's closing conditions were acceptable.

    The First Report of the Receiver, filed November 21, 2014 para 13 [*The Report*].

15. After considering all the offers it received pursuant to the Sale Process the Receiver accepted, subject to the approval of this Honourable Court, an offer from 1845351 Alberta Ltd. for the sale of the Property (the "**Sale Agreement**").

    The Report, supra para 14 para 26.

16. The offer contained in the Sale Agreement is an all cash offer for the Property on an "as is where is" basis with a purchase price as referenced in Confidential Appendix "C". The offer has no closing conditions except for Court approval of the Sale Agreement, Crown consent to the assignment of the lease on which the Project is situated, a mutual condition precedent that John Barath, Ridge Development Corp and RBC enter into an agreement with respect to the settlement of the liabilities of John Barath and Ridge Development to RBC which was waived by both the Receiver and the Purchaser on or before 5:00 on September 24, 2014 (the "**Guarantee Settlement Agreement**"), and upon John Barath and Ridge Development Corp paying all settlement funds to RBC when due pursuant to the Guarantee Settlement Agreement.

17. The Sale Agreement represents the best offer received which met both the Receiver's acceptable closing conditions and the minimum $1.0 million non-refundable deposit.

    The Report, supra para 14 para 28

III ISSUES

18. Whether this Honourable Court should approve the sale of the Whitemud Heights Projects as recommended by the Receiver.

19. Whether this Honourable Court should exercise its discretion to restrict access to materials filed in support of this Application and to court proceedings held with respect to this Application.

IV LAW AND ARGUMENT

A. Receivership Order

20. The Receivership Order authorizes the Receiver, *inter alia*, to:

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

(b) sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, with the approval of this Honourable Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in accordance with Paragraph l(1), and in each such case notice under subsection 60(8) of the *Personal Property Security Act*, RSA 2000, c P-7 shall not be required;

(c) apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property; and

(d) take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligation.

Receivership Order of Justice D.R.G. Thomas, dated November 13, 2013 para 3

B. Jurisprudence

21. The leading case of *Royal Bank of Canada v Soundair* sets out four factors that a Court must consider when determining whether to approve a proposed sale of assets by a receiver:

i. whether the receiver has made a sufficient effort to obtain the best price and has not acted improvidently;

ii. the interests of all the parties;

iii. the efficacy and integrity of the process by which offers have been obtained; and

iv. whether there has been unfairness in the working out of the process.

Royal Bank of Canada v Soundair, 1991 CarswellOnt 205, 4 OR (3d) 1 at para 16, [*Soundair*] [Tab 1].

22. When reviewing a proposed sale by a receiver, the jurisprudence is clear that the "Court should not proceed against the recommendations of its receiver except in special circumstances and where the necessity of doing so are plain."

> *Crown Trust Co et al v Rosenberg et al*, [1986] 60 OR (2d) 87, 39 DLR (4th) 526 at 548 [*Crown Trust Co*] [Tab 2].
>
> *Royal Bank of Canada v Fracmaster Ltd*, 1999 ABQB 425, 245 AR 138 at para 58 aff'd 1999 ABCA 178, 1999 CarswellAlta 539 [*Fracmaster*] [Tab 3].

23. An application of the *Soundair* factors to the Sale Agreement will illustrate that there are no special circumstances or plain necessity that would warrant the Court rejecting the Sale Agreement.

> *Crown Trust Co*, *supra* para 22 at 551 [Tab 2].

Receiver Made Sufficient Effort to Receive the Best Price and Acted Providently

24. The proper exercise of judicial discretion with regard to whether a Court should approve a sale recommended by a receiver should be limited to an assessment of "whether the receiver has made a sufficient effort to get the best price and not acted improvidently."

> *Salima Investments Ltd v Bank of Montreal*, 1985 ABCA 191, 65 AR 372 at para 12 [Tab 4].

25. As set out in *Skyepharma PLC v Hyal Pharmaceutical Corporation*, the primary duty of the receiver is not to obtain the best price for the assets being sold, but rather to act reasonably in the circumstances to obtain the best price. The Receiver accepted an offer that contained the most favourable closing conditions at the best price under the circumstances.

> *Skyepharma PLC v Hyal Pharmaceutical Corporation*, 1999 CarswellOnt 3641, [1999] OJ No 4300 at para 4, aff'd (2000), 47 OR (3d) 234, [2000] OJ No 467 [*Skyepharma*] [Tab 5].

26. The Receiver made effective efforts to sell the Whitemud Heights Project and adopted a reasonable marketing plan. The Receiver gave ten commercial realtors the opportunity to submit proposals for the marketing and sale of the Property. The Receiver carefully considered the five proposals it received and selected an experienced commercial real estate firm to oversee the sale of the Property.

27. Direct marketing efforts were targeted at over 3000 approved investors and other commercial real estate agents. In addition, online advertisements on two separate websites and numerous showings of the Property provided the market with an extensive opportunity to review and inspect the Property.

28. It is respectfully submitted that the Sale Agreement adopted by the Receiver clearly establishes that the Receiver acted sufficiently and providently in the circumstances to ensure that the best price for the Property was obtained.

29. While the price of the Sale Agreement is not the original listing price, it represents the best offer received after a considered and extensive Sale Process and a review and analysis of all offers received by the Receiver. The exposure of the Property to the open market indicates that the price of the Sale Agreement is at market value.

30. In light of all the circumstances of this case, including the purchase price and related considerations, it is respectfully submitted that the Receiver has acted reasonably and providently to ensure that the best price for the Property was obtained.

The Interests of the Parties Favour Approval

31. The primary concern for a Court in approving a recommendation for sale by a Receiver should be the interest of the creditors of the debtor. The interest of the debtor and the purchaser may also be taken into consideration.

Soundair, *supra* para 21 at paras 39-40 [Tab 1].

32. When reviewing the interests of the parties, a Court should be reluctant to oppose a receiver's recommendation where it is satisfied that the receiver acted properly and providently. In this case the Receiver carefully considered the proposals to market the Property and the eventual offers for the sale of the Property in an effort to obtain the best price possible.

Fracmaster, *supra* para 22 at para 40 [Tab 3].

33. In weighing the interests of the parties the Court should also take into account the approval of the Sale Agreement by Royal Bank of Canada, which appears to have first-ranking security over all present and after acquired personal property and real property owned by 132, in reviewing the Receiver's recommendation of sale.

34. The Court should take into consideration the lack of prejudice the Sale Agreement would have on the unsecured creditors and 132. The Receiver exposed the property to a number of potential buyers and considered all five offers it received; none of the offers considered by the Receiver would completely satisfy the amounts owed by 132 to Royal Bank of Canada. As no offer would have generated proceeds in an amount sufficient to fully repay Royal Bank of Canada, the Sale Agreement does not prejudice the unsecured creditors or 132 more than any other offer considered by the Receiver.

The Efficacy and Integrity of the Process

35. Jurisprudence has consistently set out that when considering the approval of an asset sale by a receiver, the Court should not supplant the business judgment of the receiver. As was set out in *Crown Trust Co*:

> [The Receiver's] 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 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.
>
> *Crown Trust Co*, *supra* para 22 at 551 [Tab 2].

36. The court should not scrutinize each element of the process by which the receiver reached its decision to accept the offer (*Crown Trust Co*). The Court must assume, absent any evidence to the contrary, that the receiver has acted properly (*Soundair*). The Sale Process of the Receiver was considered and extensive; there is no evidence that the Receiver acted improperly.

> *Crown Trust Co*, *supra* para 22 at 548 [Tab 2].
>
> *Soundair*, *supra* para 21 at para 14 [Tab 1].

37. The Court should not compare the price of the offer accepted by the Receiver with the price of any other offers unless there is evidence indicating that the offer accepted by the Receiver is unreasonably low. Based on the Sale Process conducted by the Receiver the offer is at market value and represents the best offer received in light of the circumstances in this case.

> *Soundair*, *supra* para 21 at para 30 [Tab 1].

38. If the Court compared the price of an offer accepted by the Receiver with the price of other offers when there is no evidence that that the accepted offer was,

> so unreasonably low as to demonstrate that the receiver was improvident in accepting it…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…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.
>
> *Soundair*, *supra* para 21 at para 30 [Tab 1].

39. While the primary purpose of the Sale Process is for the benefit of the creditors of 132, *Skypharma* indicates that Courts should also take note of the interests of the party who has invested time and resources negotiating an agreement with a court appointed receiver when considering the efficacy and integrity of the process. From a public policy perspective it is important that potential buyers of property, who bargain

seriously and in good faith with a receiver, know with sufficient certainty that the Court will not interfere in a bargain honestly reached.

> *Skyepharma PLC v Hyla Pharmaceutical Corp*, 2000 CarswellOnt 466, [2000] OJ No 467 at paras 27-28 aff'g 1999 CarswellOnt 3641, [1999] OJ No 4300 [Tab 6].

40. The Sale Agreement represents a good faith commitment of time and resources on the part of 1845351 Alberta Ltd. towards the Sale Process with the Receiver. 1845351 Alberta Ltd. has entered into an honest bargain with the Receiver and the Court should exercise caution before interfering with the process adopted by the Receiver.

> *Soundair*, *supra* para 21 at para 46 [Tab 1].

Unfairness in the Process

41. The Court should not review the "minutia of the process or of the selling strategy adopted by the receiver", but should consider generally whether the process was fair (*Soundair*). If the receiver acted reasonably, prudently, fairly and not arbitrarily, it is only on exceptional circumstances that the court will find the sale process was unfair and proceed contrary to the recommendations of the receiver (*Crown Trust Co*). In this case the Receiver's Sale Process was reasonable and not arbitrary; no parties to the Sale Process experienced preferential or unfair treatment at the hands of the Receiver.

> *Soundair*, *supra* para 21 at para 49 [Tab 1].
>
> *Crown Trust Co*, *supra* para 22 at 548 [Tab 2].

42. There can be no allegation of bad faith or arbitrariness on the party of the Receiver here, nor was any unfairness or prejudice to others based on how the Sale Process unfolded.

C. Restricted Access Order

43. This Honourable Court may seal or partially seal a Court file and any Restricted Court Access Application is governed by Division 4 of Part 6 of the Alberta Rules of Court.

44. Restricted Court Access Applications should only be granted where:

(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.

> *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 at para 45 [Tab 7].

45. It is respectfully submitted that it is common to grant a Restricted Court Access Order over materials filed in support of an application to approve the sale of assets to protect the bidding process if the transaction ultimately fails.

> *Look Communications Inc v Look Mobile Corp,* 2009 CarswellOnt 7952, [2009] OJ No 5440 at para 17 [*Look Communications*] [Tab 8].

46. In this case, the Receiver is concerned that if the Sale Agreement does not close for any reason, the disclosure of details of the Sale Agreement in the First Report of the Receiver may negatively affect the Receiver's efforts and abilities to remarket the Whitemud Heights Project, as potential future purchasers would be aware of the amount that the Receiver would be prepared to accept and support. This would limit the ability of the Receiver to obtain potentially higher purchase prices.

47. It is respectfully submitted that an Order temporarily treating as confidential, sealing and not forming part of the public record with respect to Confidential Appendix "B" and Confidential Appendix "C" of the First Report of the Receiver is necessary to protect the efficacy and integrity of the bidding process until the Sale Agreement contemplated by the Receiver's Application is complete.

48. Previous authorities have acknowledged that a temporary Restricted Court Access Order may be required until a sale is complete to protect the integrity of the sale process.

> *Look Communications*, *supra* para 45 at para 17 [Tab 8].
>
> *Canrock Ventures LLC v Ambercore Software Inc*, 2011 ONSC 2308, 2011 CarswellOnt 2505 at para 17, aff'd 2011 ONCA 414, 2011 CarswellOnt 4170 [Tab 9].

49. It is further respectfully submitted that the salutary effects of a Restricted Court Access Order with respect to Confidential Appendix "B" and Confidential Appendix "C" of the First Report of the Receiver outweigh the deleterious effects on the public's interest.

50. As a result of the above, it is respectfully submitted that an Order temporarily treating as confidential, sealing and not forming part of the public record Confidential Appendix "B" and Confidential Appendix "C" to the First Report of the Receiver until the earlier of (i) the closing of the Sale Agreement, (ii) May 28, 2015, and (iii) such later date as may be ordered further by this Honourable Court is appropriate under the circumstances.

V CONCLUSION

51. The process adopted and conducted by the Receiver was reasonable and a sufficient effort was made to obtain the best price for the Property. In conducting the Sale Process the Receiver did not act improvidently when it accepted the offer contained in the Sale Agreement

52. The Receiver, acting pursuant to the knowledge available to it at the time, accepted an offer that is in the interest of the parties for whom the sale process is conducted, the creditors, and specifically the senior secured creditor.

53. There was no unfairness in the conduct or working out of the Sale Process adopted by the Receiver. The amount of the accepted offer was not so low as to demonstrate that the Receiver was improvident in accepting it given the specific market for, and business realities of, the Property.

54. The Receiver respectfully requests that this Honourable Court grant:

(a) an Order abridging the time for service and deeming service good and sufficient upon all interested parties;

(b) an Approval and Vesting Order substantially in the form attached as Schedule "A" to the Receiver's Application, or on such further and other terms as this Honourable Court may direct;

(c) an Order temporarily treating as confidential, sealing and not forming part of the public record Confidential Appendix "B" and Confidential Appendix "C" to the First Report of the Receiver until the earlier of (i) the closing of the Sale Agreement (as subsequently defined), (ii) May 28, 2015, and (iii) such later date as may be ordered further by this Honourable Court;

(d) an Order authorizing the Receiver to distribute the proceeds of the transaction contemplated in the Sale Agreement in repayment of the Receiver's Borrowings Charge together with interest and charges thereon (as defined in the Receivership Order), and that the Receiver shall hold the remaining proceeds until further order of this Honourable Court; and

(e) such further and other relief as this Honourable Court may grant.

McMillan LLP

Per: 

MARC-ELIE SCOTT

BOOK OF AUTHORITIES

TABLE OF CONTENTS

TAB AUTHORITY

[TAB 1]

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Subject: Corporate and Commercial; Insolvency

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

Headnote

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

Court considering its position when approving sale recommended by receiver.

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

Held:

The appeal was dismissed.

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

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

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

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

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

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

Table of Authorities

Cases considered:

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

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

Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) — *referred to*

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

Salima Investments Ltd. v. Bank of Montreal (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. (2d) 58, 65 A.R. 372 , 21 D.L.R. (4th) (C.A.) — *referred to*

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

Selkirk, Re (1987), 64 C.B.R. (N.S.) 140 (Ont. S.C.) — *referred to*

Statutes considered:

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

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

Appeal from order approving sale of assets by receiver.

Galligan J.A. **:**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

15 The order of O'Brien J. provided that if the receiver could not complete the sale to Air Canada that it was "to negotiate and sell Air Toronto to another person." The court did not say how the receiver was to negotiate the sale. It did not say it was to call for bids or conduct an auction. It told the receiver to negotiate and sell. It obviously intended, because of the unusual

nature of the asset being sold, to leave the method of sale substantially in the discretion of the receiver. I think, therefore, that the court should not review minutely the process of the sale when, broadly speaking, it appears to the court to be a just process.

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

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

2. It should consider the interests of all parties.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

34 The 922 offer provided for $6 million cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of 5 years up to a maximum of $3 million. The OEL offer provided for a payment of $2 million on closing

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

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

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

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

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

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

2. Consideration of the Interests of all Parties

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

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

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

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

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

57 It is my opinion that there is no convincing proof that if an offering memorandum had been widely distributed among persons qualified to have purchased Air Toronto, a viable offer would have come forth from a party other than 922 or OEL. Therefore, the failure to provide an offering memorandum was neither unfair, nor did it prejudice the obtaining of a better price

on March 8, 1991, than that contained in the OEL offer. I would not give effect to the contention that the process adopted by the receiver was an unfair one.

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

determinative. Because, in this case, the receiver acted properly and providently, I do not think that the views of the creditors should override the considered judgment of the receiver.

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

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

the relief sought from her, which was a dismissal of the charges. It should be noted, however, that while this was formally the order being sought, it is obvious from what transpired that what counsel was really seeking as not to obtain an acquittal but to put an end to the proceedings. In granting the relief sought, I think this is really what Glube J. had in mind. Under these circumstances, I would dispose of the appeal in the manner proposed by my colleagues. Skeptical though I am of the general use of a stay as a means of combatting delay, there are cases where this is the proper course. In my view, this is one of them.

For these reasons, I would allow the appeal, reverse the judgment of the Court of Appeal and order a stay of proceedings against the appellant.

Appeal allowed; stay of proceedings ordered.

CROWN TRUST CO. et al. v. ROSENBERG et al.

Ontario High Court of Justice, Anderson J. November 6, 1986.

Civil procedure — Parties — Intervention — Receiver not recommending highest offer for court approval — Offeror seeking to be added as intervenor on motion for approval — No right to be added on motion — No interest in matter — Not adversely affected — Considerations — Rules 1.03, paras. 15, 22, 13.01 (Ont.).

Courts — Jurisdiction — Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions — Receiver developing complex disposition strategy with court approval — Moving for approval of offers — Duties of court on motion.

Debtor and creditor — Receivers — Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions — Receiver developing complex disposition strategy with court approval — Not accepting highest offer because of various concerns — Moving approval of other offers — Receiver acted reasonably, properly and fairly — Offers to be approved.

Debtor and creditor — Receivers — Court appointing interim receiver and manager to dispose of large number of properties involved in highly publicized transactions — Receiver developing complex disposition strategy with court approval — Not accepting highest offer because of various concerns — Moving approval of other offers — Highest offeror submitting new offer after commencement of hearing — New offer not to be considered.

In 1983, C Inc. was appointed by court order as interim receiver and manager of the defendants' properties. Subsequently in 1983, an order was made with respect to the marketing of the properties pursuant to a disposition strategy. That strategy involved first, a negotiation stage which included meetings between C Inc. and prospective offerors. This stage ended on September 3, 1986, with offers from prospective purchasers to the receiver wherein all terms and conditions of the

transaction except the final offering price were settled. The second stage required prospective purchasers wishing to bid on individual properties, groups of properties, or all of the properties to submit sealed bids by September 10th. The third stage called for the receiver to notify the bidders of the acceptance or rejection of their offers within 15 days of September 10th. Pursuant to the disposition strategy, C Inc. received approximately 200 offers on September 3, 1986. Also pursuant to the strategy, C Inc. received approximately 230 sealed bids on September 10th. The receiver selected 26 offers by 14 offerors and brought a motion recommending approval of those offers by the court.

L Inc. submitted four draft offers on September 3rd and four sealed bids on September 10th. The receiver rejected three of them and held the fourth open pending the disposition of this motion, but did not recommend it. L Inc. was the highest bidder. The reason the receiver did not recommend the L Inc. fourth offer was because the receiver was concerned to maintain the integrity and fairness of the tender process and because it believed that the offer, as supplemented by letters, was not in acceptable form, nor in accordance with the rules of the process. Among other things, L Inc. proposed to finance the purchase in a novel fashion by the use of a promissory note, which caused problems with the discount rate and the sale and purchase of the note; inserted a financing condition in the sealed bid which was not in its offer; failed to identify the mortgages to be discharged; and waived the financing condition on September 18th by letter from its solicitors. Further, the terms and conditions of the offer were unclear and were not clarified by L Inc. to the satisfaction of the receiver. In addition, the receiver was concerned, in view of the history of the properties and the attention they attracted in political circles, among the tenants of the properties, in the media and from the public, that L Inc.'s inflated nominal purchase price might be regarded as intended to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. If so, this might cause intervention in the transaction which would imperil a successful closing.

On the return of the motion, L Inc. moved to be added as an intervenor and several days later presented an entirely new offer for a still higher amount.

Held, the offers recommended by the receiver should be approved; L Inc.'s motion to be added as an intervenor should be dismissed, and L Inc.'s newest offer should not be considered.

(1) The court has jurisdiction under rule 13.01 (Ont.) to add a person as an intervenor to a proceeding where the person claims an interest in the subject-matter of the proceeding and that he or she may be adversely affected by a judgment in it. L Inc.'s motion to be added should be dismissed, because the rule applies only to a proceeding, defined in rule 1.03, para. 22, as an action or application. Further, para. 15 defines "judgment" as a decision that finally disposes of an application or action. Hence, rule 13.01 does not apply to a motion. In any event, L Inc. had no interest in the question whether approval of the offers recommended by the receiver was in the best interests of the parties to the action, but only in seeking to have its offer accepted. Nor would L Inc. be adversely affected by any "judgment" in the proceedings in respect of any legal or proprietary right, since it had no such right. Furthermore, the consequences of making the orders sought would likely cause delay and complication in the completion of the transactions.

(2) The late offer by L Inc. should not be considered even though it was approximately $15 million higher than those the receiver recommended for approval, that

is, approximately 3% of the aggregate of the purchase price of all the properties. To consider the offer at this date in the proceedings would make a mockery of the elaborate process devised and followed in the marketing of the property. Further, it would cause inevitable confusion and delay. There was no issue of unfairness towards L Inc. Rather, its belated offer was a blatant effort to circumvent the bidding process and to acquire the properties over those who had abided by the rules.

(3) On a motion by a receiver for approval of offers to purchase, the court must consider: (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 the offers were obtained, and (d) whether there has been unfairness in the working out of the process.

(4) The concerns that the receiver had about L Inc.'s fourth offer and the questions the receiver raised about the offer were reasonable and were not answered promptly, frankly or fully. Among other things, the financing condition should have been contained in the offer in accordance with the invitation to tender, and not inserted in the sealed bid. Moreover, in a transaction of this importance and magnitude, the receiver was properly concerned about the fact that waiver of the condition came from L Inc.'s solicitors and not from L Inc. All of these factors taken together, were reasonably considered by the receiver as adverse to and to weigh against approval of the L Inc. offer. Further, throughout the process, it was clear that L Inc. was not misled by the receiver about the disposition process.

(5) Although the L Inc. fourth offer was substantially higher than the others in absolute amount, it was not so much higher relative to the over-all amounts involved in the transactions. Hence, in view of the receiver's concerns about the L Inc. fourth offer, the receiver acted properly and reasonably in not recommending it for approval and instead recommended the other offers, about which it had no such concerns. For those reasons, the court should not intervene in the process, but approve the receiver's recommendations.

Salima Investments Ltd. v. Bank of Montreal et al. (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, 59 C.B.R. (N.S.) 242; *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245; *Bank of Montreal v. Maitland Seafoods Ltd. et al.* (1983), 46 C.B.R. (N.S.) 75, 57 N.S.R. (2d) 20; *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1; *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237, **follid**

The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd. (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72, 35 N.R. 40, **distd**

Other cases referred to

Ostrander v. Niagara Helicopters Ltd. et al. (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5

Rules and regulations referred to

Rules of Civil Procedure (Ont.), rules 1.03, paras. 15, 22, 1.04(1), 1.05, 13.01 (am. O. Reg. 221/86, s. 1)

MOTION by a court-appointed receiver and manager approving the sale of certain property; MOTION to add an offeror as an intervenor; RULING on disposition of a new offer to purchase.

P.S.A. Lamek, Q.C., and *I.V.B. Nordheimer*, for interim receiver, Clarkson Gordon Inc.

W.G. Horton, for plaintiffs.

H.T. Strosberg, Q.C., and *R.E. Carr*, for defendant, Leonard Rosenberg.

B.P. Bellmore, Q.C., for defendant, Maysfield Property Management Inc.

D. Stockwood, Q.C., and *N.J. Spies*, for defendant, Victor Prousky.

C.L. Campbell, Q.C., *G.D. Lemon* and *M.M. Thomson*, for applicant, Larco Enterprises Inc.

R.L. Falby, Q.C., *F.T. Richmond* and *L. Walton*, for defendant, Green Door Investments Ltd.

J.B. Laskin, for Canada Deposit Insurance.

ANDERSON J. (orally):—This is a motion to approve the sale of certain properties, the subject-matter of the action in which the motion is brought. The moving party is the receiver and manager appointed by the court. The respondents are parties to the action. The properties are of considerable value and the motion, therefore, is one of some importance to the receiver and to the parties. The events giving rise to the action have a measure of local notoriety, but those colourful happenings have no direct bearing on the matters which I must resolve. The disposition of the motion may be of some general interest of a legal nature, involving as it does a consideration of the nature of the function to be discharged by the court upon such a motion, and also of the nature and extent of the duties of a court-appointed receiver.

A brief chronological narrative of facts which are not in dispute and of the history of the proceedings will be useful background. In February of 1983 an order was made by the Associate Chief Justice of the High Court appointing Clarkson Gordon Inc. as interim receiver and manager of the Cadillac Fairview Properties. Where throughout these reasons I say "Clarkson", I mean Clarkson in its capacity as receiver and manager, and when I say "Receiver", I refer to Clarkson in that capacity.

In July of 1983 an order was made by Catzman J. with respect to marketing the properties pursuant to a process which has been designated the "Disposition Strategy". Clarkson implemented the strategy report and the details of that implementation are in the motion record at pp. 10-15 and from pp. 23-6.

In many cases where portions of the record are painfully familiar to the counsel and participants I propose not to read them

during the course of my reasons, although they will form part of the reasons should they be transcribed.

On September 3, 1986, Larco Enterprises submitted four draft letters. The Receiver pursuant to the Disposition Strategy had received some 200 offers from some 70 odd offerors and after the deadline fixed for such offers an additional 60 odd. On September 8, 1986, the Larco offers were acknowledged and certain comments made by the Receiver with respect to them.

On September 10th, Larco submitted four sealed bids. Clarkson received in all some 230 odd bids from 76 offerors.

On September 25th, Clarkson selected certain offers, 26 in all by some 14 offerors, and it is those offers that are recommended for the approval of the court.

This motion was launched and the material served on October 10, 1986. The motion was returnable on October 20th. October 20th and 21st were taken up with some preliminary or interlocutory matters and evidence and argument were heard for the balance of two weeks.

Of the offers submitted by Larco, three were rejected and a fourth was extended and held open pending the hearing and disposition of this motion. Clarkson does not recommend the acceptance of that offer despite the fact that it produces a higher return to the Receiver than the aggregate amount of the offers recommended. To over-simplify somewhat, Larco is the highest bidder. The extent of the difference I will discuss in a moment and I will also discuss the reasons advanced by Clarkson for not recommending it.

On the return of the motion Larco moved to be added as an intervenor under rule 13.01. I dismissed that application on the following day. The reasons for that ruling are an appendix to these reasons. (See App. I [not reproduced]).

On Wednesday, October 27th, Larco presented during the hearing of the motion an entirely new offer in a still higher amount. On Thursday, October 23rd, I made a ruling that I would not consider that offer. My reasons for that ruling are likewise an appendix to these reasons. (See App. II [not reproduced]). On the argument of the motion no criticism was advanced of any of the offers recommended by the Receiver. The only criticism that was advanced on behalf of some defendants was that the Larco bid should have been recommended and in any event should be approved by the court. The plaintiffs in the action supported the recommendation of the Receiver.

Before dealing with the elements of the ensuing dispute, I turn

to a consideration of the nature of the motion which is before me and of the duty of the court in the disposition of such a motion. The duties of the court I conceive to be the following, and I do not put them in any order of priority:

I. It is to consider whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently. Authority for that proposition is to be found in a judgment of the Alberta Court of Appeal, *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58. The [D.L.R.] headnote is of assistance, as is the judgment delivered by Kerans J.A. and particularly that portion which appears at p. 476. The questions with which the court was dealing were similar to those with which I am now concerned.

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

II. The court should consider the interests of all parties, plaintiffs and defendants alike.

That is made apparent by the judgment of this court in *Ostrander v. Niagara Helicopters Ltd. et al.* (1973), 1 O.R. (2d) 281, 40 D.L.R. (3d) 161, 19 C.B.R. (N.S.) 5, although the conclusion appears rather by indirection and as a statement *obiter* to judgment.

III. The court must consider the efficacy and integrity of the process by which the offers are obtained.

The first authority which is of assistance in that regard is the judgment of Saunders J. in *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245 (Ont. S.C. Bkcy.). There, in dealing with the question of approval, he has this to say in his reasons at p. 246:

> 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 Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1 at p. 11 (C.A.), where he said:
>
> > "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.

The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

A further authority for that proposition is to be found in *Bank of Montreal v. Maitland Seafoods Ltd. et al.* (1983), 57 N.S.R. (2d) 20 at p. 23, 46 C.B.R. (N.S.) 75 (N.S.S.C.):

> If any efficacy is to be given to the tender system, then it requires that

> . . . a person, whether insider or guarantor, who obtains full information of the amounts of the tender ought not, at the last moment, be entitled to make a somewhat higher offer and obtain the property. To permit this would create "chaos in the commercial world". Not only would there be uncertainty . . . but it could lead to the situation where there might be no bidders.

IV. The court should consider whether there has been unfairness in the working out of the process.

The authority for that is the case to which reference was made by Saunders J., *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1. The [C.B.R.] headnote again is useful as is, in this connection, the language at the concluding portion of the judgment where this is said:

> Misleading a bidder, even unintentionally, by a receiver must always be a sufficient ground for a court to refuse to approve an agreement of purchase and sale.

That case is also authority, if authority were needed for the proposition that in a proper case the court has the power to disregard the recommendation of the Receiver and to approve another offer.

It is with those areas of responsibility in mind that I proceed to deal with the motion. I have already said that no criticism is made of the offers which are recommended. Likewise no criticism has been made of the process by which the offers were obtained. Attention has focused on the different economic returns which it is anticipated would flow from the recommended offers on the one hand and the Larco offer on the other. Depending upon whose data and calculations are accepted, that difference may be as high as $7 million odd, or as low as $1 million odd. I do not propose to analyze the data or the calculations which have been advanced, because in the view which I take of the matter they are not material.

The central issue is whether the court should disregard the recommendations of the Receiver and approve the higher bid. Indeed at the end of the day that is the only real issue. This requires first some review of the reasons advanced by the Receiver for rejecting or at any rate not recommending the Larco bid. This is dealt with in the motion record in the Receiver's report in para. 38, at pp. 51-67 of the record:

> 38. Clarkson did not accept Enterprises'* Offer, and does not recommend its acceptance and approval by this Court, for the following reasons:

*Enterprises was the initial name used for Larco Enterprises Inc.

(a) Clarkson's concern to maintain the integrity and fairness of the tender process embodied in the Invitation to Tender, and Clarkson's conviction that the evident success of the marketing and tender process as reflected both in the quantity and quality of the offers which were received was due in large measure to the faith and trust of prospective purchasers that they would each be afforded a fair and equal opportunity to purchase, have been discussed at length above. Clarkson and Cogan were advised on August 14, 1986 by representatives of Enterprises that Enterprises shared those concerns as a result of an unsuccessful tender recently made by Enterprises in respect of certain other properties, and particular emphasis was placed by the said representatives of Enterprises on their need to understand the tender rules, that the rules not be changed, and that they expected everyone to adhere to such rules.

Nevertheless, Clarkson does not believe that Enterprises' Offer as supplemented by the letters delivered after the Bid Deadline was in acceptable form or in accordance with the rules of the tender process established by and embodied in the Invitation to Tender in that, inter alia,

(i) the above-mentioned mechanism for determining the price at which Clarkson would be required to sell the Note might be said to have afforded Enterprises the opportunity to change the cash purchase price offered for the subject Properties, after the Bid Deadline, although no objection could be raised to a change in such cash purchase price if the percentage to be stipulated by one of the designated financial institutions was determined by such financial institution solely on the basis of objective market interest rate criteria; Clarkson and Fraser & Beatty, following the Bid Deadline, therefore repeatedly requested confirmation from The Royal Bank of Canada that the percentage set out in its said letter dated September 15, 1986 was determined by such bank based upon objective market interest rate criteria alone, but no such confirmation was received by Clarkson;

(ii) Enterprises or persons acting on its behalf changed or attempted to change or might have changed, after the Bid Deadline, material terms and conditions of Enterprises' Offer; namely

(A) price by means of the Note purchase mechanism;

(B) the financing condition in Enterprises' Sealed Bid referred to in paragraph 34 above was included in such sealed bid despite repeated statements by Clarkson, Cogan and Fraser & Beatty to representatives of and to the solicitors for Enterprises prior to the Bid Deadline that this would represent a serious negative feature of any offer submitted; by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson (a copy of which is annexed hereto as Schedule H (Appendix III [not reproduced]) and received by Clarkson the following day, nine days after the Bid Deadline, this condition was purportedly waived;

(C) as mentioned in paragraph 36 above, Clarkson did not receive, on or before September 17, 1986, the purchase undertaking from one of the designated financial institutions in accordance

with Enterprises' Sealed Bid, and in lieu thereof the solicitors for Enterprises, by means of the aforesaid letter dated September 18, 1986, a copy of which is annexed hereto as Schedule H, purported to amend Enterprises' Offer to provide that Enterprises would cause the Note to be purchased on closing "on the same terms and conditions as contemplated in [Sealed Bid Schedule 3] paragraph 8";

(D) Clarkson and Fraser & Beatty had indicated to Enterprises and its solicitors following the Bid Deadline that Clarkson had difficulty in properly evaluating Enterprises' Offer until it knew what mortgages Enterprises intended to require be discharged. While the amount payable by Enterprises would increase dollar for dollar for each dollar spent to obtain a mortgage discharge, the effect of the aforesaid Note purchase mechanism would be to satisfy such amount (including dollars expended to obtain mortgage discharges) at 81.2 cents per dollar. Fraser & Beatty therefore asked Enterprises' solicitors to confirm in writing to Clarkson what mortgages Enterprises' solicitors believed Enterprises was entitled to request a discharge of under the terms of Enterprises' Offer, it being a fair assumption that a request for a discharge of as many mortgages as possible would be received by Clarkson given the aforesaid discount achieved by means of the Note purchase mechanism. Instead, by letter dated September 21, 1986, a copy of which is annexed hereto as Schedule I, (Appendix IV [not reproduced]) Enterprises' solicitors purported to further amend Enterprises' Offer in this regard; and

(E) notwithstanding the clear provisions of the Invitation to Tender, as late as September 17, 1986 and again on September 18, 1986 a representative of Enterprises requested that Clarkson agree to negotiate a reduction in the amount of the required deposits, which request was denied, and then requested that Clarkson agree to a reduction in the amount of the further deposit to be provided within 5 days of acceptance of any offer, which further request was also denied by Clarkson;

(b) despite repeated requests by Clarkson and Fraser & Beatty for an explanation of the commercial reason for the use of the Note purchase mechanism (which on its face only serves to reduce the purchase price for the subject Properties from a high nominal value to a lower real value), in the view of Clarkson and Fraser & Beatty no clear and consistent reasons were given. Accordingly, a written explanation was requested and a reason was cited in the letter annexed hereto as Schedule I, but Clarkson did not and does not regard the explanations received as satisfactory;

(c) Clarkson was concerned and remains concerned, particularly given the history of the subject Properties and the attention they have attracted in federal, provincial and municipal political circles and with the tenants thereof and those representing such tenants, with the appearance of the proposed transaction in the minds of the tenants, the media, the politicians and the public at large, some of

whom might be expected to question seriously whether the inflated nominal purchase price was being used to raise mortgage money without adequate security, or to lay the groundwork for an application for an excessive rent increase. In the absence of definitive evidence to the contrary, Clarkson believes that this aspect raises perceptible risks of intervention of some kind which might imperil a successful closing of the proposed transaction with Enterprises;

(d) as was mentioned above, Enterprises failed to cause the Note purchase undertaking from Citibank to be delivered to Clarkson on or before September 17, 1986 as provided in Enterprises' Sealed Bid, and Clarkson was concerned and remains concerned with the acceptance of any offer in respect of which the offeror, before Clarkson has even had a reasonable opportunity to accept the same, has already failed to perform a material term thereof; and

(e) Clarkson was not satisfied, notwithstanding all of the foregoing, that Enterprises' Offer was capable of acceptance, and believed that certain aspects thereof would have to be successfully negotiated prior to any such acceptance, including in particular:

(i) the waiver of the financing condition which, as noted above, was purportedly effected by letter dated September 18, 1986 from Enterprises' solicitors addressed to Clarkson despite the relevant provisions of Enterprises' Offer in respect of amendments and despite the statement of Enterprises' solicitors, with which Fraser & Beatty agreed, in a telephone conversation between such solicitors that this and any other matter pertaining to the terms of Enterprises' Offer should be in the name of and executed by Enterprises;

(ii) the substitution of Enterprises' agreement to cause the Note to be purchased on closing "on the same terms and conditions as contemplated in paragraph 8", which again was purportedly effected by the letter dated September 18, 1986 and therefore suffered from the same difficulties as the purported waiver plus the additional difficulty that it is unclear what such "same terms and conditions" are; in Clarkson's view, it is totally unsatisfactory for a transaction of this magnitude, which contemplates an unsecured note in the order of $375,000,000, to hinge on such vague and uncertain wording;

(iii) in connection with the aforesaid purchase of the Note on closing, reference was made in paragraph 34 above to the provision in Enterprises' Sealed Bid that the Note was to be purchased "at the closing at the said [price] as part of the escrow arrangements herein provided", but in view of the uncertainty as to the intent and effect of these words, clarification would be required to ensure that there was no misunderstanding in this respect; and

(iv) the amendment to Enterprises' Offer purportedly effected by the aforesaid letter dated September 21, 1986 from Enterprises' solicitors addressed to Clarkson in respect of the mortgages to be discharged on closing and the effect thereof on the ultimate purchase price realized by Clarkson, which at the

very least suffers from the same difficulties as the aforesaid purported waiver.

Apart altogether from its concern to maintain the integrity and fairness of the tender process, Clarkson concluded that, even if it were prepared to attempt such negotiations in an effort to put Enterprises' Offer into acceptable form, the time constraints imposed by the tender rules and the fact that all offers would expire on September 25, 1986 and the difficulties encountered in resolving outstanding questions to date raised a serious question as to the successful outcome of such negotiations. In view of the risks to the entire sales process if that had happened, Clarkson decided not to attempt such negotiations but to accept the offers in hand that were capable of acceptance as they stood.

The motion was brought on in the usual way on a written report of the Receiver signed by Mr. S.R. Shaver, a vice-president of Clarkson, and unsworn.

Counsel for the Receiver submitted at the opening of the motion that for reasons pertaining to the importance of the matter and its public interest, he proposed to lead the evidence of Mr. Shaver *viva voce* although it is something of an exception in the disposition of a motion of this kind. I acceded to that submission. I confess to having had moments during the subsequent proceedings when I doubted the wisdom of that decision. The inevitable result was that evidence was called by the defendants who were advancing a different position, and a considerable amount of time was spent. Notwithstanding my doubts, I think that for the reasons advanced by the Receiver, and because an element of catharsis is involved, perhaps the hearing of *viva voce* evidence was appropriate in all the circumstances.

I have made references to the Disposition Strategy Report which lay behind the negotiations which produced the offers which are now before the court for consideration. It is a voluminous and detailed document comprising, without its various appendices and schedules, some 98 pages. It was pursuant to that strategy report that the order of Catzman J. in July of this year set in motion the sequence of events leading to the report and motion which are now before me.

Throughout that sequence of events, the Receiver has had the benefit and assistance of the advice of eminent solicitors and counsel and of an eminent real estate consultant appointed for the purpose.

In the motion which is before me some 15 counsel appeared at various times, eight for most of the time, representing various interests. The evidence consumed seven full days and final argument a further day. Most of the principal participants in the

sequence of events made their appearance in the witness-box. The ponderous chain of happenings which followed the order of Catzman J. and culminating in the motion and the nature and extent of that motion are both matters of consequence to which I will refer subsequently.

Events were set in train by a letter written by Clarkson to potential purchasers which is dated July 28, 1986. It is found in the motion record at p. 124:

> On July 25, 1986 Mr. Justice Catzman approved the final stages of the disposition process which include the following:
>
> 1. A negotiation stage culminating on September 3, 1986 with an offer as between the Interim Receiver and Manager and prospective purchasers wherein all terms and conditions respecting the transaction, exclusive of the final offering price, are settled ("Approved Offers").
> 2. After the Approved Offers are settled prospective purchasers wishing to bid on individual Properties, groups of Properties or all of the Properties are directed to forward Sealed Bids to the Office of the Registrar of the Supreme Court of Ontario addressed to the Interim Receiver and Manager. The Sealed Bids must be submitted to the Registrar on or by 3:00 p.m. September 10, 1986 (Bid Deadline Date).
> 3. After reviewing and analyzing the Sealed Bids, in context with the Approved Offers, bidders will be notified whether or not their offers are accepted within 15 days of the Bid Deadline Date.
> 4. The Standard Form of Offer and the Invitation to Tender stipulate that offerors must submit with their Sealed Bids deposits amounting to the greater of $100,000 or 2½% of the price offered in the Sealed Bid in the form of a certified cheque or bank draft.
>
> For greater certainty and clarity we request that you carefully review the Invitation to Tender, Sealed Bid form and Standard Form of Offer in order that all aspects of the above outlined disposition process are understood and, more importantly, closely adhered to so that no one is disadvantaged throughout this process.
>
> We urge each of you to convene meetings with us at the earliest possible date to ensure that all of your queries and concerns are adequately addressed. These meetings should assist you in preparing and submitting an Approved Offer on or by September 3, 1986. To this end, we have prepared all of the schedule for each Property to be affixed to the offer(s) including financial information and rent rolls as of June 30 and July 1, 1986 respectively.
>
> There will be *one* and *only one* opportunity to bid. Because of the nature of the process, prospective purchasers will be automatically encouraged to submit their highest and best offers. Please be cognizant of the fact that all offers will be evaluated on a "cash equivalent" basis to ensure a fair and equitable evaluation process.
>
> A prospective purchaser's chance to be the successful bidder will be enhanced relative to another purchaser, assuming equal "cash equivalent" offers are received, if:
>
> 1. the Approved Offer contains fewer onerous and time consuming conditions.

2. the prospective purchaser establishes his "credit worthiness". This aspect can best be established if conclusive third party evidence of the purchaser's ability to arrange the necessary financing to close the transaction is provided; and

3. Property inspections are completed in advance of the final Bid Deadline Date, September 10, 1986.

The invitation to tender is an exhibit on these proceedings. Again, its contents are material. I do not intend to read them but they will be included in the reasons. (See App. V [not reproduced])

I said when referring to the portion of the report which set out the reasons by the Receiver for not recommending the Larco offer that I did not propose to deal in detail with each of the points raised. The objections upon which emphasis was particularly placed were the following:

1. the use of the promissory note and the related problems of the discount rate and the sale and purchase of that note;
2. the inclusion in the sealed bid of a financing condition which had not been provided in Larco's formal offer;
3. the identification and amount of the mortgages which Larco would require to be discharged upon closing, and
4. relating to the financing condition, the ultimate waiver of that condition.

The uncontentious history of the Larco offer is that prior to its being made there was a meeting in August of 1986 attended by representatives of Larco and representatives of Clarkson when the prospective offering and bidding procedure were discussed.

On September 3rd offers were submitted. On September 8th Clarkson replied in writing with certain comments. Between September 3rd and September 9th there were meetings and telephone conversations between the representatives of Larco and representatives of the Receiver. On September 10th there were consultations and there was a subsequent exchange of correspondence. When the final decision of the Receiver was announced September 25th the Larco offers were not recommended.

I have already indicated that the difference between the competing offers figured largely in the hearing and blow-by-blow accounts were given by the various participants of the exchanges between representatives of Larco and representatives of the Receiver. These exchanges must be explored to some extent, though not with the attention to detail which they received during the hearing.

I do not intend to deal *seriatim* with each of the Receiver's objections as was done by counsel for the defendants, Green Door and Walton, and I trust that he will not feel that his argument was slighted or not considered because I do not do so. I do intend to mention some of the major points.

The first of those was the note mechanism. In the preliminary discussions between representatives of Larco and the Receiver there had been some mention of the use of a note or debenture to finance a portion of the price. I think nothing turns on the contents of those precise discussions. The actual mechanism was not fully disclosed until the bid deadline and the submission of the sealed bid.

It is appropriate I think to consider that, in the offer which was submitted on September 3rd, para. 3 dealing with payment, after setting out provisions with respect to deposit and the taking back of mortgages, concluded with the following subparagraph:

> And the balance of the price for the Properties shall be paid subject to adjustments to the Interim Receiver on the Escrow Closing by certified cheque or bank draft payable to the Interim Receiver drawn on or by a Canadian chartered bank or by another Canadian financial institution acceptable to the Interim Receiver.

When the sealed bid was submitted the note mechanism, a phrase which I shall adopt although it is not in all respects a happy one, was in the form which appears at p. 136 of the record, this by way of amendment to the offer to which I have just referred:

> 8. Paragraph 3 of the Form of Offer shall be amended by adding thereto the following paragraphs:
>
> > "The balance of the price referred to in paragraph 3 of the Form of Offer shall be paid by Offeror to the Interim Receiver by Offeror's delivering to the Interim Receiver a promissory note ("Citibank Guaranteed Note") in that amount, which note shall be unsecured by any charge against the Properties, but which shall be absolutely and unconditionally guaranteed by one of Citibank Canada, Royal Bank of Canada or another financial institution reasonably acceptable to the Interim Receiver (which financial institution is herein referred to as "Citibank"). The said promissory note shall require equal monthly payments of principal and interest sufficient to fully amortize the said sum at the rate of 8.222% per annum over a term of thirty (30) years. Offeror shall arrange a conventional mortgage loan with Citibank or its designee (which party is herein called ("Lender") which shall be secured by a charge against the Properties which shall be subject and subordinate in all respects to the existing loans which are assumed by Offeror on the date of Closing."
>
> The Interim Receiver shall sell the Citibank Guaranteed Note on the date of Closing to Lender for cash purchase price determined as follows:
>
> > "on or before Monday, September 15th Citibank shall report in writing to

> the Interim Receiver stating the cash price (the "Cash Purchase Price") for the Citibank Guaranteed Note as of Wednesday, September 10, 1986. On or before Wednesday, September 17, 1986 the Interim Receiver shall have received in form satisfactory to Interim Receiver acting reasonably an undertaking from Citibank to purchase or cause to be purchased the Citibank Guaranteed Note at the Closing at the said Cash Purchase Price as part of the escrow arrangements herein provided, subject only to the acceptance of this Offer and such reasonable warranties and representations from the Interim Receiver that he has not encumbered or accepted payment on the said note as Citibank may require. Any such sale of the Citibank Guaranteed Note by the Interim Receiver will be on a non-recourse basis."
>
> Any Court approval of this Agreement to be effective and acceptable to the Offeror shall also include approval of the sale by the Interim Receiver of the Citibank Guaranteed Note as herein provided.

The concerns of the Receiver to which this aspect of the transaction gave rise are set out, as I have indicated, in para. 38 of the report. It was, I think it is fair to say, a complicated mechanism and had some elements of novelty. In its very nature it gave rise to questions, particularly perhaps having regard for the history of these properties in the recent past. It gave rise to questions as to the reasons for its use and also as to its possible effect on the price. In my view, the questions raised by the Receiver were reasonable questions and they were not answered promptly, frankly or fully.

The position of Larco, in part made explicit and in part to be inferred from conduct and from the evidence, was that this was largely none of the Receiver's business. Larco was perfectly entitled to take that position. I should say by way of digression that if in any previous ruling or in these reasons I appear to be critical of what was done by Larco, it is within the limited framework of the process with which I am concerned and not otherwise. Larco is not a charitable organization. It is a commercial corporation entitled, within the limits of the law, to carry on its commercial affairs as those having the charge of those affairs deem appropriate. But if in some respects it produced adverse reactions in the Receiver, and adverse consequences for the reception of its offer, it cannot be heard to complain.

The next contentious item to which I propose to make reference was what has been called in the evidence the "Financing Condition". This was not part of the draft offer but was contained in the sealed bid and was set out in the following terms by way of amendment to that offer:

> Notwithstanding any other provision of this Offer, the obligation of the Offeror to proceed with this transaction shall be conditional upon the Offeror's

> obtaining written commitments, reasonably acceptable to Offeror, for the Citibank Guaranteed Note and the conventional mortgage loan from the Lender no later than twenty (20) days after Acceptance of this Offer. If Offeror does not obtain the written commitments from Citibank and the Lender within the time period of twenty (20) days, Offeror may terminate this Agreement, in which case, the Interim Receiver shall return the deposits and interest thereon to Offeror promptly following demand.

In my view, such a provision given the mechanism and procedure, the process which was being followed, ought to have been part of the Larco offer and subject to negotiation at the proper time and not at the 11th hour.

The evidence of Mr. Shiraz Lalji was to the effect that he considered the offer as merely a format for the transaction and that the real substance was to be in the sealed bid. He also testified that he had been led to believe that conditional offers would be at no disadvantage. I find it difficult to accept that evidence. The financing condition was a provision so material and of such obvious advantage to the purchaser and a commensurate disadvantage to the vendor that it went to the very root of the transaction. Indeed, as the apprehension of the Receiver indicated, it converted what purported to be an offer into what was in substance an option. I shall have to discuss further in a moment the reasons that I cannot accept Mr. Lalji's evidence in that regard. I can only say for the present that if he entertained the view which he expressed with respect to the form of offer it was a mistaken view and should have been recognized as mistaken having regard particularly for the form of the invitation to tender and of the converting letter with which that invitation went out. Whether this deferral of a term so critical was deliberate or inadvertent, I need express no conclusion. It operated, however, to the detriment of Larco in the consideration of its offer by the Receiver.

Eventually it was recognized by Larco that the financing condition was likely to be seriously prejudicial, if not fatal. Steps were set in train to address its removal. That removal entailed a financial cost and risk to Larco which it had sought to avoid. Approval of its board of directors was required and that approval was obtained early on the morning of September 18th, 10 days after the bid deadline. Written confirmation of that waiver is found in sch. 8 to the report, at p. 179, in a letter from Messrs. Weir & Foulds, Solicitors to Clarkson Gordon Inc. which says after some reference of a preliminary nature to the sealed bids: "Our client has instructed us to waive, and we hereby waive, the benefit of paragraph 10 to Schedule 3."

The evidence indicated that Mr. Carthy apparently wanted some assurances from Larco before writing that letter; an apprehension which is not difficult to understand. The Receiver has taken the position that the waiver should have come direct from Larco and not from its solicitors. I do not propose to determine as a matter of law whether the purported waiver was effectual or not, although invited in argument to do so. I do not consider it any necessary part of my function on this motion. What is to be considered is the reaction of the Receiver.

In a transaction of such magnitude and pertaining to a condition so material, I do not consider it in any way unreasonable that the Receiver looked upon it as one of the unfavourable elements which ultimately tipped the scales against the Larco bid. Solicitors, of course, have certain general and accepted authority to bind their clients. But the annals of law are not wanting in cases where the authority and its exercise have become a topic of litigation. And there is a maxim well-known among businessmen that no one wants to buy a lawsuit. All of this dealing with the form of the waiver I say, without any reflection upon or lack of respect for the eminently capable and reliable firm of solicitors who offered it.

I turn now to the question of the mortgages to be discharged which proved to be a bone of contention. In view of the mechanism of the promissory note, which was to be sold at a discount, it was essential for the Receiver to know the mortgages to be discharged in order to know the real price. The final position of Larco in this regard is contained in a letter dated September 21st from Weir & Foulds which is contained at p. 181 of the record:

> 4. *Assumed Mortgages*
>
> By letter dated September 16, 1986, provided you with a letter explaining the "Estimated Assumed Loans" in connection with 's bids. As you may know, we have not had the opportunity to fully review all of the existing mortgages which affect the properties and make a final decision as to which existing mortgages will be assumed at closing by . hereby agrees that the "Reconciled Contract Price" set forth in 's letter for each of 's bids shall be the exact cash equivalent price which the Receiver shall receive at closing from . For example, if the actual assumed mortgages are less than the amount stated by in his letter, the shortfall shall be paid by in cash at closing in order to maintain the "Reconciled Contract Price" as stated in 's letter. On the other hand, if the actual assumed mortgages are more than the amount stated by in his letter, the "Face Value of Vendor Note at Closing" will be adjusted downward in such a manner as to maintain the stated "Reconciled Contract Price" as stated by in his letter.
>
> If further clarifications of the offers are required, please advise the undersigned.

It does not respond in exactly the terms in which the Receiver had put its inquiries but instead provided a mechanism for possible adjustment with respect to the mortgages assumed. Again, I do not propose to consider whether this was a satisfactory response or not. It was another complication, another blemish on the Larco offer, another factor which the Receiver not unreasonably considered to be adverse and to weigh against approval.

There is a further matter dealing with the utilization of the note. As I have indicated, the precise mechanism made its appearance in the sealed bid and I have already read the relevant paragraph. I do not propose to review all of the evidence, which was considerable, bearing on this topic. It is sufficient to say that the final solution unilaterally proposed by Larco is as found in the record at p. 179 in the letter from Weir & Foulds of September 18th to which I have already referred in another context. The concluding paragraph of that letter reads:

> Enterprises Inc. hereby agrees to cause the Citibank Guaranteed Note to be purchased on closing on the same terms and conditions as contemplated in paragraph 8.

No reference is made to the Royal Bank who at one time had been proposed as a potential purchaser or to any other purchaser. The covenant of Larco has been substituted for that of Citibank, and as I have indicated, no purchaser has been provided or even proposed.

It is the position of Larco, as put in argument and in evidence, that from a commercial standpoint the purchase of the note became irrelevant once Larco had demonstrated credit capacity adequate for the transaction, as it did by a letter from Citibank dated September 9th. Larco was then, it is said, in the same position as other tenderers, obliged to pay on closing or otherwise make good. Ignoring any frailties which may be inherent in that argument, it is undeniable that it did not put the Receiver in the position which it had originally been proposed of having a bank liable to make good.

It has been submitted by counsel supporting the Larco offer that the requirement for a purchaser of the note had been waived by the Receiver. Again, I do not propose to dispose of waiver or estoppel as matters of law. I refer to the episode as yet another problem for the Receiver and its counsel and a problem which militated against the Larco offer.

In outlining initially the obligations of the court on a motion of this kind, I adverted to the question of whether the Receiver has

in any way misled a bidder. It is clear that if a bidder has been misled that may constitute a circumstance upon which the court will intervene upon the motion for approval. Though it was not passed in argument, there was clear indication in the evidence, particularly that of Mr. Shiraz Lalji, that Larco had been misled as to the acceptability of a conditional offer. This was relevant to the much discussed financing condition.

Any suggestion that Larco was misled in this respect must be approached with a measure of skepticism. Larco is apparently a large sophisticated enterprise and those charged with its affairs appear expert in matters of contract negotiation and finance. It was advised in and about this transaction not only by members of its own board of directors but by an attorney of Seattle, Washington, Mr. Thaddas Alston. Mr. Alston testified and was quite evidently an able and experienced lawyer with a connection of some duration with the affairs of Larco. Larco was also advised by eminently capable solicitors in Toronto. It had every advantage to review and consider every aspect of the transaction.

Mr. Lalji testified that early in the discussions Shaver indicated that conditional offers would be considered on a par with unconditional offers. This Shaver denies and says that all he ever said was to the effect that: "We will look at all offers." The evidence of other representatives of the Receiver was that Larco was repeatedly told that a condition would be to its disadvantage.

It is always difficult and distasteful to a judge to have to resolve a direct conflict of evidence between what are apparently respectable and reliable witnesses. But sometimes the duty is one which cannot be avoided, and in this instance I find myself compelled to accept the evidence of Shaver and to reject that of Lalji. I do so chiefly on what is most probable. 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. Indeed it is a clear inference from Mr. Lalji's evidence that he recognized that it was bizarre and had it been said I doubt very much that he would have taken it seriously.

It was also suggested that Larco was misled into concluding at the last stages that the Receiver was not insisting on the undertaking of the bank to purchase the note. I have already made brief reference to this. It was said that Mr. Cogan, a representative of the real estate consultant advising the Receiver, had either said so or had plainly inferred it. This Cogan denies. Cogan was respon-

sible for the real estate aspects of the transaction and not for the legal or financial ones. If Larco received such an impression from Cogan, prudence would have dictated that the matter be verified either with Mr. Shaver or with the solicitors advising the Receiver. So much Mr. Alston conceded in his evidence. It would appear that Mr. Carthy of Weir & Foulds recognized that there was a deficiency in that regard.

The evidence of Mr. Zimmerman, a member of the firm of solicitors advising the Receiver, confirmed by the uncontradicted evidence of Shaver, was that on September 16th Carthy and Alson were advised during a telephone conversation that the note purchase undertaking was expected by the Receiver on the following day. It was never received.

Taking the evidence as a whole, I am not at all persuaded that Larco was misled in any material respect.

In criticism of the conduct of the Receiver, criticism which I may say has been very limited in extent, it was submitted that the Receiver negotiated with other parties after the bid deadline. Specifically reference was made to the Ivordale-Maisonettes property where a discrepancy had appeared between the words and the numerals in the offer. I am not persuaded that the resolution of the problem involved negotiation, nor that if it did it offended the process or was prejudicial to Larco.

There was likewise some criticism upon the undertaking of the recommended bidders to improve the offer in one respect made during the hearing. That was in respect of the equity participation. That is a matter which I must have in mind when I make my final disposition.

A special and somewhat peculiar position in the matter was put on behalf of the defendant Maysfield Property Management Inc. Maysfield is a corporation whose shares are effectively held by receivers appointed for two other corporations. Maysfield managed and operated the subject properties before Clarkson was appointed Receiver, and by arrangement with Clarkson continued to perform that function after the receivership commenced. It employs something over 200 persons. It has substantial worth and it has substantial revenues.

By letter dated October 16, 1986, Larco offered to purchase the outstanding shares in Maysfield for net book value, an offer conditional upon approval of the Larco offer by the court. If the offers recommended by the Receiver are approved, there appears to be no certainty and perhaps not even any probability of the continued viability of Maysfield.

In a secondary submission counsel for Maysfield asked that if an order were made as sought by the Receiver, that that order should be stayed for some period of time to enable Maysfield to negotiate with the purchaser.

I observe by looking at the clock that I have been going for something well over an hour at the moment, and I regret to tell everyone that I am not finished yet. I propose to take 10 minutes for my benefit and perhaps for yours as well.

[Court recessed 11.07 a.m. and resumed 11.19 a.m.]

I propose now to express some factual conclusions with respect to the matter.

The Larco offer is the highest bid. The difference between it and the recommended offers is substantial in absolute amount but not material in proportion or relation to the over-all amounts involved in the transaction. The difference is not such as to create any inference that the Disposition Strategy and its application by the Receiver was inadequate or unsuccessful. Indeed my conclusion would be quite to the contrary. Larco was not misled or unfairly treated by the Receiver in any material regard. The Larco offer was presented in a form and negotiated in a manner which gave the Receiver legitimate and reasonable cause for concern as to the advisability of accepting it.

Mr. Zimmerman very fairly conceded in his evidence that probably none of those causes was in itself fatal. I think that probably is so. They were, however, considered cumulatively by the Receiver and it was in my view legitimate and reasonable to do so.

In essence the position of the Receiver was this: having before it the Larco offer with the concerns about it which it entertained, having before it the offers which it now recommends which occasioned no such concerns, considering that in relative terms the difference in return was not material, the Receiver elected to recommend the somewhat lower offers which were not attended by troublesome concerns against the higher one which was. In my view the Receiver acted reasonably in doing so.

Unfortunately, that is not the end of the matter. The question remains in the light of the factual conclusions which I have reached and expressed, how should my discretion be exercised in the final result? Perhaps it is useful to review very briefly the propositions governing the duties of the court which I outlined earlier in my reasons. I must consider whether the Receiver has made a sufficient effort to get the best price and has not acted improperly. I must consider the interests of all parties to the

action, plaintiffs and defendants alike. I must consider the efficacy and the integrity of the process by which the offers were obtained. I should consider whether there has been any unfairness in the working out of the process and in a proper case I have the power and the responsibility to disregard the recommendation of the Receiver and to approve another offer or offers.

Those propositions I have put in positive terms. I think some help in measuring the ambit of the court's discretion is to be had from putting certain negative propositions which are not so explicit in the cases but which I think are fairly to be inferred from them.

The court ought not to enter into the market-place. In this case it ought not to become involved in the implementation of the Disposition Strategy and the attendant negotiations. 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. The court ought not to embark on a process analogous to the trial of a claim by an unsuccessful bidder for something in the nature of specific performance. 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.

In all of this it is necessary to keep in mind not only the function of the court but the function of the Receiver. The Receiver is selected and appointed having regard for experience and expertise in the duties which are involved. It is the function of the Receiver to conduct negotiations and to assess the practical business aspects of the problems involved in the disposition of the assets.

To put the alternative positions briefly they are these. The submission on behalf of the Receiver is that if the conclusion is that it has acted reasonably and fairly, and I would add not arbitrarily, in the best interests of the parties, I should make the order asked.

The submission of the objecting defendants reduced to its narrowest compass is along these lines. The Larco offer is or could by terms of the court's order be made legally susceptible of acceptance. It will produce the most money and it should be approved.

It is clear that to accede to the Receiver's submission will probably result in a lower return to the estate. I say "probably" because there are no certainties in this life except the classic ones

often referred to. The approval of the recommended offer will clearly and plainly be detrimental to the position of Maysfield.

Reviewing these positions I have concluded that to accede to the position advanced by the defendants involves ignoring or at any rate acting contrary to the recommendation of the Receiver appointed by the court. It would involve me in making what is essentially a business decision, though one with some legal components: A decision of which the consequences are not in all respects predictable.

I am not, as I said earlier, deciding an action for breach of contract or trying a claim for specific performance. It is because of that view that I have not responded in these reasons to all of the legal arguments advanced with much force and clarity by Mr. Falby. In my view of the function which I must discharge the decision of such technical legal matters is not involved.

Reference was made in argument to *The Queen in right of Ontario et al. v. Ron Engineering & Construction Eastern Ltd.* (1981), 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111, 13 B.L.R. 72 (S.C.C.). In that case there were contractual rights at issue as is made clear by the reasons of Estey J. referred to at p. 274 of the report. No such contractual issues arise here. At most there are some legal questions raised as being among the concerns that led to rejection of the Larco bid.

The decision made by the Receiver was one to which it brought its experience and expertise for the position to which it was appointed. It was a decision upon which the Receiver had the advice of solicitors and counsel and of an expert real estate consultant retained for the purpose. It was a decision from which the Receiver did not resile at the conclusion of two weeks of hearing.

It is clear on the one hand that the court is not to apply an automatic stamp of approval to the decision of the Receiver. Plainly, the court has power to decide differently and a discretion to exercise which must be exercised judicially.

The court no doubt has power to enter into the process to any extent which appears proper in the circumstances. In *Salima Investments Ltd. v. Bank of Montreal et al.* (1985), 21 D.L.R. (4th) 473, 65 A.R. 372, 41 Alta. L.R. (2d) 58, to which I have referred, the judge in chambers actually received bids.

In this case it was suggested by counsel for some of the objecting defendants that the court conduct a run-off or direct the Receiver to do so between the Larco and the recommended offerors. I have no doubt that I have the power to do so. To

exercise it would, in my view, exhibit very little judgment. It would be to open a Pandora's box, the contents of which might be more unruly and unpredictable than the consequences which followed my decision to hear *viva voce* evidence in this case.

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.

Much was said during the hearing about the integrity of the process, that is, the process carried through by the Receiver pursuant to the July order made by Catzman J., and whether Larco had abused or evaded or sought to abuse or evade it. The Receiver perceived, not unreasonably in my view, that that was so. Certainly it must be said that Larco fell somewhat short of coming forward promptly, openly, forthrightly and unequivocally with its best offer, an objective at which the process was directed.

In the arguments of counsel for the objecting defendants, particularly for the defendant Prousky, the process was very narrowly defined; virtually confined to the precise provisions of the plan approved by the court. I do not consider it appropriate to view it so narrowly or that the ambit of the Receiver's discretion should be so narrowly limited.

In addition to the regard which must be had for the process in this case, there is another similar factor for which I must have regard. It was adverted to by Saunders J. in the two cases of *Re Selkirk* (1986), 58 C.B.R. (N.S.) 245, and *Re Beauty Counsellors of Canada Ltd.* (1986), 58 C.B.R. (N.S.) 237, which have been referred to in the argument. It was also reflected in the Nova Scotia Court of Appeal decision in *Cameron*. In all of those cases the courts have recognized that they are not making a decision in a vacuum; that they were concerned with the process not only as it affected the case at bar, but as it stood to be effected in situations of a similar nature in the future. In what was called by MacDonald J. A. in *Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303, 38 C.B.R. (N.S.) 1, 86 A.P.R. 303, "the delicate balance of competing interests", that is a relevant and material one.

In this case I am reviewing the recommendations of the Receiver. I have had the benefit of two weeks of hearing and the assistance of a dozen learned counsel, advantages which were denied to the Receiver.

If I were persuaded, and I am not, to conclude that as a result

of this hearing the objections of the Receiver had been fully and satisfactorily met, I should still have much hesitation in rejecting the Receiver's recommendation.

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.

Plainly, each case must be decided upon its own facts, and with a view to producing a proper result within the legal framework to which I have made reference. Such policy considerations as I have just enunciated are, as they were said to be by Saunders J., secondary, but they are none the less relevant and material.

During the time which I have spent considering this matter, I have asked myself many times what the situation would have been had we been dealing with hundreds of thousands of dollars, rather than hundreds of millions, and a potential difference in the result potentially reduced accordingly. I have asked myself whether I would have had any difficulty in arriving at a conclusion and have found myself forced to answer that question in the negative. It is a well-worn adage among lawyers and judges that hard cases make bad law. Perhaps there is a corollary proposition that large cases have a tendency to do the same sort of thing.

The actual difference between the offers under consideration, I am repeating myself, is substantial. It is that alone which has really created the issue before me. While the actual difference is a factor of much weight, it must also be viewed in its relative relation to the size of the transaction. 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.

The importance of this motion, and the measure of interest

which it has for the parties and for the public, might have made desirable a period under reserve of sufficient duration to permit the writing of formal reasons for judgment. The circumstances related to the prospective sales were such that prompt disposition of the motion seemed more important than elegance of expression. The worst grammatical solecisms will be massaged out in the editorial process. As to the substance of the reasons, I feel as much confidence as is possible when one is dealing with matters of difficulty, of importance and of some notoriety.

There will be orders as asked upon the motion approving the sales. I presume that there will be some mechanical matters to be dealt with before we all part and I invite counsel, I guess first of all Mr. Lamek, to suggest whether it would be appropriate that I adjourn for a few moments while those matters be considered and discussed, or whether I should proceed to deal with them immediately.

MR. LAMEK: I suggest a short adjournment might be useful, My Lord. On the possibility that your lordship would take the view of this matter that you have expressed this morning a revised draft order was prepared to take into account the matters that occurred during the course of the hearing. We have not been so bold as to distribute that to other counsel in advance. Having not seen the revised draft, and of course neither has your lordship, it might be helpful if we do and until your lordship has a good look at the draft.

HIS LORDSHIP: Does it make any disposition as to costs, Mr. Lamek.

MR. LAMEK: I did not, my lord.

HIS LORDSHIP: If you will be kind enough to send my copy of it through the Registrar, I will recess now for what, 15 minutes?

MR. LAMEK: I think that should be sufficient, my lord, yes. If it is not perhaps . . .

HIS LORDSHIP: You can let me know?

MR. LAMEK: Thank you, my lord.

[Court recessed 11.45 a.m. and resumed 12.07 p.m. Counsel made submissions as to costs.]

HIS LORDSHIP: There will be no order as to costs. Mr. Strosberg's argument, as usual, makes good sense and I would be hard put to diagree that a measure of benefit has flowed from the proceedings.

At the same time, I think it fair to observe that the objecting defendants were not proceeding *pro bono publico*, and I see no sufficient reason that their participation should be other than at their own expense.

Before I depart from the matter I should, which I normally do at the outset before anybody knows whether they have won or lost, record my gratitude to counsel for their assistance in dealing with the matter and for the orderly conduct of the proceedings throughout.

Motion granted.

RULING ON MOTION BY LARCO ENTERPRISES INC. TO BE ADDED AS AN INTERVENOR

HIS LORDSHIP: There is a motion before the court brought by the interim receiver and manager Clarkson Gordon Inc. to approve the sales of certain properties on the recommendation of Clarkson, and for direction as to details relating to the completion of the sales which are approved.

The motion comes on pursuant to leave reserved by the order of the Honourable the Associate Chief Justice of the High Court made on November 29, 1985. Service of notice of motion was effected in accordance with an order of the Honourable Mr. Justice Catzman made on July 25, 1986.

On the return of the Receiver's motion, a motion was made on behalf of Larco Enterprises Inc. That motion seeks an order adding Larco Enterprises Inc. as an intervenor in the action and allowing the intervenor access to the report of the Receiver dated October, 1986, with respect to the proposed purchase of properties as set out.

The properties affected by the Receiver's motion are numerous and various in their quality. Details as to those matters are not necessary for present purposes. Because of the nature and number of the properties and the consequent difficulties in marketing them effectively, a complex and sophisticated plan was evolved and pursued under the authority of the order of the Honourable Mr. Justice Catzman to which I have referred. Again, details of that process are not necessary for present purposes. It is sufficient to say that a very large number of offers were made to and considered by the Receiver, of which some 26 are recommended for the approval of the court.

Among the offers received, but not recommended for approval, was one from Larco. As to its disposition of the Larco offer, it is useful to refer very briefly to two portions of the report of Clarkson which is filed in support of the substantive motion.

The first reference is to para. 33 of the report which is found at p. 52:

> Annexed hereto as Schedule E is a photocopy of one of the four sealed bids, (the "Enterprises' Sealed Bid") submitted by a particular offeror ("Enterprises") and a photocopy of Enterprises' form of offer in connection therewith, in each of which the name of Enterprises has been deleted and which together comprise one of the offers ("Enterprises' Offer") in respect of which Clarkson exercised its discretion to extend the date by which such offer may be accepted as aforesaid. Clarkson does not want the fact that this offer has been kept open to permit an inference that it in any way endorses the Enterprise Offer. Clarkson has chosen to extend such acceptance date in order that this court may effectively assess the rationale behind Clarkson's decision not to accept and recommend Enterprises's Offer. Clarkson has advised Enterprises that it has chosen not to accept any of the other three offers submitted by Enterprises.

And also for present purposes only a portion of para. 37 which is found at p. 56 of that report:

> It will be noted that if the value put by Enterprises on its offer in its letter of September 15th, 1986 referred to in paragraph 35 hereof is accepted, and if that amount is coupled with the offers accepted in respect to the Bretton Place and Bay Charles Tower Properties, the value of these offers is approximately $422,000,000 which is estimated to be, at the most, about $9,900,000 or 2.4% in excess of the cash equivalent value of those offers which Clarkson has accepted. However, Clarkson, after considering the matter at length in conjunction with Fraser & Beatty and Cogan, decided not to accept Enterprises' Offer for the reasons set forth in paragraph 38 hereof.

I need not refer at present to those reasons. Fraser & Beatty are the solicitors advising the Receiver and Cogan is the real estate expert also advising the Receiver.

I turn now to the nature and relief sought in the Larco motion and the grounds upon which it is based. Reliance is placed on rule 13.01 of the Rules of Civil Procedure. That rule, in so far as it is germane for my purposes, reads as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (*a*) an interest in the subject matter of the proceeding;
>
> (*b*) that he or she may be adversely affected by a judgment in the proceeding;
>
> [then I miss a clause which is not material]
>
> the person may move for leave to intervene as an added party.
>
> (2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

In support of the Larco motion, it has filed the affidavit of one John Hunt Nolan, and I propose to read briefly from that affidavit at p. 8 of the motion record commencing at para. 10 of the affidavit:

> 10. In the report, Clarkson has placed Bid 4 before this Court and has raised some concerns with respect to it.

11. It is clear from the report (paragraph 37) that the Larco bid is the highest value of all submitted bids.

12. In order to properly respond to Clarkson's concerns, I believe that it is necessary for Larco to be added as a party to these proceedings.

13. Larco, through its officers, was of the understanding that at all material times Clarkson had recognized the status of Larco herein and believed that Larco would be able to make representations to the Court with respect to Clarkson's report, insofar as it respected Larco's bid.

14. I believe that Larco has a valid commercial interest in these proceedings. I further believe that those interests may be adversely affected if Larco is not given standing in these proceedings and an opportunity to examine and reply to the Clarkson report. Indeed, I believe that the various defendants in these proceedings may be adversely affected if Larco is not given standing in light of its apparent highest value bid.

Larco's motion for intervention is opposed by counsel for Clarkson and by counsel for the trust companies, and is supported by counsel for the defendants Rosenberg and Prousky and for Green Door Investments Ltd. and Leonard Walton.

The first question to be addressed is whether Larco can be brought within the ambit of rule 13.01. In considering this, it is necessary to decide what is the "proceeding" to take that word from the rule.

The notice of motion says that an order is sought adding Larco "as an intervenor in the action". As the argument proceeded I think it was common ground that the "proceeding" was the motion for approval of the sales.

Counsel for Clarkson submits that the rule does not apply to such a motion, indeed does not apply to an interlocutory motion at all. In that connection reference is made to rule 1.03 and in particular to para. 22 of that rule which defines "proceeding" in these terms:

22. "proceeding" means an action or application;

It is also useful to consider para. 15 of that subrule where "judgment" is defined in these terms:

15. "judgment" means a decision that finally disposes of an application or action on its merits and includes a judgment entered in consequence of the default of a party;

There can be no doubt that the motion brought by Larco is neither an action nor an application as those terms are defined in the rules. It is, I think, questionable whether the result of the substantive motion can properly be designated as a judgment, and I do not consider it necessary to trace my way through the procedural maze which would be necessary in order to arrive at a reasonable conclusion as to whether it was or not.

I am referred by counsel for Larco to other provisions of the rules, in particular the opening words of rule 1.03 which contains the definitions to which I have referred and which says:

> 1.03 In these rules, unless the context requires otherwise ...

I am also referred to rule 1.04(1):

> 1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

And, finally, reference is made to rule 1.05:

> 1.05 When making an order under these rules the court may impose such terms and give such directions as are just.

I find nothing in the context of rule 13.01 which requires me to give to the word "proceeding" any other meaning than as defined in rule 1.03, para. 22. Nor do I consider that rule 1.04(1) gives me any licence to do so.

Thus, on purely technical grounds I hold that the Larco motion is not a motion related to a "proceeding" within the meaning of rule 13.01 and should be dismissed.

The disposition by a judge of first instance of what is essentially a question of law may well prove to be ephemeral in its nature. For that reason, and because I would prefer that my decision not be perceived as resting on grounds so narrow as technical, I intend to explore some other aspects of the matter.

If the proceeding were one to which the rule applied, the next question to explore would be whether Larco has an "interest" in the subject-matter of the proceeding.

The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.

Nor, in my view, can Larco resort successfully to cl. (*b*) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order

approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

When this offer was made it knew that the Receiver need not accept the highest or any bid. I see no force in the argument that Larco has some special right by reason of the decision of Clarkson to extend the date for acceptance having regard for the limited and special reason for which that extension was made.

While I would not give it substantial weight, I am not unmindful that the consequences of such an order, that is an order adding Larco, would be extremely difficult to predict in terms of delay and in terms of complications in the completion of the transactions under review, consequences which I have decided would not be satisfactorily resolved by any conditions which I could devise and attach.

In the course of argument I expressed the view that there would be some advantage for the court in having Larco's submissions on the Receiver's reasons for rejecting its offer. My concern on that score has been resolved by the realization that there are many counsel present in a position to extol such advantages as the Larco offer may have, and by the expressed position taken by counsel for the defendant Rosenberg that it was prepared to advance the advantages of that offer.

It has not escaped my attention that the Larco motion, however dealt with, has a potential for complication and delay of the proceedings. That is simply a fact of life and nothing within my power can alter it. Fully conscious of that I have arrived at the disposition I propose as being consistent with the law as I see it, and with, at least, no greater potential for adverse consequences.

The matter appears to be one of first impression. I would have preferred for that reason the opportunity to reserve and to deliver a written judgment. It seemed apparent, however, that the circumstances were such that expedition in the result was to be preferred over elegance in its expression.

I was referred to several cases, none of which I considered to be sufficiently on point to make it useful or necessary to refer to them.

The motion of Larco to intervene is dismissed.

Motion dismissed.

ORAL RULING REGARDING LARCO ENTERPRISES INC.'S LATE OFFER

The ruling which I must make this morning involves what disposition is to be made of a new offer by Larco Enterprises Inc., an

offer delivered by counsel for the defendant Rosenberg to the counsel for the Receiver during the luncheon recess on Wednesday, October 22, 1986.

Before proceeding to the substance of my ruling, I wish to review briefly the progress of this motion to date. The notice of motion, the substantive motion that is to approve sales, is dated October 10, 1986, and it was on that date served on agents for the solicitors for the defendant Rosenberg. It was made returnable on Monday, October 20th, and according to its return date came before me.

Also made returnable on that date was a motion by Larco for status as an intervenor in the application for approval. The supporting material filed upon that motion indicates that it was prepared not later than October 17th when the affidavit of Nolan was sworn. It is an inescapable inference that Larco knew by that time at least that the Receiver was not recommending its offer and knew the bases advanced by the Receiver for refusing to do so. It would not be unfair to surmise that Larco knew some time before that.

In the affidavit of Nolan filed in support of that motion to intervene there is no reference made to any new offer, or to the possibility of any new offer, but only an intention to address the concerns of the liquidator about the offer which was then under consideration.

The disposition of that motion to intervene was not without difficulty. It came before me as a matter of first impression. It had obvious implications whatever its disposition was and for that reason I reserved my judgment and made my ruling on the following morning at 10:00 a.m. on Tuesday, October 21, 1986.

At the request of counsel, I adjourned to chambers to discuss what method of proceeding with the substantive motion should be followed in light of that ruling, and in light of the possibility that an appeal would be taken from that ruling. After considerable discussion and the submissions of counsel, I decided not to resume the argument that day but to do so on the morning of Wednesday, October 22nd.

At the opening of court on Wednesday, October 22nd, Mr. Lamek, as counsel for the Receiver, requested leave to adduce *viva voce* evidence of an officer of the Receiver company, the vice-president of Clarkson and Gordon Inc. and such leave was granted.

Mr. Shaver was examined in-chief during the forenoon, and it was after the luncheon recess, as I have indicated, that the new

offer of Larco was tendered by counsel for Rosenberg. The precise time of its tendering I do not know, but it was first drawn to my attention when the court resumed in the afternoon.

I am urged by counsel for Rosenberg and for some other defendants to receive this offer in evidence and to consider it upon the disposition of this motion. The new offer, the details of which I have not reviewed, is said to be some $15 million higher than that which is proposed by the trustee for acceptance. This amounts to something in excess of 3% of the aggregate amount of the purchase price of all of the properties.

It is the submission of counsel for the defendant Rosenberg and some other defendants that I should receive the offer in evidence, permit the representative of the Receiver to be cross-examined with respect to it, and, at the conclusion of the motion, decide whether it should be accepted in place of that recommended by the Receiver.

I do not intend to do either. The conclusion I may say I have reached without hesitation or doubt, the reasons I am now expressing are expressed only because there is some public interest in the question, and it should be made manifest that I am deciding what I am deciding and, of course, it should be available to a reviewing court should such a court review the discretion which I have now exercised.

The sale procedure in this case was carefully devised and carefully applied. I need not review either the details of the plan or its application. They are matters of record.

Larco knew early in the procedure that its offer was perceived by the Receiver to present difficulties. Various efforts were made to resolve those difficulties. They were not successful. Larco moved to intervene in these proceedings and failed.

On the third day of the motion an entirely new offer was tendered. My reasons for refusing to admit or consider that offer are simple and basic. To do so would make a farce and a mockery of the elaborate process devised and followed in the marketing of these properties. Indeed, it would make completion of a sale such as this potentially impossible as it would deprive the process of any finality.

A judge is not equipped by training nor required in the nature of his office to assess immediately the merits or demerits of an offer so complex as this without previous analysis and advice. Inevitably, therefore, when such an offer is presented at this stage, the judge is either required to do that which he is not properly able to do, or must direct the Receiver to do so. The

latter, of course, is the only rational manner of proceeding if it is to be dealt with at all.

The potential for confusion and delay, if that were done in this case, is so obvious as not to require elaboration. The dilemma with which I am presented is not new, although it has not perhaps been presented before in circumstances so adverse and so complex as those which are before me.

It was dealt with by the Honourable Mr. Justice Saunders of this court in two judgments to which I was referred in argument, the first being the judgment in *Re Selkirk* (1986), a report of which is in 58 C.B.R. (N.S.) 245. There the circumstances under consideration involved the sale by the sheriff and the appearance after the sheriff had accepted an offer of a new and higher offer.

Mr. Justice Saunders in dealing with the matter says at p. 246 of his reasons the following:

> 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.

He then quotes a judgment of the Nova Scotia Court of Appeal [*Cameron v. Bank of Nova Scotia et al.* (1981), 45 N.S.R. (2d) 303 at p. 314, 86 A.P.R. 303, 38 C.B.R. (N.S.) 1, *per* Macdonald J.A.] in the following terms:

> "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."

Continuing with Mr. Justice Saunders' judgment [at pp. 246-7]:

> 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.
>
> The submissions on behalf of Leung and the creditors who are opposing approval boil down to this: that if, subsequent to a court-appointed receiver making a contract subject to court approval, a higher and better offer is submitted, the court should not approve what the receiver has done. There may be circumstances where the court would give effect to such a submission. 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. Also, if there were circumstances which indicated a defect in the sale process as ordered by the court, such as unfairness to a potential purchaser, that might be a reason for withholding approval of the sale.

The second judgment of Mr. Justice Saunders is one in *Re Beauty Counsellors of Canada Ltd.*, again in 58 C.B.R. (N.S.) at p. 237. There the facts were very similar to those in the *Selkirk* case. At p. 242 Mr. Justice Saunders makes the following observation:

> I must conclude that the final Noevir offer when compared with the numbered company offer is better for the creditors of the bankrupt to a significant extent. The matter then, as I see it, resolves into two issues:
>
> 1. Should the appeal be allowed because the Noevir offer is significantly better than the offer accepted by the trustee from the numbered company; or
>
> 2. If not, should the appeal be allowed because the process which resulted in the contract between the trustee and the numbered company was unfair to Noevir?

At p. 243 he says:

> Leaving aside for a moment the question of unfairness, if a purchaser is able to wait until the approval of the sale comes before the court before submitting his best offer, then no prudent purchaser will make a final offer until that time. Every offer accepted or recommended by a trustee will be vulnerable. The court will be then required to enter into the marketplace and perform the function that up to now has been the function of the trustee. That is an undesirable situation which would make court-supervised sales very difficult to carry out.

I consider that the concluding observation made by Mr. Justice Saunders in that context was something of an understatement:

> 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. 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.
>
> In this case, while the difference in the two offers may be significant, I do not consider the difference to be of such a magnitude as to warrant the disruption of the process. To refuse approval and reopen the negotiations at this time could, on the evidence, be extremely costly and might reduce or even destroy the difference between the two offers. In this particular situation time is of critical importance.

I consider that these cases should be followed in this case. I refer especially to what I just read from the judgment of Mr. Justice Saunders. The logic is, in my view, impeccable and, in application to this case, unanswerable. The processes discussed there apply with even greater force in a case such as this where

the process of sale has been so complex, so demanding and so exhausting.

No question of fairness as raised by Mr. Justice Saunders arises in respect to Larko. If there is a want of fairness involved it has been exhibited by Larko. The present offer is a belated and blatant effort to circumvent the bidding process and to acquire the property over the heads of those who have dealt according to the rules prescribed. Only most extraordinary circumstances would justify the court in putting its approval on such conduct. No such circumstances exist here.

Counsel for the defendant Rosenberg submits with his customary vigour that $15 million is a lot of money; that the court must have regard for commercial reality; that this last offer represents the current state of a buoyant real estate market; and, that it is notorious that court-conducted sales always realize less than the full potential value of the subject property.

Let me deal with those submissions in order. $15 million is a lot of money in absolute terms even in the debased currency of 1986, but in relative terms it is something over 3% of the aggregate value of the properties. There is no such shortfall or disproportion as to call in question the fundamental soundness of the sale procedure ordered by the court, or the application of that procedure by the Receiver.

The court must, of course, have regard for commercial reality. One aspect of commercial reality is that there are certain inherent limitations in a court sale, limitations which are unavoidable. The court has not the capacity to wheel and deal as an individual entrepreneur is able to do, and the court must have regard not only for commercial reality but for commercial morality, a conditioning factor which is not always apparent in private deals.

This last offer may represent the current market. It may also represent simply the desire of the offeror to acquire an advantage over other bidders. It is customary that court sales and sales in foreclosure or liquidation or under other constraint, tend to obtain less advantageous prices than those which might be obtained by a skilful and unfettered vendor free to manoeuvre in an open market. But it must not be forgotten that court sales or other liquidation or forced sales are symptoms of a commercial collapse or dispute or disease of some kind, and the sale cannot wholely escape the consequences of the disease.

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.

Some suggestion was made by counsel for the defendant Rosenberg that the extra recovery which this new offer purports to make available might significantly reduce the ambit of the litigation of which this motion is an offshoot. That would be a consummation much to be desired. But in my view, this prospect is too indefinite, too amorphous, and too remote to be given weight in the disposition of the matter which is now before me.

When the offer was produced I said to Mr. Lamek with what may have been an unfortunate air of flippancy that it would not go away, nor will it. But it will have no role in the conduct of this motion so long as I am seized with the motion.

The offer or a copy will be marked ex. A to these proceedings for the purpose of identification only and so that it may be available to any other court in any review of the discretion which I have exercised in excluding it from present consideration. It will not be the subject of examination or cross-examination of any witness.

Ruling accordingly.

VLADI v. VLADI

Nova Scotia Supreme Court, Trial Division, Burchell J. May 28, 1987.

Conflict of laws — Choice of law — Property — Marital property — Statute requiring application of law of place of last common habitual residence — Foreign law referring to law of third jurisdiction — Reference to third jurisdiction rejected on grounds that law of this jurisdiction archaic and contrary to public policy — Matrimonal Property Act, 1980 (N.S.), c. 9, s. 22.

The parties were Iranian nationals who were resident in West Germany at the time of their marriage in 1973 and West Germany was their last common habitual residence. At the time of the application under the *Matrimonial Property Act*, 1980 (N.S.), c. 9, the parties had been divorced in West Germany and the former wife, the plaintiff, was resident in Nova Scotia while the former husband resided in both Nova Scotia and West Germany. The former wife sought division of property.

Held, the law to be applied was the law of West Germany. The *Matrimonial Property Act*, s. 22, directs that the division of matrimonial assets shall be governed by the law of the place where both spouses had their last common habitual residence. That place was West Germany, and under West German law, Iranian law would apply. While the Act leaves open the possibility of "renvoi", under which Iranian law would govern the division of assets between the parties,

[TAB 3]

1999 ABQB 425
Alberta Court of Queen's Bench

Royal Bank v. Fracmaster Ltd.

1999 CarswellAlta 475, 1999 ABQB 425, [1999] A.J. No. 632, 11 C.B.R. (4th) 217, 245 A.R. 138

Royal Bank of Canada and Royal Bank of Canada as agent for Royal Bank of Canada, Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hongkong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada, Plaintiffs and Fracmaster Ltd., Defendant

Paperny J.

Oral reasons: May 21, 1999 *
Docket: Calgary 9901-08246

Counsel: *B.P. O'Leary*, for Receiver/Manager, Arthur Anderson Inc.
V.P. Lalonde, for Alfred Balm.
B.A.R. Smith, Q.C., for Outside Directors.
G.B. Davison, for Fracmaster Ltd.
T. Mallett, for BJ Services Company.
H.A. Gorman, for UTI Energy Corp.
J.P. Peacock, Q.C., *E.W. Halt* and *G.G. Turnbull*, for Calfrac Limited.
F.R. Dearlove, for Lending Syndicate.
W.E.B. Code, for Banque National de Paris (Canada).
D.B. Higa, for Cananwill Ltd.
W. McDonald Jr., Q.C., for TrizecHahn.
M.G. Damm, for Various Employees.
A.G.P. Shewchuk, for Various Shareholders.
L. Robinson, for TD Asset Management Ltd.

Subject: Insolvency

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

Headnote

Bankruptcy --- Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Defendant company had insufficient equity to satisfy fully claims of all creditors and shareholders — Court ordered receiver to make recommendation to court on bids with consideration given to terms set out by court — Syndicate of creditors and company U made side agreement with respect to company U's offer prior to receiver's recommendation to court on sale process — With approval of court, receiver issued press release outlining terms of sale — Three bids were received by receiver at which time content of every bid was disclosed to parties — Receiver recommended to court company B's offer that exceeded original cash bid by approximately 20 million dollars — Court-appointed receiver applied for approval of sale of assets of defendant company to company B — Application was granted — Creditors' opinions were important but were not deciding factor — Receiver properly adhered to terms for offers set out by court order and acted properly throughout bidding process — Terms for offers set out in court order had to be read in context of commercial realities of business world and minor variations were not problematic — Receiver properly used its business experience and acumen in choosing offer ultimately recommended to court.

Table of Authorities

Cases considered by *Paperny J.*:

Bank of Nova Scotia v. Yoshikuni Lumber Ltd. (1992), 74 B.C.L.R. (2d) 19, 99 D.L.R. (4th) 289, (sub nom. *Bank of Nova Scotia v. Yoshikumi Lumber Ltd. (Receivership))* 20 B.C.A.C. 134, [1993] 2 W.W.R. 695, 16 C.B.R. (3d) 10, (sub nom. *Bank of Nova Scotia v. Yoshikumi Lumber Ltd. (Receivership))* 35 W.A.C. 134 (B.C. C.A.) — not followed

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

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.) — distinguished

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

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

Statutes considered:

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

Investment Canada Act, R.S.C. 1985, c. 28 (1st Supp.)
Generally — referred to

APPLICATION by court-appointed receiver for approval of sale of assets of defendant company.

***Paperny J.* (orally):**

1 This is an application to approve the sale of all or substantially all of the assets of Fracmaster Ltd. ("Fracmaster"). It is brought by the receiver-manager appointed by this Court on May 17, 1999 (the "Receiver") and considers the role of the Court and of a Court-appointed receiver upon such a motion.

I. Background and Facts

2 On March 18, 1999, LoVecchio J. granted an order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (*CCAA*) imposing a stay of proceedings and appointing Arthur Anderson Inc. ("Arthur Anderson") as the monitor (the "Monitor") of Fracmaster. On May 14, I heard arguments from various parties on numerous applications, and I extended the stay to May 17. The disposition of those applications is embodied in my reasons for decision of May 17, 1999 [reported at 11 C.B.R. (4th) 204].

3 On that date I granted an order lifting the stay so that the primary secured creditors could enforce their security. The primary secured creditors are the Royal Bank of Canada ("Royal Bank"), Canadian Imperial Bank of Commerce, Bank of Nova Scotia, Hongkong Bank of Canada, Banque Nationale de Paris (Canada) and Credit Suisse First Boston Canada (together, the "Syndicate"). Royal Bank also has a separate interest as operating lender. I refer to these primary secured creditors, collectively, as the Syndicate.

4 On May 17, I granted the Syndicate's application to appoint Arthur Anderson as Receiver of Fracmaster, on certain terms and conditions. From the valuation information available at that time, it appeared that there was insufficient equity in Fracmaster to satisfy fully the claims of the Syndicate. Consequently, there did not appear to be any remaining equity in Fracmaster for the secondary secured creditor, the unsecured creditors or the shareholders. The Syndicate had requested that I immediately direct the Receiver to sell substantially all of Fracmaster's assets to UTI Energy Corp. ("UTI"). As I stated (para. 44):

> In my view the purpose of the appointment of the Receiver would be largely defeated were I to fetter his discretion in that regard.... I am confident, given his prior involvement in this matter, that he will be able to take whatever immediate action he deems necessary and to report to the Court as required.

At paragraph 46 of that decision, I set out some of the terms of the Receiver's appointment, including:

> The Receiver shall report to this Court at the earliest opportunity, ... as to its recommendation with respect to a sale of Fracmaster's assets, or such other immediate action as it may deem appropriate for the benefit of all claimants, including the secured creditors.
>
> The Receiver may from time to time apply to this Court for advice and direction in the discharge of its powers and duties...

5 The Court appointed the Receiver recognizing that its previous involvement with Fracmaster as Monitor would be of great assistance. For example, the Receiver had observed the previous sale process. At paragraph 40 of my May 17 decision, one of the reasons I rejected the UTI offer under the *CCAA* was the absence of evidence from an independent source as to the integrity of that previous process. The Court left open to the Receiver the possibility of recommending the UTI offer, or either of the other offers, without more, if it could comfortably make that recommendation bearing in mind the concerns I had raised.

6 On May 18, the Receiver returned to the Court and recommended to it a new process to fulfill its mandate. The Receiver proposed that the process should respond to a number of concerns I had raised in my reasons, including the need: (1) to resolve the uncertainty surrounding Fracmaster's business; (2) to have a process that would be fair, binding all parties to the same rules; and (3) to bring finality and closure to the process of selling the assets. The Receiver proposed a sealed bid process with bidding to close at 2:00 p.m. on May 20; the bids to be opened shortly thereafter; and the Receiver to make an application at 10:00 a.m. on May 21 for Court approval of a bid.

7 At that time all known interested parties appeared before the Court and made submissions as to the fairness, timing and method of conducting such a re-bid process. Fracmaster, the Syndicate and UTI were opposed to the process. Fracmaster noted that the Receiver, while acting as Monitor, had not expressed any criticisms of the previous sale process undertaken and expressed concerns about further uncertainty. The Syndicate submitted that it continued to support the UTI bid and intended to continue to do so even if I granted the Receiver's application for approval of a re-bid process. UTI submitted that the entire re-bid process put it at a disadvantage, because all interested bidders were now aware of the amount and terms of its offer.

8 The Receiver became aware of a side agreement between the Syndicate and UTI with respect to the UTI Offer prior to making its recommendation to the Court on a sale process. It recommended the re-bid process notwithstanding this agreement for a number of reasons, including:

> a) the agreement was only one factor to be considered by the Court; and
>
> b) the bidding process was the only way to finally determine if an offer were available in excess of the Syndicate's claim.

9 Notwithstanding the objections raised by the opposing parties, the Receiver maintained that the re-bid process ought still to occur so that it could fulfill its mandate to ensure that everyone had a fair and reasonable opportunity to bid on the assets, taking into consideration the interests of all parties.

10 It is to be noted that the original sale process undertaken by Fracmaster, although conducted under the protection of the *CCAA*, was a company-run sale process that was not controlled by or supervised by the Monitor or the Court.

11 I accepted the Receiver's recommendation and directed him to conduct the process of re-bidding. In accordance with Court direction the Receiver contacted all parties who had previously made an offer on the Fracmaster assets during the *CCAA* proceedings and who had earlier expressed an interest in making an offer.

12 In addition, the Receiver issued a press release outlining the terms of sale. The Receiver's proposed form of purchase and sale agreement document was circulated to prospective purchasers on May 19, 1999. Three bids were received by the deadline on May 20, at which time the content of every bid was disclosed to the parties present.

II. Application to Approve Sale

13 The Receiver applies today for the Court to approve a sale of all of the assets of Fracmaster to BJ Services Company (the "BJ Services Offer") for $80 million, all cash. Some basic terms of the BJ Services Offer are as follows:

- $80 million cash.
- $8 million deposit.
- Closing date 30 days from Court approval (possible two week extension by payment of $2 million; 50% of deposit (*i.e.*, $4 million) forfeited if BJ Services elects not to extend).
- Subject to Canadian and U.S. regulatory approval.
- $6 million "debtor-in-possession" or interim financing ("DIP financing").

14 The Receiver also received offers from UTI (the "UTI Offer") and Calfrac (the "Calfrac Offer").

15 Some basic terms of the UTI Offer are as follows:

- $60.7 million cash price (subject to a reduction based on accounts receivable), plus warrants for a 5% equity position in the purchaser.
- Closing date appears to be June 10, 1999.
- $6.07 million deposit.
- Investment Canada approval required.

16 Some basic terms of the Calfrac Offer are as follows:

- $66 million cash price, plus warrants for a 5% equity position in the purchaser.
- Closing date of June 21, 1999 or 30 days from Court approval.
- $6.6 million deposit for purchase; $2.9 million deposit for operating credit.
- $2 million trust fund to be managed by the Receiver, for the benefit of certain parties (*e.g.*, certain former employees and trade creditors).

Objections to the BJ Services Offer

17 Fracmaster objects to the BJ Services Offer essentially on the basis that BJ Services is a direct competitor to Fracmaster, already has a presence in the Canadian market and as such has duplicate operating facilities and if operations were combined with Fracmaster the result might be significant job losses.

18 As well concern is raised that the Director of the Canadian Competition Bureau could challenge the proposed transaction and such denial of approval would force Fracmaster into liquidation.

19 However I note in paragraph 7 of Mr. Margetak's affidavit that these concerns did not prevent Fracmaster's substantive negotiations with BJ Services in May-June 1997, in October 1998 and in late February 1999.

20 It is clear that the interests of current employees are a consideration. There is conflicting evidence and contrary submissions as to whose bid will likely employ more people. While the employees are significant stake-holders, no bid guarantees jobs. No bidder is prepared, quite realistically, to say how many jobs there would be and where such jobs would be. Some suggest more opportunity; others less. However, without a contractual commitment from any bidder this factor cannot be determinative.

21 Regarding the risks of obtaining regulatory approval from Investment Canada, UTI submitted a letter dated May 21, 1999 from the Minister of Industry, granting unconditional approval under the *Investment Canada Act*.

22 BJ Services submits that it foresees no difficulty obtaining the same approval within the same expedited two-week time frame. UTI questions whether the factors in s.20(a) and (d) of the *Investment Canada Act* will cause BJ Services some difficulty. Those requirements, which help determine if the proposed investment is likely to be of net benefit to Canada, relate to the effects of the proposed investment on employment and competition in Canada.

23 BJ Services states that it has received advice from Canadian and American counsel, and that it does not believe there are any serious competition issues that would prevent the transaction from closing. BJ Services points to its willingness to pay to extend the closing date and its willingness to forfeit part of its deposit if there are regulatory approval difficulties.

24 There has been much discussion regarding the assessment of closing risk. There was also some effort by one of the bidders to enter into an agreement which, although made for a business purpose, it submits has the effect of increasing the closing risk of another bid. The assessment of closing risk is properly within the domain of the Receiver and I rely on the assessment it has maintained since the outset.

25 I am satisfied that the Receiver has carefully assessed the closing risks associated with each of the bids as outlined in his affidavit.

26 I accept the Receiver's recommendation that the closing risk associated with BJ Services is more than the Calfrac Offer and no greater than the UTI Offer and more than offset by the purchase price.

III. Analysis

27 In *Royal Bank v. Soundair Corp.* (1991), 83 D.L.R. (4th) 76 (Ont. C.A.), at 93, the majority of the Ontario Court of Appeal set out the Court's duties when assessing whether a receiver who conducted a sale has acted properly:

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.

I accept this formulation of the Court's responsibilities in the present circumstances.

A. Effort to Obtain the Best Price

28 The Receiver is of the opinion that it has made all possible efforts to obtain the best price for the assets of Fracmaster for the following reasons:

a) The evidence provided to the Court during the *CCAA* proceedings indicated that Fracmaster (as a company) and its assets had been exposed to the market since at least September 1998.

b) Fracmaster and its assets were further exposed for either an equity injection or asset sale during the *CCAA* proceedings.

c) All parties who had made previous offers were made aware of the sales process.

d) The process was well publicized.

29 Based on its analysis the Receiver recommended that the BJ Services offer of $80 million be accepted because:

a) It provides the highest cash purchase price at closing ($13 million more than Calfrac and $19.3 million more than UTI).

b) The closing risk associated with BJ Services is more than the Calfrac Offer and no greater than UTI and is more than offset by the increased amount of cash purchase price.

c) Although the Calfrac offer provides some recovery to unsecured creditors, its offer provides for $13 million less in cash recovery to the secured lenders.

d) The UTI offer was considered least favourable because the purchase price is subject to downward adjustment, the offer does not indemnify the Receiver for certain costs, and it did not confirm acceptance of the Receiver's form of Purchase and Sale Agreement.

e) Both the UTI and Calfrac Offers include upside potential, the value of which is speculative.

30 Fracmaster attempted to obtain the funds necessary to carry out a Plan of Arrangement by seeking an equity injection or a sale of assets. The sale process was conducted by Fracmaster and was not managed, controlled or otherwise supervised by Arthur Andersen as Monitor.

31 On May 14 an application was made by Fracmaster for approval of a sale of substantially all of its assets to UTI. It would not have generated any proceeds for unsecured creditors. The offer was not approved under the *CCAA*. Upon application by the Syndicate, Arthur Andersen was appointed Receiver with powers to sell the assets of Fracmaster subject to Court approval and to make recommendation with respect to a sale or such other immediate action as it deemed appropriate for the benefit of all claimants.

32 After discussion with representatives of Fracmaster, the Syndicate, former and prospective offerors and counsel for certain other creditors, the Receiver made its recommendation for the sale process which I approved.

33 The recommended offer exceeds the original bid cash purchase price by $19.3 million although it is not enough to fully satisfy the claims of the Syndicate which exceed $96 million.

B. The Interests of All Parties

34 The Court directed the Receiver to return to the Court with a recommendation bearing in mind the interests of all claimants including the secured creditors. The Calfrac Offer attempts to provide some monies for former employees and trade creditors. However, in my earlier decision I recognized, on the evidence before me, that it appeared that the Syndicate had the only remaining financial stake in the outcome. The bid process confirms this. The issue is what weight the Court ought to give the Syndicate's wishes to close the UTI Offer notwithstanding an apparent 33% increase in return to the Syndicate under the BJ Services Offer.

35 The law makes it clear that creditors' interests are an important consideration; however, they are not the only consideration - see, *Beauty Counsellors of Canada Ltd., Re* (1986), 58 C.B.R. (N.S.) 237 (Ont. S.C.), at 243, 244.

36 The decision in *Soundair* is instructive on this point. The court there split on the issue of how much weight to give the secured creditors' wishes, where they were the only ones with any real financial stake in the outcome. The majority held that the secured creditors's views should be taken into account (Galligan J.A. at 103), and the receiver's procedure should be carefully scrutinized (McKinlay J.A., concurring, at 89), but that the secured creditors' opinions are not necessarily determinative "if the court decides that the receiver has acted properly and providently" (Galligan J.A. at 103).

37 Galligan J.A. mentioned that the secured creditors had chosen to initiate the court process, by asking for a court-appointed receiver, rather than a private receiver. He stated that this decreased the secured creditors' risks, but also decreased their control over the sale process (at 103-04). However, McKinlay J.A., while concurring in the result, emphasized that the secured creditors' rights should not be diminished merely because they invoked the court process: "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." (at 89).

38 Goodman J.A., in dissent, stated that the receiver's and the court's prime consideration is the interests of the creditors, with the process as a secondary, but important, factor (at 79). He concluded that the process there was unfair to the unsuccessful bidder and improvident for the secured creditors (at 81). The secured creditors preferred the bid with a significantly higher down payment, which also apparently offered more security for payment of the balance.

39 To summarize, *Soundair* states that the creditors' opinions are important, but are not the deciding factor.

40 I accept the principle that although creditors' views should be very seriously considered, if I am satisfied that the Court-appointed Receiver acted properly and providently, I should be reluctant to withhold approval from a sale agreed to or recommended by the Receiver.

41 I do not think the decision of *Bank of Nova Scotia v. Yoshikuni Lumber Ltd.* (1992), 99 D.L.R. (4th) 289 (B.C. C.A.) regarding a referential bid is applicable. Neither do I find *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.) on point. Its facts regarding the sale process are not similar to the case at bar.

42 In the present circumstances, the Syndicate supports the UTI Offer, for both contractual and business reasons. To evaluate those concerns effectively one must weigh the Syndicate's position carefully. It has business concerns and legal concerns. It has agreed to use its reasonable best efforts to conclude the transaction with UTI provided it receives the same consideration in a receivership as under the original offer.

43 The business risks articulated are: delay in closing due to regulatory approvals or simply a failure to close, not the financial ability of BJ Services to close. The Receiver's assessment was that these risks were not significant. The Syndicate does not share the Receiver's view. One cannot help but wonder to what extent the Syndicate's assessment is influenced by its contractual obligation. The Receiver was not so burdened in its analysis.

44 The Syndicate's opinion is a very important consideration. However, noble the commercial considerations were for entering into and maintaining support for the UTI bid, that agreement, while a consideration, cannot fetter the discretion of this Court.

C. The Efficacy and Integrity of the Process

45 As mentioned earlier, the Receiver, in its discretion, and with its experience (including its previous involvement as Monitor of Fracmaster) applied to have a re-bid process. Concerns were raised over several aspects of the re-bid process, with the allegation that it was not conducted with fairness and integrity because it did not exactly follow the requirements set out in my May 18 order.

46 That order directed the Receiver to "contact all parties who had previously made an offer" during the *CCAA* proceedings, to invite them to submit bids. Calfrac submits that BJ Services was ineligible to participate in the re-bid process because it had not made a bid during the *CCAA* proceedings. However, it was clear during the submissions before the Court on May 18 that there was no intention on the Receiver's part to limit bidding only to *CCAA* bidders. The Receiver merely wished to limit the

number of parties that it was directed to contact, given the short time frame involved. I accept that the BJ Services Offer does not violate the letter or spirit of this part of the May 18 order.

47 Calfrac also alleges non-compliance by BJ Services with several terms required by my May 18 order to be in each offer. First, Calfrac states that BJ Services' deposit is not a "real" deposit because there are limitations on the amount and conditions of forfeiture.

48 Second, Calfrac notes that BJ Services, under clause 2.1 of its offer, is entitled to exclude any assets prior to the closing date, with no reduction in the purchase price. I agree with the Receiver that this does not contravene the requirement for the offer to be for "all or substantially all of the assets." Moreover, the Receiver emphasizes that there is no risk to Fracmaster or the Syndicate from this clause, as it allows for no reduction in the purchase price.

49 Third, Calfrac argues that BJ Services' closing date contravenes the May 18 order's requirement for a 30-day closing date. Fourth, Calfrac notes that BJ Services' operating financing is capped at $6 million. Apart from the Receiver's statement that $6 million will likely be sufficient, these two concerns of Calfrac's can be easily addressed in the context of commercial reality. While the May 18 order set out terms for the offers, that must be read in light of the commercial realities of the business world in general and a bidding process in particular. In my view, minor variations are not problematic.

50 Fifth, as part of the re-bid process established on May 18, I ordered that no offer or changes to offers received after 2:00 p.m. on May 20 would be considered by the Court. I also ordered that the Receiver's proposed form of Purchase and Sale Agreement be substantially accepted to by the offer or, subject to any amendments approved by this Court.

51 Calfrac argues that the conditions precedent to closing contravene this requirement and that the waiver by BJ Services of one of those conditions precedent in Court constitutes an unallowable amendment. I disagree. The Court reserved the right to make amendments in order to allow for flexibility and commercial reality. Moreover, the extent of such changes is not material here. Finally, I cannot equate a waiver of a condition precedent to an amendment.

52 Calfrac also notes that, after the 2:00 p.m. deadline, the Receiver received a letter dated May 20, 1999 from Canadian counsel for BJ Services. It identified what it characterized as an "error" in the wording of s.6.1(6). That section relates to the offeror's responsibility for all amounts accruing to employees. The purported amendment states that BJ Services is prepared to be responsible for those amounts, subject to its "review and approval" of the amounts.

53 There is no indication of a lack of good faith in this purported amendment and I recognize the severe time pressure faced by all parties. The Purchase and Sale Agreement of the BJ Services Offer is still in substantially the same form as proposed by the Receiver. Moreover, the Receiver has stated that in the highly unlikely "worst-case scenario", if BJ Services does not approve any of the amounts, the highest possible amount the Receiver would be liable for is approximately $4.8 million. Even if that were to happen, the Receiver notes that the BJ Services Offer would still be substantially higher than the other two.

54 Based on that business evaluation by the Receiver, I am prepared to amend the Purchase and Sale Agreement to include the language erroneously omitted by BJ Services in the first instance. The evidence satisfies me that the re-bid process was conducted in accordance with the Receiver's recommendation and this Court's direction.

55 Counsel for Fracmaster, the Syndicate and UTI argue that certain policy considerations including sanctity of contract and certainty of result are cornerstones of a bid process. They submit that the original sale process conducted by the company was a broad and efficacious process and as such the decision of the company and its lenders to enter into a contractual arrangement with UTI ought not to be disturbed. Further, UTI expresses great concern that what it considers to be its final and best offer has been used as the floor price of the re-bid process. I am sensitive to those concerns and have some sympathy for the position that UTI was in. However, I cannot overlook the fact that UTI was aware that it was involved in a process originally under the *CCAA* requiring the Court to consider the offer within the context of the Act and the best interests of all stake-holders. UTI recognized those commercial and legal risks and contracted to account for them. Further, the Syndicate, in asking the Court to appoint a Receiver, recognized the duties of the Receiver including the duty to make a sufficient effort to get the best possible price for

the assets, for all claimants, to assess the business issues involved in the disposition of assets including a disposition strategy, and to analyse and consider the offers. Within the new process UTI had full opportunity to improve its bid. It chose not to.

56 I find the Receiver acted in good faith and with integrity. I also find that the process as designed had the effect of determining if an offer was available for the assets of Fracmaster in an amount in excess of the Syndicate's claim. It was not, but was successful in increasing the cash offer price by almost $20 million.

D. Fairness in Working Out the Process

57 As noted the process itself was commented on by all counsel before the Court and eventually approved by the Court after hearing submissions from counsel. I find nothing unfair in the working out of the process.

IV. Conclusion

58 This Court appointed the Receiver based on its experience and expertise. It is the Receiver's function to do the business analysis necessary to develop a disposition strategy, to analyse the proposed offers and to make a recommendation to the Court. As Anderson, J. stated in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.), at 109, the Court ought not:

> enter into the market-place.... 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.... 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.

59 I find that the Receiver has acted properly throughout. Its decision to recommend a re-biding process, although not popular with all parties, is fair in light of the circumstances of the original sale process and the subsequent proposals put before the Court. The re-bid process unfolded fairly and equitably, according to the requirements set out in my order. All bids received by the deadline were carefully considered by the Receiver, which used its business experience and acumen to recommend the BJ Services Offer. I accept the validity and integrity of the process conducted in good faith by the Receiver. On that basis I am exercising my discretion and approve the BJ Services Offer as recommended.

V. Disposition

60 The Receiver's application to approve the BJ Services Offer for all or substantially all of Fracmaster's assets is granted in the form of the draft order presented.

61 The draft order as provided is acceptable. Paragraph 5 is to include that the order is made without prejudice to the rights and interests of Cananwill and TD Asset Management Ltd. The applications of TD Asset Management Ltd. and TrizecHahn are adjourned sine die to be brought on two days notice.

Application granted.

Footnotes

* Affirmed (1999), 11 C.B.R. (4th) 230, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 244 A.R. 93, (sub nom. *UTI Energy Corp. v. Fracmaster Ltd.*) 209 W.A.C. 93 (Alta. C.A.).

[TAB 4]

1985 CarswellAlta 332
Alberta Court of Appeal

Salima Investments Ltd. v. Bank of Montreal

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

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

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

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

Counsel: *R. Dodic*, for appellant.
G. McKibben, for respondent Bank of Montreal.
Q. Smith, for respondents Mammoth Developments Ltd. and Bolero Management Ltd.
D. Barber, for third party, 304987 Alberta Ltd.

Subject: Corporate and Commercial; Insolvency

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

Receivers — Sale of debtor's assets — Jurisdiction of court — Sale subject to court approval — Order appointing receiver giving power to sell without court approval — Court having jurisdiction to refuse to approve sale and to request and consider further bids.

A court order had been obtained empowering the receiver of the defendants to sell the defendants' property without further order of the court. However, after calling for bids on the property in question and after negotiating an increase in the price with S. Ltd., the highest bidder, the receiver, entered into an agreement to sell the property to S. Ltd., but subject to court approval since the sale price was slightly lower than the appraised value. Prior to the return of the application for court approval of the sale, a higher offer was made directly to the court by one of the previous bidders. The court adjourned the application for approval of the sale and requested further bids and on this basis later approved a sale to a bidder other than S. Ltd. S. Ltd. appealed.

Held:

Appeal dismissed.

By entering into an agreement which was subject to court approval, S. Ltd. acknowledged the possibility that the court might not approve the sale. Having refused to approve the sale, the court was then entitled to and did properly exercise its discretion in assuming conduct of the sale through a judicial auction.

Table of Authorities

Cases considered:

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.) — *applied*

Can. Permanent Trust Co. v. King Art Dev. Ltd., [1984] 4 W.W.R. 587, 32 Alta. L.R. (2d) 1, 12 D.L.R. (4th) 161, 54 A.R. 172 (C.A.) — *applied*

Appeal from order approving salde or property in receivership.

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

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

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

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

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

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

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

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

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

9 The first ground raises the question of jurisdiction. It is said that the learned chambers judge had no application before him to approve the sale to 304987 Alberta Ltd. It is also said that he improperly considered the other offers and other materials.

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

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

> It is obvious that the receiver did in fact have the power under the original court order to make the sale as he did. Furthermore, had there been no clause inserted in the sales agreement to the effect that it was subject to the approval of the court, it is doubtful whether the contract made with the appellant could be disturbed. The receiver, however, insisted that the clause be placed in the contract making it subject to the approval of the court, and the appellant considering all of the circumstances agreed to accept this clause as part of the agreement. Both of the parties to the contract therefore agreed that the sale would not become a binding sale if the vendor chose to submit its terms to the court for approval and failed to receive such approval...
>
> This, in my opinion, shows an intention on behalf of the parties to invoke the normal equitable doctrines which place the court in the position of looking to the interests of all persons concerned before giving its blessing to a particular transaction submitted for approval.

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

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

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

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

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

15 We do not have the benefit of the recorded reasons by the learned chambers judge. We assume that he came to the conclusion that the efforts of the receiver — while always in good faith — had not been adequate. In our view, there was

evidence before him to support that finding, and we cannot say that this conclusion is so unreasonable as to warrant interference. Nor can we criticize his decision to conduct a summary court-supervised sale in the urgent circumstances which then arose.

16 We dismiss the appeal.

Appeal dismissed.

[TAB 5]

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 jeopordize 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 Plimsoll 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 6]

2000 CarswellOnt 466
Ontario Court of Appeal

Skyepharma PLC v. Hyal Pharmaceutical Corp.

2000 CarswellOnt 466, [2000] O.J. No. 467, 130 O.A.C. 273,
15 C.B.R. (4th) 298, 47 O.R. (3d) 234, 95 A.C.W.S. (3d) 90

Skyepharma PLC, Plaintiff and Hyal Pharmaceutical Corporation, Defendant

Carthy, Goudge, O'Connor JJ.A.

Heard: December 21, 1999
Judgment: February 18, 2000
Docket: CA M25061, C33086

Proceedings: affirmed *Skyepharma PLC v. Hyal Pharmaceutical Corp.* ((1999)), 1999 CarswellOnt 3641, [1999] O.J. No. 4300, 12 C.B.R. (4th) 87, [2000] B.P.I.R. 531 ((Ont. S.C.J. [Commercial List]))

Counsel: *James W.E. Doris*, for Skyepharma PLC.
Alan H. Mark, for Appellant/Respondent on the motion, Bioglan Pharma PLC.
Joseph M. Steiner and *Steven G. Golick*, for Price Waterhouse Coopers Inc., court-appointed receiver of Hyal Pharmaceutical Corp.

Subject: Corporate and Commercial; Insolvency

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

Headnote

Corporations — Arrangements and compromises — Under general corporate legislation

Receiver was appointed and authorized to liquidate and realize defendant's assets — In its report, receiver pointed out importance of finalizing sale at early date, as defendant's debt was increasing at rate of $70,000 per week — Court ordered receiver to negotiate exclusively with two prospective purchasers, including plaintiff company, and gave receiver discretion to negotiate with non-exclusive purchasers if parties could not reach agreement — Receiver recommended approval of sale to plaintiff company, which would not necessarily maximize realization of assets, but would minimize risk of not closing and risk of increasing liabilities — Court approved sale of assets to plaintiff company — Unsuccessful, non-exclusive purchaser brought appeal to have order approving sale set aside — Receiver brought motion to quash appeal — Motion granted — As unsuccessful purchaser did not acquire sufficient interest to be added as party, unsuccessful purchaser did not have right that was finally disposed of by approval order — Unsuccessful purchaser had no legal or proprietary right in property being sold and did not have right or interest that was affected by sale approval order — Involvement of unsuccessful purchaser would create potential for delay and uncertainty, possibly giving unsuccessful purchaser leverage, which would be counterproductive — Ordinary meaning of language in order did not require that unsuccessful purchaser extend its outstanding offer — Fact that receiver had discretion to negotiate with non-exclusive buyers did not create duty or right — Fact that court heard submissions from unsuccessful purchaser did not create standing for appeal, because purchaser was heard as creditor and not as unsuccessful purchaser.

Table of Authorities

Cases considered by *O'Connor J.A.*:

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

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 (N.S. C.A.) — considered

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

Halbert v. Netherlands Investment Co., [1945] S.C.R. 329, [1945] 2 D.L.R. 418 (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 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 6(1)(b) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 13.01 — considered

R. 13.01(1)(a) — considered

R. 13.01(1)(b) — considered

MOTION by receiver to quash appeal by unsuccessful prospective purchaser from judgment, reported at (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), ordering approval of sale of assets.

The judgment of the court was delivered by *O'Connor J.A.*:

1 This is a motion to quash an appeal from the order of Farley J. made on October 24, 1999. By his order, Farley J. approved the sale of the assets of Hyal Pharmaceutical Corporation by the court-appointed receiver of Hyal to Skyepharma PLC. Bioglan Pharma PLC, a disappointed would be purchaser of those assets has appealed, asking this court to set aside the sale approval order and to direct that there be a new sale process.

2 The receiver moves to quash the appeal on the ground that Bioglan, as a potential purchaser, did not have any rights that were finally determined by the sale approval order. Accordingly, the receiver contends, this court does not have jurisdiction to hear the appeal.

Background

3 Skyepharma, the largest creditor of Hyal, moved for the appointment of Pricewaterhouse Coopers Inc. as the receiver and manager of all of the assets of Hyal. On August 16, 1999, Molloy J. granted the order which included provisions authorizing the receiver to take the necessary steps to liquidate and realize upon the assets, to sell the assets (with court approval for transactions exceeding $100,000) and to hold the proceeds of any sales pending further order of the court.

4 On August 26, 1999, Cameron J. made an order approving the process proposed by the receiver for soliciting, receiving and considering expressions of interest and offers to purchase the assets of Hyal.

5 The receiver reported to the court on September 27, 1999 and set out the results of the sale process. The receiver sought the court's approval to enter into exclusive negotiations with two parties which had made offers, Skyepharma and Cangene Corporation. The receiver indicated that it had also received an offer from Bioglan and explained why, in its view, the best realisation was likely to result from negotiations with Skyepharma and Cangene.

6 In its report, the receiver pointed out the importance of attempting to finalize the sale of the assets at an early date. The interest and damages on the secured and unsecured debt of Hyal were increasing in the amount of approximately $70,000 a week. Professional fees and operational costs were also adding to the aggregate debt of the company.

7 On September 28, 1999 Farley J. ordered that the receiver negotiate exclusively with Skyepharma and Cangene until October 6, in an attempt to conclude a transaction that was acceptable to the receiver and that realised the superior value inherent in the offers made by Skyepharma and Cangene. [1] The court also directed that no party would be entitled to retract, withdraw, vary or counteract any outstanding offer prior to October 29, 1999 and that, if the receiver was unable to reach agreement with Skyepharma or Cangene, then it would have the discretion to negotiate with other parties.

8 On October 13, the receiver reported to the court on the results of the negotiations with Skyepharma and Cangene. The parties had been unable to structure the transaction to take advantage of Hyal's tax loss positions. Nevertheless, the receiver recommended approval for an agreement to sell the assets of Hyal to Skyepharma. In its report, the receiver pointed out that the agreement it was recommending did not necessarily maximize the realisation for the assets but that it did minimize the risk of not closing and also the risk of liabilities increasing in the interim period up to closing, which risks arose from the provisions and timeframes contained in other offers. The receiver said that these risks were not immaterial.

9 At the same time that the receiver filed its report it brought a motion for approval of the agreement with Skyepharma. The motion was heard by Farley J. on October 20, 1999. Counsel for Skyepharma, Cangene and Bioglan appeared and were permitted to make submissions. Skyepharma, which was both a creditor of Hyal and the purchaser under the agreement for which approval was being sought, supported the motion. Cangene and Bioglan, which in addition to being unsuccessful prospective purchasers, were also creditors of the company, opposed the motion.

10 It is apparent that the motions judge heard the submissions of Cangene and Bioglan in their capacities as creditors of Hyal and not in their role as unsuccessful bidders for the assets being sold. In his endorsement made on October 24 he said:

> 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 interests of the parties directly involved.

The motions judge continued by saying that he would "take into account the objections of Bioglan and Cangene as they have shoehorned into the approval motion". This latter comment, as it applied to Bioglan, appears to refer to the fact that Bioglan only became a creditor after the receiver was appointed and then only by acquiring a small debt of Hyal in the amount of $40,000.

11 The motions judge approved the agreement for the sale of the assets to Skyepharma. In his endorsement, he noted that the assets involved were "unusual" and that the process to sell these assets was complex. He attached significant weight to the recommendation of the receiver who, he pointed out, had the expertise to deal with matters of this nature. The motions judge noted that the receiver's primary concern was to protect the interests of the creditors of Hyal. He recognized the advantages of avoiding risks that may result from the delay or uncertainty inherent in offers containing conditional provisions. The certainty and timeliness of the Skyepharma agreement were important factors in both the recommendation of the receiver and in the reasons of the court for approving the sale.

12 The motions judge said that "at first blush", it appeared that the receiver had conducted itself appropriately throughout the sale process. He reviewed the specific complaints of Cangene and Bioglan and concluded that, although the process was not perfect (my words), there was no impediment to approving the sale to Skyepharma.

13 This court was advised by counsel that the transaction closed immediately after the order approving the sale was made.

14 Bioglan has filed a notice of appeal seeking to set aside the approval order and asking that this court direct that the assets of Hyal be sold pursuant to a court-supervised judicial sale or, alternatively, that the receiver be required to reopen the bidding relating to the sale. The notice of appeal does not set out any specific grounds of appeal. It states only that the motions judge erred in approving the sale agreement.

15 In argument, counsel for Bioglan said that there are two grounds of appeal. First, the receiver misinterpreted the order of September 28, 1999 and should have negotiated further with the non-exclusive bidders, including Bioglan, once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. Second, the motions judge erred in holding that Bioglan had a full opportunity to participate in the process and was the author of its own misfortune by using a "low balling strategy."

Analysis

16 The receiver moves to quash the appeal on the ground that this court does not have jurisdiction.

17 Section 6(1)(b) of the *Courts of Justice Act* provides for a right of appeal to this court from a final order of a judge of the Superior Court of Justice. A final order is one that finally disposes of the rights of the parties: *Halbert v. Netherlands Investment Co.*, [1945] S.C.R. 329 (S.C.C.).

18 The issue raised by the motion is whether Bioglan had a right that was finally disposed of by the sale approval order. Bioglan submits that there are four separate ways by which it acquired the necessary right. The first is one of general application that would apply to all unsuccessful prospective purchasers in court supervised sales. The other three arise from the specific circumstances of this case.

19 First, Bioglan submits that because it made an offer to buy the assets of Hyal, it acquired a right that entitled it to participate in the sale approval motion and to oppose the order sought by the receiver. This right, Bioglan maintains, was finally disposed of by the order approving the sale to Skyepharma.

20 A similar issue was considered by Anderson J. in *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (Ont. H.C.). In that case, a receiver brought a motion to approve the sale of certain properties. On the return of the motion, Larco Enterprises, a prospective purchaser whose offer was not being recommended for approval by the receiver, moved to intervene as an added party under rule 13.01 of the *Rules of Civil Procedure*. The relevant portion of that rule, at the time, read as follows:

> 13.01(1) Where a person who is not a party to a proceeding claims,
>
> (a) an interest in the subject matter of the proceeding;
>
> (b) that he or she may be adversely affected by a judgment in the proceeding;
>
> ... the person may move for leave to intervene as an added party. [2]

21 Anderson J. concluded that "the proceeding" referred to in rule 13.01 only included an action or an application. The motion for approval of the sale by the receiver was neither. He therefore dismissed Larco's motion. He continued, however, and held that even if the proceeding was one to which the rule applied, Larco did not satisfy the criteria in it because it did not

have an interest in the subject-matter of the sale approval motion nor did it have any legal or proprietary right that would be adversely affected by the court's order approving the sale.

22 I adopt both his reasoning and his conclusion. At p. 118, he said:

> The motion brought by Clarkson to approve the sales is one upon which the fundamental question for consideration is whether that approval is in the best interests of the parties to the action as being the approval of sales which will be most beneficial to them. In that fundamental question Larco has no interest at all. Its only interest is in seeking to have its offer accepted with whatever advantages will accrue to it as a result. That interest is purely incidental and collateral to the central issue in the substantive motion and, in my view, would not justify an exercise of the discretion given by the rule.
>
> Nor, in my view, can Larco resort successfully to cl. (*b*) of rule 13.01(1) which raises the question whether it may be adversely affected by a judgment in the proceeding. For these purposes I leave aside the technical difficulties with respect to the word "judgment". In my view, Larco will not be adversely affected in respect of any legal or proprietary right. It has no such right to be adversely affected. The most it will lose as a result of an order approving the sales as recommended, thereby excluding it, is a potential economic advantage only.

23 The British Columbia Supreme Court reached a similar conclusion in *British Columbia Development Corp. v. Spun Cast Industries Ltd.* (1977), 26 C.B.R. (N.S.) 28 (B.C. S.C.). In that case the receiver in a debenture holder's action for foreclosure moved for an order to approve the sale of assets. A group of companies, the Shaw group, had made an offer and sought to be added as a party under a rule which authorized the Court to add as a party any person "whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated upon ...". Berger J. dismissed this motion. At p. 30, he said:

> The Shaw group of companies has no legal interest in the litigation at bar. It has a commercial interest, but that is not, in my view, sufficient to bring it within the rule. Simply because it has made an offer to purchase the assets of the company does not entitle it to be joined as a party. Nothing in *Gurtner v. Circuit* [cite omitted] goes so far. No order made in this action will result in any legal liability being imposed on the Shaw group, and no claim can be made against it on the strength of any such order.

24 Although the issues considered in these cases are not identical to the case at bar, the reasoning applies to the issue raised on this appeal. If an unsuccessful prospective purchaser does not acquire an interest sufficient to warrant being added as a party to a motion to approve a sale, it follows that it does not have a right that is finally disposed of by an order made on that motion.

25 There are two main reasons why an unsuccessful prospective purchaser does not have a right or interest that is affected by a sale approval order. First, a prospective purchaser has no legal or proprietary right in the property being sold. Offers are submitted in a process in which there is no requirement that a particular offer be accepted. Orders appointing receivers commonly give the receiver a discretion as to which offers to accept and to recommend to the court for approval. The duties of the receiver and the court are to ensure that the sales are in the best interests of those with an interest in the proceeds of the sale. There is no right in a party who submits an offer to have the offer, even if the highest, accepted by either the receiver or the court: *Crown Trust v. Rosenberg, supra.*

26 Moreover, the fundamental purpose of the sale approval motion is to consider the best interests of the parties with a direct interest in the proceeds of the sale, primarily the creditors. The unsuccessful would be purchaser has no interest in this issue. Indeed, the involvement of unsuccessful prospective purchasers could seriously distract from this fundamental purpose by including in the motion other issues with the potential for delay and additional expense.

27 In making these comments, I recognize that a court conducting a sale approval motion is required to consider the integrity of the process by which the offers have been obtained and to consider whether there has been unfairness in the working out of that process. *Crown Trust v. Rosenberg, supra*; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. C.A.). The examination of the sale process will in normal circumstances be focussed on the integrity of that process from the perspective of those for whose benefit it has been conducted. The inquiry into the integrity of the process may incidentally address the fairness of the

process to prospective purchasers, but that in itself does not create a right or interest in a prospective purchaser that is affected by a sale approval order.

28 In *Soundair*, the unsuccessful would be purchaser was a party to the proceedings and the court considered the fairness of the sale process from its standpoint. However, I do not think that the decision in *Soundair* conflicts with the position I have set out above for two reasons. First, the issue of whether the prospective purchaser had a legal right or interest was not specifically addressed by the court. Indeed, in describing the general principles that govern a sale approval motion, Galligan J.A., for the majority, adopted the approach in *Crown Trust v. Rosenberg*. Under the heading "Consideration of the interests of all the parties", he referred to the interests of the creditors, the debtor and a purchaser who has negotiated an agreement with the receiver. He did not mention the interests of unsuccessful would be purchasers. Second, the facts in *Soundair* were unusual. The unsuccessful offeror was a company in which Air Canada had a substantial interest. The order appointing the receiver specifically directed the receiver "to do all things necessary or desirable to complete a sale to Air Canada" and if a sale to Air Canada could not be completed to sell to another party. Arguably, this provision in the order of the court created an interest in Air Canada which could be affected by the sale approval order and which entitled it to standing in the sale approval proceedings.

29 In limited circumstances, a prospective purchaser may become entitled to participate in a sale approval motion. For that to happen, it must be shown that the prospective purchaser acquired a legal right or interest from the circumstances of a particular sale process and that the nature of the right or interest is such that it could be adversely affected by the approval order. A commercial interest is not sufficient.

30 There is a sound policy reason for restricting, to the extent possible, the involvement of prospective purchasers in sale approval motions. There is often a measure of urgency to complete court approved sales. This case is a good example. When unsuccessful purchasers become involved, there is a potential for greater delay and additional uncertainty. This potential may, in some situations, create commercial leverage in the hands a disappointed would be purchaser which could be counterproductive to the best interests of those for whose benefit the sale is intended.

31 In arguing that simply being a prospective purchaser accords a broader right or interest than I have set out above, Bioglan relies on the decision of the Nova Scotia Court of Appeal 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 (N.S. C.A.). In that case, the receiver invited tenders to purchase lands of the debtor and received three offers. The receiver accepted Cameron's offer and inserted a clause in the sale agreement calling for court approval. On the application to approve the sale, Treby, an unsuccessful bidder, was joined as an intervener. Treby opposed approval, arguing that he had been misled into believing that he would have another opportunity to bid on the property. The court directed that all three bidders be given a further opportunity to bid by way of sealed tender. Cameron appealed the order. The tender process proceeded. Treby and the third bidder submitted bids; Cameron did not. The receiver accepted Treby's offer and the court approved the sale to Treby. Cameron also appealed this order and Cameron's two appeals were heard together. Hart J.A. held that both Cameron and Treby had a right to appear at the original hearing because both were parties directly affected by the decision of the court. He concluded that the first decision reopening the bidding process and the order approving the sale to Treby were both final in their nature in that they amounted to a final determination of the rights of Cameron and Treby. He did not set out specifically what "rights" he was referring to. Having regard to the facts in the case, it is not clear to me that *Cameron* stands for the proposition asserted by Bioglan, that an unsuccessful would be purchaser, without more, has a right that is finally determined by an order approving a sale. If it does, I would, with respect, disagree.

32 In the result, I conclude that the fact that Bioglan made an offer to purchase Hyal's assets did not give it a right or interest that was affected by the sale approval order. It was not entitled to standing on the motion on that basis nor is it now entitled to bring this appeal on that basis.

33 As an alternative, Bioglan relies upon three circumstances in this case, each of which it says, in somewhat different ways, results in it having the right to appeal the sale approval order to this court. First, Bioglan submits that it acquired this necessary right under the provision in the order of September 28 which directed that "no party shall be entitled to retract, withdraw, vary or countermand any offer submitted to the receiver prior to October 29 1999."

34 Bioglan's offer was, by its terms, to expire on October 4. Bioglan argues that the order of September 28 imposed an obligation on it to keep that offer open until October 29. That being the case, Bioglan maintains that it acquired a right to appear and oppose the motion to approve the sale.

35 I do not accept this argument. The ordinary meaning of the language in the order did not require Bioglan to extend its outstanding offer. The order did nothing more than preclude parties from taking steps to either amend or withdraw their offers before October 29. By its terms, Bioglan's offer was to expire on October 4. The order of September 28 did not affect the expiry date of the offer.

36 Even if the language of the September 28 order is interpreted to preclude an existing offer from expiring in accordance with its terms, the result would be the same. Bioglan made its offer to the receiver under terms and conditions of sale approved by the court on August 26. The terms and conditions of the sale were deemed to be part of each offer made to the receiver. Clause 14 of the terms and conditions provided:

> ... No party shall be entitled to retract, withdraw, vary or countermand its offer prior to acceptance or rejection thereof by the vendor (receiver). [My emphasis.]

37 The order of September 28 tracks the emphasized language. If the language in the order is interpreted to preclude an existing offer from expiring according to its terms, then when Bioglan submitted its offer it agreed, by virtue of clause 14 in the terms and conditions of sale, that its offer would remain open until it was either accepted or rejected by the receiver. Assuming this interpretation, the order of September 28 added nothing to the obligation that Bioglan had assumed when it made its offer.

38 Accordingly I would not give effect to this argument.

39 Next, Bioglan submits that the order of September 28 created a duty on the receiver to negotiate further with the non-exclusive bidders once it determined that a transaction based on the tax benefits of Hyal's tax loss position could not be structured. This duty, it is argued, created a corresponding legal right in Bioglan to participate further in the process. This right, Bioglan maintains, was violated by the receiver when it recommended the Skyepharma agreement.

40 I do not read the order of September 28 as imposing this duty on the receiver. The order provided the receiver with a discretion as to whether to negotiate further with the non-exclusive bidders. It did not require the receiver to do so. Moreover, the order of September 28 did not limit the receiver to entering into an agreement with the exclusive bidders only if an agreement could be structured to take advantage of the tax losses. The order of September 28 did not create either the duty or the right asserted by Bioglan.

41 Finally, Bioglan submits that it acquired the necessary right to bring this appeal because the motions judge permitted it to make submissions on the sale approval motion. Again, I see no merit in this argument. As I have set out above, it seems apparent that the motions judge heard Bioglan's argument solely because it was a creditor of Hyal and not because it was an unsuccessful prospective purchaser. Bioglan does not seek to bring this appeal in its role as a creditor, nor does it complain that the sale approval order is unfair to the creditors of Hyal.

42 The motions judge approved the sale based on the recommendation of the receiver that it was in the best interests of the creditors. The fact that Bioglan was given an opportunity to be heard in these circumstances did not create a right which would provide standing to bring this appeal. The order sought to be appealed does not finally dispose of any right of Bioglan as creditor.

Disposition

43 In the result, I would allow the motion and quash the appeal with costs to the moving party.

Motion granted.

Footnotes

These offers were superior in that they were the only two that attempted to provide value for the tax loss positions of Hyal.

The rule as presently worded is not.

End of Document

[TAB 7]

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

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

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

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

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

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

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

The federal government provided a Crown corporation with a $1.5 billion loan for the construction and sale of two CANDU nuclear reactors to China. An environmental organization sought judicial review of that decision, maintaining that the authorization of financial assistance triggered s. 5(1)(b) of the *Canadian Environmental Assessment Act*. The Crown corporation was an intervenor with the rights of a party in the application for judicial review. The Crown corporation filed an affidavit by a senior manager referring to and summarizing confidential documents. Before cross-examining the senior manager, the environmental organization applied for production of the documents. After receiving authorization from the Chinese authorities to disclose the documents on the condition that they be protected by a confidentiality order, the Crown corporation sought to introduce the documents under R. 312 of the *Federal Court Rules, 1998* and requested a

confidentiality order. The confidentiality order would make the documents available only to the parties and the court but would not restrict public access to the proceedings.

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

Held: The appeal was allowed.

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

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

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

Le gouvernement fédéral a fait un prêt de l'ordre de 1,5 milliards de dollar en rapport avec la construction et la vente par une société d'État de deux réacteurs nucléaires CANDU à la Chine. Un organisme environnemental a sollicité le contrôle judiciaire de cette décision, soutenant que cette autorisation d'aide financière avait déclenché l'application de l'art. 5(1)b) de la *Loi canadienne sur l'évaluation environnementale*. La société d'État était intervenante au débat et elle avait reçu les droits de partie dans la demande de contrôle judiciaire. Elle a déposé l'affidavit d'un cadre supérieur dans lequel ce dernier faisait référence à certains documents confidentiels et en faisait le résumé. L'organisme environnemental a demandé la production 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. Épurer les documents serait virtuellement impraticable et inefficace. Fournir des résumés des documents ne constituait pas une « autre option raisonnable » à la communication aux parties des documents de base. L'ordonnance de confidentialité était nécessaire parce que la communication des documents menacerait gravement un intérêt commercial important de la société d'État et parce qu'il n'existait aucune autre option raisonnable que celle d'accorder l'ordonnance.

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

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

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

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

Statutes considered:

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

Generally — referred to

s. 1 — referred to

s. 2(b) — referred to

s. 11(d) — referred to

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

Generally — considered

s. 5(1)(b) — referred to

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 CEAA 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 CEAA. 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 CEAA, 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 CEAA, the inability to present this information hinders the appellant's capacity to make full answer and defence or, expressed more generally, the appellant's right, as a civil litigant, to present its case. In that sense, preventing the appellant from disclosing these documents on a confidential basis infringes its right to a fair trial. Although in the context of a civil proceeding this does not engage a *Charter* right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157 (S.C.C.), at para. 84, *per* L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

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.

End of Document

[TAB 8]

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

Look Communications Inc. v. Look Mobile Corp.

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

IN THE MATTER OF LOOK COMMUNICATIONS INC. (Applicant) and LOOK MOBILE CORPORATION AND LOOK COMMUNICATIONS L.P. (Respondent)

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

Newbould J.

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

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

Subject: Corporate and Commercial; Civil Practice and Procedure

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

Headnote

Business associations --- Changes to corporate status — Arrangements and compromises — Under general corporate legislation

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

Table of Authorities

Cases considered by *Newbould J.*:

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982 CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110 (S.C.C.) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002

SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada)* 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — considered

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

Statutes considered:

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

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

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

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

***Newbould J.*:**

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

Circumstances of Sealing Order

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

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

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

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

approving the transaction, i.e., May 14, 2012. I am told that the reason for the staged dates was that it was anticipated that the necessary regulatory approvals for the sale of the Spectrum and License could take some time.

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

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

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

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

Analysis

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

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

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

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

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

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

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

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

17 It is common when assets are being sold pursuant to a court process to seal the Monitor's report disclosing all of the various bids in case a further bidding process is required if the transaction being approved falls through. Invariably, no one comes back asking that the sealing order be set aside. That is because ordinarily all of the assets that were bid on during the court sale process end up being sold and approved by court order, and so long as the sale transaction or transactions closed, no one has any further interest in the information. In *887574 Ontario Inc. v. Pizza Pizza Ltd.* (1994), 23 B.L.R. (2d) 239 (Ont. Gen. Div. [Commercial List]), Farley J. discussed the fact that valuations submitted by a Receiver for the purpose of obtaining court approval are normally sealed. He pointed out that the purpose of that was to maintain fair play so that competitors or potential bidders do not obtain an unfair advantage by obtaining such information while others have to rely on their own resources. In that context, he stated that he thought the most appropriate sealing order in a court approval sale situation would be that the supporting valuation materials remain sealed until such time as the sale transaction had closed.

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

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

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

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

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

> Underlying freedom of expression are 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. v. Quebec (AttorneyGeneral)*, [1989] 1 S.C.R. 927, [page551] at p. 976; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 762-64, per Dickson C.J. Charter jurisprudence has established that the closer the speech in question lies to these core values, the harder it will be to justify a s. 2(b) infringement of that speech under s. 1 of the Charter: Keegstra, at pp. 760-61. Since the main goal in this case is to exercise judicial discretion in a way which conforms to Charter principles, a discussion of the deleterious effects of the confidentiality order on freedom of expression should include an assessment of the effects such an order would have on the three core values. 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. (underlining added)

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

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

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

Motion granted.

End of Document

[TAB 9]

2011 ONSC 2308
Ontario Superior Court of Justice [Commercial List]

Canrock Ventures LLC v. Ambercore Software Inc.

2011 CarswellOnt 2505, 2011 ONSC 2308, 200 A.C.W.S. (3d) 707, 75 C.B.R. (5th) 94

Canrock Ventures LLC (Applicant) and Ambercore Software Inc. and Terrapoint Canada (2008) Inc. (Respondents)

D.M. Brown J.

Heard: April 11, 2011
Judgment: April 13, 2011
Docket: CV-10-8985-00CL

Counsel: F. Spizzirri, M. Nowina for Shimmerman Penn Title & Associates Inc., Receiver and Manager of Ambercore Software Inc., Terrapoint Canada (2008) Inc.
P. Shea for Canrock Ventures LLC
J. Spiegelman for Quorum Investment Pool Limited Partnership
M. Green for Quorum Oil & Gas Technology Fund Limited
R. Brosseau, A. Rush for GeoDigital International

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Headnote

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

Sale of debtor's assets — Court approval of sale — Debtors A Inc. and T Inc. were providers of spatial data and technology solutions — Court refused to approve receiver's proposed sale of all assets of A Inc. and T Inc. to C LLC and GD — Receiver obtained valuations of A Inc.'s intellectual property — Receiver entered into agreement to sell assets of T Inc. and grant technology licence agreement (TLA) to GD — Receiver brought motion for orders approving sale agreement and TLA, and sealing sale agreement and valuations — Motion was granted — Receiver acted prudently and reasonably in its efforts to secure sale of some assets of T Inc. — Sale process and proposed agreements satisfied criteria for approval — Sale of all assets of A Inc. and T Inc. *en bloc* was not realistic in circumstances — Debtors lacked cash to fund extensive round of marketing — Receiver used sufficient efforts to pursue sale of assets — Receiver took into account interests of all parties, giving due recognition to amount of liabilities of debtors — Price of proposed sale was reasonable when measured against valuations — It was reasonable to provide GD with access to source code in TLA as provider of software, A Inc., may not be able to maintain source code on go-forward basis — Sealing orders were granted as being appropriate to protect integrity of sale process.

Bankruptcy and insolvency — Administration of estate — Sale of assets — Jurisdiction of court to approve sale

Sale of debtor's assets by receiver — Debtors A Inc. and T Inc. were providers of spatial data and technology solutions — Court refused to approve receiver's proposed sale of all assets of A Inc. and T Inc. to C LLC and GD — Receiver obtained valuations of A Inc.'s intellectual property — Receiver entered into agreement to sell assets of T Inc. and grant technology licence agreement (TLA) to GD — Receiver brought motion for orders approving sale agreement and TLA, and sealing sale agreement and valuations — Motion was granted — Receiver acted prudently and reasonably in its efforts to secure sale of some assets of T Inc. — Sale process and proposed agreements satisfied criteria for approval — Sale of all assets of A Inc. and T Inc. *en bloc* was not realistic in circumstances — Debtors lacked cash to fund extensive round of marketing — Receiver used sufficient efforts to pursue sale of assets — Receiver took into account interests of all parties,

giving due recognition to amount of liabilities of debtors — Price of proposed sale was reasonable when measured against valuations — It was reasonable to provide GD with access to source code in TLA as provider of software, A Inc., may not be able to maintain source code on go-forward basis — Sealing orders were granted as being appropriate to protect integrity of sale process.

Table of Authorities

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

Canrock Ventures LLC v. Ambercore Software Inc. (2011), 2011 ONSC 1138, 2011 CarswellOnt 1069 (Ont. S.C.J. [Commercial List]) — referred to

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

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

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 53.03(2.1) — considered

MOTION by receiver for orders approving sale of debtor's assets and technology licence agreement, and sealing sale agreement and valuations.

***D.M. Brown J.*:**

I. Receiver's motion: approval of sale

1 Shimmerman Penn Title & Associates Inc., in its capacity as receiver and manager of Ambercore Software Inc. and Terrapoint Canada (2008) Inc., seeks approval of the sale of the assets of Terrapoint to GeoDigital International Inc., a related vesting order, approval of an associated technology licence agreement, approval of a Master Services Agreement, approval of its Interim Report dated March 14, 2011 and Third Report dated April 3, 2011, as well as orders sealing the sale agreement and certain valuations.

2 For the reasons set out below, I grant the orders sought.

II. Events leading up to the motion before Newbould J.

3 This past February the Receiver sought court approval for the sale of the assets of Ambercore and Terrapoint. Newbould J. refused to approve the sale: 2011 ONSC 1138 (Ont. S.C.J. [Commercial List]). In his February 18, 2011 Reasons Newbould J. described the business activities of Ambercore and Terrapoint, as well as the pre-receivership borrowings of those companies:

> [3] Ambercore is a development company that provides spatial data solutions for the energy, mining and natural resources sector. It collects high resolution light detection and ranging ("LiDAR") spatial data. Ambercore has patented software algorithms and its technology, according to the affidavit of Mr. Goffin filed on behalf of Quorum, is a robust, efficient

and scalable design for extremely large data applications. This evidence has not been challenged and, indeed, very little of the nature of the business of Ambercore or of Terrapoint has been included in the material filed by the receiver. The assets of Ambercore are fixed assets, largely comprised of computer technology, intellectual property comprised of patents, proprietary software applications, trademarks and processes, supply contracts under which Ambercore has various software maintenance supply contracts in software licensing agreements, and an investment in shares of Terrapoint USA Inc., a wholly-owned subsidiary of Ambercore acquired in 2008.

[4] Terrapoint is a provider of cost-effective, high value on time LiDAR and related geo-spatial technology solutions. Its assets consist of fixed assets, being a fleet of LiDAR systems, intellectual property and contracts in progress. There are two large contracts in process, one being for Ontario Power Generation originally valued at $1.57 million with remaining billings of approximately $667,000 and the second being for Nalcor originally valued at $1 million with remaining billings of approximately $275,000.

[5] Ambercore and Terrapoint borrowed from RBC which held security over all of their assets. They had a revolving demand facility of $1.5 million, a $250,000 demand facility by way of letters of guarantee and other minimal loans. On August 23, 2010 RBC assigned its security to Canrock and on the same day Canrock, Ambercore and Terrapoint signed a loan amending agreement under which Canrock became the lender[1]. While there is no evidence in the record, Mr. Shea advises that Canrock is a U.S. based financing company that looks for distressed debt situations. On November 18, 2010 Canrock applied on an ex parte basis and obtained an order appointing the receiver. At the date of the receivership Canrock was in a first secured position owed $1.745 million. Since then Canrock/GeoDigital has advanced approximately $344,000 to the receiver on receiver certificates secured by the assets of Ambercore and Terrapoint.

[6] Quorum is an indirect and direct secured creditor of Ambercore. It advanced $3.15 million to an Alberta numbered corporation which advanced that amount and more to Ambercore under debenture security. The Alberta numbered corporation has a second secured position against Ambercore and Terrapoint for U.S. $5.65 million. Quorum advanced a further $2.335 million to Ambercore and holds a third secured position for that amount against Ambercore and Terrapoint.

The Receiver stated, in its Third Report, that it is important to recall that until 2008 Ambercore and Terrapoint were unrelated companies. That year Ambercore acquired Terrapoint and its US affiliate, Terrapoint USA, Inc.

4 The Receiver was appointed receiver and manager of all the assets, properties and undertakings of Ambercore and Terrapoint by order dated November 18, 2010. The results of the initial efforts of the Receiver to sell the assets of the Debtors were described by Newbould J. as follows:

[11] The receiver received seven expressions of interest, all but one of which were in respect of specific assets. Only one en bloc offer was received, that being from Canrock/GeoDigital. An asset purchase agreement was negotiated and signed January 14, 2011.

5 On the motion before Newbould J. the Receiver sought approval of a sale agreement with Canrock/GeoDigital. The proposed sale agreement was in the nature of a credit bid. Newbould J. described the proposed agreement:

[12] Salient features of the APA include:

- the en bloc purchase of all Ambercore and Terrapoint assets
- a purchase price of $1.7 million, to be paid by the partial forgiveness of $1.7 million of the debt owed to Canrock
- there is no allocation of the price between Ambercore and Terrapoint
- the purchaser is to assume the receiver's customer and supplier obligations with respect to the completion of customer contracts.

• while the Ambercore intellectual property is sold under the APA, there is a provision in section 1.03 for the marketing of the Ambercore intellectual property either by Canrock/GeoDigital or, at the option of the receiver, by the receiver.

[13] Section 1.03 of the APA dealing with the Ambercore IP provides that the Ambercore IP sold to the purchaser will, following the completion of the transaction, be marketed under either of two arrangements. While the language of section 1.03 is not entirely clear, it would appear that the alternative methods of marketing the Ambercore IP after the completion of the sale to Canrock/GeoDigital are as follows:

(a) Canrock will market the Ambercore IP for 30 days from the time of closing on terms satisfactory to the receiver, which terms shall include the provision of a non-exclusive, worldwide, perpetual, irrevocable, royalty-free, fully paid up licence to Canrock/GeoDiigital to use or modify the IP for the purpose of integrating it into any product or service offered by Canrock/GeoDigital, provided that such product or service containing Ambercore IP is not made available principally for the purpose of providing the Ambercore IP. The first $450,000 of sale proceeds plus marketing expenses will be paid to Canrock and the balance, if any, to the receiver. Or,

(b) The receiver may market the Ambercore IP for resale for a maximum period of 75 days after closing provided that the receiver and Canrock receive payment from a third-party in advance for all reasonable expenses with respect to the marketing and preservation of the Ambercore IP. Any sale of the Ambercore IP shall include a term that a copy of the source code shall be retained by Canrock/GeoDigital and the purchaser of the Ambercore IP shall enter into a third-party source code agreement with a depository to hold the software to preserve the underlying code base and permit Canrock/GeoDigital full access to that source code.

6 One secured creditor, Quorum Oil and Gas Technology Fund Limited ("QOGT"), opposed the proposed sale agreement. In his February Reasons Newbould J. voiced numerous concerns about the proposed sale, including the following:

[14] There has been no evidence provided to the Court, even on a confidential basis, of a valuation or indication of value of most of the assets sold. The reason is that no such valuations were obtained by the receiver, save for a forced liquidation value of the Ambercore office and equipment assets. Two assets stand out.

[15] One of the assets sold were the shares of Terrapoint USA. The receiver obtained no valuation or opinion regarding their value and there has been no analysis of those assets provided by the receiver. They may have little or great value, but that is not known to the Court.

[16] The appraisal of the Ambercore office and equipment at the end of the report stated that the Ambercore IP had no value, stating that the IP contained little to no value due to licence agreements, proprietary and transferable issues. The report stated that the Ambercore IP would only have value on a company going forward scenario, and no value on that basis was provided. What the qualifications of the appraiser were to be dealing with the sophisticated software in question were not provided. Essentially, therefore, the receiver obtained no valuation of the Ambercore IP, a valuation which KPMG, the receiver of the Alberta numbered company, urged the receiver to obtain.

[17] The affidavit evidence of Mr. Goffin filed on behalf of Quorum, on which there was no cross-examination, stated that he had discussions with Mr. Jim Estill, a partner at Canrock working with Ambercore to sell the Ambercore business, and was led to believe by Mr. Estill that the Ambercore IP was worth many millions of dollars. Mr. Estill told him that the Ambercore IP was a potential "lottery ticket" potentially worth many millions of dollars.

[18] This is a credit bid in which no cash is being paid to the receiver. Without an indication of the value of the assets that have been sold, is not possible to consider whether the payment by way of a reduction of debt is satisfactory. Without this information, what is taking place is essentially a foreclosure with the prospect that any upside may well be all to the benefit of Canrock/GeoDigital. There is no basis for a court to conclude that a sale in the circumstances should be approved.

[19] There is also a concern raised, and not without merit, that the time provided for the marketing and submission of bids for the Ambercore assets, particularly the Ambercore IP, was too short. The receiver noted in his first report that there was less urgency for the Ambercore assets to be sold than for the Terrapoint assets, yet he used the extremely short time frame for the sale of assets of both companies. There appears to be little justification for this, which is compounded by the fact that the receiver had no advice as to the value of the Ambercore IP. Moreover, there was only one ad placed in the Globe and Mail, with no description of the Ambercore IP other than "Intellectual Property", and no discussion by the receiver whether that single ad could be expected to reach persons who might be interested in it. I am not persuaded that there was sufficient exposure of the Ambercore assets, particularly the Ambercore IP, to the market place. The belated carve out of the Ambercore IP on section 1.03 of the APA is a recognition of this concern by the receiver.

[20] The carve out of the Ambercore IP in section 1.03 of the APA gives rise to some fundamental concerns. The first is that it is difficult to understand why it would be in the interests of Canrock/GeoDigital to sell the IP. Mr. Shea asserted that the IP was critical to the Terrapoint business, without which his client would not be interested in purchasing Terrapoint. I have severe doubts that Canrock/GeoDigital would be a motivated seller. In argument, Mr. Shea recognized the concern and said that his client would waive its right to attempt to sell the Ambercore IP and instead let the receiver do it. The fact that the receiver agreed to this term in the first place gives some concern as to the independence of the receiver from Canrock. I will have more to say about that.

. . .

[23] In light of the concerns expressed by KPMG regarding the method of selling the Ambercore IP proposed by the receiver and its urging to obtain a valuation, one would have expected the receiver to have given far more consideration as to what should be done with the Ambercore IP. I have no confidence that this unusual method of marketing the Ambercore IP by the receiver after the closing of the sale of it to Canrock/GeoDigital will produce a reasonable bid.

[24] There is no indication in the material filed that discusses the relationship between Canrock and GeoDigital or what GeoDigital is paying for the assets being acquired. Mr. Shea advised the court that the two companies are separate and that GeoDigital has paid Canrock $600,000. He also stated that they had put a value of $450,000 on the Ambercore IP, although on what basis that was done is unknown.

7 In his Reasons Newbould J. also expressed concerns about the amount of advocacy contained in the Receiver's Second Report seeking approval of the sale, as well as the representation of the Receiver by the counsel who had acted for Canrock on the application to appoint a receiver. Newbould J. concluded:

[32] In my view the receiver should retain new counsel and any further material provided by the receiver be done in a manner that will give comfort that the receiver has given due consideration to all important aspects of the receivership and is acting as a neutral, non- interested court officer providing balanced reports.

[33] The principles to be considered by a court in deciding to approve a sale recommended by a receiver are well known and set out in *Royal Bank of Canada v. Soundair Corp.*, 1991 CanLII 2727 (ON C.A.), (1991), 4 O.R. (3d) 1 (C.A.). Regrettably, I have come to the conclusion that the tests set out in *Soundair* have not been met. In all the circumstances, the motion to approve APA is dismissed.

III. Assets, liabilities and status of Ambercore and Terrapoint

8 In its Third Report the Receiver described the current state of the affairs of Ambercore and Terrapoint:

(i) The Receiver retained new counsel following the release of the decision of Newbould J.;

(ii) Ambercore has conducted little in the way of new business. Since its appointment the Receiver has only issued one invoice, for US $16,000, for work performed by Ambercore. The company's main assets are the intellectual property it owns. The Ambercore Software has been used, without licence, by Terrapoint to carry on its business;

(iii) Ambercore owns Ambercore Ukraine, which develops software for its parent. Ambercore Ukraine presently is developing software under the name of "Project Cloud". The Receiver has not taken any steps to control the operations of Ambercore Ukraine. That company has 8 employees, and uses 14 independent consultants to develop software. Its monthly payroll totals US $25,000. Neither Ambercore nor Ambercore Ukraine have any revenues. To March 20, 2011, Ambercore had advanced $191,174 to fund Ambercore Ukraine, with a significant portion of those funds coming from advances by Canrock to the Receiver;

(iv) Seven patents exist relating to software developed by Ambercore Ukraine on behalf of Ambercore. Four are provisional; legal disputes may surround some of the provisional patents;

(v) As at March 20, 2011, Terrapoint held cash of $32,207 and its books and records reflected receivables totaling $271,847. The Receiver expected to invoice a further $200,000 to $300,000 during the balance of March and early April, 2011. The Receiver has collected most of the receivables which were on the books of Terrapoint at the time of its appointment, and the Receiver noted that its ability to do so was connected to Terrapoint's completion of work-in-progress under existing contracts. As of March 20, 2011 Terrapoint's work-in-progress amounted to $623,740. It has five remaining open contracts, the largest being with electricity generation utilities. Most of the work remaining under those contracts will be completed this spring. Under the receivership Terrapoint has not entered into any new contracts. The fixed assets of Terrapoint consist largely of LiDAR systems with a book value of $986,248;

(vi) The Receiver entered into a Master Services Agreement with GeoDigital on March 4, 2011 under which it subcontracted the use of certain Terrapoint equipment to that company. That agreement has generated some revenue for Terrapoint.

9 On February 21, 2011, Canrock advised the Receiver that it was no longer prepared to advance funds for the operation of Ambercore Ukraine. Neither the receiver of 148 Alberta nor QOGT have offered to fund Ambercore. The Appointment Order of November 18, 2010 limited the Receiver's power to borrow to $350,000.00. To date the Receiver has borrowed up to that permitted limited; it has no further power to borrow without leave of the Court. In its Third Report the Receiver noted the lack of funds in the receivership, the unwillingness of any secured creditor to advance further funds, and the limit it had reached on its borrowing power.

10 Although the source code for Ambercore's Intellectual Property is maintained in the Ukraine, the Receiver has possession of a baseline copy of the source code and has verified the accuracy of the copy in its hands.

11 There are three secured creditors of Ambercore and Terrapoint — Canrock, 1482747 Alberta Inc., and QOGT. Funds advanced by 148 Alberta came from Quorum Investment Pool Limited Partnership ("QIP) in the amount of $2.5 million and QOGT in the amount of $3.15 million. Although on his cross-examination Mr. Michael Goffin, a representative of QOGT, refused to answer questions regarding the relative priority of the investments of QIP and QOGT within 148 Alberta, public filings indicate that QIP enjoys priority.

12 In its Third Report the Receiver summarized the administrative and secured claims against Ambercore and Terrapoint as of April 3, 2011: (i) Receiver's administrative fees and disbursements: $458,618; (ii) Receiver's certificates: Canrock and GeoDigital: $343,508; (iii) CRA deemed trust: $15,695; (iv) Canrock secured claim: $1,745,749; (v) 148 Alberta: $5,650,000; (v) QOGT: $1,200,000, for a total of $8,595,749.

13 The Receiver has obtained an independent legal opinion that Canrock has a valid, first-ranking security interest against both Ambercore and Terrapoint.

14 As of the date of the receivership, Terrapoint has unsecured debts of approximately $1.165 million and Ambercore, $164,000.

IV. Efforts of Receiver to sell assets since the decision of Newbould J.

A. Decision not to conduct a new sale process

15 In its Third Report the Receiver stated that it considered its options for sale in light of the decision of Newbould J. and concluded that the impediments to running a new sales process of any length involving Terrapoint's assets outweighed any possible benefits for several reasons: (i) by the end of March there would be no significant work for Terrapoint's employees other than work under a subcontracting agreement with GeoDigitial and residual work under the five contracts; (ii) as a result there will be a delay in Terrapoint generating receivables; (iii) there is no money to support additional due diligence by prospective purchasers; (iv) no additional interested purchasers have come forward; (v) Terrapoint is likely to start losing employees; (vi) the Receiver does not have access to additional financing; and (vii) purchasers must be Controlled Goods registrants, a process which requires some time for an unregistered interested party to complete.

B. Valuation of Ambercore Intellectual Property

16 To address the concern expressed by Newbould J. in his reasons about the lack of valuations for the Intellectual Property, the Receiver sought out a valuator. Due to cost constraints, the Receiver elected to secure a valuation letter of opinion, in lieu of a more expensive appraisal. The Receiver retained Astrina Capital LLC, a company with experience in commercializing technology, to provide a valuation letter of opinion. Astrina prepared a valuation of the Ambercore Intellectual Property dated March 27, 2011, as well as a letter opinion dated April 4, 2011commenting on the potential impairment of the licencing value of the Ambercore Intellectual Property caused by the Receiver's proposed transaction with GeoDigital.

17 The Receiver sought orders sealing both letters of opinion from Astrina. The Receiver was prepared to provide copies of the valuation to QOGT if it entered into a non-disclosure agreement and confirmed that it was not a potential purchaser of the Ambercore Intellectual Property. Those requests were reasonable ones in order to protect the integrity of the sale process. QOGT was not prepared to give an assurance that it would not be a purchaser; consequently, it has not received copies of the valuations. Having considered the principles set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522 (S.C.C.), I conclude that it is appropriate to grant the requested sealing orders for the Astrina valuations in order to protect the integrity of the sale process, and I grant the sealing order sought by the Receiver in paragraph 6 of its Notice of Motion.

C. Further discussions with GeoDigital

18 GeoDigital is the largest provider of corridor aerial LiDAR mapping in North America. It had joined Canrock on the proposed purchase which Newbould J. did not approve. After the release of the Court's decision, the Receiver inquired of GeoDigital whether it was interested in acquiring Terrapoint's assets. GeoDigital submitted a draft offer to the Receiver for Terrapoint's assets, leading to the execution of a Purchase and Sale Agreement dated April 1, 2011 between GeoDigital and the Receiver (the "Purchase Agreement").

19 The Receiver provided GeoDigital's Offer to certain parties, including QOGT, and provided a redacted version of the Purchase Agreement to QOGT. The Receiver seeks a sealing order for the Purchase Agreement.

V. Key elements of proposed sale of Terrapoint's assets

20 Under the Purchase Agreement GeoDigital would acquire all of the assets and undertaking of Terrapoint as vested in the Receiver, other than accounts receivable and cash. The purchase price is to be satisfied by payment of a deposit, with the balance to be paid on closing. The Purchase Agreement allocates the purchase price amongst several categories of assets, including an allocation for a Technology License Agreement for Ambercore IP. Execution of the Technology License Agreement is a condition of closing in favour of the purchaser.

21 Under the proposed Technology License Agreement, the Receiver, in its capacity as receiver of Ambercore, would grant to GeoDigital a non-exclusive, world-wide, perpetual, irrevocable, royalty-free, fully paid-up licence to use and integrate into any of its products and services the Ambercore IP. GeoDigital would be permitted to sublicence the Ambercore IP as part of its own services or products, but only in the stipulated "Field of Use" and provided any product containing the Ambercore IP

was not made available for the principal purpose of offering for sale the Ambercore IP. The definition of "Field of Use" in the Technology Licence Agreement is intended to restrict the use of the Ambercore IP to the scope of services and products falling within Terrapoint's business. All parties recognize that the operation of Terrapoint's business depends upon access to the Ambercore IP.

22 The Technology License Agreement includes within the ambit of licensed software both the object and source code for the Ambercore IP, so that on closing a copy of the source code would be delivered to GeoDigital.

23 Finally, the Technology License Agreement provides that GeoDigital will own any improvements which it makes or creates to the Ambercore IP and GeoDigital may use such improvements in the defined Field of Use.

VI. Positions of the parties

24 Canrock supports approval of the proposed Purchase Agreement and its associated Technology License Agreement. QIP submitted that the proposed transaction appears likely to be the best available in the circumstances.

25 QOGT voiced several concerns about the proposed transaction: (i) the Receiver has not marketed the assets of Terrrapoint and Ambercore as it should have; (ii) the assets of Ambercore and Terrapoint should be sold *en bloc*, not separately; (iii) the source code for the Ambercore IP should not be delivered to GeoDigital as part of the sale of Terrapoint's assets; and, (iv) any licence to GeoDigital to use the Ambercore IP should be temporary in nature, permitting any eventual purchaser of Ambercore's assets to re-negotiate the licence. QOGT submitted that it would support the proposed sale to GeoDigital, but only on the basis that source code was not provided to GeoDigital but, instead, be placed in the hands of an escrow agent. QOGT made no suggestions about appropriate terms of escrow.

26 Counsel for GeoDigital indicated that her client was prepared to close the proposed transaction as quickly as possible. She also stated that GeoDigital would not purchase Terrapoint's assets unless it received a copy of the source code for the Ambercore IP as part of the Technology License Agreement.

VII. Governing principles

27 The principles to be considered by a court in deciding whether to approve a sale recommended by a receiver are set out in *Royal Bank v. Soundair Corp.*.[1] I accept as an accurate summary of the *Soundair* principles the following passage from Kevin McElcheran's work, *Commercial Insolvency in Canada, Second Edition*:

> The Ontario Court of Appeal...listed the following standards for the court's review of a receiver conducting a court-supervised sale process:
>
> (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 interest 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.[2]

VIII. Analysis

28 In his February Reasons Newbould J. outlined the positions of the parties at that time regarding the sale process for Terrapoint:

> [8] With respect to Terrapoint, the receiver stated that he was of the opinion that the most significant recoveries would come from Terrapoint's accounts receivable and work in process and that while a fully advertised, open and transparent

sales process of Terrapoint's assets might seem preferable, it would be best if the contracts were sold quickly. Quorum does not take strong issue with this process so far as Terrapoint is concerned. Mr. Wener of KPMG, the receiver of the Alberta numbered company, wrote to the receiver concurring with the need to act quickly to realize maximum value of the Terrapoint assets.

29 Newbould J. refused to approve the Canrock/GeoDigital offer to purchase all the assets of Ambercore and Terrapoint. QOGT now states that the Receiver should sell those assets *en bloc*, not separately. The evidence reveals that such an approach is not realistic in current circumstances. As a result of its marketing efforts in late 2010 the Receiver obtained only one expression of interest for an *en bloc* purchase, and that was the credit bid put forward by Canrock/GeoDigital which the Court refused to approve. Although Mr. Michael Goffin, on behalf of QOGT, deposed that he had indicated to the Receiver the possible interest of two other companies in the assets of Ambercore and Terrapoint, he was short on details and certainly did not adduce evidence to suggest any degree of serious interest by either of the two companies.

30 I must also give weight to the financial reality facing both companies as described by the Receiver — they lack the cash to fund an extensive second round of marketing, the Receiver has exhausted its court-approved borrowing limit, no secured creditor is prepared to advance further funds to the Receiver, and Terrapoint is running out of work for its employees.

31 Two other points are of significance regarding the sale process. First, following the release of the decision of Newbould J. the Receiver obtained the Astrina letters of opinion regarding the value of the Ambercore IP and the potential impact the Technology License Agreement might have on the sale value of the Ambercore IP. I have reviewed the Astrina letters of opinion, as well as the RDAS December, 2010 appraisal of certain assets of Ambercore and Terrapoint valued on a forced liquidation basis.

32 Second, the Receiver made available, to those prepared to execute non-disclosure agreements, the GeoDigital offer to purchase, a redacted Purchase Agreement, and the Technology License Agreement. In its Third Report the Receiver described the consultations it had undertaken with secured parties for the proposed sale to GeoDigital.

33 I am satisfied that since the release of the Reasons of Newbould J., the Receiver has used sufficient efforts, appropriate in the circumstances, to pursue the sale of the assets. Some degree of urgency surrounded the need to secure the sale of Terrapoint while still a going concern, so the Receiver's decision to pursue the sale of Terrapoint on its own was reasonable. Further, it is apparent that the Receiver has tried to take into account the interests of all parties, giving due recognition to the overall amount of liabilities attaching to both companies and the priorities amongst the secured creditors, and it has attempted to consult with the secured parties to ensure a fair sales process.

34 As to the proposed transaction, I am satisfied that the price in the Purchase Agreement, together with the allocation of the purchase price, when measured against the valuations obtained by the Receiver, is reasonable in the circumstances.

35 Regarding the terms of the proposed sale, QOGT's primary objection was that the Technology License Agreement should not provide GeoDigital with a copy of the source code for the Ambercore IP, but only a copy of the object code. In support of its position QOGT filed affidavits from Robert Percival, a lawyer at Ogilvy Renault in Toronto who practises in the Technology and Outsourcing area, and from Michael Rebeiro, a solicitor in the London, U.K., office of Norton Rose LLP who specializes in information technology law. Both affidavits were filed at the last possible moment — one during the hearing — affording the Receiver and others no opportunity to test the opinions advanced by both lawyers. Moreover, the affidavits, containing as they did expert opinions, did not comply with the requirements of Rule 53.03(2.1) of the *Rules of Civil Procedure* regarding the content of expert reports. That said, the Receiver did not object to their admission, submitting that both affidavits actually supported the approach taken by the Receiver in the Technology License Agreement.

36 Mr. Rebeiro deposed that "in my experience, software owners will not in the normal course of business provide a copy of the source code to a licensee". Mr. Percival stated: "In my experience it is the general practice in the software industry that the end user licensees do not in the normal course of the licensing transaction generally receive a copy of the source code, since the source code is considered to be the confidential trade secret."

37 In its Third Report the Receiver addressed the issue of delivering a copy of the source code to GeoDigital under the Technology License Agreement:

> 112. At this time, it is not clear what will become of Ambercore or its assets. To ensure that GeoDigital is able to maintain the software necessary to carry on the Terrapoint business that is being licenced from Ambercore, GeoDigital, in addition to a licence to use the Ambercore software, will need to have access to a "baseline" or reference code for the software.
>
> . . .
>
> 114. GeoDigital maintains that unless the development of LiDAR IQ and related software continues as developments and improvements are generally produced in the field of use, the viability of the LiDAR data acquisition and processing business, Terrapoint's business, will fail due to competitive pressures.
>
> . . .
>
> 119. The source code therefore is required to i) maintain the software's functionality; and ii) to further develop the LiDAR IQ software and to complete development of other software under development, particularly given that Ambercore is not required to maintain or upgrade the software under licence nor may it have that ability going forward.

38 Unfortunately, neither Mr. Percival nor Mr. Rebeiro offered any opinion on this portion of the Receiver's Third Report for it appears from their affidavits that they were not given a copy of the Report to review. Accordingly, the general opinions they expressed in their affidavits provide little assistance to me in the specific circumstances of the proposed sale. Notwithstanding this fundamental limitation on the utility of their opinions, Mr. Rebeiro did offer some views about what might happen if a transaction fell outside of the ordinary course of business. He deposed:

> At most, a software owner may, if commercial circumstances dictate, sometimes be prepared to agree with its licensee that it will put a copy of the source code into 'escrow' with an escrow agent who keeps the source code stored in a confidential depository. These arrangements usually work whereby the software owner, the licensee and the escrow agent enter into any agreement where, *in certain agreed circumstances such as the material failure of the software owner to provide maintenance and support in accordance with an agreed support and maintenance contract, the licensee, needing access to the source code, can apply to the escrow agent in pre-agreed circumstances to obtain access to the source code to enable it to make the required developments/upgrades to the software itself.* (my emphasis)

39 The circumstances in which Mr. Rebeiro opined that it would be reasonable to provide the licensee with access to the source code strike me as precisely those in which Terrapoint now finds itself — the provider of its software, Ambercore, may not be able to repair or maintain the Ambercore IP's functionality on a go-forward basis.

40 Two final comments are necessary. First, I do not accept QOGT's submission that any licence to GeoDigital to use the Ambercore IP should be temporary in nature, permitting any eventual purchaser of Ambercore's assets to re-negotiate the licence. Why would GeoDigital pay any amount for a software license if it was open to an eventual purchaser of Ambercore's assets to re-negotiate its terms? QOGT's position makes no commercial sense. Second, counsel for GeoDigital was clear about its client's position — no source code, no deal.

41 Balancing all these factors, I conclude that the Receiver has acted prudently and reasonably in its efforts to secure the sale of some of the assets since the release of the decision of Newbould J. and that the sale process, and the resulting proposed Purchase Agreement and associated Technology License Agreement, satisfy the principles set out in the *Soundair* decision. Accordingly, I approve the proposed sale.

IX. Conclusion and orders

42 By way of summary, the Receiver has sought orders sealing the Astrina valuations and the earlier RDAS liquidation valuation, as well as the Purchase Agreement and associated Technology License Agreement. Those orders are necessary in

order to protect the integrity of the sale processes. I am satisfied that the Receiver's request meets the principles set out in *Sierra Club of Canada, supra.*, so I grant the sealing orders requested in paragraphs 5 and 6 of its notice of motion.

43 I approve the proposed Purchase Agreement with GeoDigital, together with the necessary vesting order, as well as the associated Technology License Agreement. No party took exception to the requests by the Receiver for approval, *nunc pro tunc*, of the Master Services Agreement with GeoDigital or for approval of the Interim Report dated March 14, 2011 and the Third Report dated April 3, 2011, so I grant those approvals. Counsel may appear before me any day this week to obtain my issuance of the appropriate order.

Motion granted.

Footnotes

1 (1991), 4 O.R. (3d) 1 (Ont. C.A.).

2 Kevin McElcheran, *Commercial Insolvency in Canada, Second Edition* (Toronto: LexisNexis, 2011), p.215.