

COURT FILE NUMBER **2201-01086**

COURT COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT CANADIAN WESTERN BANK

RESPONDENTS BIG BEAR ENERGY RENTALS LTD., 1509571 ALBERTA LTD., 5556300 MANITOBA LTD., BARRICADE ENVIRONMENTAL LTD., DIRECT ENVIRONMENTAL TECHNOLOGIES INC., JASON ROBERT LLOYD, KENNETH JOHN GEORGE CARSTAIRS, ROBERT CHRISTOPHER LLOYD and DANIEL ROBERTS

DOCUMENT **BENCH BRIEF OF THE RECEIVER**

**(RE: Application by Receiver for Auction Approval and Vesting Order and Restricted Access and Sealing Order)**

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**BENCH BRIEF OF ALVAREZ & MARSAL CANADA INC., RECEIVER**

**APPLICATION TO BE HEARD ON JULY 8, 2022 AT 10:00 A.M.**

**BEFORE THE HONOURABLE MADAM JUSTICE K.M. HORNER**

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## A. INTRODUCTION

1. This bench brief is submitted on behalf of Alvarez & Marsal Canada Inc., in its capacity as Receiver and Manager of Big Bear Energy Rentals Ltd. (“**Big Bear**”), 1509571 Alberta Ltd., 5556300 Manitoba Ltd., Barricade Environmental Ltd. (“**Barricade**”), and Direct Environmental Technologies Inc. (collectively, the “**Debtors**”). The Receiver seeks Orders, *inter alia*:
  - a. approving the Auction and Liquidation Services Agreement (“**Auction Agreement**”) between Maynards Industries II Canada Ltd. (the “**Auctioneer**”) and the Receiver, and authorizing the transactions contemplated in the Auction Agreement (the “**Transactions**”);
  - b. approving the Receiver’s actions, conduct and activities as well as the professional fees of the Receiver and its legal counsel; and
  - c. approving a Restricted Court Access and Sealing Order in respect of confidential appendices (the “**Confidential Appendices**”) to the Second Report of the Receiver dated June 27, 2022 (the “**Second Report**”).
2. The Receiver respectfully submits that the relief sought should be granted because:
  - a. the Transactions are commercially reasonable and appropriate and are the result of a robust sales process;
  - b. the Transactions represent the best outcome for the Debtors’ creditors and their stakeholders in the circumstances;
  - c. the Transactions satisfy the principles set out in *Royal Bank v. Soundair Corp.*<sup>1</sup> (the “**Soundair Principles**”);
  - d. The Receiver’s actions, conduct and activities are reasonable, appropriate and in line with the Court’s direction and common law expectation of a court appointed Receiver;
  - e. The professional fees of the Receiver and its legal counsel are fair and reasonable; and
  - f. The Confidential Appendices contain commercially sensitive information, the disclosure of which at this time may jeopardize the closing of the Transactions and the proposed Auctioneer’s commercial interests, and there are no reasonable alternative measures to protect this commercially sensitive information. The salutary effects of the sealing order

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<sup>1</sup> [1991] OJ No 1137, 27 ACWS (3d) 1178 (ONCA) [*Soundair*] [TAB 1].

outweigh its deleterious effects and it is in the public interest to seal the information on a temporary basis.

## **B. FACTS**

4. The relevant facts supporting the relief sought by the Receiver are more particularly set out in the Second Report. Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Second Report.

## **C. ISSUES**

5. The issue before this Honourable Court is whether it is appropriate in the circumstances to approve the Transactions. More specifically:
  - a. Should the Auction Agreement and Transactions be approved?
  - b. Should the Receiver's actions, conduct and activities as well as the professional fees of the Receiver and its legal counsel be approved?
  - c. Should the Confidential Appendices to the Second Report be sealed?

## **D. LAW & ARGUMENT**

### ***THE TRANSACTIONS SATISFY THE SOUNDAIR PRINCIPLES AND SHOULD BE APPROVED***

7. It is well-established that where a Court is asked to approve a transaction in a receivership context, the Court must consider *Soundair* Principles,<sup>2</sup> which are as follows:
  - a. Whether the Receiver made 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 was any unfairness in working out the process.<sup>3</sup>

The Receiver has satisfied each of these principles, which are addressed in greater detail below.

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<sup>2</sup> See e.g. *1705221 Alberta Ltd v. Three M Mortgages Inc*, 2021 ABCA 144 at para 2. [TAB 2]

<sup>3</sup> *Soundair* at para 16. [TAB 1]

*Sufficient effort was made to obtain the best price*

8. The Auction Agreement was negotiated between the Receiver and the Auctioneer in accordance with the terms of the Sales Process previously approved by the Court, in order to obtain the best price for the Property. Specifically, with respect to the Sales Process, the Receiver:
  - a. delivered the Teaser Letter and supporting Sales Process documentation to 67 parties that the Receiver understood were potentially interested in participating in the Sales Process.<sup>4</sup>
  - b. placed advertisements of the Sales Process in local and national publications in Canada and the United States;<sup>5</sup>
  - c. provided access to the Data Room to 42 Qualified Bidders;<sup>6</sup>
  - d. provided access to 26 Qualified Bidders to physically inspect the Assets located at the Big Bear Facility in Canada; and<sup>7</sup>
  - e. provided access to 7 Qualified Bidders to physically inspect the Assets located at the Barricade Facilities in the United States.<sup>8</sup>
9. The Receiver received and evaluated 17 Qualified Bids in significant detail.<sup>9</sup> Those Qualified Bids that proposed a purchase price in the form of a net minimum guarantee (“NMG”) were considerably more favourable than the other proposals that were submitted in Qualified Bids.<sup>10</sup>
10. The Qualified Bid submitted by the Auctioneer proposed a purchase price in the form of an NMG that was higher and better than all of other Qualified Bids.<sup>11</sup> The Receiver declared it to be the Winning Bid under the Sales Process and subsequently negotiated and entered into the Auction Agreement with the Auctioneer.<sup>12</sup>

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<sup>4</sup> Second Report at para 60.

<sup>5</sup> Second Report at para 61.

<sup>6</sup> Second Report at para 63(a).

<sup>7</sup> Second Report at para 63(c).

<sup>8</sup> Second Report at para 63(c).

<sup>9</sup> Second Report at para 64.

<sup>10</sup> Second Report at para 67.

<sup>11</sup> Second Report at para 68. Note: a summary of all Qualified Bids is set out at Confidential Appendix 1 to the Second Report.

<sup>12</sup> Second Report at para 68.

*The interests of all parties have been served*

11. The Transactions contemplated by the Auction Agreement provide for the best possible outcome in the circumstances for all parties with an economic interest in the proceedings. In particular, the Auction Agreement provides for a NMG that was higher and better than all other offers submitted in Qualified Bids.
12. The Defendants, Mr. Robert Lloyd, Mr. Jason Lloyd and Mr. Kenneth Carstairs, were each represented by legal counsel that attended at the application in which the Sales Process was approved, and raised no objections to the Sales Process at that time. In addition, both of the Debtors' senior secured creditors approve of the Transactions.<sup>13</sup>

*The sales process was run with integrity and there was no unfairness*

13. The Sales Process was robust and was conducted with integrity by the Receiver. Any interested party was permitted to participate in the Sales Process, subject to the conditions set out therein (applicable to all parties), which are standard and reasonable in the circumstances. All available information with respect to the Assets was made available to any potential bidder who signed a confidentiality agreement. Thus, all bidders had the opportunity to view the same information.
14. The Receiver was directly involved in negotiating the terms and conditions of the Auction Agreement and believes it is commercially reasonable and provides the highest net realization to the estate, with a sizeable non-refundable deposit, thus reducing the risk and cost to the estate.<sup>14</sup>

**ACTIVITIES AND FEES SHOULD BE APPROVED**

15. Section 247 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 provides that a receiver shall act honestly and in good faith and deal with the property of the insolvent person or the bankrupt in a commercially reasonable manner.
16. The standard of care of a receiver-manager is that of reasonable care, supervision and control that an ordinary person would give to the business if it were its own.<sup>15</sup> The purpose of a receivership is to enhance and facilitate the preservation and realization of the assets for the benefit of creditors.<sup>16</sup> Where a receiver has fulfilled its prime purpose of obtaining as high a value for the debtor's assets

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<sup>13</sup> Second Report at para 68.

<sup>14</sup> Second Report at para 71(g).

<sup>15</sup> *Bayhold Financial Corp. v. Clarkson Co.* (1991), 10 CBR 3d 159 (NSCA). [TAB 3]

<sup>16</sup> *Third Eye Capital Corporation v Ressources Dianor Inc/Dianor Resources Inc*, 2019 ONCA 508 at para 73 [Dianor]. [TAB 4]

that it could, the court will find that the receiver has acted properly and within the mandate given to it by the court.<sup>17</sup>

17. Since its appointment - first as Interim Receiver, then as Receiver – the Receiver has, among other things:
  - a. Received and preserved the Debtors’ records;<sup>18</sup>
  - b. obtained full access to the Debtors’ accounting, email and other electronic information;<sup>19</sup>
  - c. Reviewed the Debtors’ receipts, disbursements and bank accounts;<sup>20</sup>
  - d. Conducted a detailed review of the Debtors’ records, job tracking system, and other electronic information;<sup>21</sup>
  - e. engaged in discussions with the Debtors’ senior management regarding the Debtors’ financial statements, including attempts to resolve irregular transactions;<sup>22</sup>
  - f. thoroughly investigated irregularities in the Debtors’ financial statements;
  - g. reported its initial findings to the Court in the Interim Report;
  - h. Attended at the Debtors’ premises to gain familiarity with the Property;<sup>23</sup>
  - i. Identified employees that needed to be retained, and terminated other employees;<sup>24</sup>
  - j. Engaged former Big Bear employees to assist in identifying, preserving and protecting Big Bear’s equipment and inventory;<sup>25</sup>
  - k. Conducted physical inventories of equipment and assets;<sup>26</sup>
  - l. Delivered demands for return of various of the Debtors’ assets from other companies and individuals;<sup>27</sup>

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<sup>17</sup> *Re Regal Constellation Hotel Ltd.*, (2004) 50 CBR (4<sup>th</sup>) 253 (Ont SCJ Comm List) [TAB 5]; aff’d (2004), 50 CBR (4<sup>th</sup>) 258 (ONCA).

<sup>18</sup> First Report of the Interim Receiver, dated February 1, 2022 at para 21(b) [*Interim Report*].

<sup>19</sup> Interim Report at para 21(d).

<sup>20</sup> Interim Report at para 21(e).

<sup>21</sup> Interim Report at para 51.

<sup>22</sup> Interim Report at paras 21(g) & (h).

<sup>23</sup> First Report of the Receiver, dated April 25, 2022 at para 19(b) [*First Report*].

<sup>24</sup> First Report at para 19(c) & (d).

<sup>25</sup> First Report at para 19(f), 46.

<sup>26</sup> First Report at para 19(g).

<sup>27</sup> First Report at para 19(m).

- m. Reviewed the Debtors' various projects in order to determine the net benefit to the Debtors' estates, and completed those projects determined by the Receiver to provide a net benefit;<sup>28</sup>
  - n. Negotiated with customers to collect outstanding and confirmed accounts receivables and taken steps to preserve claims including by filing liens and entering into a tolling agreement;<sup>29</sup>
  - o. Responded to various inquiries from the individual Defendants regarding the Property;<sup>30</sup>
  - p. Reviewed existing appraisals of the Property, and obtained two independent desktop appraisals in respect of portions of the Property;<sup>31</sup>
  - q. Sold portions of the Property to arm's length third parties;<sup>32</sup>
  - r. Worked with the Debtors' insurers to reduce the premiums owing on the various insurance policies;<sup>33</sup>
  - s. Established and conducted the Sale Process, which was approved by this Honourable Court; and
  - t. Provided access to the Debtors' financial records to the individual defendants in this Action.
18. If a stakeholder has objections to the receiver's reports or to any of the receiver's activities, the stakeholder should not wait until the discharge application to lodge the objection. Rather, the stakeholder should object at the time when the receiver files a report in support of a motion rather than wait until the receivership is completed.<sup>34</sup> The Receiver is to date, unaware of any specific objection to its conduct in these proceedings.
19. Throughout its engagement, the Receiver has preserved the value of the Debtors' estate for the benefit of all stakeholders, and has acted in good faith. The Sales Process has resulted in a proposed transaction that will yield the highest value for the Property achievable in the circumstances. The Receiver's conduct in this matter from the time it was appointed as Interim Receiver on January 21, 2022, has met the required standard of care. As a result, the Receiver respectfully submits that its activities and conduct should be approved by the Honourable Court.

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<sup>28</sup> First Report at para 19(o).

<sup>29</sup> First Report at para 19(q).

<sup>30</sup> First Report at para 19(y).

<sup>31</sup> First Report at para 39, 40.

<sup>32</sup> First Report at para 19(v), Second Report at para 17(l).

<sup>33</sup> First Report at para 35.

<sup>34</sup> Frank Bennett, *Bennett on Receiverships*, 4<sup>th</sup> Ed (Toronto: Thompson Reuters, 2021) at p 775 [*Bennett on Receiverships*]. [TAB 6]



20. The general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable.<sup>35</sup> The Receiver's accounts must disclose the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.<sup>36</sup>
21. Additional factors that a court may consider when evaluating whether the Receiver's fees are fair and reasonable include:<sup>37</sup>
- a. the complications and difficulties encountered;
  - b. time spent by the receiver;
  - c. the receiver's knowledge, experience and skill;
  - d. diligence and thoroughness;
  - e. responsibilities assumed;
  - f. results achieved; and,
  - g. the cost of comparable services.
22. The Receiver's activities in respect of these proceedings are set out in each of the Second Report, the First Report and the First Report of the Interim Receiver, and the details of the Receiver's accounts for this period have been provided to the Court in a confidential package.
23. The Receiver is a highly skilled and experienced accounting and restructuring firm with particular knowledge of the oil and gas services sector. The Receiver spent a significant amount of time, among other things, conducting a thorough Sales Process which produced a bid that will deliver

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<sup>35</sup> *Confectionately Yours Inc., Re*, 219 DLR (4th) 72, at para 42 [*Bakemates*]. [TAB 7]

<sup>36</sup> *Bakemates* at para 37. [TAB 7]

<sup>37</sup> *Servus Credit Union Ltd v Trimove Inc*, 2015 ABQB 745 at para 28. [TAB 8]

the highest and best price for the Property. The Receiver internally delegated tasks to ensure that work was being performed by professionals of appropriate seniority.

24. Further, the Receiver is of the view that the professional fees of its legal counsel are fair and reasonable in the circumstances and commensurate with the work required.<sup>38</sup> The Receiver therefore respectfully seeks this Honourable Courts approval of its fees and the fees of its legal counsel.

***THE CONFIDENTIAL APPENDICES SHOULD BE SEALED***

25. Part 6 – Division 4 of the Alberta *Rules of Court* permits a person to file an application seeking to seal or partially seal a court file only if the Court has authority to do so under an enactment or at common law.<sup>39</sup>
26. The common law test for determining whether a sealing order should be granted is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*.<sup>40</sup> In that case, Justice Iacobucci held that a sealing order should only be granted when: (i) such an order is necessary to prevent risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (ii) the salutary effects of the sealing order outweigh the deleterious effects.
27. More recently, in *Sherman Estate v Donovan*<sup>41</sup>, the Supreme Court of Canada affirmed the essence of the test set out in *Sierra Club*, and rearticulated it, providing that an applicant seeking a sealing order must establish that:
- a. court openness poses a serious risk to an important public interest;
  - b. the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
  - c. as a matter of proportionality, the benefits of the order outweigh its negative effects.<sup>42</sup>
28. The Receiver submits that there is an important public interest in temporarily sealing the Confidential Appendices until the close of the Transactions contemplated by the Auction

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<sup>38</sup> Second Report at para 87.

<sup>39</sup> Rule 6.30.

<sup>40</sup> 2002 SCC 41. [TAB 9]

<sup>41</sup> 2021 SCC 25 [*Sherman Estate*]. [TAB 10]

<sup>42</sup> *Sherman Estate* at para 38. [TAB 10]

Agreement. The public interest is to facilitate one of the main purposes of the receivership – to preserve value for the benefit of creditors.<sup>43</sup>

29. The Confidential Appendices contain commercially sensitive information, the disclosure of which may jeopardize the closing of the Transactions contemplated by the Auction Agreement, to the detriment of the Debtors' creditors. There are no reasonable alternative measures that can prevent this risk, no stakeholders will be materially prejudiced in granting the sealing order, and the Receiver respectfully submits that the salutary effects in granting the sealing order outweigh the deleterious effects.

**E. RELIEF REQUESTED**

54. The Receiver respectfully requests this Honourable Court grant an Order:
- a. Approving the Transactions;
  - b. Approving the Receiver's actions, conduct and activities as well as the professional fees of the Receiver and its legal counsel; and
  - c. Sealing the Confidential Appendices to the Second Report.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 5th day of July, 2022.

**BORDEN LADNER GERVAIS LLP**

Per:



Robyn Gurofsky / Anthony Mersich

Counsel for Alvarez & Marsal Canada Inc. in its capacity as Court-appointed Receiver and Manager of Big Bear Energy Rentals Ltd., 1509571 Alberta Ltd., 5556300 Manitoba Ltd., Barricade Environmental Ltd., and Direct Environmental Technologies Inc.

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<sup>43</sup> *Dianor* at paras 73. [TAB 4]

**TABLE OF AUTHORITIES**

<b><u>TAB</u></b>	<b><u>AUTHORITY</u></b>
1.	Royal Bank of Canada v. Soundair Corporation, 1991 CarswellOnt 205, [1991] OJ No 1137, 27 ACWS (3d) 1178 (ONCA)
2.	1705221 Alberta Ltd v. Three M Mortgages Inc, 2021 ABCA 144
3.	<i>Bayhold Financial Corp. v. Clarkson Co.</i> (1991), 10 CBR 3d 159 (NSCA)
4.	<i>Third Eye Capital Corporation v Ressources Dianor Inc./Dianor Resources Inc</i> , 2019 ONCA 508
5.	<i>Re Regal Constellation Hotel Ltd.</i> (2004), 50 CBR (4 <sup>th</sup> ) 258 (ONCA)
6.	Frank Bennett, <i>Bennett on Receiverships</i> , 4 <sup>th</sup> Ed (Toronto: Thompson Reuters, 2021) at p 775
7.	<i>Confectionately Yours Inc., Re</i> , 219 DLR (4th) 72
8.	<i>Servus Credit Union Ltd v Trimove Inc</i> , 2015 ABQB 745
9.	<i>Sierra Club of Canada v. Canada (Minister of Finance)</i> , 2002 SCC 41
10.	<i>Sherman Estate v Donovan</i> , 2021 SCC 25

**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.

***Galligan J.A. :***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 I will deal with the two issues separately.

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

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

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

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

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

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

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

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

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

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



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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

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

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

24 I now turn to consider whether the price contained in the OEL offer was one which it was provident to accept. At the outset, I think that the fact that the OEL offer was the only acceptable one available to the receiver on March 8, 1991, after 10

months of trying to sell the airline, is strong evidence that the price in it was reasonable. In a deteriorating economy, I doubt that it would have been wise to wait any longer.

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

## **2. Consideration of the Interests of all Parties**

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

40 In my opinion, there are other persons whose interests require consideration. In an appropriate case, the interests of the debtor must be taken into account. I think also, in a case such as this, where a purchaser has bargained at some length and

doubtless at considerable expense with the receiver, the interests of the purchaser ought to be taken into account. While it is not explicitly stated in such cases as *Crown Trust Co. v. Rosenberg* , supra, *Re Selkirk* (1986), supra, *Re Beauty Counsellors* , supra, *Re Selkirk* (1987), supra, and (*Cameron* ), supra, I think they clearly imply that the interests of a person who has negotiated an agreement with a court-appointed receiver are very important.

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

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

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

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

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

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

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

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

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

54 Moreover, I am not prepared to find that 922 was in any way prejudiced by the fact that it did not have an offering memorandum. It made an offer on March 7, 1991, which it contends to this day was a better offer than that of OEL. 922 has not convinced me that if it had an offering memorandum, its offer would have been any different or any better than it actually was. The fatal problem with the first 922 offer was that it contained a condition which was completely unacceptable to the receiver. The receiver, properly, in my opinion, rejected the offer out of hand because of that condition. That condition did not relate

to any information which could have conceivably been in an offering memorandum prepared by the receiver. It was about the resolution of a dispute between CCFL and the Royal Bank, something the receiver knew nothing about.

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

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

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

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

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

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

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

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

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

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

I agree.

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

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

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

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

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

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

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

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

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

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

69 In its factum, the receiver pointed out that, because of greater liabilities imposed upon private receivers by various statutes such as the *Employment Standards Act*, R.S.O. 1980, c. 137, and the *Environmental Protection Act*, R.S.O. 1980, c. 141, it is likely that more and more the courts will be asked to appoint receivers in insolvencies. In those circumstances, I think that creditors who ask for court-appointed receivers and business people who choose to deal with those receivers should know that



if those receivers act properly and providently, their decisions and judgments will be given great weight by the courts who appoint them. I have decided this appeal in the way I have in order to assure business people who deal with court-appointed receivers that they can have confidence that an agreement which they make with a court-appointed receiver will be far more than a platform upon which others may bargain at the court approval stage. I think that persons who enter into agreements with court-appointed receivers, following a disposition procedure that is appropriate given the nature of the assets involved, should expect that their bargain will be confirmed by the court.

70 The process is very important. It should be carefully protected so that the ability of court-appointed receivers to negotiate the best price possible is strengthened and supported. Because this receiver acted properly and providently in entering into the OEL agreement, I am of the opinion that Rosenberg J. was right when he approved the sale to OEL and dismissed the motion to approve the 922 offer.

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

**McKinlay J.A. :**

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

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

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

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

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



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

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

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

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

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

79 In *Cameron v. Bank of Nova Scotia* (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303, 86 A.P.R. 303 (C.A.) , Hart J.A., speaking for the majority of the court, said at p. 10 [C.B.R.]:

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

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

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

82 It is my further view that any negotiations which took place between the only two interested creditors in deciding to support the approval of the 922 offer were not relevant to the determination by the presiding judge of the issues involved in the motion for approval of either one of the two offers, nor are they relevant in determining the outcome of this appeal. It is

sufficient that the two creditors have decided unanimously what is in their best interest, and the appeal must be considered in the light of that decision. It so happens, however, that there is ample evidence to support their conclusion that the approval of the 922 offer is in their best interests.

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

This does not mean that a court should ignore a new and higher bid made after acceptance where there has been no unfairness in the process. The interests of the creditors, while not the only consideration, are the prime consideration.

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

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

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

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

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

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

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

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

89 In my opinion there was no evidence before him or before this court to indicate that Air Canada, with CCFL, had not bargained in good faith, and that the receiver had knowledge of such lack of good faith. Indeed, on his appeal, counsel for the receiver stated that he was not alleging Air Canada and CCFL had not bargained in good faith. Air Canada had frankly stated at the time that it had made its offer to purchase, which was eventually refused by the receiver, that it would not become involved in an "auction" to purchase the undertaking of Air Canada and that, although it would fulfil its contractual obligations to provide connecting services to Air Toronto, it would do no more than it was legally required to do insofar as facilitating the purchase of Air Toronto by any other person. In so doing, Air Canada may have been playing "hardball," as its behaviour was characterized by some of the counsel for opposing parties. It was nevertheless merely openly asserting its legal position, as it was entitled to do.

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

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

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

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

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

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

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

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

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

98 This statement, together with other statements set forth in the letter, was sufficient to indicate that Air Canada was not interested in purchasing Air Toronto in the process apparently contemplated by the receiver at that time. It did not form a proper foundation for the receiver to conclude that there was no realistic possibility of selling Air Toronto [to] Air Canada, either alone or in conjunction with some other person, in different circumstances. In June 1990, the receiver was of the opinion that the fair value of Air Toronto was between \$10 million and \$12 million.

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

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

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

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

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

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

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

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

107 By letter dated March 1, 1991, CCFL advised the receiver that it intended to submit a bid. It set forth the essential terms of the bid and stated that it would be subject to customary commercial provisions. On March 7, 1991 CCFL and Air Canada,

jointly through 922, submitted an offer to purchase Air Toronto upon the terms set forth in the letter dated March 1, 1991. It included a provision that the offer was conditional upon the interpretation of an inter-lender agreement which set out the relative distribution of proceeds as between CCFL and the Royal Bank. It is common ground that it was a condition over which the receiver had no control, and accordingly would not have been acceptable on that ground alone. The receiver did not, however, contact CCFL in order to negotiate or request the removal of the condition, although it appears that its agreement with OEL not to negotiate with any person other than OEL expired on March 6, 1991.

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

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

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

111 I do not doubt that the receiver felt that it was more likely that the condition in the OEL offer would be fulfilled than the condition in the 922 offer. It may be that the receiver, having negotiated for a period of 3 months with OEL, was fearful that it might lose the offer if OEL discovered that it was negotiating with another person. Nevertheless, it seems to me that it was imprudent and unfair on the part of the receiver to ignore an offer from an interested party which offered approximately triple the cash down payment without giving a chance to the offeror to remove the conditions or other terms which made the offer unacceptable to it. The potential loss was that of an agreement which amounted to little more than an option in favour of the offeror.

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

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

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

If he meant by "acceptable in form" that it was acceptable to the receiver, then obviously OEL had the unfair advantage of its lengthy negotiations with the receiver to ascertain what kind of an offer would be acceptable to the receiver. If, on the other hand,

he meant that the 922 offer was unacceptable in its form because it was conditional, it can hardly be said that the OEL offer was more acceptable in this regard, as it contained a condition with respect to financing terms and conditions "*acceptable to them* ."

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

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

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

If a substantially higher bid turns up at the approval stage, the court should consider it. Such a bid may indicate, for example, that the trustee has not properly carried out its duty to endeavour to obtain the best price for the estate. In such a case the proper course might be to refuse approval and to ask the trustee to recommence the process.

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

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

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

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

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

of the court to approve the offer accepted by the receiver would not reflect on the integrity of procedures followed by court-appointed receivers, and is not the type of refusal which will have a tendency to undermine the future confidence of business persons in dealing with receivers.

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



2021 ABCA 144  
Alberta Court of Appeal

1705221 Alberta Ltd v. Three M Mortgages Inc

2021 CarswellAlta 968, 2021 ABCA 144, [2021] A.W.L.D. 4108, 336 A.C.W.S. (3d) 283

**1705221 Alberta Ltd (Appellant / Plaintiff) and Three M Mortgages Inc and Avatex Land Corporation (Respondents / Plaintiffs) and Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming (Defendants) and BDO Canada Limited (Interested Party) and Shelby Fehr (Interested Party)**

Three M Mortgages Inc and Avatex Land Corporation (Respondents / Plaintiffs) and Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming (Appellants / Defendants) and BDO Canada Limited (Interested Party) and Shelby Fehr (Interested Party)

Jack Watson J.A., Dawn Pentelchuk J.A., and Kevin Feehan J.A.

Heard: April 1, 2021

Judgment: April 21, 2021

Docket: Edmonton Appeal 2003-0076AC, 2003-0077AC

Proceedings: additional reasons at [1705221 Alberta Ltd v. Three M Mortgages Inc \(2021\)](#), [2021 ABCA 192](#), [2021 CarswellAlta 1232](#), Dawn Pentelchuk J.A., Jack Watson J.A., Kevin Feehan J.A. (Alta. C.A.)

Counsel: D.R. Bieganeck, Q.C., for Appellant, 1705221 Alberta Ltd

K.A. Rowan, Q.C., for Respondents, Three M Mortgages Inc and Avatex Land Corporation

K.G. Heintz, for Respondents, Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming, and the Estate of Albert Oeming

M.J. McCabe, Q.C., for Interested Party, BDO Canada Limited

B.G. Doherty, for Interested Party, Shelby Fehr

**Per curiam:**

**Overview**

1 These appeals involve challenges to a sale approval and vesting order granted by a chambers judge in the course of receivership proceedings. The appellant guarantors, Todd Oeming, Todd Oeming as Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming (collectively, Oeming) seek to set aside the order approving the sale of lands to Shelby Fehr, as does an unsuccessful prospective purchaser, the appellant 1705221 Alberta Ltd (170).

2 These appeals engage consideration of whether the Receiver, BDO Canada Limited, satisfied the well-known test for court approval outlined in [Royal Bank of Canada v Soundair Corp\(1991\)](#), 83 DLR (4th) 76, 4 OR (3d) 1 (CA) [*Soundair*]. The arguments of both appellants coalesce around the suggestion that the sale process lacked the necessary hallmarks of fairness, integrity and reasonableness.

3 The chambers judge applied the correct test in deciding whether to approve the sale recommended by the Receiver; therefore, for either appeal to succeed, one or both appellants must demonstrate that the chambers judge erred in the exercise of his discretion in approving the sale. This attracts a high degree of deference. Since the chambers judge did not misdirect himself on the law, this Court will only interfere if his decision was so clearly wrong that it amounts to an injustice or where

the chambers judge gave no or insufficient weight to relevant considerations: [Jaycap Financial Ltd v Snowdon Block Inc, 2019 ABCA 47 at para 20](#).

4 We have concluded that neither Oeming nor 170 has demonstrated any error that would warrant setting aside the order. For the reasons that follow, the appeals are dismissed.

## **Background**

5 The genesis of this long-standing indebtedness is a loan granted by the Respondents, Three M Mortgages Inc and Avatex Land Corporation (the creditors) to Al Oeming Investments Ltd (Oeming Investments), which was secured by a mortgage on lands owned by Oeming Investments. The loan was guaranteed by Oeming.

6 In March 2015, the creditors foreclosed on the Oeming Investments lands, obtaining a deficiency judgment in the sum of \$ 941,826.09. In February 2016, the creditors sued Oeming on the guarantees and in December 2018, obtained judgment in this amount.

7 Oeming's assets included shares in Wild Splendor Development Inc, which company owned lands formerly known as the Alberta Game Farm, later Polar Park, in Strathcona County (the lands). These lands are the subject of the present appeals.

8 The creditors enforced their judgment against Oeming by applying under the [Business Corporations Act, RSA 2000, c B-9](#), the [Judicature Act, RSA 2000, c J-2](#) and the [Civil Enforcement Act, RSA 2000, c C-15](#), for the appointment of BDO Canada Limited as Receiver of Wild Splendor. The Receivership/Liquidation Order was granted in June 2019. The Receiver moved to sell the lands, obtaining an order on October 10, 2019, authorizing it to list the lands for sale with Avison Young Canada Inc at a price of \$1,950,000.

9 Two parties were interested in purchasing the lands: 170 and Shelby Fehr, both adjacent landowners. 170 made an offer to purchase on January 11, 2020, but it was not in a form acceptable to the Receiver. 170 submitted a second offer on February 3, 2020 at a price slightly below what the Receiver advised it would accept. While 170 believed its offer would be accepted by the Receiver, it never was and 170 withdrew its offer on February 7, 2020 out of concern its offer was being "shopped".

10 Fehr made an offer to purchase the lands on February 7, 2020. On Avison Young's recommendation of this "extremely strong offer", the Receiver promptly accepted it, subject to court approval.

11 The Receiver filed an application for court approval of Fehr's offer, returnable February 27, 2020. On February 10, 2020, the Receiver invited 170 to submit an improved offer to purchase and to attend the upcoming application.

12 At the application, spanning February 27-28, 2020, 170 raised concerns regarding the sale process. It urged the chambers judge to consider its third offer, dated February 18, 2020, or to establish a bid process to allow both Fehr and 170 to submit further offers.

13 Oeming also opposed the application, seeking an adjournment on the basis that the County of Strathcona was scheduled in April 2020 to vote on a land use bylaw changing the zoning of the lands to seasonal recreational resort use, which Oeming said would dramatically increase the value of the lands. This re-zoning would in turn facilitate their ability to refinance. They also argued that the anticipated bylaw would result in Fehr experiencing a financial windfall. Oeming took issue with the appraisal relied on by the Receiver, suggesting the lands had been undervalued and the sale process rushed, all of which served to prejudice their interests.

## **Decision of the Chambers Judge**

14 The chambers judge declined to adjourn the application, noting that the anticipated land use bylaw question had been raised previously, including before the chambers judge who granted the order approving the sale process. He also observed that there was no certainty the bylaw would be passed or when the lands would ever be permissibly developed.

15 The chambers judge next considered whether the process should be re-opened to allow bids from 170 and Fehr. He found the Receiver's sale process to be adequate and found nothing in the evidence to warrant permitting further bids. The chambers judge concluded that "If receivership and the exercise of receivership powers by officers of the court are to have meaning, the court itself must abide by the process it has set out". However, the chambers judge permitted 170 to present its third offer to the court and adjourned the proceedings to the following day to allow 170, Oeming and the Receiver to put forward affidavit evidence on whether the sale process was unfair.

16 On February 28, 2020, after reviewing the affidavit evidence and hearing full submissions, the chambers judge made the following findings:

- 170's February 3, 2020 offer was never accepted;
- There was no consensus between 170 and the Receiver regarding the structure of the purchase price; this was being negotiated;
- There was no evidence 170's offer was shopped around beyond the normal course;
- 170, through its realtor, was aware of other potential purchasers;
- 170's suspicion something untoward had happened was not grounded in the evidence.

17 The chambers judge concluded that allowing 170's offer to be considered "would be manifestly unfair and lend uncertainty to the process of sales under receiverships, which would be untenable in the commercial community and would erode trust in that community and its confidence in the court-supervised receivership process". The sale to Fehr was approved.

18 The chambers judge later granted a stay of the order pending appeal.

### **The Soundair Test**

19 Court approval of the sale requires the Receiver to satisfy the well-known test in *Soundair*. As this Court summarized in *Pricewaterhousecoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433 at para 10 [ ], the test requires satisfaction of four factors:

- i. Whether the Receiver has made a sufficient effort to get the best price and has not acted improvidently;
- ii. Whether the interests of all parties have been considered, not just the interests of the creditors of the debtor;
- iii. The efficacy and integrity of the sale process by which offers are obtained; and
- iv. Whether there has been unfairness in the working out of the process.

20 Although the grounds of appeal of 170 and Oeming differ, they all lead to the central question of whether the Receiver satisfied the *Soundair* requirements. 170 seeks to set aside the order and asks that a bid process involving 170 and Fehr be allowed, on the condition that neither party be allowed to submit an offer for less than their last and highest offer. Oeming asks that the order be set aside and that they be provided additional time to refinance or alternatively, that the lands be re-marketed for a minimum of six to nine months.

21 We will address each of the four *Soundair* factors in turn, from the perspective of both 170 and Oeming.

#### ***i. Sufficient Efforts to Sell***

22 A court approving a sale recommended by a receiver is not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances: *Soundair* at paras 21, 58. A receiver plays the lead role in receivership proceedings. They are officers of the court; their advice should therefore be given significant

weight. To otherwise approach the proceedings would weaken the receiver's central purpose and function and erode confidence in those who deal with them: [Crown Trust Co v Rosenberg\(1986\)](#), 39 DLR (4th) 526, 60 OR (2d) 87 (ONSC) at p 551.

23 Oeming argues that the chambers judge erred in relying on the Receiver's appraisal of the lands which was not appended to an affidavit and therefore constituted inadmissible hearsay. Oeming further alleges that the Receiver acted improvidently in listing the lands for sale at \$1,950,000, an amount they insist is significantly below property value. They point to their appraisal from Altus Group, appended to the appraiser's affidavit, in support of their claim that the lands are worth far more than the amount suggested by the Receiver.

24 These arguments cannot succeed. Neither the Receivership/Liquidation Order nor the Order Approving Receiver's Activities and Sale Process required the Receiver to submit its reports by way of affidavit. To the contrary, the Receivership/Liquidation Order was an Alberta template order containing the following provision expressly exempting the Receiver from reporting to the court by way of affidavit:

28. Notwithstanding [Rule 6.11 of the Alberta Rules of Court](#), unless otherwise ordered by this Court, the Receiver/Liquidator will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence . . .

25 The draft Altus Group appraisal (identical in form to the signed appraisal appended to the affidavit) and the Glen Cowan appraisal obtained by the Receiver were included in the Receiver's First Report that was before the chambers judge who issued the Order Approving Receiver's Activities and Sale Process. No one, least of all Oeming, took exception to the appraisals being considered in this form at that time.

26 Further, the Receiver addressed the disparity in valuations in its First Report. Briefly, the Altus Group appraisal included two parcels of land that were not part of the sale process. Of the three lots to be sold, Altus had a higher value per acre on Lots 1 and 2 which the Receiver advised was intrinsically related to the purchase of Lot 3 for the purposes of commercial/recreational development, which was not the zoning then existing.

27 The Receiver also advised it had requested proposals from eight realtors, receiving four. It set out why it was recommending that Avison Young's proposal (suggesting a list price of \$1,950,000) be accepted.

28 The respondents argue this amounts to a collateral attack on this earlier-in-time order, which, notably, was never appealed. We agree. All of this information was before the chambers judge who granted the order approving the sale process. If his decision was unreasonable or amounted to a miscarriage of justice, Oeming should have appealed that order. It cannot now do so indirectly vis-à-vis the subsequent Sale Approval and Vesting Order.

29 Before the chambers judge, 170 emphasized its perception that its second offer had been shopped, rendering the sale process unfair. This suggestion was roundly rejected by the chambers judge, who found no evidence that the amount of 170's offer had been disclosed, and any disclosure to Fehr that there was another interested party was in the normal course.

30 For the first time on appeal, 170 focuses on Avison Young's listing proposal, found in the Confidential Supplement to the Receiver's First Report. It is unclear whether the Confidential Supplement was available to 170 when the chambers judge heard the application to approve the sale to Fehr, but it was requested by 170's appellate counsel and provided to him prior to these appeals. 170 argues the court-approved marketing proposal was not transparent and not followed by Avison Young and the Receiver, making the sale process unfair. 170 relies specifically on the following references found within the five-phase marketing strategy:

- Phase 2- Solicit Offers from Buyers (option to use template prior to bid date);
- Phase 3- Selection of preferred Buyer(s):
  - Potential to short list and request improved resubmission.

31 170 suggests the proposal *directed* a bid process and the opportunity to resubmit highest and best offers, similar to a formal tender process. As offers were not elicited through a bid process and no opportunity was given to the preferred buyers to resubmit a further, improved offer, 170 alleges the sale process was neither transparent, fair, nor commercially reasonable.

32 Aside from concerns that this issue is raised for the first time on appeal, the argument fails on its merits. On a plain reading of the impugned portions of the marketing proposal, neither a bid process, nor the option to resubmit offers, is mandated; rather, they are framed as possible options Avison Young *could* employ. A receiver relies on the advice and guidance of the court-approved listing agent in how best to market and sell the asset in question and its own commercial expertise in accepting an offer subject to court approval. Avison Young's realtor deposed that in some circumstances, he will recommend a receiver seek "best and final offers" from interested purchasers. However, in this instance, given the nature of the lands, the present economy, the level of interest and the potential that the Fehr offer could be withdrawn at any moment, his advice to the Receiver was that the unconditional and irrevocable Fehr offer be accepted without delay.

33 Second, prospective purchasers like 170 are not parties to the listing agreement. While 170 suggests it is entitled to the benefit of the marketing process, there are sound policy reasons militating against this proposition. The insolvency regime depends on expediency and certainty. It is untenable to suggest that a "bitter bidder" like 170 can, after another offer has been accepted, look to particulars of the agreement between the listing agent and the Receiver to mount an argument that the sale process was unfair. We agree with the chambers judge's conclusion that the court-approved sale process was followed and that there was nothing unfair about it.

34 It must be remembered that the position of 170 as a bidder in this context is not analogous to the Contract A/Contract B reasoning in the law of tenders. Even if 170's disappointment stemming from its wishful optimism of being able to purchase the lands is understandable, this is not the same as 170 having an enforceable legal right arising from sales guidance of the listing agent. In any event, it would appear that 170 was not even aware of the guidance from the listing agent, which is now suggested to be a condition precedent to the Receiver accepting the Fehr offer.

35 In this instance, it appears the chambers judge declined to consider 170's third offer in his determination of whether the sale to Fehr should be approved. On the present facts, we see no error in this approach. The Fehr offer was significantly better than 170's second offer and clearly reasonable given that it exceeded the appraised value of the lands. We are satisfied the Receiver demonstrated reasonable efforts to market the lands and did not act improvidently. Its acceptance of the Fehr offer was reasonable in the circumstances and unassailable.

## ***ii. Whether the Interests of All Parties Have Been Considered***

36 This segues to the question of whether 170 has any standing to appeal. The Receiver raised this issue in its factum, but did not strenuously pursue it at the appeal hearing. We understand the Receiver's position is grounded by the fact the Receiver had invited 170 to participate in the application to approve the sale and that 170's standing was not raised in the proceedings before the chambers judge, at least until the stay application pending appeal on March 12, 2020. 170 suggests its standing to appeal was given tacit approval.

37 Given the position taken by the Receiver and the particular circumstances before us, we decline to comment on this issue at this time. However, we note that the issue of standing for an interested entity like 170 has not yet been decided by this Court and remains a live issue.

38 We equally do not purport to define or delineate the scope of "party" for the purposes of determining whether a receiver has met the *Soundair* test. Under the current state of the law, what is and is not a "party" has yet to be resolved with absolute precision and clarity. Its definition is a matter of importance in the functionality of the four factors, and the conduct of receivership proceedings generally, and deserves proper debate best reserved for another day. As noted, the specific facts of this case have obviated the need to definitively and directly address this question.

39 Nonetheless, it is helpful to examine the policy reasons why a prospective purchaser's ability to challenge a sale approval application should be closely circumscribed. As noted by the Ontario Court of Appeal in [Skyepharma PLCv](#) , the prospective purchaser has no legal or proprietary right in the lands being sold. Normally, an examination of the sale process and whether the Receiver has complied with the [Soundair](#) principles, is focussed on those with a direct interest in the sale process, primarily the creditors.

40 In that regard, the creditors acknowledge they will be paid in full through acceptance of either offer. It is the interests of Oeming that are front and center. Unfortunately, Oeming repeats the same themes they have raised throughout these proceedings. It may come to pass that the new land use bylaw will result in a dramatic increase in the land value but that is a speculative concept beyond this Court's proper consideration. The Receiver's decision to accept the Fehr offer must be assessed under the circumstances then existing: [Pricewaterhousecoopers](#) at para 14; [Soundair](#) at para 21. Challenges to a sale process based on after-the-fact information should generally be resisted.

41 On the record before us, we agree with the chambers judge that the opportunity for Oeming to obtain refinancing has passed. While Oeming argues their efforts at refinancing have been hamstrung by the receivership proceedings, there is evidence the debt could have been paid through the Oeming estate, but decisions were made to distribute those funds elsewhere.

42 Consideration must also be given to Fehr who negotiated an offer to purchase in good faith over a year ago, yet continues to live with uncertainty. Beyond affecting Fehr's interests, this also undermines the integrity of receivership proceedings generally. As neatly summarized in [Soundair](#) at para 69:

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.

### ***iii. The Efficacy and Integrity of the Sale Process***

43 In obtaining an order approving the sale process, the Receiver satisfied the court of its efforts to engage an appraiser to value the lands for sale. The Receiver also satisfied the court of its efforts to determine the best sale process and why it was recommending Avison Young from the list of four realtors submitting proposals. As we have indicated, the marketing proposal outlined by Avison Young was followed.

44 Oeming also argues the marketing period was unduly rushed. Avison Young's marketing efforts included contacting 407 individual prospective buyers and brokers. It fielded inquiries from 15 interested parties and toured the lands with three interested parties. Signage visible from Highway 14 was placed on the lands and the listing was placed on Avison Young's website. The only offers received were from the two adjacent landowners. Marketing an asset is an unpredictable exercise. It is pure speculation that a longer marketing period would have generated additional, let alone better, offers.

45 We are not persuaded that the integrity of the sale process was compromised. It bears repeating that 170's second offer was *below* the amount the Receiver advised it would accept. 170 had full autonomy over that decision. Its offer was never accepted. While 170 may have believed its offer was going to be accepted, it chose to withdraw its offer, suspecting that same was being shopped around. As the chambers judge found, there is no evidence to support that suspicion.

46 The Fehr offer was significantly higher than 170's. Since it exceeded the appraised value of the land, was irrevocable and unconditional, it is hardly surprising that Avison Young recommended its immediate acceptance.

### ***iv. Whether there was Unfairness in the Working Out of the Process***

47 While courts should avoid delving "into the minutia of the process or of the selling strategy adopted by the receiver", courts must still ensure the process was fair: [Soundair](#) at para 49. The chambers judge afforded both Oeming and 170 the opportunity

to make full submissions and tender further evidence before deciding to approve the sale to Fehr. Having concluded that both the sale process and the Fehr offer were fair and reasonable, there was no reason for the chambers judge to compare 170's third offer to the offer accepted, nor to enter into a new bid process.

### **Conclusion**

48 These proceedings have become long and unwieldy. Courts cannot lose sight of two of the overarching policy considerations that articulate bankruptcy and insolvency proceedings: urgency and commercial certainty. Delay fuels increased costs and breeds chaos and confusion, all of which risk adversely affecting the interests of parties with a direct and immediate stake in the sale process.

49 The appeals are dismissed and the stay granted by order dated March 12, 2020 is lifted.

*Appeals dismissed.*

TAB 3



1991 CarswellNS 33  
Nova Scotia Supreme Court, Appeal Division

Bayhold Financial Corp. v. Clarkson Co.

1991 CarswellNS 33, [1991] N.S.J. No. 488, 108 N.S.R. (2d) 198, 10 C.B.R.  
(3d) 159, 294 A.P.R. 198, 30 A.C.W.S. (3d) 832, 86 D.L.R. (4th) 127

**BAYHOLD FINANCIAL CORP. LIMITED v. CLARKSON COMPANY  
LIMITED, DANIEL SCOULER and ERNST & YOUNG INC.**

Jones, Hallett and Matthews JJ.A.

Heard: September 18, 1991  
Judgment: December 2, 1991  
Docket: Doc. S.C.A. 02376

Counsel: *Douglas Caldwell, Q.C.*, and *Joel E. Fichaud*, for appellant.  
*Harry E. Wrathall, Q.C.*, and *Stephen Kingston*, for respondents.

**Headnote**

Bankruptcy --- Administration of estate — Trustee continuing bankrupt's business — Personal liability of trustee  
Receivers — Duties and liability — Court appointed receiver-manager — Personal liability for excess borrowings — Closing hotel operating at loss not inconsistent with power to manage — No personal liability for breaching contracts entered into prior to receivership.

The appellant B lent money to C, secured by a first and second mortgage against the hotel owned by C. The hotel was failing and C's controlling shareholder was heavily indebted to Revenue Canada. Revenue Canada obtained an order to appoint a receiver-manager who took possession of C's assets. The respondent Clarkson was the receiver-manager appointed by the court. Clarkson tried to renovate and improve the hotel in order to sell it as a going concern. This failed and the hotel was closed.

In the meantime, B commenced foreclosure proceedings and an order was obtained fixing the amount owed to B. At the sheriff's sale, B purchased the hotel for \$200,000. Most of the proceeds were used to pay outstanding realty taxes. The surplus was paid to Clarkson as reimbursement for expenses to improve the hotel. The improvement expenses were fixed at a figure \$63,000 above what Clarkson received at sale, and that balance was found to have priority over B's security with respect to the hotel's chattels. B later entered into an agreement to sell the hotel to E for \$1 million including its interest in the chattels. Clarkson had tried to purchase the chattels; however, B did not respond. Clarkson finally engaged a private security firm to remove the chattels from the hotel. E offered to buy the chattels from Clarkson, but Clarkson felt that they were worth \$120,000 more than E offered. Clarkson therefore advised E that they would have to buy the chattels at auction. E then advised B that it would not complete the purchase. B did not re-open the hotel and finally sold it for \$450,000 to another party. B sued the respondents Clarkson, the chartered accountant in charge of the receivership and Clarkson's successor firm for damages for breach of duties as receiver-manager. At trial, the judge dismissed all claims, finding that Clarkson was not negligent in performance of its duties. The appellant appealed.

**Held:**

The appeal was dismissed.

There was no breach of duties by the respondents and the appellant did not suffer recoverable damages as a result of actions by the respondents. The fact that the court order gave the receiver-manager the power to carry on business did not mean that the receiver was not entitled to close the business if it operated at a loss. The receiver-manager is vested with the power to manage the business, but this does not derogate from his or her power to realize on the assets. Even though the receiver-manager did not apply to the court for approval of the closing of the hotel, it did not breach its duty to preserve the goodwill of the debtor since there was no goodwill.

A receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore, the receiver-manager was not held to be liable to pay interest that was payable during the receivership on mortgages made prior to the receivership order. While the receiver-manager should apply to the courts for approval to disregard any executory contracts, he or she is not personally responsible for breaching pre-existing contracts; however, if the receiver-manager adopts pre-existing contracts, he or she becomes personally liable for their performance. The company in receivership continues to be liable for pre-existing contracts that the receiver-manager fails to honour during the term of the receivership.

B, as a secured creditor, allowed the receiver-manager to operate the hotel and took no steps to enforce its floating charge and therefore the charge did not crystallize. This then meant that it did not become fixed and therefore the assets of the company in receivership and its revenues, were not attached for the secured creditor other than as an uncrystallized floating charge. The secured creditor cannot have it both ways; that is, allow the business to be operated by the receiver-manager without intervening and then take the position that its floating charge had crystallized upon the appointment of the receiver-manager, and therefore it was entitled to all the money that the receiver-manager collected in its operation of the hotel. B, as first mortgagee in the realty and personalty, could have applied for the appointment of its own receiver if it wished to enforce its floating charge.

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

1 This is an appeal from a decision of Kelly J. [reported at 99 N.S.R. (2d) 91, 270 A.P.R. 91 (T.D.)] dismissing the appellant Bayhold's claim against the respondents. Bayhold lent money to the Community Hotel Company Limited ("Community") which was secured by a first and second mortgage against the hotel owned by Community. The security consisted of a first specific charge against the realty and chattels and a floating charge on Community's undertaking. By the late seventies the hotel was a faded rose from a bygone day. Mr. Carl Rahey was the controlling shareholder of Community and by 1980 he was heavily indebted to Revenue Canada. On February 1, 1981, Revenue Canada obtained an order from the Supreme Court appointing a receiver-manager to take possession of the assets of Community; that is, the hotel as well as all the assets of Rahey. The respondent Clarkson, a national accounting firm, was appointed receiver-manager and went into possession of the hotel which at that time was run-down and suffering losses. Clarkson decided the best course of action was to spruce up the hotel with the hope of increasing occupancy during the 1981 tourist season and thus obtain a good price for the hotel as a going concern. The hoped-for increase in occupancy was never achieved and on November 3, 1981, Clarkson closed the hotel. In the meantime, Bayhold had commenced foreclosure proceedings and on November 27, 1981, a foreclosure order was obtained fixing the amount owing for principal and interest on Bayhold's mortgages as of September 1, 1981, at \$623,861.66 with interest to be calculated from September 1, 1981. At the sheriff's sale on January 13, 1982, Bayhold bid in the real property (exclusive of the chattels in the hotel) for \$200,000. The sum of \$157,766.59 was used to pay outstanding real property taxes owing to the City of Sydney. The surplus of \$42,233.41 was paid into court and ultimately paid to Clarkson to reimburse it for expenses incurred by Clarkson to preserve the property of Community during the receivership. These expenses were fixed by Burchell J. on January 6, 1983, at \$109,608.73 and were found to have priority over Bayhold's security against the hotel chattels. After payment to Clarkson of the money paid into court following the foreclosure sale, plus the interest earned on such funds, there remained a balance of \$63,117.50 due to Clarkson to reimburse it for the "preservation expenses". The order of Burchell J. establishing this priority was not appealed.

2 Following the purchase of the hotel by Bayhold at the sheriff's sale, it went into possession and in late 1982 allowed Mr. Rahey (with the approval of Clarkson) to operate the hotel. In the spring of 1983 Bayhold entered into an agreement with Equitas Investment Corp. ("Equitas") to sell the hotel for the sum of \$1,000,000 (\$50,000 down and the balance secured by two mortgages back to Bayhold).

3 The agreement of purchase and sale provided for the transfer of the real property free from encumbrances but insofar as the chattels were concerned, Bayhold agreed only to transfer its interest. The agreement provided that Bayhold did not warrant the condition or even the existence of the chattels although there was a list of chattels initialled by the parties. The chattels were, of course, located in the hotel and included all the furnishings.

4 The agreement of sale was to close on May 2, 1983. Bayhold was aware that under the Burchell order, Clarkson had a prior charge against the chattels for \$63,117.50. Despite repeated requests by Clarkson to Bayhold to purchase the chattels, Bayhold did not respond. Clarkson threatened to remove the chattels. On April 29, 1983, Clarkson engaged a private security firm and

the chattels were removed from the hotel. On May 2, 1983, Equitas offered to buy the chattels from Clarkson for about \$30,000. The respondent, Mr. Scouler, the chartered accountant with Clarkson who was Clarkson's directing mind in this receivership, refused the offer. He felt the chattels were worth about \$150,000. He advised Equitas it would have to purchase the chattels at auction. On May 2, 1983, Equitas advised Bayhold it would not complete the purchase. Bayhold did not re-open the hotel and on November 29, 1983, sold it for \$450,000 to a Sydney businessman.

5 Bayhold commenced action against Scouler, Clarkson and its successor firm, the respondent Ernst & Young Inc., claiming damages for breach of duties as receiver-manager up to a maximum amount of \$808,339.21 plus prejudgment interest from November 29, 1983 (the date Bayhold sold the hotel) to April 3, 1990 of \$519,425.47. The learned trial judge dismissed all the claims, essentially finding that Clarkson was not negligent in the performance of its duties. The appellant Bayhold identified six issues on the appeal; I will deal with each in the order raised by the appellant.

## **Issue 1**

6 The appellant asserts that the respondents Clarkson, Scouler and Ernst & Young are liable for damages to Bayhold for breach of fiduciary duty for failing to apply to the court in April 1981 after Clarkson as receiver-manager had borrowed in excess of \$50,000. The appellant asserts that Clarkson was limited, pursuant to the terms of the receivership order, to borrow an amount not exceeding \$50,000.

7 It is therefore relevant to look at the terms of the receivership order. It provided for a broad power of management as contained in cl. 3 of the order wherein it is stated:

3. THAT The Clarkson Company Limited, be and it is hereby appointed Receiver and Manager of the undertaking; property and assets of each of the Respondents, with authority to manage the business and undertaking of each of the Respondents, and to act at once and until further order of this Court.

Community was one of the respondents named in the receivership order.

8 Specific powers granted the receiver are set forth in cl. 6 of the order:

6. THAT the said Receiver and Manager be and it is hereby empowered from time to time to do all or any of the following acts and things until further order of this Court or a judge thereof:

(a) To carry on and manage the businesses of all of the Respondents, in all phases whatsoever;

(b) To enter into negotiations for the sale, conveyance, transfer, assignment, mortgaging or other disposition of the real property and/or shares of the Respondent Companies, owned, legally or beneficially, by any of the Respondents, in such manner and at such price as the Receiver and Manager, in its discretion, may determine, provided that the Receiver and Manager may not enter into any agreement or commitment to sell, convey, transfer, assign, mortgage or otherwise dispose of the real property and/or shares of the Respondent Companies, without prior approval of the Court;

(c) To pay such debts of the Respondents, as the Receiver and Manager deems necessary or advisable to properly operate and manage the businesses of the Respondents and all such payments shall be allowed the Receiver and Manager in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents in priority to any other person, company, or corporation, secured or unsecured;

(d) For the purpose of carrying out the powers and duties hereunder, to employ, retain, or dismiss such agents, assistants, employees, solicitors and auditors as the Receiver and Manager may consider necessary or desirable for the purpose of preserving and realizing on the said property and assets of the Respondents, and carrying on the businesses and undertakings of the Respondents, and to enter into agreements with any person or corporation respecting the said businesses or properties and that any expenditure which shall be properly made or incurred by the said Receiver and Manager in so doing shall be allowed it in passing its accounts and shall form a charge on the undertaking, property and assets of the Respondents, in priority to any other person, company, or corporation, secured or unsecured;

(e) To receive and collect all monies now or hereafter owing to the Respondents;

(f) To take such other steps as the Receiver and Manager deems necessary or desirable to preserve and protect the real and personal property of the Respondents, in its custody.

9 The court, pursuant to cl. 7 of the receivership order, authorized the borrowing of up to \$50,000 which would be secured against the property and assets of all the respondents, which of course included Community. That clause of the order provided as follows:

7. THAT for the purpose of exercising the powers and performing the duties hereunder, the said Receiver and Manager be and it is hereby empowered from time to time to borrow monies not exceeding \$50,000.00 by way of revolving credit which may be borrowed and re-borrowed provided that the said limit is not exceeded at any time and that as security therefor the whole of the said properties and assets of the Respondents, together with all other assets and properties which may hereafter be in the custody or control of the said Receiver and Manager, do stand charged with the payment of the sum or sums so borrowed as aforesaid together with interest thereon in priority to all claims of the Applicant or any other person, secured or unsecured, by which the assets and properties of the Respondents may be encumbered.

10 The receivership was funded by Revenue Canada which advanced funds to Clarkson or reimbursed Clarkson for moneys Clarkson borrowed from the Toronto-Dominion Bank during the period Community was in receivership. By April 1981, Clarkson had borrowed in excess of \$50,000. The appellant argues this was a breach of the terms of the order and therefore a breach of fiduciary duty that Clarkson, as receiver-manager, owed not only to the court but to all the creditors and the debtors. The appellant argues that Clarkson was required by law to go back to the court to obtain increased borrowing authority and that Clarkson's failure to do so deprived Bayhold of an opportunity to make representations to the court that there were other options the receiver-manager could pursue rather than continue with its strategy to keep the hotel open so as to take advantage of the hoped-for increase in occupancy in the tourist season.

11 The premise for this argument is that a receiver-manager must obtain approval of the court before it exceeds the borrowing authorized by the court pursuant to a clause such as cl. 7 of the receiving order and that the failure to do so is a breach of a fiduciary duty that gives rise to the liability of a receiver-manager for unpaid amounts due to creditors of the debtor. In my opinion, that proposition is not valid. The purpose of cl. 7 of the receiving order and like clauses which are common in such orders was to authorize the receiver-manager to borrow up to \$50,000 and with respect to such borrowings the receiver-manager would have a charge against the undertaking property and assets of the debtor in priority to other creditors. The only result of a failure to get approval for further borrowings would be that the receiver-manager would have no assurance that the court would retroactively grant the receiver-manager a prior charge against the assets for such excess borrowings. The failure to obtain court approval does not automatically result in the receiver-manager becoming personally liable for the existing contractual obligations of the debtor. In this case, Clarkson was being indemnified by Revenue Canada for funds borrowed to operate and manage the hotel business. The receiving order, read as a whole, shows that there was no prohibition against borrowing in excess of \$50,000. The receiver-manager was given broad management powers and could borrow up to \$50,000 and have a charge against the assets for such an amount. If the receiver-manager chose to borrow more without obtaining court approval, the only repercussion would be that Clarkson would not have the comfort of a charge against the assets of the hotel for such excess borrowing.

12 Support for this conclusion is the following statement from *Receiverships* by Frank Bennett (Toronto: Carswell, 1985) where the author states at p. 128:

The receiver has no authority to borrow more money than has been authorized, including any overdraft position. If the receiver does not obtain a further order for borrowings, he may be prevented from being indemnified out of the assets for expenses incurred unless he can show that such expenses were proper and beneficial to the estate. If the receiver borrows in good faith but for an improper purpose, he will be denied indemnity.

However, the receiver may bring a motion after the event for an order nunc pro tunc, but on such motion, the receiver must demonstrate that the borrowings were properly incurred and that he was justified in the circumstances in exceeding his borrowing limits. It will not be enough to show that the additional expenses were made in good faith and in the ordinary course of business.

If there is no provision in the order authorizing the receiver to borrow moneys, the court may infer such power from the other provisions in the order, particularly the power to carry on the business.

13 Further at p. 216, the author states:

In the event that the receiver exceeds his borrowing power, or borrows without power to do so, he may be deprived of his right of indemnification out of the assets in receivership to the extent of such amount in excess of his authority. Irrespective of whether the receivership is private or court-appointed such borrowings may be unsecured or at best rank subsequently to any prior security unless they can be justified as necessary for the preservation of the property. While each case must be reviewed on an individual basis, it is not enough to show that the further liabilities had been incurred bona fides and in the ordinary course of business. Furthermore, if the debt is incurred on a speculative basis, the receiver will be denied his indemnity.

14 The decision of the Manitoba Court of Appeal in *Edinburgh Mortgage Ltd. v. Voyageur Inn Ltd.*, (sub nom. *Rothburg v. Federal Business Development Bank*) 28 C.B.R. (N.S.) 73, [1978] 2 W.W.R. 744 is illustrative that the courts regularly consider whether a receiver should be retroactively indemnified for exceeding the borrowing limits under clauses similar to cl. 7 of the receiving order granted in the case we have under consideration. There are no cases cited by the appellant to support its position that the failure to return to court to have the court authorize borrowing in excess of \$50,000 could result in the receiver-manager becoming personally liable for obligations under contracts including the liabilities accruing under mortgages that existed prior to the receiver-manager being appointed.

15 Insofar as the appellant's arguments focus on breaches of perceived duties of receiver-managers, it is important to consider what are the duties of a receiver-manager. The essential duty of a receiver-manager as an officer of the court is to discharge those duties prescribed by the order appointing the receiver-manager. (See *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160, 9 D.L.R. 476.) Bennett, at p. 118, explains the extent of a receiver-manager's duties as follows:

Notwithstanding that the receiver and manager is an officer of the court, his fiduciary duty to all extends to a standard of care in the running of the business comparable to the 'reasonable care, supervision and control as an ordinary man would give to the business were it his own'. Where he fails to provide such a standard of care, he may be liable for his negligence.

16 That is the standard a receiver-manager's performance must measure up to before liability is imposed. The trial judge found that Clarkson was not negligent in the conduct of the receivership. There was ample evidence before the trial judge to support such a finding.

17 In summary, the receiving order gave the receiver-manager broad power of management. Read in the context of the receiving order and the law, cl. 7 did not prohibit Clarkson from borrowing in excess of \$50,000 while operating the hotel. Therefore, there was no breach of duty giving rise to the liability that the appellant seeks to impose. Accordingly there is, in my opinion, no merit to the first issue raised by the appellant.

## Issue 2

18

Are the respondents liable to Bayhold for damages for breach of fiduciary duty for closure of the hotel on November 3, 1981?

19 The clauses in the receivership order relevant to this issue are cls. 3, 6(a), (b), and (f), which have previously been set out. In short, cl. 3 appointed Clarkson receiver and manager of the undertaking property and assets of Community with authority to manage the business until further order of the court. Under cls. 6(a) and (b) there were broad and specific powers of management and under 6(f) Clarkson could take such steps as it deemed necessary or desirable to preserve and protect the real and personal property of Community. Clause 9 might also be of some relevance in that it provided that the receiver and manager could apply to court from time to time for direction and guidance in the discharge of its duties.

20 It is clear from the order and not uncommon that the receiver-manager could not dispose of major assets without court approval. In this case, the receivership order provided that the receiver-manager could not dispose of the real property or the shares of Community without prior approval of the court. The question raised by the appellant is whether or not the receiver-manager could close the hotel without court approval where it was operating at a loss. The appellant asserts in para. 110 of the factum that the receivership order, para. 6(a), provided that Clarkson should

until further order of this court ... carry on and manage the business of all the Respondents, in all phases whatsoever.

21 Counsel for the appellant argues from this provision that the closure without court approval offended the receivership order and constituted a breach of the receiver-manager's fiduciary duties to Bayhold. Accordingly he asserts that the respondents are liable to Bayhold for the full amount that was owing on its mortgage as of the date of the foreclosure sale, plus prejudgment interest from that date, for a total claim in excess of \$1.3 million.

22 The receivership order does not state what the appellant asserts. Clause 3 provides for Clarkson's appointment as receiver-manager of the undertaking, property and assets of each of the respondents with authority to manage the business and undertaking of each of the respondents and to act at once and until further order of this court. Clarkson was empowered under cl. 6(a) until further order of the court to carry on and manage the business in all phases. The appellant's argument is that unless a further order of the court was obtained the receiver-manager had an obligation to continue to operate the hotel. The words of cl. 6 granted Clarkson the *power* to carry on the business. The clause did not oblige Clarkson to do so until further order of the court. There is a major distinction between a power and an obligation; this is the flaw in the appellant's argument. Furthermore, the receiver's general power of management seems to me to entail full scope of management responsibilities including, as provided for in para. 6(f), the right of the receiver-manager to take such steps as it deems necessary or desirable to preserve and protect the real and personal property of Community. The only power given to the receiver-manager in the order that could not be exercised without court approval would be the sale or mortgaging of the real property or shares of the respondent companies, including Community. When the receivership order is read as a whole, there is no limitation placed on the scope of the receiver's powers of management other than if he chooses to sell or mortgage the real property or the shares of the respondent companies. The order does not expressly require that he keep the hotel open or obtain court approval before closing. Does the law impose such a duty on a receiver-manager?

23 The appellant submits that if Clarkson had applied to the court in October or November of 1981 for approval of its intention to close the hotel, the court would have terminated the receivership for the hotel and returned the hotel to Community. He asserts that this would have permitted Community to operate the hotel until the most propitious moment for a sale and that in all likelihood an offer in the range of \$1,000,000, as eventually was offered by Equitas in April 1983, could have been obtained and Bayhold's mortgage would have been paid out. It should be noted that by the fall of 1981, prior to the closure of the hotel, Bayhold had already commenced foreclosure proceedings. With respect to the arguments advanced by the appellant, it is a matter of speculation as to what would have happened had Clarkson applied to the court for approval to close the hotel. It is quite clear the operation of the hotel was incurring very substantial deficits. It is more likely that the court would have approved of the closing of the hotel rather than return it to Community which had no apparent ability to finance the continued operation of the hotel.

24 The appellant relies on certain statements from Bennett on *Receiverships* that Clarkson could not have closed the hotel without court approval. At p. 118 Bennett states:

As a fiduciary to all, the court-appointed receiver must manage and operate the debtor's business as though it were his own. He cannot therefore, without court approval, close the business down or repudiate executory contracts.

25 Bennett does not cite any authority for the statement that the receiver-manager cannot close the business without court approval.

26 At p. 119 of text, Bennett states:

As a general matter, the court-appointed receiver, unlike the privately appointed receiver, owes a duty to the holder and the debtor to preserve the goodwill and the property. The receiver will not be able upon appointment to close down the debtor's business. He will have to demonstrate that it is a losing proposition before the court will permit the receiver to break contracts and terminate the debtor's business.

27 Does this statement lead to the conclusion that Clarkson should have applied to the court before closing the hotel? Is the statement supported by the authorities? Bennett appears to cite as authority for this proposition the case of *Re Newdigate Colliery Ltd.; Newdegate v. The Co.*, [1912] 1 Ch. 468 (C.A.). However a review of that case does not support such a broad statement. The *Newdigate* case is authority for the following valid proposition (p. 468):

It is the duty of the receiver and manager of the property and undertaking of a company to preserve the goodwill as well as the assets of the business, and it would be inconsistent with that duty for him to disregard contracts entered into by the company before his appointment.

28 In that case, the receiver-manager of the undertaking and property of a colliery company wished to repudiate certain unfavourable forward contracts for the supply of coal. The court declined to approve of the repudiation as it would be inconsistent with the duty of the receiver-manager to preserve the goodwill of the business. However, the case is not authority for the proposition that the court cannot approve of the repudiation of such contracts and certainly not authority for the proposition that a failure to obtain authorization to close down a business results in personal liability of the receiver-manager to existing creditors who remain unpaid as a result of the assets of the debtors being insufficient to pay their claims.

29 Again it is important to remind oneself that the duty owed by a receiver-manager is to exercise reasonable care in the management and operation of the business. The trial judge found Clarkson was not negligent in deciding to close the hotel. There was no duty specifically imposed on Clarkson pursuant to the receivership order to keep the hotel open until such time as it obtained approval of the court to close it. While it may have been prudent to obtain such approval in view of the statements in Bennett, there was no obligation under the receivership order to do so. There is no case law in support of the statement made in Bennett that a receiver-manager cannot close a business without approval of the court.

30 What Bennett was probably referring to is the recognized duty of the receiver-manager, not only to preserve the property of the debtor, but also the goodwill of the debtor's business if there is any. Certainly if a business is operating at a profit or there is goodwill it would be a breach of the receiver-manager's duty, to the debtor at least, to close the business. The receiver-manager under such circumstances would require court approval before doing so as on its face it would appear that the receiver-manager would be in breach of the duty to preserve the goodwill. It would be for the receiver-manager to satisfy the court that under all the circumstances a liquidation of the business was reasonable. Whether that duty extends to the creditors I have some doubt. However, the receiver-manager does have a duty to creditors to operate the receivership with reasonable care so as not to unfairly affect the interest of all the persons affected by the receivership; that is, debtor and creditors, and has a duty to the court to act in accordance with the terms of the order and the law.

31 In dealing with the appellant's argument on this issue, it may be useful to consider the *nature* and *purpose* of a receiver-manager's appointment. The remarks of Cozens-Hardy M.R. at p. 472 of the *Newdigate* case, *supra*, are relevant; he stated:

The jurisdiction of the Court to appoint receivers is extremely old, but I believe the practice of appointing a manager is far more modern, and I think it has been settled that the Court will never appoint a person receiver and manager except with a view to a sale. The appointment is made by way of interlocutory order with a view to a sale; it is not a permanency.

32 The point being that while a receiver-manager is empowered to carry on the debtor's business, it is contemplated that eventually there will likely be a liquidation notwithstanding that the receiver-manager has a duty to preserve the property and the goodwill of the business. The trial judge found in this case there was no goodwill at the time when Clarkson made its decision to close the hotel. The evidence could lead to no other conclusion. In my opinion, the failure to apply to the court for approval to close the hotel on the facts of this case did not breach any duty Clarkson owed to Bayhold. Furthermore, the law is clear that if a debtor or creditor feels adversely affected by any action of a receiver-manager the person may apply to the court to protest the action and the complainant must prove the receiver is in breach of his duties. Bayhold made no such application but continued with its foreclosure action. I reject the argument by the appellants that this proceeding is Bayhold's complaint. The time to apply would have been in November 1981, not years later when this action was commenced.

33 The position of Bayhold on the first two grounds of appeal is interesting. On the one hand, Bayhold asserts that Clarkson should have applied to the court in April 1981 to approve an increase in its borrowing and at that time Bayhold argues if such an application had been made it could have made submissions to the court that the hotel should have been sold as early as April 1981 as it was losing money and there was no need to wait for the summer season to show that it could not be viable. Yet despite its argument that the hotel should have been sold in April 1981, it objects to Clarkson having closed the hotel in November of 1981, arguing that the hotel should have been kept open to facilitate a sale as an ongoing concern. It is difficult to reconcile these positions except to say that one argument is needed to support the first ground of appeal and the latter argument the second.

34 In summary, the essence of a receiver's powers is to liquidate the assets. On the other hand, a receiver-manager is vested with the additional power to manage the business, but this does not derogate from his power to realize on the assets. His management duty, if I can call it that, is to act with the care an owner would exercise in the running of his own business subject of course to the terms of the court order appointing him receiver-manager. In this receivership, as in most, the powers to manage are broad. There is nothing in the order that required the receiver-manager to obtain court approval before closing the hotel. Justice Kelly found this was a valid business judgment considering all the circumstances and I agree. The receiver-manager had the power pursuant to cl. 6(f) of the order to preserve the assets; the hotel was losing money, the receivership had turned out to be a financial disaster and closing it to await the foreclosure sale was a reasonable judgment to preserve the property. The receiver-manager did owe a duty to act reasonably in the conduct of the hotel business so as to preserve the goodwill and the property of Community in the interests of not only Community but all the creditors, including the appellant. The fact that Clarkson did not apply for court approval of the closure is not a breach of his duty to preserve the goodwill of Community in view of the finding of the trial judge that there was no goodwill, a fact which the receiver was well aware of at the time of the closure. Furthermore, even if Clarkson had breached its duties, the learned trial judge found as a fact that the closure did not cause any loss to Bayhold. There was evidence to support this conclusion. There is no need to go into detail with respect to this finding, as I have disposed of Issue 2 on the ground there was no breach of any duty owed by Clarkson to Bayhold. Therefore I reject the appellant's argument that on this ground the respondents are liable to Bayhold for \$808,339.21 plus prejudgment interest.

### **Issue 3**

35

Are the respondents liable to Bayhold for damages resulting from the trespass on April 29, 1983, causing loss of the Equitas sale of \$1,000,000?

36 This issue is framed by the appellant in such a way that it assumes the trespass and the removal of the chattels caused the loss of the Equitas sale. The only impropriety which surrounded the chattels removal was Clarkson's failure to obtain a recovery order from the court. The hotel had been purchased by Bayhold at the sheriff's sale on January 13, 1982, and Clarkson had agreed to leave the chattels in place rather than remove them for storage. The sale of the realty by the foreclosure order



did not include a sale of the chattels. The chattels were still owned by Community and were subject to a first charge in favour of Clarkson for the balance of the preservation expenses and were subject to a second specific charge and a floating charge in favour of Bayhold under the terms of its security document.

37 The appellant's argument is that by removing the chattels the receiver-manager committed a trespass and that this trespass was the cause of Equitas refusing to complete the agreement to acquire the hotel from Bayhold for \$1,000,000.

38 The trial judge clearly directed himself to the appropriate question when he rhetorically stated at p. 129 of his decision [p. 145 N.S.R.]:

Although Clarkson's method of seizing the chattels from Bayhold was improper, is Equitas (sic) correct when it alleges that this action caused a loss to Bayhold, in that it resulted in Equitas properly refusing to perform the agreement of purchase and sale?

39 After dealing with a number of issues raised by Bayhold on this question, the trial judge decided as follows (p. 132 [p. 146 N.S.R.]):

Before Bayhold can succeed in this aspect of the claim, it must satisfy the Court that the negligent or trespass action of Clarkson was the cause of its failure to complete its contract with Equitas, and that it suffered a measurable loss from this failure. On the face of it, Bayhold has not satisfied me that the agreement of purchase and sale incorporated a condition that the hotel be a going concern at the time of the closing, nor have they satisfied me that there was a collateral enforceable agreement to this effect. I therefore cannot conclude that the precipitous and inappropriate seizure action initiated by Mr. Scouler on behalf of Clarkson was the cause of a breach of contract. Bayhold was in a position to provide to Equitas all of the apparent requirements of the written agreement.

40 The trial judge, in effect, found that the seizure of the chattels by Clarkson was not the cause of Bayhold's losing the sale to Equitas as there was no requirement in the agreement of sale that the chattels be even in existence let alone in the hotel. The learned trial judge found that Bayhold didn't satisfy him that there was a collateral agreement (outside the written agreement between the parties) that the hotel would be a going concern on May 2, 1983, the closing date. The trial judge found that Bayhold could comply with the requirements of the written agreement. The evidence is clear that Bayhold did not sue Equitas on the agreement. The trial judge found that the conduct of both Bayhold and Clarkson with respect to events surrounding the proposed sale to Equitas was somewhat tainted. He stated (pp. 131-132 [p. 146 N.S.R.]):

Neither Bayhold nor Clarkson come to court with very clean hands in the matter of Equitas refusing to complete the sale of the hotel. Clarkson took possession of the chattels without proceeding in the appropriate way with a recovery order, and its agent removed furniture in a clumsy way causing some minor damage to the hotel. The agent also removed furniture and fixtures in which Clarkson had no claim. Bayhold was less than candid with Equitas about the nature and extent of the claim of Clarkson to the chattels, and did not give Equitas notice of the clear warning from Clarkson that it would take action to remove the furniture if some satisfactory arrangement was not made with respect to its claim. As well, Bayhold did not bargain in good faith regarding the retention of the chattels.

41 The appellant asserts that the trial judge erred when he seemed to conclude that Bayhold would have had to sue Equitas before coming against Clarkson. This argument is based on the following statement by the trial judge at p. 132 [p. 147 N.S.R.]:

Bayhold has not tested the validity of its proposition by a legal action to enforce the agreement or for damages. If Bayhold had brought an action to enforce its agreement by way of specific performance, or an action for damages for the breach of the contract, it would have recovered to the same extent that it now seeks to recover from Clarkson. If it had taken this action and failed on the basis that there was a binding term of the contract that the property be a going concern, then an action against Clarkson might be sustainable. However, I am not satisfied that Bayhold would not have succeeded in its action to enforce the contract against Equitas, and I must therefore conclude that Bayhold cannot succeed on this alternative claim.

42 I tend to agree with Bayhold's assertion that there was no requirement that Bayhold sue Equitas on the agreement before pressing any claim it might have against the receiver-manager for damages arising from the removal of the chattels. However, that does not assist the appellant. The trial judge was not satisfied the removal of the chattels was the cause of Bayhold losing the sale to Equitas. There is evidence to support such a finding as despite the removal of the chattels from the hotel on April 29, 1983, Equitas was prepared to buy the chattels from Clarkson for \$30,000 on May 2, 1983. Therefore, the removal per se was not the fact which caused Equitas to refuse to complete. It would appear that the reason this sale fell through was that Bayhold did not own the chattels and Equitas was unable to buy the chattels from Clarkson for a price Equitas was prepared to pay. While technically Clarkson had no right to enter the hotel premises in the possession of Bayhold and remove the chattels without a recovery order, Bayhold was well aware that the chattels were owned by Community and aware of Clarkson's prior secured claim to the chattels. In addition, Clarkson had repeatedly requested a decision from Bayhold as to whether it intended to purchase the chattels and, if not, Clarkson would remove them. The trial judge found that Mr. Scouler mistakenly believed the order of Burchell J., dated January 6, 1983, in which the receiver-manager was granted a prior charge against the hotel and the chattels to the extent of the preservation expenses was sufficient authority from the court to seize the chattels on April 29, 1983. I would note that the order provided as follows:

AND IT IS FURTHER ORDERED that The Clarkson Company Limited is entitled to the chattels in The Isle Royal Hotel in priority to Bayhold Financial Corporation Limited and Romiss Sales Limited to the extent that the expenses exceed the surplus proceeds of the foreclosure and sale of The Community Hotel Company Limited

43 At most, the trespass was technical. Under the circumstances that existed on or about April 29, 1983, it is likely that Clarkson could have obtained from the court a recovery order to remove the chattels from the hotel premises as Bayhold had no legal right to retain them as title to the chattels was still vested in Community and Bayhold knew its interest in the chattels as mortgagee was subject to the prior charge of Clarkson in the amount of \$63,117.50. Equitas knew Bayhold was not warranting even the existence of the chattels, so Equitas ought to have been alert although not fully informed by Bayhold that there was a problem with respect to the transfer of the chattels that were in the hotel. The trial judge's conclusion that the seizure of the chattels was not the cause of Bayhold losing the sale to Equitas was based on the trial judge's view that there was no agreement between Bayhold and Equitas that the sale of the hotel was to be as a going concern. In other words, he didn't consider the inability to deliver the chattels as part of the hotel property at closing was a requirement of Bayhold under the sale agreement. The terms of the agreement support this conclusion.

44 When one looks at all the facts surrounding this sale to Equitas, the removal of the chattels was certainly not the real cause of Equitas's failure to complete the agreement to purchase the hotel. Apart from the reason identified by the trial judge, Bayhold cannot be heard to complain too much about this lost sale being caused by Clarkson's removal of the chattels because Bayhold, by purporting to sell the chattels to Equitas pursuant to the terms of the agreement, was holding out to Equitas that it owned the chattels, whereas in fact it did not. The chattels were owned by Community and were subject to a first charge to Clarkson and then a second charge to Bayhold. Bayhold had no right to sell the chattels and can hardly be heard to assert that it lost the sale because Clarkson removed them from the premises. Bayhold really lost the sale because it didn't own the chattels; it didn't have any right to sell them in the first place and Equitas wasn't able to buy them at a price Equitas was prepared to offer to the receiver-manager.

45 There isn't any need to deal with the issue whether the trial judge was in error when he suggested Bayhold must first sue Equitas for a breach of contract before claiming damages for trespass.

46 I reject Bayhold's claim for damages which it asserts arises as a result of the trespass on April 29, 1983. The sale to Equitas was not lost because of Clarkson's technical trespass.

#### **Issue 4**

47 The appellant sets out this issue as follows:

Are the respondents liable to Bayhold for mortgage interest owing to Bayhold during the term of the receivership until Bayhold acquired the hotel at the foreclosure?

48 The short answer is "no"; the receiver-manager is not personally liable for the performance of contracts entered into prior to the receivership. Therefore the respondents are not liable to pay the interest that was payable during the receivership under the mortgages made by Community prior to the date of the receivership order. This is abundantly clear from the statements made in the *Newdigate* case where Cozens-Hardy, in dealing with contracts which the receiver-manager did not wish to perform and in which he had applied to the court to be excused from performing, stated at p. 474:

I do not quite like the phrase 'break these contracts,' because it is not a question of breaking them. They are still subsisting, but it is impossible to suggest that the receiver and manager is under any liability to the persons who have entered into them. In my opinion they are not contracts with him; they are contracts made with the company, which is still a company, and has not yet been wound up. If he discharges the obligations of the company under the contracts he will be entitled to receive the money due from the other contracting parties to the company; but to say that he is under any personal liability with regard to the contracts and that he ought to be indemnified or relieved in respect of them is entirely to misunderstand the position of a receiver and manager.

49 Buckley L.J. in the same case made it abundantly clear that receiver-managers are not personally bound by existing contracts. He stated at pp. 476-477:

As is notorious, and as appears by the evidence in this case, the value of coal has recently very largely risen, and if the Court were to make the order asked for, the receiver and manager would be directed to refuse to perform the existing contracts for the sale of coal in order that he might sell it at the enhanced price it now commands, with the result that the company would be liable on the contracts for damages for breach thereof. The question is whether the Court ought to give such a direction as that. Something has been said about these contracts being binding upon the receiver and manager personally. That is not so at all.

50 In support of the argument that the receiver-manager is obliged to pay mortgage interest to Bayhold, the appellant relies on certain statements by Bennett, *Receiverships*, and Sir R. Walton and M. Hunter, *Kerr on Receivers and Administrators*, 17th ed., (London: Sweet & Maxwell, 1989), the essence of which is that a receiver-manager, since he has been entrusted with possession of not only the property but the goodwill of the business in receivership, cannot, without the express permission of the court, disregard contracts entered into by the company prior to the receivership because to do so would result in the destruction of the goodwill which the receiver-manager is obliged to preserve (*Kerr*, pp. 31, 207, 219-220; *Halsbury's Law of England*, 4th ed., vol. 39 (London: Butterworths, 1982) (Receiverships) at para. 982; Bennett's *Receiverships* (1985), pp. 119, 110 and 118).

51 The flaw in the appellant's argument is that the law does not go so far as to impose personal liability on a receiver-manager so as to render him liable for damages to a party who contracted with the company in receivership prior to the receivership order if the receiver-manager does not honour such contracts. One of the statements that the appellant relies on can be quoted to illustrate that the appellant has put the emphasis in the wrong place and drawn the wrong conclusions. The appellant's factum quotes from *Kerr* at pp. 219-220 with emphasis by the appellant as follows:

The receiver and manager is the agent neither of the company nor of the debenture holders, but owes duties to both. He is appointed to preserve the goodwill of the business and therefore, *subject to any directions made on his appointment, it is his duty to carry into effect contracts entered into by the company before his appointment. Such contracts, unless they are contracts depending on personal relationship, such as contracts of employment, remain valid and subsisting, notwithstanding the appointment of a receiver and manager.* Any breach of them will render the company, not the manager, liable in damages, and will, moreover, destroy the goodwill of the business. *In this respect, a manager differs from a receiver appointed over the assets without any power to carry on the business, who is under no obligation and has no power to carry out these contracts, nor to have regard to preserving the goodwill, and whose appointment therefore operates to determine the contracts. A manager must not, without leave of the court, disregard the contracts* in order to benefit the

debenture holders, since this course would both destroy the goodwill and render the company liable in damages; *nor must he pick and choose which contracts he will carry out as being most profitable.*

52 The appellant's factum does not highlight the sentence which states that "[a]ny breach [of pre-existing contracts] will render the company, not the manager, liable in damages and will, moreover, destroy the goodwill of the business." This statement in *Kerr on Receivers and Administrators* is consistent with the views expressed by the justices who rendered opinions in the *Newdigate* case.

53 The reasons a receiver-manager cannot break contracts are that to do so could destroy the goodwill of the business and result in the company in receivership being liable for such a breach as the company continues in existence and could be sued for failure to honour its contracts should it get out of receivership. That is one of the reasons why a receiver-manager should apply to the court for approval to disregard any executory contracts. But the breach of such contracts does not make the receiver-manager personally liable to the creditors which is the position urged upon us by the appellant. There is not any authority to support the appellant's argument. The receiver-manager is bound by the terms of the executory contracts entered into by the business in receivership before the appointment of the receiver- manager only in the general sense that the receiver-manager must honour them to preserve the goodwill of the business. In Bennett on *Receiverships*, at p. 223, the author states:

At the commencement of any receivership, the receiver reviews the terms of any executory contracts made by the debtor at the time of the appointment or order with a view to determining whether or not he should complete those contracts.

In a court-appointed receivership, the *receiver is not bound by existing contracts made by the debtor*. However, that does not mean he can arbitrarily break a contract. He must exercise proper discretion in doing so since ultimately he may face the allegation that he could have realized more by performing the contract rather than terminating it or that he breached his duty by dissipating the debtor's assets. Thus, if the receiver chooses to break a contract, he should seek leave of the court.

[Emphasis added.]

54 The statement which I have underlined in Bennett is a contradiction of the following statement made by Bennett at p. 110 of his book on *Receiverships* and upon which the appellant relies: "The receiver will be bound by the terms of existing contracts. However, the receiver may move before the court for an order to breach such contracts." Bennett was merely making a general statement; the footnotes refer the reader to his section on contracts which starts at p. 223 where he makes a more specific statement, which I have quoted, and then goes on to discuss the *Newdigate Colliery* case.

55 That the receiver-manager is not personally liable for breaking pre-existing contracts is clear from the statements of the justices in the *Newdigate Colliery* case. Of course, if the receiver-manager adopts pre-existing contracts he then becomes personally liable for their performance. That is not the situation we have here. With respect to pre-existing contracts, it is the company in receivership that continues to be liable for such contractual commitments if the receiver-manager fails to honour them during the term of the receivership. That is all that the case of *Parsons v. Sovereign Bank of Canada*, supra, stands for.

56 There is no doubt that the law requires a receiver-manager to preserve the goodwill of the business but that does not require that he perform all existing contracts. This is clear from the following passage from *Parsons v. Sovereign Bank of Canada* at pp. 170-171 [A.C.]:

The construction which their Lordships place on the correspondence is that the receivers and managers had intended to carry on the existing arrangements as long as possible without break in continuity, *but to make it clear that they reserved intact the power, which they undoubtedly possessed, later on to refuse to fulfil the contracts which existed between the company and the appellants*. That such a breach would give rise to claims for damages against the company which might lead to its winding up, or to counter-claims, although the claimants could not get at the assets in the hands of the receivers, was sufficient reason for the receivers and managers not desiring to put their powers in force. The inference is that as between the company and the appellants the contracts continued to subsist.

[Emphasis added.]

57 The duty to preserve "the goodwill" is primarily owed to the company in receivership rather than the creditors. The risk the receiver-manager runs in terminating pre-existing contracts is that to do so could diminish the goodwill and without obtaining approval the debtor might sue the receiver-manager for damages or the court might censure the receiver-manager for the manner in which the receivership was conducted, but a party who had contracted with the company in receivership prior to the receivership order being granted does not have a cause of action against the receiver-manager if the latter chooses not to honour pre-existing contracts. The preservation of the goodwill of the hotel, if there was any, did not require payment of mortgage interest as the income from the operations was insufficient to do so. In short, the appellant has read into the case law and the statements in the text books a duty on a receiver-manager that he honour contracts and that if he does not he incurs personal liability for the breaches notwithstanding he was not a party to the contracts. The case law does not support such a proposition and, in fact, it supports the contrary (*Newdigate* case). The appellant had a remedy as a secured creditor which it eventually exercised to foreclose the mortgage and have the real property sold by the sheriff pursuant to court order. In conclusion, the respondents did not incur personal liability to the appellant for mortgage interest that was owing by Community at the date of the receivership or accrued during the term of the receivership up to the date of the sheriff sale on January 13, 1982. This ground of appeal is without merit.

## Issue 5

58

Did Bayhold have priority over Clarkson for monies disbursed by Clarkson over \$109,608.73?

59 The appellant argues that all receipts from the continuation of the hotel business during the receivership including borrowings from the Toronto-Dominion Bank plus realizations from the liquidation of the assets ought to have been paid to Bayhold to pay out the mortgages held by Bayhold on Community's property before any receipts were used by Clarkson to pay the expenses of the receivership (except to the extent of \$109,608.73 found by Burchell J. to have been expenditures by Clarkson for preservation of Community assets and therefore having priority over Bayhold). The appellant's argument on this issue rests on the assertion that there was an automatic crystallization of Bayhold's floating charge on Community's assets and undertaking when, on February 1, 1981, Burchell J., upon the application of Revenue Canada as a creditor of Community, appointed Clarkson receiver-manager. The appellant asserts that the "authorities are overwhelmingly" in support of this argument.

60 The learned trial judge found that there was no automatic crystallization and that Bayhold would have to have intervened by appointing its own receiver to have crystallized its floating charge. The appellant asserts that the trial judge considered none of the case law in support of their position that the floating charge had crystallized upon the appointment of Clarkson as receiver-manager. The appellant cites the following cases [and authorities] in support of the argument:

*Bank of Montreal v. Glendale (Atlantic) Ltd.* (1977), 20 N.S.R. (2d) 216 (sub nom. *Glendale (Atlantic) Ltd. v. Gentleman*), 1 B.L.R. 279, 76 D.L.R. (3d) 303 (C.A.), at pp. 250-251 [N.S.R.];

*Palmer's Company Law*, Clive M. Schmitthoff and James H. Thompson, 21st ed. (London: Steven & Sons Limited, 1968) pp. 396-397;

*Irving A. Burton Ltd. v. Canadian Imperial Bank of Commerce* (1982), 41 C.B.R. (N.S.) 217, 36 O.R. (2d) 703, 17 B.L.R. 170, 2 P.P.S.A.C. 22, 134 D.L.R. (3d) 369 (C.A.), at p. 220 [C.B.R.];

*Kerr on Receivers and Administrators*, 17th ed., pp. 50-51;

*Evans v. Rival Granite Quarries Ltd.*, [1910] 2 K.B. 979 (C.A.), at p. 1000;

*Re Crompton & Co. Ltd.*; *Player v. Crompton & Co.*, [1914] 1 Ch. 954;

Bennett, *Receiverships* (1985), p. 48;

Gough, *Company Charges* (London: Butterworths, 1978), pp. 84-86;

Lightman, G. & G. Moss, *The Law of Receivers and Companies* (London: Sweet & Maxwell, 1986), p. 28.

61 I have reviewed the authorities cited by appellant's counsel and would note that the statements referred to in the *Glendale* case are quotations from texts simply describing the nature of a floating charge and are not of great assistance in dealing with the issue before us as the statements do not address the issue whether a holder of such a charge must intervene to crystallize the floating charge. However, the statements do set out a point of view on crystallization. The general statement from *Palmer's Company Law* as referred to in the *Glendale* decision at p. 250 [N.S.R.] reads in part as follows:

Upon the happening of certain events, which are set out in the charging deed, the floating charge becomes fixed or, in technical terminology, it 'crystallizes', and thereafter the assets comprised in the charge are subject to the same restrictions as those under a specific charge. Unless otherwise agreed, a floating charge will also crystallize on the appointment of a receiver (either by the court or by a debenture holder under a power contained in the debenture) or on the commencement of winding up ...

62 In *Irving A. Burton v. Canadian Imperial Bank of Commerce*, supra, the case involved an assignment of book debts. On the facts of that case, anyone would agree that an assignment of book debts made in compliance with the applicable legislation would take priority, with respect to the book debts, over a subsequent assignment in bankruptcy.

63 With respect to the statement in *Kerr on Receivers and Administrators*, 17th ed., at pp. 50-51, the author is referring to situations in which a receiver will be appointed and does not address the issue as to when exactly a floating charge crystallizes and what is the effect of the so-called crystallization.

64 The *Crompton* case, supra, doesn't address the issue raised by the appellant in this case. In *Crompton* the debenture holders applied for and were granted an order appointing a receiver when the company ceased to do business. Here, Bayhold never applied for the appointment of a receiver.

65 With respect to the statement on p. 48 in Bennett, *Receiverships*, the author makes a general statement that "if the business ceases or is disposed of as a business, the floating charge automatically crystallizes since the debtor is no longer in business". No authority is cited by the author for this proposition but it is consistent with the statement from *Palmer* previously quoted.

66 In Gough, *Company Charges* (1978), pp. 84-85, the author states:

Since a specific charge over trading assets was considered necessarily to bring about the consequence of paralysis or stoppage of the business, it can be seen that the first moment when it might be envisaged, according to the intention of the parties as expressed in the security contract, that the process of crystallization might come about is when the business of the company for some reason or other ceases to operate on a continuing and going basis; in short, when the business stops. The business might stop by virtue of a decision made by the company management (and therefore ultimately membership), or else by virtue of the decision of any company creditor, including the creditor secured by floating charge, to initiate proceedings towards that end. The company is, respectively, either unwilling or unable any longer to appropriate its property in the ordinary course of business for purposes other than that of the security. Obviously, in either case it is the intention of the parties under the security contract, with the purpose of the floating charge having been served and the disadvantage of a specific charge over trading assets, viz., to cause a paralysis or stoppage of the business, no longer being relevant, that such circumstances constitute the natural time for the conversion of charge from being hitherto floating into a specific security.

67 I agree with the above as a general statement as to the nature, purpose and effect of a floating charge as opposed to a fixed charge.

68 In Lightman & Moss, *The Law of Receivers and Companies* (1986), p. 28, the general statement dealing with the crystallization is as follows:

A floating charge will crystallize on the appointment of a receiver (whether by the debenture-holder under the debenture or the court) or on the commencement of winding-up (even if the winding-up is merely for the purposes of reconstruction) or on the cessation of business.

69 It is to be noted that this statement is made in the context of a chapter entitled "The Basis of Appointment of Receivers"; the statement must be looked at in that light.

70 The crystallization of a floating charge means that upon the happening of some event or events the charge that had been floating over the assets becomes fixed.

71 To the extent there are conflicting views as to when a floating charge crystallizes and the effect of the same, I am attracted to the reasoning of Berger J. in *R. v. Consolidated Churchill Copper Corp.*, 30 C.B.R. (N.S.) 27, [1978] 5 W.W.R. 652, 90 D.L.R. (3d) 357 (B.C.S.C.) that before the floating charge in favour of a mortgage or debenture holder crystallizes, that is becomes fixed on all the assets and undertakings of the debtor, the holder must intervene by going into possession or by bringing an application for the appointment of a receiver.

72 In that case, Berger J. analyzed the decisions which deal with the subject of automatic crystallization including the decision in *Evans v. Rival Granite Quarries*, supra, and concluded that it was only Buckley L.J. in the *Evans* case who took the view, in obiter, that a floating charge might crystallize without intervention. Berger J. referred to L.C.B. Gower, *Modern Company Law*, 3rd ed. (1969) in which the author stated at p. 421:

Default alone will not suffice to crystallize the charge, the debenture-holders must intervene to determine the licence to the company to deal with the property, normally by appointing a receiver or by applying to the court to do so.

73 Berger J. went on to state that there has been no judgment rendered in Canada on the issue of automatic crystallization. I agree with the policy enunciated by Berger J. in the following passage from his decision (pp. 41-42 [C.B.R.]):

But there has been no judgment rendered on the question in Canada. The matter is one of first impression. So policy considerations should be placed on the scales. These considerations weigh heavily against the adoption of the motion of self-generating crystallization. In the case at bar there were numerous acts of default, going back to 1972. Brameda did not, until 14th April 1975, take the position that the floating charge had crystallized. If in truth it had crystallized back in 1972, when Brameda acquired the bank's interest in the debenture, Brameda did not treat the company thereafter as if its licence to carry on business was at an end. Brameda sought to have it both ways: to attain priority over the province's lien without putting Churchill into receivership. This shows the parlous state of affairs which would result if the concept of self-generating crystallization were to be adopted. The requirements for filing by a receiver under the *Companies Act* would be rendered a dead letter. The company would not know where it stood; neither would the company's creditors. How is anyone to know the true state of affairs between the debenture-holder and the company unless there is an unequivocal act of intervention? How can it be said that the default by the company terminated its licence to carry on business when in fact it was allowed by Brameda to carry on business for three years thereafter? If the argument were sound, the debenture-holder would be able to arrange the affairs of the company in such a way as to render it immune from executions. The debenture-holder would have all the advantages of allowing the company to continue in business and all of the advantages of intervening at one and the same time, to the prejudice of all other creditors. This contention was rejected in the *Evans* case: see Vaughan Williams L.J. at pp. 989-990, and Fletcher Moulton L.J. at p. 995.

It is my view that not in the older cases nor in the recent cases nor in the exigencies of policy is there any justification for the adoption of a concept of self-generating crystallization. If there is any practical scope for such a theory it does not extend to a case where the conduct of the debenture-holder is inconsistent with the assertion of any such claim.

This brings me back to the wording of the floating charge in the case at bar. It says that 'such floating charge shall in no way hinder or prevent the company ... until the security hereby constituted shall have become enforceable from ... dealing with the subject matter of such floating charge in the ordinary course of its business.' Condition 6 of the debenture says: 'If

the security hereby constituted shall become enforceable the Banks (Brameda) may be instrument in writing ... appoint any person ... to be a receiver ... of the property and assets hereby charged.' The point is that default by the company renders the floating charge enforceable. To that extent, default is a hindrance to the company, i.e., the debenture-holder has the right to intervene when he pleases. But in order to terminate the company's licence to carry on business, the debenture-holder must in fact intervene. This is provided for by the very language of the debenture itself. While the security may become *enforceable* on default, still the debenture-holder must intervene to *enforce* his security before it crystallizes.

74 In the case we have under consideration, the floating charge in favour of the appellant (the pledge agreement dated July 24, 1974) provides for the standard two-step process for the enforcement of the floating charge. Although the appointment of a receiver gave rise to a default just as did the failure to pay moneys due from Community to Bayhold, the terms of the pledge agreement (cl. 6 of the debenture) provided: "At any time after the happening of any event by which the security hereby constituted becomes enforceable, the chargee shall have the following rights and powers". There were then listed a number of powers Bayhold could exercise, including the power to appoint a receiver.

75 Therefore, although the charges created by the security document became enforceable upon the appointment of Clarkson, Bayhold would have to have taken proceedings under cl. 6 to appoint a receiver or exercise any of the other powers mentioned before the security would be enforced. Bayhold did not exercise its right under the provision of the security document, but allowed the hotel to be operated by Clarkson under the receiving order that had been granted. Bayhold took no formal steps to enforce the floating charge and therefore applying the decision in the *Consolidated Churchill* case, the charge did not crystallize. That means it did not become fixed, therefore Community's assets and revenues were not attached for the benefit of Bayhold other than as an uncrystallized floating charge. Bayhold cannot have it both ways; that is, allow the business to be operated by the receiver-manager without intervening itself and then subsequently take the position its floating charge had crystallized upon the appointment of Clarkson and that it was therefore entitled to all the money that went into the bank account opened by the receiver-manager in connection with its operation of the hotel. That would create an impossible and inequitable situation for all creditors and receivers.

76 Bayhold, as the first mortgagee on the realty and personalty and holder of the first floating charge on the undertaking, could have applied for the appointment of its own receiver if it wished to enforce its floating charge. It chose not to do so for the obvious reason it did not want to take on the task of providing money to run the hotel in the summer of 1981; a task which was so graciously accepted by the Canadian taxpayers.

77 In summary, for the policy reasons enunciated by Berger J. coupled with the fact that the terms of the security document held by the appellant provided separately for, (i) events of default (for example, the appointment of a receiver being in the event of a default), and (ii) enforcement; the appellant, to crystallize its floating charge security, would have had to intervene by application to appoint a receiver of its own or have gone into possession. The appellant did not make any such application to court, nor did it go into possession until after it acquired the hotel at the sheriff's sale. Therefore, I reject the appellant's argument that it was entitled to all revenues that came into the hands of Clarkson while operating the hotel.

78 Bayhold also argues that because it did not get notice of Revenue Canada's application to the court to appoint Clarkson receiver-manager, Bayhold is entitled to all moneys received by Clarkson during the receivership. The appellant relies on the case of *Robert F. Kowal Investments Ltd. v. Deeder Electric Ltd.* (1975), 21 C.B.R. (N.S.) 210, 9 O.R. (2d) 84, 59 D.L.R. (3d) 492 (C.A.). The *Kowal* case does not support the appellant's argument. In the *Kowal* case the Ontario Court of Appeal simply said a receiver-manager could not have a charge against the mortgagee's security for the amounts that the receiver-manager had paid to the mortgagee during the period of the receivership as the payments were not made for the preservation of the property and therefore not for the benefit of all the creditors. In the case we have under consideration, Clarkson's expenditures in operating the hotel were for the benefit of all the creditors and Clarkson did not get priority over Bayhold against the hotel assets except to the extent of the preservation expenses in the amount of \$109,608.73. Bayhold, by commencing foreclosure proceedings and having the real property sold by the sheriff, realized on its security against the real property. However, the surplus from the sheriff's sale and the realization from the sale of the hotel chattels was insufficient to pay Clarkson's "preservation expenses". Other than with respect to the "preservation expenses", the receiver-manager did not subject Bayhold's security to recover the receiver-manager's expenditures in operating the hotel; these expenses were paid out of the borrowings from the Toronto-Dominion



Bank and advances from Revenue Canada. In summary, the *Kowal* case does not stand for the proposition that all revenues or realizations on the sale of assets during a receivership must be turned over to a creditor with an uncrystallized floating charge against the assets and undertaking of the company in receivership simply because the holder of the floating charge was not given notice of the application to appoint a receiver-manager.

79 In summary in Issue 5, Bayhold does not have priority over Clarkson for moneys disbursed by Clarkson during the receivership.

#### **Issue 6**

80 As framed by the appellant: "Is Clarkson liable to Bayhold for the damage to the building caused by fires and a flood during the receivership?"

81 During receivership there were two fires which caused damage to the boiler room and the Sadat Room (a conference room). Clarkson received and kept the fire insurance proceeds of \$13,773.07. Clarkson did not repair all the damage to the boiler room because it was not necessary for the operation of the hotel.

82 With respect to the flood damage, the following facts are relevant. The hotel had been closed on November 3, 1981, and the heat turned down. On January 13, 1982, Bayhold purchased the hotel at the sheriff's sale. Mr. Scouler had undertaken to one of the counsel for Bayhold to keep the hotel premises safe and secure. On January 20, 1982, a Ms Bagnell, who was employed by Clarkson at the time, before leaving the hotel during a period of cold weather decided it would be prudent to flush some of the toilets to loosen up any ice clogging the pipes as the heat had been turned back. During the night the pipes froze and there was substantial damage done.

83 As Bayhold wished to sell the hotel as a going concern, it allowed Mr. Rahey to go into possession and operate the hotel. Mr. Rahey repaired most of the fire and flood damage caused during the receivership. The appellant asserts that Mr. Rahey did so at a cost of \$125,000 and that Mr. Rahey was setting this off against Community's outstanding mortgage debt to Bayhold. Bayhold claims \$125,000 from the respondents which it says it owes to Rahey for the work to repair the fire and flood damage. The learned trial judge found that the care of the hotel by Clarkson in this period was adequate under the circumstances and that none of the physical damage was caused by the negligence of Clarkson. The trial judge also concluded that Bayhold had not suffered recoverable damages as a result of the actions even if Clarkson had been negligent.

84 With respect to the claim of \$125,000 the respondents make the following points in their factum:

Bayhold claims that in 1982-83 Rahey repaired damages sustained by the hotel during the receivership, at a cost of some \$125,000.00. Bayhold further claims that Rahey is now 'setting-off' these repairs as against his debt to Bayhold. It seeks damages in the same amount as against Clarkson as a result. Clarkson makes the following points in response:

- (a) The learned trial judge found as a matter of fact that Clarkson had maintained adequate precautions and performed adequate remedial measures and was not responsible in negligence for any physical damage to the hotel;
- (b) Little or no evidence was provided with respect to repairs performed by Rahey, or the value of any such repairs;
- (c) Little or no evidence was provided with respect to any attempt by Mr. Rahey to set-off the amount of any such repairs as against Bayhold. Mr. Rahey had not claimed the cost of repairs as against Bayhold in the eight years which had elapsed since repairs allegedly took place;
- (d) Both Alan Feldman and Gordon MacLean testified that Rahey operated the hotel on the basis that he would contribute necessary repairs, pay mortgage interest, and pay most operating expenses and, in return, be entitled to keep all hotel revenue. *By Bayhold's own evidence, accordingly, Rahey has no basis to claim the cost of any repairs as against Bayhold.*

[Emphasis added.]

85 I am satisfied based on the points made by the respondents, as set out above, that the learned trial judge did not commit error when he concluded that Clarkson was not responsible to Bayhold for the \$125,000. The evidence does not support a finding for the appellant on this issue. By Bayhold's own evidence the damage was repaired by Rahey pursuant to the agreement they made with him. Based on that agreement alone, Mr. Rahey has no right of recovery against Bayhold for any expenditures made to repair the fire and flood damage while he was operating the hotel. Mr. Rahey has not commenced an action in which he has made such a claim. The evidence supports the trial judge's conclusion that Bayhold did not suffer recoverable damage as a result of the actions of Clarkson.

86 In summary, I would dismiss the appeal with costs to the respondents to be taxed.

*Appeal dismissed.*

TAB 4

2019 ONCA 508  
Ontario Court of Appeal

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.

2019 CarswellOnt 9683, 2019 ONCA 508, [2019] O.J. No. 3211, 11 P.P.S.A.C. (4th) 11,  
306 A.C.W.S. (3d) 235, 3 R.P.R. (6th) 175, 435 D.L.R. (4th) 416, 70 C.B.R. (6th) 181

**Third Eye Capital Corporation (Applicant / Respondent) and  
Ressources Dianor Inc. /Dianor Resources Inc. (Respondent /  
Respondent) and 2350614 Ontario Inc. (Interested Party / Appellant)**

S.E. Pepall, P. Lauwers, Grant Huscroft JJ.A.

Heard: September 17, 2018

Judgment: June 19, 2019

Docket: CA C62925

Proceedings: affirming *Third Eye Capital Corp. v. Dianor Resources Inc.* (2016), 41 C.B.R. (6th) 320, 2016 CarswellOnt 15947, 2016 ONSC 6086, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Third Eye Capital Corp. v. Ressources Dianor Inc. / Dianor Resources Inc.* (2016), 2016 CarswellOnt 18827, 2016 ONSC 7112, 42 C.B.R. (6th) 269, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter L. Roy, Sean Grayson, for Appellant, 2350614 Ontario Inc.

Shara Roy, Nilou Nezhat, for Respondent, Third Eye Capital Corporation

Stuart Brotman, Dylan Chochla, for Receiver of Respondent, Ressources Dianor Inc./Dianor Resources Inc., Richter Advisory Group Inc.

Nicholas Kluge, for Monitor of Essar Steel Algoma Inc., Ernst & Young Inc.

Steven J. Weisz, for Intervener, Insolvency Institute of Canada

***S.E. Pepall J.A.:***

**Introduction**

1 There are two issues that arise on this appeal. The first issue is simply stated: can a third party interest in land in the nature of a Gross Overriding Royalty ("GOR") be extinguished by a vesting order granted in a receivership proceeding? The second issue is procedural. Does the appeal period in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA") or the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("CJA") govern the appeal from the order of the motion judge in this case?

2 These reasons relate to the second stage of the appeal from the decision of the motion judge. The first stage of the appeal was the subject matter of the first reasons released by this court: see *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2018 ONCA 253, 141 O.R. (3d) 192 (Ont. C.A.) ("First Reasons"). As a number of questions remained unanswered, further submissions were required. These reasons resolve those questions.

**Background**

3 The facts underlying this appeal may be briefly outlined.

4 On August 20, 2015, the court appointed Richter Advisory Group Inc. ("the Receiver") as receiver of the assets, undertakings and properties of Dianor Resources Inc. ("Dianor"), an insolvent exploration company focused on the acquisition and exploitation of mining properties in Canada. The appointment was made pursuant to s. 243 of the BIA and s. 101 of the

[CJA](#), on the application of Dianor's secured lender, the respondent Third Eye Capital Corporation ("Third Eye") who was owed approximately \$5.5 million.

5 Dianor's main asset was a group of mining claims located in Ontario and Quebec. Its flagship project is located near Wawa, Ontario. Dianor originally entered into agreements with 3814793 Ontario Inc. ("381 Co.") to acquire certain mining claims. 381 Co. was a company controlled by John Leadbetter, the original prospector on Dianor's properties, and his wife, Paulette A. Mousseau-Leadbetter. The agreements provided for the payment of GORs for diamonds and other metals and minerals in favour of the appellant 2350614 Ontario Inc. ("235 Co."), another company controlled by John Leadbetter.<sup>1</sup> The mining claims were also subject to royalty rights for all minerals in favour of Essar Steel Algoma Inc. ("Algoma"). Notices of the agreements granting the GORs and the royalty rights were registered on title to both the surface rights and the mining claims. The GORs would not generate any return to the GOR holder in the absence of development of a producing mine. Investments of at least \$32 million to determine feasibility, among other things, are required before there is potential for a producing mine.

6 Dianor also obtained the surface rights to the property under an agreement with 381 Co. and Paulette A. Mousseau-Leadbetter. Payment was in part met by a vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd., another Leadbetter company. Subsequently, though not evident from the record that it was the mortgagee, 1778778 Ontario Inc. ("177 Co."), another Leadbetter company, demanded payment under the mortgage and commenced power of sale proceedings. The notice of sale referred to the vendor take-back mortgage in favour of 381 Co., Paulette A. Mousseau-Leadbetter, and 1584903 Ontario Ltd. A transfer of the surface rights was then registered from 177 Co. to 235 Co. In the end result, in addition to the GORs, 235 Co. purports to also own the surface rights associated with the mining claims of Dianor.<sup>2</sup>

7 Dianor ceased operations in December 2012. The Receiver reported that Dianor's mining claims were not likely to generate any realization under a liquidation of the company's assets.

8 On October 7, 2015, the motion judge sitting on the Commercial List, and who was supervising the receivership, made an order approving a sales process for the sale of Dianor's mining claims. The process generated two bids, both of which contained a condition that the GORs be terminated or impaired. One of the bidders was Third Eye. On December 11, 2015, the Receiver accepted Third Eye's bid conditional on obtaining court approval.

9 The purchase price consisted of a \$2 million credit bid, the assumption of certain liabilities, and \$400,000 payable in cash, \$250,000 of which was to be distributed to 235 Co. for its GORs and the remaining \$150,000 to Algoma for its royalty rights. The agreement was conditional on extinguishment of the GORs and the royalty rights. It also provided that the closing was to occur within two days after the order approving the agreement and transaction and no later than August 31, 2016, provided the order was then not the subject of an appeal. The agreement also made time of the essence. Thus, the agreement contemplated a closing prior to the expiry of any appeal period, be it 10 days under the [BIA](#) or 30 days under the [CJA](#). Of course, assuming leave to appeal was not required, a stay of proceedings could be obtained by simply serving a notice of appeal under the [BIA](#) (pursuant to [s. 195 of the BIA](#)) or by applying for a stay under [r. 63.02 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194](#).

10 On August 9, 2016, the Receiver applied to the court for approval of the sale to Third Eye and, at the same time, sought a vesting order that purported to extinguish the GORs and Algoma's royalty rights as required by the agreement of purchase and sale. The agreement of purchase and sale, which included the proposed terms of the sale, and the draft sale approval and vesting order were included in the Receiver's motion record and served on all interested parties including 235 Co.

11 The motion judge heard the motion on September 27, 2016. 235 Co. did not oppose the sale but asked that the property that was to be vested in Third Eye be subject to its GORs. All other interested parties including Algoma supported the proposed sale approval and vesting order.

12 On October 5, 2016, the motion judge released his reasons. He held that the GORs did not amount to interests in land and that he had jurisdiction under the [BIA](#) and the [CJA](#) to order the property sold and on what terms: at para. 37. In any event, he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. He granted the sale approval and vesting order vesting the property in Third Eye and ordering that on payment

of \$250,000 and \$150,000 to 235 Co. and Algoma respectively, their interests were extinguished. The figure of \$250,000 was based on an expert valuation report and 235 Co.'s acknowledgement that this represented fair market value.<sup>3</sup>

13 Although it had in its possession the terms of the agreement of purchase and sale including the closing provision, upon receipt of the motion judge's decision on October 5, 2016, 235 Co. did nothing. It did not file a notice of appeal which under [s. 195 of the BIA](#) would have entitled it to an automatic stay. Nor did it advise the other parties that it was planning to appeal the decision or bring a motion for a stay of the sale approval and vesting order in the event that it was not relying on the [BIA](#) appeal provisions.

14 For its part, the Receiver immediately circulated a draft sale approval and vesting order for approval as to form and content to interested parties. A revised draft was circulated on October 19, 2016. The drafts contained only minor variations from the draft order included in the motion materials. In the absence of any response from 235 Co., the Receiver was required to seek an appointment to settle the order. However, on October 26, 2016, 235 Co. approved the order as to form and content, having made no changes. The sale approval and vesting order was issued and entered on that same day and then circulated.

15 On October 26, 2016, for the first time, 235 Co. advised counsel for the Receiver that "an appeal is under consideration" and asked the Receiver for a deferral of the cancellation of the registered interests. In two email exchanges, counsel for the Receiver responded that the transaction was scheduled to close that afternoon and 235 Co.'s counsel had already had ample time to get instructions regarding any appeal. Moreover, the Receiver stated that the appeal period "is what it is" but that the approval order was not stayed during the appeal period. Counsel for 235 Co. did not respond and took no further steps. The Receiver, on the demand of the purchaser Third Eye, closed the transaction later that same day in accordance with the terms of the agreement of purchase and sale. The mining claims of Dianor were assigned by Third Eye to 2540575 Ontario Inc. There is nothing in the record that discloses the relationship between Third Eye and the assignee. The Receiver was placed in funds by Third Eye, the sale approval and vesting order was registered on title and the GORs and the royalty interests were expunged from title. That same day, the Receiver advised 235 Co. and Algoma that the transaction had closed and requested directions regarding the \$250,000 and \$150,000 payments.

16 On November 3, 2016, 235 Co. served and filed a notice of appeal of the sale approval and vesting order. It did not seek any extension of time to appeal. 235 Co. filed its notice of appeal 29 days after the motion judge's October 5, 2016 decision and 8 days after the order was signed, issued and entered.

17 Algoma's Monitor in its [Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 \("CCAA"\)](#) proceedings received and disbursed the funds allocated to Algoma. The \$250,000 allocated to 235 Co. are held in escrow by its law firm pending the resolution of this appeal.

### **Proceedings Before This Court**

18 On appeal, this court disagreed with the motion judge's determination that the GORs did not amount to interests in land: see First Reasons, at para. 9. However, due to an inadequate record, a number of questions remained to be answered and further submissions and argument were requested on the following issues:

- (1) Whether and under what circumstances and limitations a Superior Court judge has jurisdiction to extinguish a third party's interest in land, using a vesting order, under [s. 100 of the CJA](#) and [s. 243 of the BIA](#), where [s. 65.13\(7\) of the BIA](#); [s. 36\(6\) of the CCAA](#); [ss. 66\(1.1\) and 84.1 of the BIA](#); or [s. 11.3 of the CCAA](#) do not apply;
- (2) If such jurisdiction does not exist, should this court order that the Land Title register be rectified to reflect 235 Co.'s ownership of the GORs or should some other remedy be granted; and
- (3) What was the applicable time within which 235 Co. was required to appeal and/or seek a stay and did 235 Co.'s communication that it was considering an appeal affect the rights of the parties.

19 The Insolvency Institute of Canada was granted intervener status. It describes itself as a non-profit, non-partisan and non-political organization comprised of Canada's leading insolvency and restructuring professionals.

### ***A. Jurisdiction to Extinguish an Interest in Land Using a Vesting Order***

#### ***(1) Positions of Parties***

20 The appellant 235 Co. initially took the position that no authority exists under [s. 100 of the CJA](#), [s. 243 of BIA](#), or the court's inherent jurisdiction to extinguish a real property interest that does not belong to the company in receivership. However, in oral argument, counsel conceded that the court did have jurisdiction under [s. 100 of the CJA](#) but the motion judge exercised that jurisdiction incorrectly. 235 Co. adopted the approach used by Wilton-Siegel J. in *Romspen Investment Corp. v. Woods Property Development Inc.*, [2011 ONSC 3648](#), [75 C.B.R. \(5th\) 109](#) (Ont. S.C.J.), at para. 190, rev'd on other grounds, [2011 ONCA 817](#), [286 O.A.C. 189](#) (Ont. C.A.). It took the position that if the real property interest is worthless, contingent, or incomplete, the court has jurisdiction to extinguish the interest. However here, 235 Co. held complete and non-contingent title to the GORs and its interest had value.

21 In response, the respondent Third Eye states that a broad purposive interpretation of [s. 243 of the BIA](#) and [s. 100 of the CJA](#) allows for extinguishment of the GORs. Third Eye also relies on the court's inherent jurisdiction in support of its position. It submits that without a broad and purposive approach, the statutory insolvency provisions are unworkable. In addition, the *Conveyancing and Law of Property Act*, R.S.O. 1990, c. C. 34 ("CLPA") provides a mechanism for rights associated with an encumbrance to be channelled to a payment made into court. Lastly, Third Eye submits that if the court accedes to the position of 235 Co., Dianor's asset and 235 Co.'s GORs will waste. In support of this argument, Third Eye notes there were only two bids for Dianor's mining claims, both of which required the GORs to be significantly reduced or eliminated entirely. For its part, Third Eye states that "there is no deal with the GORs on title" as its bid was contingent on the GORs being vested off.

22 The respondent Receiver supports the position taken by Third Eye that the motion judge had jurisdiction to grant the order vesting off the GORs and that he appropriately exercised that jurisdiction in granting the order under [s. 243 of the BIA](#) and, in the alternative, the court's inherent jurisdiction.

23 The respondent Algoma supports the position advanced by Third Eye and the Receiver. Both it and 235 Co. have been paid and the Monitor has disbursed the funds paid to Algoma. The transaction cannot now be unwound.

24 The intervener, the Insolvency Institute of Canada, submits that a principled approach to vesting out property in insolvency proceedings is critical for a properly functioning restructuring regime. It submits that the court has inherent and equitable jurisdiction to extinguish third party proprietary interests, including interests in land, by utilizing a vesting order as a gap-filling measure where the applicable statutory instrument is silent or may not have dealt with the matter exhaustively. The discretion is a narrow but necessary power to prevent undesirable outcomes and to provide added certainty in insolvency proceedings.

#### ***(2) Analysis***

##### ***(a) Significance of Vesting Orders***

25 To appreciate the significance of vesting orders, it is useful to describe their effect. A vesting order "effects the transfer of purchased assets to a purchaser on a *free and clear* basis, while preserving the relative priority of competing claims against the debtor vendor with respect to the proceeds generated by the sale transaction" (emphasis in original): David Bish & Lee Cassey, "Vesting Orders Part 1: The Origins and Development" (2015) 32:4 Nat'l. Insolv. Rev. 41, at p. 42 ("Vesting Orders Part 1"). The order acts as a conveyance of title and also serves to extinguish encumbrances on title.

26 A review of relevant literature on the subject reflects the pervasiveness of vesting orders in the insolvency arena. Luc Morin and Nicholas Mancini describe the common use of vesting orders in insolvency practice in "Nothing Personal: the *Bloom Lake* Decision and the Growing Outreach of Vesting Orders Against *in personam* Rights" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2017* (Toronto: Thomson Reuters, 2018) 905, at p. 938:

Vesting orders are now commonly being used to transfer entire businesses. Savvy insolvency practitioners have identified this path as being less troublesome and more efficient than having to go through a formal plan of arrangement or *BIA* proposal.

27 The significance of vesting orders in modern insolvency practice is also discussed by Bish and Cassey in "Vesting Orders Part 1", at pp. 41-42:

Over the past decade, a paradigm shift has occurred in Canadian corporate insolvency practice: there has been a fundamental transition in large cases from a dominant model in which a company restructures its business, operations, and liabilities through a plan of arrangement approved by each creditor class, to one in which a company instead conducts a sale of all or substantially all of its assets on a going concern basis outside of a plan of arrangement . . .

Unquestionably, this profound transformation would not have been possible without the *vesting order*. It is the cornerstone of the modern "restructuring" age of corporate asset sales and secured creditor realizations . . . The vesting order is the holy grail sought by every purchaser; it is the carrot dangled by debtors, court officers, and secured creditors alike in pursuing and negotiating sale transactions. If Canadian courts elected to stop granting vesting orders, the effect on the insolvency practice would be immediate and extraordinary. Simply put, the system could not function in its present state without vesting orders. [Emphasis in original.]

28 The authors emphasize that a considerable portion of Canadian insolvency practice rests firmly on the granting of vesting orders: see David Bish & Lee Cassey, "Vesting Orders Part 2: The Scope of Vesting Orders" (2015) 32:5 Nat'l Insolv. Rev. 53, at p. 56 ("Vesting Orders Part 2"). They write that the statement describing the unique nature of vesting orders reproduced from Houlden, Morawetz and Sarra (and cited at para. 109 of the reasons in stage one of this appeal)<sup>4</sup> which relied on 1985 and 2003 decisions from Saskatchewan is remarkable and bears little semblance to the current practice. The authors do not challenge or criticize the use of vesting orders. They make an observation with which I agree, at p. 65, that: "a more transparent and conscientious application of the formative equitable principles and considerations relating to vesting orders will assist in establishing a proper balancing of interests and a framework understood by all participants."

### **(b) Potential Roots of Jurisdiction**

29 In analysing the issue of whether there is jurisdiction to extinguish 235 Co.'s GORs, I will first address the possible roots of jurisdiction to grant vesting orders and then I will examine how the legal framework applies to the factual scenario engaged by this appeal.

30 As mentioned, in oral submissions, the appellant conceded that the motion judge had jurisdiction; his error was in exercising that jurisdiction by extinguishing a property interest that belonged to 235 Co. Of course, a party cannot confer jurisdiction on a court on consent or otherwise, and I do not draw on that concession. However, as the submissions of the parties suggest, there are various potential sources of jurisdiction to vest out the GORs: *s. 100 of the CJA*, *s. 243 of the BIA*, *s. 21 of the CLPA*, and the court's inherent jurisdiction. I will address the first three potential roots for jurisdiction. As I will explain, it is unnecessary to resort to reliance on inherent jurisdiction.

### **(c) The Hierarchical Approach to Jurisdiction in the Insolvency Context**

31 Before turning to an analysis of the potential roots of jurisdiction, it is important to consider the principles which guide a court's determination of questions of jurisdiction in the insolvency context. In *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 65, Deschamps J. adopted the hierarchical approach to addressing the court's jurisdiction in insolvency matters that was espoused by Justice Georgina R. Jackson and Professor Janis Sarra in their article "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters" in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Carswell, 2008) 41. The authors suggest that in addressing under-inclusive or skeletal legislation, first one "should engage in statutory interpretation to determine the limits of authority, adopting a broad, liberal and purposive interpretation that may reveal that authority": at p.



42. Only then should one turn to inherent jurisdiction to fill a possible gap. "By determining first whether the legislation can bear a broad and liberal interpretation, judges may avoid the difficulties associated with the exercise of inherent jurisdiction": at p. 44. The authors conclude at p. 94:

On the authors' reading of the commercial jurisprudence, the problem most often for the court to resolve is that the legislation in question is under-inclusive. It is not ambiguous. It simply does not address the application that is before the court, or in some cases, grants the court the authority to make any order it thinks fit. While there can be no magic formula to address this recurring situation, and indeed no one answer, it appears to the authors that practitioners have available a number of tools to accomplish the same end. In determining the right tool, it may be best to consider the judicial task as if in a hierarchy of judicial tools that may be deployed. The first is examination of the statute, commencing with consideration of the precise wording, the legislative history, the object and purposes of the Act, perhaps a consideration of Driedger's principle of reading the words of the Act in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament, and a consideration of the gap-filling power, where applicable. It may very well be that this exercise will reveal that a broad interpretation of the legislation confers the authority on the court to grant the application before it. Only after exhausting this statutory interpretative function should the court consider whether it is appropriate to assert an inherent jurisdiction. Hence, inherent jurisdiction continues to be a valuable tool, but not one that is necessary to utilize in most circumstances.

32 Elmer A. Driedger's now famous formulation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *The Construction of Statutes* (Toronto: Butterworth's, 1974), at p. 67. See also *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; *Montreal (Ville) v. 2952-1366 Québec inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141 (S.C.C.), at para. 9. This approach recognizes that "statutory interpretation cannot be founded on the wording of the legislation alone": *Rizzo*, at para. 21.

#### (d) Section 100 of the CJA

33 This brings me to the CJA. In Ontario, the power to grant a vesting order is conferred by s. 100 of the CJA which states that:

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

34 The roots of s. 100 and vesting orders more generally, can be traced to the courts of equity. Vesting orders originated as a means to enforce an order of the Court of Chancery which was a court of equity. In 1857, *An Act for further increasing the efficiency and simplifying the proceedings of the Court of Chancery*, c. 1857, c. 56, s. VIII was enacted. It provided that where the court had power to order the execution of a deed or conveyance of a property, it now also had the power to make a vesting order for such property.<sup>5</sup> In other words, it is a power to vest property from one party to another in order to implement the order of the court. As explained by this court in *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 O.R. (3d) 641 (Ont. C.A.), at para. 281, leave to appeal refused, [2001] S.C.C.A. No. 63 (S.C.C.), the court's statutory power to make a vesting order supplemented its contempt power by allowing the court to effect a change of title in circumstances where the parties had been directed to deal with property in a certain manner but had failed to do so. Vesting orders are equitable in origin and discretionary in nature: *Chippewas*, at para. 281.

35 Blair J.A. elaborated on the nature of vesting orders in *Regal Constellation Hotel Ltd., Re* (2004), 71 O.R. (3d) 355 (Ont. C.A.), at para. 33:

A vesting order, then, had a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order).

36 Frequently vesting orders would arise in the context of real property, family law and wills and estates. *Trick v. Trick* (2006), 81 O.R. (3d) 241 (Ont. C.A.), leave to appeal refused, (2007), [2006] S.C.C.A. No. 388 (S.C.C.), involved a family

law dispute over the enforcement of support orders made under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.). The motion judge in *Trick* had vested 100 per cent of the appellant's private pension in the respondent in order to enforce a support order. In granting the vesting order, the motion judge relied in part on s. 100 of the *CJA*. On appeal, the appellant argued that the vesting order contravened s. 66(4) of the *Pension Benefits Act*, R.S.O. 1990, c. P. 8 which permitted execution against a pension benefit to enforce a support order only up to a maximum of 50 per cent of the benefit. This court allowed the appeal and held that a vesting order under s. 100 of the *CJA* could not be granted where to do so would contravene a specific provision of the *Pension Benefits Act*: at para. 16. Lang J.A. stated at para. 16 that even if a vesting order was available in equity, that relief should be refused where it would conflict with the specific provisions of the *Pension Benefits Act*. In *obiter*, she observed that s. 100 of the *CJA* "does not provide a free standing right to property simply because the court considers that result equitable": at para. 19.

37 The motion judge in the case under appeal rejected the applicability of *Trick* stating, at para. 37:

That case [*Trick*] i[s] not the same as this case. In that case, there was no right to order the CPP and OAS benefits to be paid to the wife. In this case, the BIA and the *Courts of Justice Act* give the Court that jurisdiction to order the property to be sold and on what terms. Under the receivership in this case, Third Eye is entitled to be the purchaser of the assets pursuant to the bid process authorized by the Court.

38 It is unclear whether the motion judge was concluding that either statute provided jurisdiction or that together they did so.

39 Based on the *obiter* in *Trick*, absent an independent basis for jurisdiction, the *CJA* could not be the sole basis on which to grant a vesting order. There had to be some other root for jurisdiction in addition to or in place of the *CJA*.

40 In their article "Vesting Orders Part 1", Bish and Cassey write at p. 49:

Section 100 of the *CJA* is silent as to any transfer being on a *free and clear* basis. There appears to be very little written on this subject, but, presumably, the power would flow from the court being a court of equity and from the very practical notion that it, pursuant to its equitable powers, can issue a vesting order transferring assets and should, correspondingly, have the power to set the terms of such transfer so long as such terms accord with the principles of equity. [Emphasis in original.]

41 This would suggest that provided there is a basis on which to grant an order vesting property in a purchaser, there is a power to vest out interests on a free and clear basis so long as the terms of the order are appropriate and accord with the principles of equity.

42 This leads me to consider whether jurisdiction exists under s. 243 of the *BIA* both to sell assets and to set the terms of the sale including the granting of a vesting order.

#### **(e) Section 243 of the BIA**

43 The *BIA* is remedial legislation and should be given a liberal interpretation to facilitate its objectives: *Ford Credit Canada Ltd. v. Welcome Ford Sales Ltd.*, 2011 ABCA 158, 505 A.R. 146 (Alta. C.A.), at para. 43; *Nautical Data International Inc., Re*, 2005 NLTD 104, 249 Nfld. & P.E.I.R. 247 (N.L. T.D.), at para. 9; *Bell, Re*, 2013 ONSC 2682 (Ont. S.C.J.), at para. 125; and *Scenna v. Gurizzan* (1999), 11 C.B.R. (4th) 293 (Ont. S.C.J.), at para. 4. Within this context, and in order to understand the scope of s. 243, it is helpful to review the wording, purpose, and history of the provision.

#### ***The Wording and Purpose of s. 243***

44 Section 243 was enacted in 2005 and came into force in 2009. It authorizes the court to appoint a receiver where it is "just or convenient" to do so. As explained by the Supreme Court in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419 (S.C.C.), prior to 2009, receivership proceedings involving assets in more than one province were complicated by the simultaneous proceedings that were required in different jurisdictions. There had been no legislative provision authorizing the appointment of a receiver with authority to act nationally. Rather, receivers were appointed under provincial statutes, such as the *CJA*, which resulted in a requirement to obtain separate appointments in each province or territory where the debtor had assets. "Because of the inefficiency resulting from this multiplicity of proceedings, the federal

government amended its bankruptcy legislation to permit their consolidation through the appointment of a national receiver": *Lemare Lake Logging*, at para. 1. Section 243 was the outcome.

45 Under s. 243, the court may appoint a receiver to, amongst other things, take any other action that the court considers advisable. Specifically, s. 243(1) states:

243(1). Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

- (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
- (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,
- (c) take any other action that the court considers advisable.

46 "Receiver" is defined very broadly in s. 243(2), the relevant portion of which states:

243(2) [I]n this Part, *receiver* means a person who

- (a) is appointed under subsection (1); or
- (b) is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt — under
  - (i) an agreement under which property becomes subject to a security (in this Part referred to as a "security agreement"), or
  - (ii) a court order made under another Act of Parliament, or an Act of a legislature of a province, that provides for or authorizes the appointment of a receiver or a receiver — manager. [Emphasis in original.]

47 *Lemare Lake Logging* involved a constitutional challenge to Saskatchewan's farm security legislation. The Supreme Court concluded, at para. 68, that s. 243 had a simple and narrow purpose: the establishment of a regime allowing for the appointment of a national receiver and the avoidance of a multiplicity of proceedings and resulting inefficiencies. It was not meant to circumvent requirements of provincial laws such as the 150 day notice of intention to enforce requirement found in the Saskatchewan legislation in issue.

### ***The History of s. 243***

48 The origins of s. 243 can be traced back to [s. 47 of the BIA](#) which was enacted in 1992. Before 1992, typically in Ontario, receivers were appointed privately or under [s. 101 of the CJA](#) and s. 243 was not in existence.

49 In 1992, [s. 47\(1\) of the BIA](#) provided for the appointment of an interim receiver when the court was satisfied that a secured creditor had or was about to send a notice of intention to enforce security pursuant to s. 244(1). Section 47(2) provided that the court appointing the interim receiver could direct the interim receiver to do any or all of the following:

47(2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:

- (a) take possession of all or part of the debtor's property mentioned in the appointment;
- (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and

(c) take such other action as the court considers advisable.

50 The language of this subsection is similar to that now found in s. 243(1).

51 Following the enactment of s. 47(2), the courts granted interim receivers broad powers, and it became common to authorize an interim receiver to both operate and manage the debtor's business, and market and sell the debtor's property: Frank Bennett, *Bennett on Bankruptcy*, 21st ed. (Toronto: LexisNexis, 2019), at p. 205; Roderick J. Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015), at pp. 505-506.

52 Such powers were endorsed by judicial interpretation of s. 47(2). Notably, in *Canada (Minister of Indian Affairs & Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. Gen. Div. [Commercial List]), Farley J. considered whether the language in s. 47(2)(c) that provided that the court could "direct an interim receiver . . . to . . . take such other action as the court considers advisable", permitted the court to call for claims against a mining asset in the Yukon and bar claims not filed by a specific date. He determined that it did. He wrote, at p. 185:

It would appear to me that Parliament did not take away any inherent jurisdiction from the Court but in fact provided, with these general words, that the Court could enlist the services of an interim receiver to do not only what "justice dictates" but also what "practicality demands." It should be recognized that where one is dealing with an insolvency situation one is not dealing with matters which are neatly organized and operating under predictable discipline. Rather the condition of insolvency usually carries its own internal seeds of chaos, unpredictability and instability.

See also *Loewen Group Inc., Re* (2001), 22 B.L.R. (3d) 134 (Ont. S.C.J. [Commercial List])<sup>6</sup>.

53 Although Farley J. spoke of inherent jurisdiction, given that his focus was on providing meaning to the broad language of the provision in the context of Parliament's objective to regulate insolvency matters, this might be more appropriately characterized as statutory jurisdiction under Jackson and Sarra's hierarchy. Farley J. concluded that the broad language employed by Parliament in s. 47(2)(c) provided the court with the ability to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands".

54 In the intervening period between the 1992 amendments which introduced s. 47, and the 2009 amendments which introduced s. 243, the BIA receivership regime was considered by the Standing Senate Committee on Banking, Trade and Commerce ("Senate Committee"). One of the problems identified by the Senate Committee, and summarized in *Lemare Lake Logging*, at para. 56, was that "in many jurisdictions, courts had extended the power of interim receivers to such an extent that they closely resembled those of court-appointed receivers." This was a deviation from the original intention that interim receivers serve as "temporary watchdogs" meant to "protect and preserve" the debtor's estate and the interests of the secured creditor during the 10 day period during which the secured creditor was prevented from enforcing its security: *Big Sky Living Inc., Re*, 2002 ABQB 659, 318 A.R. 165 (Alta. Q.B.), at paras. 7-8; Standing Senate Committee on Banking, Trade and Commerce, *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (Ottawa: Senate of Canada, 2003), at pp. 144-145 ("Senate Committee Report").<sup>7</sup>

55 Parliament amended s. 47(2) through the *Insolvency Reform Act* 2005 and the *Insolvency Reform Act* 2007 which came into force on September 18, 2009.<sup>8</sup> The amendment both modified the scope and powers of interim receivers, and introduced a receivership regime that was national in scope under s. 243.

56 Parliament limited the powers conferred on interim receivers by removing the jurisdiction under s. 47(2)(c) authorizing an interim receiver to "take such other action as the court considers advisable". At the same time, Parliament introduced s. 243. Notably Parliament adopted substantially the same broad language removed from the old s. 47(2)(c) and placed it into s. 243. To repeat,

243(1). On application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or,

(c) take any other action that the court considers advisable. [Emphasis added.]

57 When Parliament enacted s. 243, it was evident that courts had interpreted the wording "take such other action that the court considers advisable" in s. 47(2)(c) as permitting the court to do what "justice dictates" and "practicality demands". As the Supreme Court observed in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.): "It is a well-established principle that the legislature is presumed to have a mastery of existing law, both common law and statute law". Thus, Parliament's deliberate choice to import the wording from s. 47(2)(c) into s. 243(1)(c) must be considered in interpreting the scope of jurisdiction under [s. 243\(1\) of the BIA](#).

58 Professor Wood in his text, at p. 510, suggests that in importing this language, Parliament's intention was that the wide-ranging orders formerly made in relation to interim receivers would be available to s. 243 receivers:

The court may give the receiver the power to take possession of the debtor's property, exercise control over the debtor's business, and take any other action that the court thinks advisable. This gives the court the ability to make the same wide-ranging orders that it formerly made in respect of interim receivers, including the power to sell the debtor's property out of the ordinary course of business by way of a going-concern sale or a break-up sale of the assets. [Emphasis added.]

59 However, the language in s. 243(1) should also be compared with the language used by Parliament in [s. 65.13\(7\) of the BIA](#) and [s. 36 of the CCAA](#). Both of these provisions were enacted as part of the same 2009 amendments that established s. 243.

60 In [s. 65.13\(7\), the BIA](#) contemplates the sale of assets during a proposal proceeding. This provision expressly provides authority to the court to: (i) authorize a sale or disposition (ii) free and clear of any security, charge or other restriction, and (iii) if it does, order the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

61 The language of [s. 36\(6\) of the CCAA](#) which deals with the sale or disposition of assets of a company under the protection of the [CCAA](#) is identical to that of [s. 65.13\(7\) of the BIA](#).

62 [Section 243 of the BIA](#) does not contain such express language. Rather, as mentioned, s. 243(1)(c) simply uses the language "take any other action that the court considers advisable".

63 This squarely presents the problem identified by Jackson and Sarra: the provision is not ambiguous. It simply does not address the issue of whether the court can issue a vesting order under [s. 243 of the BIA](#). Rather, s. 243 uses broad language that grants the court the authority to authorize any action it considers advisable. The question then becomes whether this broad wording, when interpreted in light of the legislative history and statutory purpose, confers jurisdiction to grant sale and vesting orders in the insolvency context. In answering this question, it is important to consider whether the omission from s. 243 of the language found in [65.13\(7\) of the BIA](#) and [s. 36\(6\) of the CCAA](#) impacts the interpretation of s. 243. To assist in this analysis, recourse may be had to principles of statutory interpretation.

64 In some circumstances, an intention to exclude certain powers in a legislative provision may be implied from the express inclusion of those powers in another provision. The doctrine of implied exclusion (*expressio unius est exclusio alterius*) is discussed by Ruth Sullivan in her leading text *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016), at p. 154:

An intention to exclude may legitimately be implied whenever a thing is not mentioned in a context where, if it were meant to be included, one would have expected it to be expressly mentioned. Given an expectation of express mention, the silence of the legislature becomes meaningful. An expectation of express reference legitimately arises whenever a pattern



or practice of express reference is discernible. Since such patterns and practices are common in legislation, reliance on implied exclusion reasoning is also common.

65 However, Sullivan notes that the doctrine of implied exclusion "[l]ike the other presumptions relied on in textual analysis . . . is merely a presumption and can be rebutted." The Supreme Court has acknowledged that when considering the doctrine of implied exclusion, the provisions must be read in light of their context, legislative histories and objects: see *Marche v. Halifax Insurance Co.*, 2005 SCC 6, [2005] 1 S.C.R. 47 (S.C.C.), at para. 19, *per* McLachlin C.J.; *Copthorne Holdings Ltd. v. R.*, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), at paras. 110-111.

66 The Supreme Court noted in *Turgeon v. Dominion Bank* (1929), [1930] S.C.R. 67 (S.C.C.), at pp. 70-71, that the maxim *expressio unius est exclusio alterius* "no doubt . . . has its uses when it aids to discover intention; but, as has been said, while it is often a valuable servant, it is a dangerous master to follow. Much depends upon the context." In this vein, Rothstein J. stated in *Copthorne*, at paras. 110-111:

I do not rule out the possibility that in some cases the underlying rationale of a provision would be no broader than the text itself. Provisions that may be so construed, having regard to their context and purpose, may support the argument that the text is conclusive because the text is consistent with and fully explains its underlying rationale.

However, the implied exclusion argument is misplaced where it relies exclusively on the text of the . . . provisions without regard to their underlying rationale.

67 Thus, in determining whether the doctrine of implied exclusion may assist, a consideration of the context and purpose of s. 65.13 of the BIA and s. 36 of the CCAA is relevant. Section 65.13 of the BIA and s. 36 of the CCAA do not relate to receiverships but to restructurings and reorganizations.

68 In its review of the two statutes, the Senate Committee concluded that, in certain circumstances involving restructuring proceedings, stakeholders could benefit from an insolvent company selling all or part of its assets, but felt that, in approving such sales, courts should be provided with legislative guidance "regarding minimum requirements to be met during the sale process": Senate Committee Report, pp. 146-148.

69 Commentators have noted that the purpose of the amendments was to provide "the debtor with greater flexibility in dealing with its property while limiting the possibility of abuse": Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2018), at p. 294.

70 These amendments and their purpose must be read in the context of insolvency practice at the time they were enacted. The nature of restructurings under the CCAA has evolved considerably over time. Now liquidating CCAAs, as they are described, which involve sales rather than a restructuring, are commonplace. The need for greater codification and guidance on the sale of assets outside of the ordinary course of business in restructuring proceedings is highlighted by Professor Wood's discussion of the objective of restructuring law. He notes that while at one time, the objective was relatively uncontested, it has become more complicated as restructurings are increasingly employed as a mechanism for selling the business as a going concern: Wood, at p. 337.

71 In contrast, as I will discuss further, typically the nub of a receiver's responsibility is the liquidation of the assets of the insolvent debtor. There is much less debate about the objectives of a receivership, and thus less of an impetus for legislative guidance or codification. In this respect, the purpose and context of the sales provisions in s. 65.13 of the BIA and s. 36 of the CCAA are distinct from those of s. 243 of the BIA. Due to the evolving use of the restructuring powers of the court, the former demanded clarity and codification, whereas the law governing sales in the context of receiverships was well established. Accordingly, rather than providing a detailed code governing sales, Parliament utilized broad wording to describe both a receiver and a receiver's powers under s. 243. In light of this distinct context and legislative purpose, I do not find that the absence of the express language found in s. 65.13 of the BIA and s. 36 of the CCAA from s. 243 forecloses the possibility that the broad wording in s. 243 confers jurisdiction to grant vesting orders.

## Section 243 — Jurisdiction to Grant a Sales Approval and Vesting Order

72 This brings me to an analysis of the broad language of s. 243 in light of its distinct legislative history, objective and purposes. As I have discussed, s. 243 was enacted by Parliament to establish a receivership regime that eliminated a patchwork of provincial proceedings. In enacting this provision, Parliament imported into s. 243(1)(c) the broad wording from the former s. 47(2)(c) which courts had interpreted as conferring jurisdiction to direct an interim receiver to do not only what "justice dictates" but also what "practicality demands". Thus, in interpreting s. 243, it is important to elaborate on the purpose of receiverships generally.

73 The purpose of a receivership is to "enhance and facilitate the preservation and realization of the assets for the benefit of creditors": *Hamilton Wentworth Credit Union Ltd. (Liquidator of) v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Ont. Gen. Div. [Commercial List]), at p. 787. Such a purpose is generally achieved through a liquidation of the debtor's assets: Wood, at p. 515. As the Appeal Division of the Nova Scotia Supreme Court noted in *Bayhold Financial Corp. v. Clarkson Co.* (1991), 108 N.S.R. (2d) 198 (N.S. C.A.), at para. 34, "the essence of a receiver's powers is to liquidate the assets". The receiver's "primary task is to ensure that the highest value is received for the assets so as to maximise the return to the creditors": *National Trust Co. v. 1117387 Ontario Inc.*, 2010 ONCA 340, 262 O.A.C. 118 (Ont. C.A.), at para. 77.

74 This purpose is reflected in commercial practice. Typically, the order appointing a receiver includes a power to sell: see for example the Commercial List Model Receivership Order, at para. 3(k). There is no express power in the BIA authorizing a receiver to liquidate or sell property. However, such sales are inherent in court-appointed receiverships and the jurisprudence is replete with examples: see e.g. *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, 44 C.B.R. (5th) 171 (B.C. S.C. [In Chambers]), *Royal Bank v. Fracmaster Ltd.*, 1999 ABCA 178, 11 C.B.R. (4th) 230 (Alta. C.A.), *Skyepharm PLC v. Hyal Pharmaceutical Corp.* (1999), 12 C.B.R. (4th) 87 (Ont. S.C.J. [Commercial List]), aff'd (2000), 47 O.R. (3d) 234 (Ont. C.A.).

75 Moreover, the mandatory statutory receiver's reports required by s. 246 of the BIA direct a receiver to file a "statement of all property of which the receiver has taken possession or control that *has not yet been sold or realized*" during the receivership (emphasis added): *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368, r. 126 ("BIA Rules").

76 It is thus evident from a broad, liberal, and purposive interpretation of the BIA receivership provisions, including s. 243(1)(c), that implicitly the court has the jurisdiction to approve a sale proposed by a receiver and courts have historically acted on that basis. There is no need to have recourse to provincial legislation such as s.100 of the CJA to sustain that jurisdiction.

77 Having reached that conclusion, the question then becomes whether this jurisdiction under s. 243 extends to the implementation of the sale through the use of a vesting order as being incidental and ancillary to the power to sell. In my view it does. I reach this conclusion for two reasons. First, vesting orders are necessary in the receivership context to give effect to the court's jurisdiction to approve a sale as conferred by s. 243. Second, this interpretation is consistent with, and furthers the purpose of, s. 243. I will explain.

78 I should first indicate that the case law on vesting orders in the insolvency context is limited. In *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.*, 2005 BCCA 154, 9 C.B.R. (5th) 267 (B.C. C.A.), the British Columbia Court of Appeal held, at para. 20, that a court-appointed receiver was entitled to sell the assets of New Skeena Forest Products Inc. free and clear of the interests of all creditors and contractors. The court pointed to the receivership order itself as the basis for the receiver to request a vesting order, but did not discuss the basis of the court's jurisdiction to grant the order. In 2001, in *Loewen Group Inc., Re*, Farley J. concluded, at para. 6, that in the CCAA context, the court's inherent jurisdiction formed the basis of the court's power and authority to grant a vesting order. The case was decided before amendments to the CCAA which now specifically permit the court to authorize a sale of assets free and clear of any charge or other restriction. The Nova Scotia Supreme Court in *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 420, 353 N.S.R. (2d) 194 (N.S. S.C.) stated that neither provincial legislation nor the BIA provided authority to grant a vesting order.

79 In *Anglo Pacific Group PLC c. Ernst & Young Inc.*, 2013 QCCA 1323 (C.A. Que.), the Quebec Court of Appeal concluded that pursuant to s. 243(1)(c) of the BIA, a receiver can ask the court to sell the property of the bankrupt debtor, free of any charge. In that case, the judge had discharged a debenture, a royalty agreement and universal hypothecs. After reciting s. 243, Thibault J.A., writing for the court stated, at para 98: "It is pursuant to paragraph 243(1) of the BIA that the receiver can ask the court to sell the property of a bankrupt debtor, free of any charge." Although in that case, unlike this appeal, the Quebec Court of Appeal concluded that the instruments in issue did not represent interests in land or 'real rights', it nonetheless determined that s. 243(1)(c) provided authority for the receiver to seek to sell property free of any charge(s) on the property.

80 The necessity for a vesting order in the receivership context is apparent. A receiver selling assets does not hold title to the assets and a receivership does not effect a transfer or vesting of title in the receiver. As Bish and Cassey state in "Vesting Orders Part 2", at p. 58, "[a] vesting order is a vital legal 'bridge' that facilitates the receiver's giving good and undisputed title to a purchaser. It is a document to show to third parties as evidence that the purported conveyance of title by the receiver — which did not hold the title — is legally valid and effective." As previously noted, vesting orders in the insolvency context serve a dual purpose. They provide for the conveyance of title and also serve to extinguish encumbrances on title in order to facilitate the sale of assets.

81 The Commercial List's Model Receivership Order authorizes a receiver to apply for a vesting order or other orders necessary to convey property "free and clear of any liens or encumbrances": see para. 3(l). This is of course not conclusive but is a reflection of commercial practice. This language is placed in receivership orders often on consent and without the court's advertence to the authority for such a term. As Bish and Cassey note in "Vesting Orders Part 1", at p. 42, the vesting order is the "holy grail" sought by purchasers and has become critical to the ability of debtors and receivers to negotiate sale transactions in the insolvency context. Indeed, the motion judge observed that the granting of vesting orders in receivership sales is "a near daily occurrence on the Commercial List": at para. 31. As such, this aspect of the vesting order assists in advancing the purpose of s. 243 and of receiverships generally, being the realization of the debtor's assets. It is self-evident that purchasers of assets do not wish to acquire encumbered property. The use of vesting orders is in essence incidental and ancillary to the power to sell.

82 As I will discuss further, while jurisdiction for this aspect of vesting orders stems from s. 243, the exercise of that jurisdiction is not unbounded.

83 The jurisdiction to vest assets in a purchaser in the context of a national receivership is reflective of the objective underlying s. 243. With a national receivership, separate sales approval and vesting orders should not be required in each province in which assets are being sold. This is in the interests of efficiency and if it were otherwise, the avoidance of a multiplicity of proceedings objective behind s. 243 would be undermined, as would the remedial purpose of the BIA.

84 If the power to vest does not arise under s. 243 with the appointment of a national receiver, the sale of assets in different provinces would require a patchwork of vesting orders. This would be so even if the order under s. 243 were on consent of a third party or unopposed, as jurisdiction that does not exist cannot be conferred.

85 In my view, s. 243 provides jurisdiction to the court to authorize the receiver to enter into an agreement to sell property and in furtherance of that power, to grant an order vesting the purchased property in the purchaser. Thus, here the Receiver had the power under s. 243 of the BIA to enter into an agreement to sell Dianor's property, to seek approval of that sale, and to request a vesting order from the court to give effect to the sale that was approved.

86 Lastly, I would also observe that this conclusion supports the flexibility that is a hallmark of the Canadian system of insolvency — it facilitates the maximization of proceeds and realization of the debtor's assets, but as I will explain, at the same time operates to ensure that third party interests are not inappropriately violated. This conclusion is also consonant with contemporary commercial realities; realities that are reflected in the literature on the subject, the submissions of counsel for the intervener, the Insolvency Institute of Canada, and the model Commercial List Sales Approval and Vesting Order. Parliament knew that by importing the broad language of s. 47(2)(c) into s. 243(1)(c), the interpretation accorded s. 243(1) would be consistent, thus reflecting a desire for the receivership regime to be flexible and responsive to evolving commercial practice.



87 In summary, I conclude that jurisdiction exists under [s. 243\(1\) of the BIA](#) to grant a vesting order vesting property in a purchaser. This jurisdiction extends to receivers who are appointed under the provisions of the [BIA](#).

88 This analysis does not preclude the possibility that s. 21 of the CLPA also provides authority for vesting property in the purchaser free and clear of encumbrances. The language of this provision originated in the British *Conveyancing and Law of Property Act, 1881*, 44 & 45 Vict. ch. 41 and has been the subject matter of minimal judicial consideration. In a nutshell, s. 21 states that where land subject to an encumbrance is sold, the court may direct payment into court of an amount sufficient to meet the encumbrance and declare the land to be free from the encumbrance. The word "encumbrance" is not defined in the CLPA.

89 G. Thomas Johnson in Anne Warner La Forest, ed., *Anger & Honsberger Law of Real Property*, 3rd ed., loose-leaf (Toronto: Thomson Reuters, 2017), at J§34:10 states:

The word "encumbrance" is not a technical term. Rather, it is a general expression and must be interpreted in the context in which it is found. It has a broad meaning and may include many disparate claims, charges, liens or burdens on land. It has been defined as "every right to or interest in land granted to the diminution of the value of the land but consistent with the passing of the fee".

90 The author goes on to acknowledge however, that even this definition, broad as it is, is not comprehensive enough to cover all possible encumbrances.

91 That said, given that s. 21 of the CLPA was not a basis advanced before the motion judge, for the purposes of this appeal, it is unnecessary to conclusively determine this issue.

### ***B. Was it Appropriate to Vest out 235 Co's GORs?***

92 This takes me to the next issue — the scope of the sales approval and vesting order and whether 235 Co.'s GORs should have been extinguished.

93 Accepting that the motion judge had the jurisdiction to issue a sales approval and vesting order, the issue then becomes not one of "jurisdiction" but rather one of "appropriateness" as Blair J.A. stated in *Canadian Red Cross Society / Société Canadienne de la Croix-Rouge, Re* (1998), 5 C.B.R. (4th) 299 (Ont. Gen. Div. [Commercial List]), at para. 42, leave to appeal refused, (1998), 32 C.B.R. (4th) 21 (Ont. C.A.). Put differently, should the motion judge have exercised his jurisdiction to extinguish the appellant's GORs from title?

94 In the first stage of this appeal, this court concluded that the GORs constituted interests in land. In the second stage, I have determined that the motion judge did have jurisdiction to grant a sales approval and vesting order. I must then address the issue of scope and determine whether the motion judge erred in ordering that the GORs be extinguished from title.

#### ***(1) Review of the Case Law***

95 As illustrated in the first stage of this appeal and as I will touch upon, a review of the applicable jurisprudence reflects very inconsistent treatment of vesting orders.

96 In some cases, courts have denied a vesting order on the basis that the debtor's interest in the property circumscribes a receiver's sale rights. For example, in *1565397 Ontario Inc., Re* (2009), 54 C.B.R. (5th) 262 (Ont. S.C.J.), the receiver sought an order authorizing it to sell the debtor's property free of an undertaking the debtor gave to the respondents to hold two lots in trust if a plan of subdivision was not registered by the closing date. Wilton-Siegel J. found that the undertaking created an interest in land. He stated, at para. 68, that the receiver had taken possession of the property of the debtor only and could not have any interest in the respondents' interest in the property and as such, he was not prepared to authorize the sale free of the undertaking. Wilton-Siegel J. then went on to discuss five "equitable considerations" that justified the refusal to grant the vesting order.

97 Some cases have weighed "equitable considerations" to determine whether a vesting order is appropriate. This is evident in certain decisions involving the extinguishment of leasehold interests. In *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2005] O.J. No. 3707 (Ont. S.C.J.), the court-appointed receiver had sought a declaration that the debtor's land could be sold free and clear of three non-arm's length leases. Each of the lease agreements provided that it was subordinate to the creditor's security interest, and the lease agreements were not registered on title. This court remitted the matter back to the motion judge and directed him to consider the equities to determine whether it was appropriate to sell the property free and clear of the leases: see *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 1726 (Ont. C.A.). The motion judge subsequently concluded that the equities supported an order terminating the leases and vesting title in the purchaser free and clear of any leasehold interests: *Meridian Credit Union Ltd. v. 984 Bay Street Inc.*, [2006] O.J. No. 3169 (Ont. S.C.J.).

98 An equitable framework was also applied by Wilton-Siegel J. in *Romspen*. In *Romspen*, Home Depot entered into an agreement of purchase and sale with the debtor to acquire a portion of the debtor's property on which a new Home Depot store was to be constructed. The acquisition of the portion of property was contingent on compliance with certain provisions of the *Planning Act*, R.S.O. 1990, c. P.13. The debtor defaulted on its mortgage over its entire property and a receiver was appointed.

99 The receiver entered into a purchase and sale agreement with a third party and sought an order vesting the property in the purchaser free and clear of Home Depot's interest. Home Depot took the position that the receiver did not have the power to convey the property free of Home Depot's interest. Wilton-Siegel J. concluded that a vesting order could be granted in the circumstances. He rejected Home Depot's argument that the receiver took its interest subject to Home Depot's equitable property interest under the agreement of purchase and sale and the ground lease, as the agreement was only effective to create an interest in land if the provisions of the *Planning Act* had been complied with.

100 He then considered the equities between the parties. The mortgage had priority over Home Depot's interest and Home Depot had failed to establish that the mortgagee had consented to the subordination of its mortgage to the leasehold interest. In addition, the purchase and sale agreement contemplated a price substantially below the amount secured by the mortgage, thus there would be no equity available for Home Depot's subordinate interest in any event. Wilton-Siegel J. concluded that the equities favoured a vesting of the property in the purchaser free and clear of Home Depot's interests.<sup>9</sup>

101 As this review of the case law suggests, and as indicated in the First Reasons, there does not appear to be a consistently applied framework of analysis to determine whether a vesting order extinguishing interests ought to be granted. Generally speaking, outcomes have turned on the particular circumstances of a case accounting for factors such as the nature of the property interest, the dealings between the parties, and the relative priority of the competing interests. It is also clear from this review that many cases have considered the equities to determine whether a third party interest should be extinguished.

## *(2) Framework for Analysis to Determine if a Third Party Interest Should be Extinguished*

102 In my view, in considering whether to grant a vesting order that serves to extinguish rights, a court should adopt a rigorous cascade analysis.

103 First, the court should assess the nature and strength of the interest that is proposed to be extinguished. The answer to this question may be determinative thus obviating the need to consider other factors.

104 For instance, I agree with the Receiver's submission that it is difficult to think of circumstances in which a court would vest out a fee simple interest in land. Not all interests in land share the same characteristics as a fee simple, but there are lesser interests in land that would also defy extinguishment due to the nature of the interest. Consider, for example, an easement in active use. It would be impractical to establish an exhaustive list of interests or to prescribe a rigid test to make this determination given the broad spectrum of interests in land recognized by the law.

105 Rather, in my view, a key inquiry is whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself. This latter type

of interest is tied to the inherent characteristics of the property itself; it is not a fixed sum of money that is extinguished when the monetary obligation is fulfilled. Put differently, the reasonable expectation of the owner of such an interest is that its interest is of a continuing nature and, absent consent, cannot be involuntarily extinguished in the ordinary course through a payment in lieu.

106 Another factor to consider is whether the parties have consented to the vesting of the interest either at the time of the sale before the court, or through prior agreement. As Bish and Cassey note, vesting orders have become a routine aspect of insolvency practice, and are typically granted on consent: "Vesting Orders Part 2", at pp. 60, 65.

107 The more complex question arises when consent is given through a prior agreement such as where a third party has subordinated its interest contractually. *Meridian, Romspen, and Firm Capital Mortgage Fund Inc. v. 2012241 Ontario Ltd.*, 2012 ONSC 4816, 99 C.B.R. (5th) 120 (Ont. S.C.J. [Commercial List]) are cases in which the court considered the appropriateness of a vesting order in circumstances where the third party had subordinated its interests. In each of these cases, although the court did not frame the subordination of the interests as the overriding question to consider before weighing the equities, the decisions all acknowledged that the third parties had agreed to subordinate their interest to that of the secured creditor. Conversely, in *Winick v. 1305067 Ontario Ltd.* (2008), 41 C.B.R. (5th) 81 (Ont. S.C.J. [Commercial List]), the court refused to vest out a leasehold interest on the basis that the purchaser had notice of the lease and the purchaser acknowledged that it would purchase the property subject to the terms and conditions of the leases.

108 The priority of the interests reflected in freely negotiated agreements between parties is an important factor to consider in the analysis of whether an interest in land is capable of being vested out. Such an approach ensures that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency.

109 Thus, in considering whether an interest in land should be extinguished, a court should consider: (1) the nature of the interest in land; and (2) whether the interest holder has consented to the vesting out of their interest either in the insolvency process itself or in agreements reached prior to the insolvency.

110 If these factors prove to be ambiguous or inconclusive, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case. This would include: consideration of the prejudice, if any, to the third party interest holder; whether the third party may be adequately compensated for its interest from the proceeds of the disposition or sale; whether, based on evidence of value, there is any equity in the property; and whether the parties are acting in good faith. This is not an exhaustive list and there may be other factors that are relevant to the analysis.

### (3) *The Nature of the Interest in Land of 235 Co.'s GORs*

111 Turning then to the facts of this appeal, in the circumstances of this case, the issue can be resolved by considering the nature of the interest in land held by 235 Co. Here the GORs cannot be said to be a fee simple interest but they certainly were more than a fixed monetary interest that attached to the property. They did not exist simply to secure a fixed finite monetary obligation; rather they were in substance an interest in a continuing and an inherent feature of the property itself.

112 While it is true, as the Receiver and Third Eye emphasize, that the GORs are linked to the interest of the holder of the mining claims and depend on the development of those claims, that does not make the interest purely monetary. As explained in stage one of this appeal, the nature of the royalty interest as described by the Supreme Court in *Bank of Montreal v. Dynex Petroleum Ltd.*, 2002 SCC 7, [2002] 1 S.C.R. 146 (S.C.C.), at para. 2 is instructive:

. . . [R]oyalty arrangements are common forms of arranging exploration and production in the oil and gas industry in Alberta. Typically, the owner of minerals *in situ* will lease to a potential producer the right to extract such minerals. This right is known as a working interest. A royalty is an unencumbered share or fractional interest in the gross production of such working interest. A lessor's royalty is a royalty granted to (or reserved by) the initial lessor. An overriding royalty or a gross overriding royalty is a royalty granted normally by the owner of a working interest to a third party in exchange for consideration which could include, but is not limited to, money or services (e.g., drilling or geological surveying) (G. J. Davies, "The Legal Characterization of Overriding Royalty Interests in Oil and Gas" (1972), 10 *Alta. L. Rev.* 232, at p.

233). The rights and obligations of the two types of royalties are identical. The only difference is to whom the royalty was initially granted. [*Italics in original; underlining added.*]

113 Thus, a GOR is an interest in the gross product extracted from the land, not a fixed monetary sum. While the GOR, like a fee simple interest, may be capable of being valued at a point in time, this does not transform the substance of the interest into one that is concerned with a fixed monetary sum rather than an element of the property itself. The interest represented by the GOR is an ownership in the product of the mining claim, either payable by a share of the physical product or a share of revenues. In other words, the GOR carves out an overriding entitlement to an amount of the property interest held by the owner of the mining claims.

114 The Receiver submits that the realities of commerce and business efficacy in this case are that the mining claims were unsaleable without impairment of the GORs. That may be, but the imperatives of the mining claim owner should not necessarily trump the interest of the owner of the GORs.

115 Given the nature of 235 Co.'s interest and the absence of any agreement that allows for any competing priority, there is no need to resort to a consideration of the equities. The motion judge erred in granting an order extinguishing 235 Co.'s GORs.

116 Having concluded that the court had the jurisdiction to grant a vesting order but the motion judge erred in granting a vesting order extinguishing an interest in land in the nature of the GORs, I must then consider whether the appellant failed to preserve its rights such that it is precluded from persuading this court that the order granted by the motion judge ought to be set aside.

### ***C. 235 Co.'s Appeal of the Motion Judge's Order***

117 235 Co. served its notice of appeal on November 3, 2016, more than a week after the transaction had closed on October 26, 2016.

118 Third Eye had originally argued that 235 Co.'s appeal was moot because the vesting order was spent when it was registered on title and the conveyance was effected. It relied on this court's decision in *Regal Constellation* in that regard.

119 Justice Lauwers wrote that additional submissions were required in the face of the conclusion that 235 Co.'s GORs were interests in land: First Reasons, at para. 21. He queried whether it was appropriate for the court-appointed receiver to close the transaction when the parties were aware that 235 Co. was considering an appeal prior to the closing of the transaction: at para. 22.

120 There are three questions to consider in addressing what, if any, remedy is available to 235 Co. in these circumstances:

- (1) What appeal period applies to 235 Co.'s appeal of the sale approval and vesting order;
- (2) Was it permissible for the Receiver to close the transaction in the face of 235 Co.'s October 26, 2016 communication to the Receiver that "an appeal is under consideration"; and
- (3) Does 235 Co. nonetheless have a remedy available under the *Land Titles Act*, R.S.O. 1990, c. L.5?

#### ***(1) The Applicable Appeal Period***

121 The Receiver was appointed under s. 101 of the CJA and s. 243 of the BIA. The motion judge's decision approving the sale and vesting the property in Third Eye was released through reasons dated October 5, 2016.

122 Under the CJA, the appeal would be governed by the *Rules of Civil Procedure*, r. 61.04(1) which provides for a 30 day period from which to appeal a final order to the Court of Appeal. In addition, the appellant would have had to have applied for a stay of proceedings.

123 In contrast, under the BIA, s. 183(2) provides that courts of appeal are "invested with power and jurisdiction at law and in equity, according to their ordinary procedures except as varied by" the BIA or the BIA Rules, to hear and determine appeals.

An appeal lies to the Court of Appeal if the point at issue involves future rights; if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings; if the property involved in the appeal exceeds in value \$10,000; from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed \$5,000; and in any other case by leave of a judge of the Court of Appeal: [BIA, s. 193](#). Given the nature of the dispute and the value in issue, no leave was required and indeed, none of the parties took the position that it was. There is therefore no need to address that issue.

124 Under [r. 31](#) of the BIA Rules, a notice of appeal must be filed "within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates."

125 The 10 days runs from the day the order or *decision* was rendered: *Moss, Re* (1999), 138 Man. R. (2d) 318 (Man. C.A. [In Chambers]), at para. 2; *Koska, Re*, 2002 ABCA 138, 303 A.R. 230 (Alta. C.A.), at para. 16; *7451190 Manitoba Ltd v. CWB Maxium Financial Inc et al*, 2019 MBCA 28 (Man. C.A.) (in Chambers), at para. 49. This is clear from the fact that both [r. 31](#) and [s. 193](#) speak of "order or decision" (emphasis added). If an entered and issued order were required, there would be no need for this distinction.<sup>10</sup> Accordingly, the "[t]ime starts to run on an appeal under the [BIA](#) from the date of pronouncement of the decision, not from the date the order is signed and entered": *Koska, Re*, at para. 16.

126 Although there are cases where parties have conceded that the [BIA](#) appeal provisions apply in the face of competing provincial statutory provisions (see e.g. *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers), at para. 36 and *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 1), until recently, no Ontario case had directly addressed this point.

127 Relying on first principles, as noted by Donald J.M. Brown in *Civil Appeals* (Toronto: Carswell, 2019), at 2:1120, "where federal legislation occupies the field by providing a procedure for an appeal, those provisions prevail over provincial legislation providing for an appeal." Parliament has jurisdiction over procedural law in bankruptcy and hence can provide for appeals: *Solloway, Mills & Co., Re* (1934), [1935] O.R. 37 (Ont. C.A.). Where there is an operational or purposive inconsistency between the federal bankruptcy rules and provincial rules on the timing of an appeal, the doctrine of federal paramountcy applies and the federal bankruptcy rules govern: see *Moore, Re*, 2013 ONCA 769, 118 O.R. (3d) 161 (Ont. C.A.), at para. 59, aff'd 2015 SCC 52, [2015] 3 S.C.R. 397 (S.C.C.); *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 (S.C.C.), at para. 16.

128 In *Business Development Bank of Canada v. Astoria Organic Matters Ltd.*, 2019 ONCA 269 (Ont. C.A.), Zarnett J.A. wrote that the appeal route is dependent on the jurisdiction pursuant to which the order was granted. In that case, the appellant was appealing from the refusal of a judge to grant leave to sue the receiver who was stated to have been appointed pursuant to [s. 101 of the CJA](#) and [s. 243 of the BIA](#). There was no appeal from the receivership order itself. Thus, to determine the applicable appeal route for the refusal to grant leave, the court was required to determine the source of the power to impose a leave to sue requirement in a receivership order. Zarnett J.A. determined that by necessary implication, Parliament must be taken to have clothed the court with the power to require leave to sue a receiver appointed under [s. 243\(1\) of the BIA](#) and federal paramountcy dictated that the [BIA](#) appeal provisions apply.

129 Here, 235 Co.'s appeal is from the sale approval order, of which the vesting order is a component. Absent a sale, there could be no vesting order. The jurisdiction of the court to approve the sale, and thus issue the sale approval and vesting order, is squarely within [s. 243 of the BIA](#).

130 Furthermore, as 235 Co. had known for a considerable time, there could be no sale to Third Eye in the absence of extinguishment of the GORs and Algoma's royalty rights; this was a condition of the sale that was approved by the motion judge. The appellant was stated to be unopposed to the sale but in essence opposed the sale condition requiring the extinguishment. Clearly the jurisdiction to grant the approval of the sale emanated from the [BIA](#), and as I have discussed, so did the vesting component; it was incidental and ancillary to the approval of the sale. It would make little sense to split the two elements of the order in these circumstances. The essence of the order was anchored in the [BIA](#).



131 Accordingly, I conclude that the appeal period was 10 days as prescribed by r. 31 of the BIA Rules and ran from the date of the motion judge's decision of October 5, 2016. Thus, on a strict application of the BIA Rules, 235 Co.'s appeal was out of time. However, in the circumstances of this case it is relevant to consider first whether it was appropriate for the Receiver to close the transaction in the face of 235 Co.'s assertion that an appeal was under consideration and, second, although only sought in oral submissions in reply at the hearing of the second stage of this appeal, whether 235 Co. should be granted an extension of time to appeal.

(2) *The Receiver's Conduct*

132 The Receiver argues that it was appropriate for it to close the transaction in the face of a threatened appeal because the appeal period had expired when the appellant advised the Receiver that it was contemplating an appeal (without having filed a notice of appeal or a request for leave) and the Receiver was bound by the provisions of the purchase and sale agreement and the order of the motion judge, which was not stayed, to close the transaction.

133 Generally speaking, as a matter of professional courtesy, a potentially preclusive step ought not to be taken when a party is advised of a possible pending appeal. However, here the Receiver's conduct in closing the transaction must be placed in context.

134 235 Co. had known of the terms of the agreement of purchase and sale and the request for an order extinguishing its GORs for over a month, and of the motion judge's decision for just under a month before it served its notice of appeal. Before October 26, 2016, it had never expressed an intention to appeal either informally or by serving a notice of appeal, nor did it ever bring a motion for a stay of the motion judge's decision or seek an extension of time to appeal.

135 Having had the agreement of purchase and sale at least since it was served with the Receiver's motion record seeking approval of the transaction, 235 Co. knew that time was of the essence. Moreover, it also knew that the Receiver was directed by the court to take such steps as were necessary for the completion of the transaction contemplated in the purchase and sale agreement approved by the motion judge pursuant to para. 2 of the draft court order included in the motion record.

136 The principal of 235 Co. had been the original prospector of Dianor. 235 Co. never took issue with the proposed sale to Third Eye. The Receiver obtained a valuation of Dianor's mining claims and the valuator concluded that they had a total value of \$1 million to \$2 million, with 235 Co.'s GORs having a value of between \$150,000 and \$300,000, and Algoma's royalties having a value of \$70,000 to \$140,000. No evidence of any competing valuation was adduced by 235 Co.

137 Algoma agreed to a payment of \$150,000 but 235 Co. wanted more than the \$250,000 offered. The motion judge, who had been supervising the receivership, stated that 235 Co. acknowledged that the sum of \$250,000 represented the fair market value: at para. 15. He made a finding at para. 38 of his reasons that the principal of 235 Co. was "not entitled to exercise tactical positions to tyrannize the majority by refusing to agree to a reasonable amount for the royalty rights." In *obiter*, the motion judge observed that he saw "no reason in logic . . . why the jurisdiction would not be the same whether the royalty rights were or were not an interest in land": at para. 40. Furthermore, the appellant knew of the motion judge's reasons for decision since October 5, 2016 and did nothing that suggested any intention to appeal until about three weeks later.

138 As noted by the Receiver, it is in the interests of the efficient administration of receivership proceedings that aggrieved stakeholders act promptly and definitively to challenge a decision they dispute. This principle is in keeping with the more abbreviated time period found in the BIA Rules. Blair J.A. in *Regal Constellation*, at para. 49, stated that "[t]hese matters ought not to be determined on the basis that 'the race is to the swiftest'". However, that should not be taken to mean that the race is adjusted to the pace of the slowest.

139 For whatever reasons, 235 Co. made a tactical decision to take no steps to challenge the motion judge's decision and took no steps to preserve any rights it had. It now must absorb the consequences associated with that decision. This is not to say that the Receiver's conduct would always be advisable. Absent some emergency that has been highlighted in its Receiver's report to the court that supports its request for a vesting order, a Receiver should await the expiry of the 10 day appeal period before closing the sale transaction to which the vesting order relates.

140 Given the context and history of dealings coupled with the actual expiry of the appeal period, I conclude that it was permissible for the Receiver to close the transaction. In my view, the appeal by 235 Co. was out of time.

(3) *Remedy is not Merited*

141 As mentioned, in oral submissions in reply, 235 Co. sought an extension of time to appeal *nunc pro tunc*. It further requested that this court exercise its discretion and grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and granting an order directing the Minings Claim Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated. The Receiver resists this relief. Third Eye does not oppose the relief requested by 235 Co. provided that the compensation paid to 235 Co. and Algoma is repaid. However, counsel for the Monitor for Algoma states that the \$150,000 it received for Algoma's royalty rights has already been disbursed by the Monitor to Algoma.

142 The rules and jurisprudence surrounding extensions of time in bankruptcy proceedings is discussed in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Thomson Reuters, 2009). Rule 31(1) of the BIA Rules provides that a judge of the Court of Appeal may extend the time to appeal. The authors write, at pp. 8-20-8-21:

The court ought not lightly to interfere with the time limit fixed for bringing appeals, and special circumstances are required before the court will enlarge the time . . .

In deciding whether the time for appealing should be extended, the following matters have been held to be relevant:

- (1) The appellant formed an intention to appeal before the expiration of the 10 day period;
- (2) The appellant informed the respondent, either expressly or impliedly, of the intention to appeal;
- (3) There was a continuous intention to appeal during the period when the appeal should have been commenced;
- (4) There is a sufficient reason why, within the 10 day period, a notice of appeal was not filed . . . ;
- (5) The respondent will not be prejudiced by extending the time;
- (6) There is an arguable ground or grounds of appeal;
- (7) It is in the interest of justice, i.e., the interest of the parties, that an extension be granted. [Citations omitted.]

143 These factors are somewhat similar to those considered by this court when an extension of time is sought under r. 3.02 of the *Rules of Civil Procedure*: did the appellant form a *bona fide* intention to appeal within the relevant time period; the length of and explanation for the delay; prejudice to the respondents; and the merits of the appeal. The justice of the case is the overarching principle: see *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636 (Ont. C.A.) (in Chambers), at para. 15.

144 There is no evidence that 235 Co. formed an intention to appeal within the applicable appeal period, and there is no explanation for that failure. The appellant did not inform the respondents either expressly or impliedly that it was intending to appeal. At best, it advised the Receiver that an appeal was under consideration 21 days after the motion judge released his decision. The fact that it, and others, might have thought that a longer appeal period was available is not compelling seeing that 235 Co. had known of the position of the respondents and the terms of the proposed sale since at least August 2016 and did nothing to suggest any intention to appeal if 235 Co. proved to be unsuccessful on the motion. Although the merits of the appeal as they relate to its interest in the GORs favour 235 Co.'s case, the justice of the case does not. I so conclude for the following reasons.

1. 235 Co. sat on its rights and did nothing for too long knowing that others would be relying on the motion judge's decision.

2. 235 Co. never opposed the sale approval despite knowing that the only offers that ever resulted from the court approved bidding process required that the GORs and Algoma's royalties be significantly reduced or extinguished.

3. Even if I were to accept that the *Rules of Civil Procedure* governed the appeal, which I do not, 235 Co. never sought a stay of the motion judge's order under the *Rules of Civil Procedure*. Taken together, this supports the inference that 235 Co. did not form an intention to appeal at the relevant time and ultimately only served a notice of appeal as a tactical manoeuvre to engineer a bigger payment from Third Eye. As found by the motion judge, 235 Co. ought not to be permitted to take tyrannical tactical positions.

4. The Receiver obtained a valuation of the mining claims that concluded that the value of 235 Co.'s GORs was between \$150,000 and \$300,000. Before the motion judge, 235 Co. acknowledged that the payment of \$250,000 represented the fair market value of its GORs. Furthermore, it filed no valuation evidence to the contrary. Any prejudice to 235 Co. is therefore attenuated. It has been paid the value of its interest.

5. Although there are no subsequent registrations on title other than Third Eye's assignee, Algoma's Monitor has been paid for its royalty interest and the funds have been distributed to Algoma. Third Eye states that if the GORs are reinstated, so too should the payments it made to 235 Co. and Algoma. Algoma has been under CCAA protection itself and, not surprisingly, does not support an unwinding of the transaction.

145 I conclude that the justice of the case does not warrant an extension of time. I therefore would not grant 235 Co. an extension of time to appeal *nunc pro tunc*.

146 While 235 Co. could have separately sought a discretionary remedy under the *Land Titles Act* for rectification of title in the manner contemplated in *Regal Constellation*, at paras. 39, 45, for the same reasons I also would not exercise my discretion or refer the matter back to the motion judge to grant an order pursuant to ss. 159 and 160 of the *Land Titles Act* rectifying the title and an order directing the Mining Claims Recorder to rectify the provincial register so that 235 Co.'s GORs are reinstated.

## **Disposition**

147 In conclusion, the motion judge had jurisdiction pursuant to s. 243(1) of the BIA to grant a sale approval and vesting order. Given the nature of the GORs the motion judge erred in concluding that it was appropriate to extinguish them from title. However, 235 Co. failed to appeal on a timely basis within the time period prescribed by the BIA Rules and the justice of the case does not warrant an extension of time. I also would not exercise my discretion to grant any remedy to 235 Co. under any other statutory provision. Accordingly, it is entitled to the \$250,000 payment it has already received and that its counsel is holding in escrow.

148 For these reasons, the appeal is dismissed. As agreed by the parties, I would order Third Eye to pay costs of \$30,000 to 235 Co. in respect of the first stage of the appeal and that all parties with the exception of the Receiver bear their own costs of the second stage of the appeal. I would permit the Receiver to make brief written submissions on its costs within 10 days of the release of these reasons and the other parties to reply if necessary within 10 days thereafter.

***P. Lauwers J.A.:***

I agree.

***Grant Huscroft J.A.:***

I agree.

*Appeal dismissed.*

Footnotes



- 1 The original agreement provided for the payment of the GORs to 381 Co. and Paulette A. Mousseau-Leadbetter. The motion judge noted that the record was silent on how 235 Co. came to be the holder of these royalty rights but given his conclusion, he determined that there was no need to resolve this issue: at para. 6.
- 2 The ownership of the surface rights is not in issue in this appeal.
- 3 Although in its materials filed on this appeal, 235 Co. stated that the motion judge erred in making this finding, in oral submissions before this court, Third Eye's counsel confirmed that this was the position taken by 235 Co.'s counsel before the motion judge, and 235 Co.'s appellate counsel, who was not counsel below, stated that this must have been the submission made by counsel for 235 Co. before the motion judge.
- 4 To repeat, the statement quoted from Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed., loose-leaf (Toronto: Carswell, 2009), at Part XI, L]§21, said:  
A vesting order should only be granted if the facts are not in dispute and there is no other available or reasonably convenient remedy; or in exceptional circumstances where compliance with the regular and recognized procedure for sale of real estate would result in an injustice. In a receivership, the sale of the real estate should first be approved by the court. The application for approval should be served upon the registered owner and all interested parties. If the sale is approved, the receiver may subsequently apply for a vesting order, but a vesting order should not be made until the rights of all interested parties have either been relinquished or been extinguished by due process. [Citations omitted.]
- 5 Such orders were subsequently described as vesting orders in *An Act respecting the Court of Chancery*, C.S.U.C. 1859, c. 12, s. 63. The authority to grant vesting orders was inserted into the *The Judicature Act*, R.S.O. 1897, c. 51, s. 36 in 1897 when the Courts of Chancery were abolished. Section 100 of the CJA appeared in 1984 with the demise of *The Judicature Act*: see *An Act to revise and consolidate the Law respecting the Organization, Operation and Proceedings of Courts of Justice in Ontario*, S.O. 1984, c. 11, s. 113.
- 6 This case was decided before s. 36 of the *Companies' Creditors Arrangements Act*, R.S.C. 1985, c. C-36 ("CCAA") was enacted but the same principles are applicable.
- 7 This 10 day notice period was introduced following the Supreme Court's decision in *Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd.*, [1982] 1 S.C.R. 726 (S.C.C.) which required a secured creditor to give reasonable notice prior to the enforcement of its security.
- 8 *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 ("Insolvency Reform Act 2005"); *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, S.C. 2007, c. 36 ("Insolvency Reform Act 2007").
- 9 This court allowed an appeal of the motion judge's order in *Romspen* and remitted the matter back to the motion judge for a new hearing on the basis that the motion judge applied an incorrect standard of proof in making findings of fact by failing to draw reasonable inferences from the evidence, and in particular, on the issue of whether Romspen had expressly or implicitly consented to the construction of the Home Depot stores: see *Romspen Investment Corp. v. Woods Property Development Inc.*, 2011 ONCA 817, 286 O.A.C. 189 (Ont. C.A.).
- 10 *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 323 O.A.C. 101 (Ont. C.A.) (in Chambers) a decision of a single judge of this court, states, at para. 5, that a signed, issued, and entered order is required. This is generally the case in civil proceedings unless displaced, as here by a statutory provision. *Smoke, Re* (1989), 77 C.B.R. (N.S.) 263 (Ont. C.A.), that is relied upon and cited in *Ontario Wealth Managements Corporation*, does not address this issue.

TAB 5

Regal Constellation Hotel Ltd., Re.

2004 CarswellOnt 428, [2004] O.J. No. 365, 128 A.C.W.S. (3d) 646, 37 C.L.R. (3d) 207, 50 C.B.R. (4th) 253

**IN THE MATTER OF the Receivership of Regal Constellation  
Hotel Limited, of The City of Toronto, In the Province of Ontario**

AND IN THE MATTER OF s. 41 of the Mortgages Act, R.S.O. 1990 c. M.40.

Farley J.

Heard: January 15, 2004

Judgment: January 15, 2004 \*

Docket: 03-CL-5044

Proceedings: affirmed *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 2653 (Ont. C.A.)

Counsel: John J. Pirie for Deloitte & Touche Inc., Court Appointed Receiver and Manager, and for HSBC Bank Canada  
Mahesh Uttamchandani for Interim Receiver, Deloitte & Touche Inc.  
Robert Rueter for Debtor, Regal Pacific (Holdings) Limited

**Headnote**

Debtors and creditors --- Receivers --- Conduct and liability of receiver --- General conduct of receiver  
Receiver brought motion for approval of activities as set out in various reports, including sale of hotel to numbered company  
--- Motion granted --- Objective of any receiver is to receive highest value for asset for benefit of stakeholders --- All cash and unconditional offers are generally to be preferred, keeping in mind that one must do reasonable risk/reward analysis --- Receiver acted properly and within mandate given to it by court --- Receiver fulfilled its prime purpose of obtaining as high a value as it could for hotel after approved marketing campaign --- Identity of principals of purchaser and fact that there was some overlap with principals involved in earlier aborted purchase was of no consequence.

**Farley J.:**

1 Mr. Rueter, counsel for Regal Pacific (Holdings) Limited ("Holdings") asked for an adjournment of the Receiver's (Deloitte & Touche Inc.) motion for various approvals, but specifically the approval of the Receiver's activities as reflected in their various reports (5 plus a supplemental to the 1<sup>st</sup> which was sealed until the closing of the sale to 2031903 Ontario Inc. ("203")). He wanted a 4-week adjournment indicating that he had just determined that principals involved in 203 were also involved in Hospitality Investors Group LLC ("HIG") as per the *Toronto Star* article of January 10, 2004. A corporate profile report on 203 was obtained on January 13, 2004 afternoon. I asked Mr. Rueter to put his concerns in writing and he did so as per the attached, which I have marked Appendix A.

2 I appreciate that Holdings, faced with a shortfall on the hotel realization by the Receiver of some \$9 million, would wish to reopen the whole matter and as Mr. Rueter stated, have a new Receiver appointed who would conduct a new sales process - all with the hope that there would/might be a better result which either would generate a surplus or perhaps minimize the amount of the shortfall.

3 As this was a last minute adjournment request, I indicated that I would reserve on the question of an adjournment, but would continue to hear the Receiver's motion (with a view to minimizing cost, delay and expense), on the contingency that I did not grant the adjournment but that if the adjournment were granted, then that hearing would vaporize into the ether and be a nullity.

4 Having now reviewed the material once again in light of the unanticipated objection and "new" information (to be fair it would have been new no earlier than January 8, 2004 as Mr. Rueter did not get the unsealed supplemental report to report #1 until then), I have concluded that it is unnecessary and inappropriate to grant the requested Holdings adjournment - and that in refusing that request, I do not see that Holdings will suffer any prejudice. In that respect, I will deal with certain non-Receiver aspects later as to the effect of this order on others aside from the Receiver.

5 In order to stop interest continuing to accrue, the Receiver paid \$23.5 million (having received \$24 million on the sale which closed January 5/6, 2004 with 203) to HSBC Bank ("Bank") on January 6, 2004; this, as Mr. Rueter acknowledged, would be beneficial to Holdings in minimizing to that extent its exposure. That payment is hereby approved.

6 The fees and disbursements of the Receiver appear regular and in accordance with the detailed activities by it, all of which were encompassed by various orders of this court. I would note as well that the hotel was operated (albeit with a sub-contract) for a month before it was decommissioned; there were difficulties with getting accepted offers to close, but the Receiver was diligent in obtaining non-refundable substantial deposits, all of which (\$3 million) also went to reducing Holdings' exposure; and the hotel "project" in all other respects a reasonably complicated and difficult asset to deal with and dispose of. Apparently legal fees were directly paid by Bank except to the extent of \$22,000 regarding a tax appeal. I am satisfied that the Receiver's fees and disbursements are reasonable and incurred in satisfactorily carrying out its activities; they are approved.

7 What apparently truly causes Mr. Rueter concern is the issue of approval of the Receiver's activities as detailed in its various reports. However, with respect, while understanding Holdings' concerns about the same principals being involved in various offers, I see no cause to be concerned with the Receiver in this regard. This hotel has been a difficult property for a number of years; it is old and in need of refurbishing; it has been marketed extensively before the receivership. As indicated by Mr. Rueter, before the receivership there was a deal with a corporation which had some principals in common with 203 and HIG. However, this deal did not close and the vendor interests are suing. Nothing in the motion for approval of the Receiver's activities affects that lawsuit. I would note that the objective of any receiver is to receive the highest value for an asset for the benefit of the stakeholders (creditors according to their priority, and below them the shareholders). All cash and unconditional (or easy, certain to fulfill conditions) offers are generally to be preferred, keeping in mind that one must do a reasonable risk/reward analysis. The skill, expertise and experience of a court appointed officer such as a receiver (court appointed) will assist it in doing an analysis to bring to a common level (apples to apples, converting at appropriate rates various other fruit into apples) comparison and conclusion on which to base a recommendation to the court. As outlined in the Receiver's reports, certain of the higher value offers received (13 in total, as a result of the approved marketing campaign) were eliminated in favour of the 203 one for \$25 million because of riskier conditions or the question of having to obtain financing. The HIG offer was withdrawn on September 2, 2003. While the 203 deal for \$25 million did not close (while it was unconditional and no mention was made with regard to the need for financing, and with it being understood that the person involved (presented as being the principal of 203) had no funding problem because of past knowledge as to this person), it would not appear that the failure to close can be laid at the door of the Receiver. If the Receiver had not recommended 203's \$25 million deal, then it would have had to go further down the ladder (on a risk/reward analysis) which would mean that in "present value" money terms (i.e. at the time of the recommendation after discounting for risk), the proceeds would have been less than \$25 million.

8 Indeed when 203 was unable to close on the specified closing date, the Receiver conducted another analysis and determined that it would likely maximize the proceeds by doing another deal with 203, albeit at \$24 million, but keeping in mind the forfeit deposit and the obtaining of a further non-refundable deposit.

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

10 Mr. Rueter points out the Cocov (one of the principals) affidavit of June 25, 2003 that the property had an "as is" value of \$30.65 million. However, this fails to take into account that not only was this affidavit before the receivership commenced (July 4, 2003), but it was in fact in an effort to convince the court that a receiver need not be appointed because there was

sufficient value to cover the Bank indebtedness. Affidavits of this nature must be taken with a grain of salt regarding puffery. I note as well that receivership sales are believed generally to generate lower amounts than a sale in the ordinary course of a non-pressed vendor.

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

12 Holdings, of course, is free to make whatever allegations it feels appropriate against these entities and their principals and pursue whatever remedies it feels that it may have against them; the approval of the Receiver's activities is not intended in any way to have any impact or in any way to act as a shield for them.

13 In the end result, it appears to me that the adjournment request is merely to facilitate what Holdings believes is in its best interests - namely, it is under water as to its obligations to the Bank and so is drowned by the sale to 203; it hopes that if enough confusion is created in this approval of the Receiver's activities motion, that it will have the opportunity of being raised from the depths and artificial respiration applied. If it is presently drowned, a new sales process cannot do anything worse vis-à-vis it than drown it at a deeper depth. It will still be drowned, but the Bank in first priority position will be prejudiced in having to look to other sources, including Hong Kong based Holdings, for recovery of the deficit, in that case a greater deficit.

14 In the end result, the activities of the Receiver as detailed in its various reports are approved. For greater certainty, the activities of no one else are approved.

*Motion granted.*

## **APPENDIX — A**

### **HSBC Bank of Canada and Regal Constellation Hotel Limited**

My submission respecting the sale process is that neither my client nor the Court to my knowledge were aware that the purchaser under the offer to purchase recommended to the Court by the Receiver, were the same principals as the principals of the purchaser under the \$45,000,000 agreement to purchase with Regal marked as Exhibit 1 to the Affidavit of Fernandez sworn June 25, 2003, in Responding Motion Record.

The Court and Regal were advised by the Receiver's counsel on September 9/03 that there was an offer from the purchasers under the Regal Agreement but it was withdrawn when the deposit could not be certified.

Therefore the Court was not aware that the principals behind the offer #1 in the sealed Supplemental Report of the Receiver were the same as the principals behind purchaser #4 who was being recommended to the Court. The sale process was manipulated in that the same principals made offer #1 at \$31.0 million and offer #4 at \$25 million and that one of those principals, Mr. Cocov, deposed in an affidavit before this Court sworn 25 June 03, that the Hotel has a value of \$30,650,000 on an "as is" basis (Responding Motion Record 25 June 03 filed by Goodman and Carr) but it was not known he was a principal of the recommended offeror.

My submission is that these are material facts bearing upon the integrity of the sale process which may well have affected the Court in approving the offer from 2031903 Ontario Inc.

The Supplemental Receiver's Report 8 Sept. 03 was not disclosed to me until last Friday, 8 Jan./04.

Respectfully submitted,

"Robert Rueter"

Counsel for Regal Pacific (Holdings) Limited

## Footnotes

- \* Affirmed at *Regal Constellation Hotel Ltd., Re* (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258 (Ont. C.A.)

TAB 6

05 JUL 2022

# **Bennett on Receiverships, Fourth Edition**

**CARSWELL**

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**12 — Discharge, p.775**



## **Bennett on Receiverships, Fourth Edition**

### 12 — Discharge

(c) the receiver shall not be liable for any act or omission, including any act or omission pertaining to the discharge of the receiver's duties as receiver of the debtor's property, save and except for any liability arising out of fraud, gross negligence or wilful misconduct on the part of the receiver.

At that time, all stakeholders are given another opportunity to review the receiver's reports and oppose the discharge. If a stakeholder has objections to the receiver's reports or to any of the receiver's activities, the stakeholder should not wait until the discharge application to lodge the objection. If the objections relate to the receiver's conduct where there are allegations of maladministration, gross negligence or wilful misconduct, the stakeholder should proceed to obtain an order under section 215 giving it the right to sue the receiver or a similar order if Part XI of the *Bankruptcy and Insolvency Act* does not apply to the receivership. The stakeholder should object at the time when the receiver files a report in support of a motion rather than wait until the receivership is completed. Typical objections include:

- the receiver improvidently sold some or all the assets;
- the receiver failed to realize on the receivables;
- the receiver failed to obtain HST refunds;
- the receiver failed to examine the debtor and its officers and directors for hidden assets;
- the receiver failed to investigate preferences and transfers at undervalue;
- the receiver failed to report to the court on a regular basis;
- the receiver failed to conduct an efficient administration.<sup>[24](#)</sup>

On the discharge application, the court then reviews the complete administration and decides whether to grant the discharge or require the receiver to complete the administration.<sup>[25](#)</sup> By this time, the court has already ruled on the receiver's passing of accounts, although there is nothing preventing the court from reviewing the accounts and discharging the receiver at the same time.

However, there are situations where the receivership may be substituted or terminated earlier than by completion. Once the court terminates the appointment and discharges the receiver, the former receiver then passes its accounts while the successor receiver continues with administration. The

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## FOOTNOTES

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<sup>24</sup> These types of objection fall under the receiver's remuneration. There are numerous objections that can be made concerning the receiver's remuneration. See Chapter 11.

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<sup>25</sup> *Royal Bank of Canada v. Paulsen & Son Excavating Ltd.*, 2012 CarswellSask 29, 2012 SKQB 8 (Sask. Q.B.), additional reasons as to costs 2012 CarswellSask 475, 2012 SKQB 267, 92 C.B.R. (5th) 284 (Sask. Q.B.), leave to appeal refused 2012 SKCA 101, 2012 CarswellSask 741 (Sask. C.A. [In Chambers]) where the motion court judge reviews in some depth the receiver's discharge.

TAB 7

2002 CarswellOnt 3002  
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164  
O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

**IN THE MATTER OF THE PROPOSALS OF CONFECTIONATELY YOURS,  
INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC.,  
CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.**

Catzman, Doherty, Borins JJ.A.

Heard: April 8, 2002  
Judgment: September 19, 2002  
Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano  
*Benjamin Zarnett, David Lederman*, for Respondent, KPMG Inc.  
*Katherine McEachern*, for Respondent, Laurentian Bank of Canada

**Headnote**

Receivers --- Remuneration of receiver — Accounts

Court-appointed receiver operated business of debtor companies pending going concern asset sale — Receiver presented report to court for approval — Report recommended that court approve receiver's fees and disbursements as well as fees and disbursements of receiver's solicitors — Shareholders of debtor companies objected to amount of fees and disbursements of receiver and solicitors — Motion judge refused to permit counsel for shareholders to cross-examine representative of receiver on report — Motion judge permitted counsel for shareholders as judge's "proxy" to ask questions of receiver's representative who was not sworn — Motion judge approved fees and disbursements of receiver and solicitors in amount submitted in report without any reduction — Shareholders appealed — Appeal allowed in part — Portion of order of motion judge approving accounts of receiver's solicitors set aside — Motion judge erred in failing to give accounts of receiver's solicitors separate consideration — Accounts of receiver's solicitors were ordered to be resubmitted, verified by affidavit and assessed by different judge — Shareholders had fair opportunity to challenge remuneration of receiver and questioning of receiver's representative was adequate substitute for cross-examining him, however receiver's representative could not speak to accuracy or reasonableness of solicitors' accounts — No representative of receiver's solicitors was available to question or cross-examine — Motion judge erred in equating procedure to be followed for approving receiver's conduct of receivership with procedure to be followed in assessing receiver's remuneration — Better practice is for receiver and its solicitors to each support claim for remuneration by way of affidavit.

***Borins J.A.:***

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook, consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

## Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately \$24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

**THIS COURT ORDERS** that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately \$6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from \$175 to \$550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

- receiver's fees and disbursements of \$1,080,874.93, inclusive of GST.
- legal fees of Goodmans of \$209,803.46, inclusive of GST.
- legal fees of Goodman and Carr of \$92,292.32, inclusive of GST.
- legal fees of Kavinoky & Cook of \$2,583.23.

7 The Parravano's objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravano's, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

- (1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;
- (2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and
- (3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

### **Reasons of the motion judge**

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

Perhaps it is the height — or depth — of audacity for counsel for the Parravano's to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances

for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravanos' counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

- (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.
- (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.
- (3) The receivership was difficult and "rather unique".

- (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".
- (5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravanos.
- (6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.
- (7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he emphasized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

[An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

## Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

### (1) Bias



22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.
- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.
- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".
- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.
- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

***(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver***

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

... the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. ... Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).<sup>1</sup> I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."<sup>2</sup> In *Holmsted and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In

*In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, e.g., *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle*, *supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

### **(3) Fair and reasonable remuneration**

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); *aff'd* [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, e.g., *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the

time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bkcty.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, e.g., *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must

relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde* and *Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

## Conclusion

### (1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.



## *(2) Cross-examination of the receiver*

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witnesses, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer

the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . . "

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, e.g., *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.



- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded from any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- Mr. Pape was given a full opportunity to make submissions.

### ***(3) The remuneration claimed by the receiver and its solicitor***

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

### **Result**

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

***Catzman J.A.:***

I agree.

***Doherty J.A.:***

I agree.

Footnotes

- 1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.
- 2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

TAB 8

2015 ABQB 745  
Alberta Court of Queen's Bench

Servus Credit Union Ltd. v. Trimove Inc.

2015 CarswellAlta 2169, 2015 ABQB 745, [2015] A.J. No. 1275, [2016] A.W.L.D. 488, 260 A.C.W.S. (3d) 677

**Servus Credit Union Ltd, Applicant and Trimove Inc. and Geeta Luthra, Respondents**

J.B. Veit J.

Heard: November 18, 2015  
Judgment: November 24, 2015  
Docket: Edmonton 1503-06388

Counsel: Kentigern A. Rowan, Q.C., for Receiver, MNP Ltd.  
Thomas Gusa, for Applicant, Servus Credit Union Ltd.  
Darren R. Bieganek, Q.C., for AFSC (Agricultural Financial Service Corporation)  
Vishal Luthra, Geeta Luthra, for themselves

**Headnote**

Bankruptcy and insolvency --- Receivers — Fees and expenses

Court-appointed receiver recovered total of approximately \$1.1 million of which approximately \$863,000 was available to distribute to creditors — Receiver brought application for approval of its fees and its lawyer's fees which together totalled approximately \$82,000 — Application granted — No basis was established for any substantive challenge to fees — Receiver provided detailed information about its activities and about individuals who undertook them and their rates — Amount of work undertaken by receiver was to be assessed in light of all circumstances of case including uncooperative attitude expressed by debtors at outset, difficulties of accounting for rolling stock, and ongoing failure of debtors to provide timely, accurate information — Debtors had contracted to pay receiver's lawyer's fees on full indemnity basis — Contract with respect to fees should be conclusive in absence of any argument that contract itself is invalid — There was no suggestion that legal fees exceeded those which could be said to be essential to and arising within four corners of litigation.

**J.B. Veit J.:**

**Summary**

- 1 The court-appointed receiver asks for approval of its, and its lawyer's, fees.
- 2 The debtors claim that both the receiver's fees and the receiver's lawyer's fees are excessive. They do not provide any evidence in support of their argument.
- 3 The court granted to Servus Credit Union Ltd. a without notice interim receivership, subsequently extended to a full receivership, of Trimove Inc. By the time of the granting of the full receivership, it was apparent that the debtors were insolvent: not only could they not pay Servus' demand claims, they could not pay their employees' salaries, etc. As of the date of the current application to distribute proceeds and award costs, the debtors owed Servus Credit Union approximately \$1.2 million. The instruments creating the secured debt include a contractual obligation on Trimove Inc. and the guarantor Luthra to pay all costs and expense of enforcing the security, including legal fees on "a solicitor-and-his-own-client full indemnity basis". The receiver recovered a total of approximately \$1.1 million, of which approximately \$863,000.00 was available to distribute to Trimove's secured creditors. The receiver proposes that Servus receive approximately \$298,000.00 of that fund. The fees claimed by the receiver and the receiver's lawyer total approximately \$82,000.00.

4 The debtors propose that the court appoint an independent expert in receiverships to assess the costs claimed and report to the court; they propose that the maximum fee payable for that work be \$3,000.00.

5 The debtors' application for the appointment of an expert to give an opinion on fees is denied. The applicant's request for approval of its, and its lawyers' fees, is granted.

6 Receivers and receivers' lawyers' fees are tested according to well-established legal principles as set out, for example, in *Belyea*, *Bakemates* and *Diemer*.

7 Here, the receiver has set out detailed dockets and an explanation of the multiplicand basis for its fee. Not only have the debtors not provided any evidence that the hourly fees charged were excessive, they have not established that the work undertaken was excessive. On the contrary, in light of the principal's early comment to the receiver, "We'll make sure you get nothing", the nature of the assets - rolling stock, and the documented failure of the debtors to provide reliable information on such crucial assets as accounts receivable, there is no evidence that the time spent by the receiver in tracking down assets was unreasonable.

8 While the claim for lawyer's fees was set out in only two lines of information and was not verified by affidavit as is recommended in *Bakemates*, the debtors contracted to pay all legal costs associated with recovery "on an indemnity basis"; that contract does not limit fees to what is reasonable. There is no suggestion of duress or equivalent in the negotiation of the lawyer's fee contract; as indicated by Farley J., in the absence of duress, an "agreement as to the fees should be conclusive." *BT-PR Realty Holdings*. In any event, however, neither of the two main secured creditors, who are the only parties whose recovery deficit would be ameliorated if the fees were reduced, nor the court, in the exercise of its oversight responsibility, discern any excess in the fees claimed by the receiver's lawyers.

9 If there were a basis for review of the receivers' fees, the court would not hire an outside expert; rather it would engage in the process outlined in *Bakemates*.

#### **Cases and authority cited:**

10 *By the debtors: Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B. C.A.); *Bank of Nova Scotia v. Diemer*, 2014 ONCA 851 (Ont. C.A.).

11 *By the court: Confectionately Yours Inc., Re*, [2002] O.J. No. 3569 (Ont. C.A.) [hereinafter *Bakemates*]; *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]); *911502 Alberta Ltd. v. Elephant Enterprises Inc.*, 2014 ABCA 437 (Alta. C.A.); *Sidorsky v. CFCN Communications Ltd.*, [1995] A.J. No. 174 (Alta. Q.B.); *Alberta Treasury Branches v. Weatherlok Canada Ltd.*, 2011 ABCA 314 (Alta. C.A.) [hereinafter *Trinier*].

#### **1. Background**

12 Trimove is a transport company specializing in the delivery of heavy crude oil in the Vermilion area of Alberta; it also operates in the United States.

13 Servus Credit Union Ltd. issued a demand overdraft loan, and demand term loans, to Trimove Inc.; those facilities totalled approximately \$1.1 million. As a representative example, in the \$700,000.00 Demand Commercial Mortgage issued on June 12, 2013 to Trimove by Servus, Trimove agreed to the following conditions of credit:

1) The Borrower agrees to pay all expenses, fees and charges incurred by Servus Credit Union in relation to the loans; the preparation and registration of security, enforcement or preservation of Servus Credit union's rights and remedies; whether or not any such documentation is completed or any funds are advanced, including but not limited to legal expenses (on a solicitor-and-his-own-client full indemnity basis), cost of accountants, engineers, architects, consultants, appraisers and cost of searches and registration.

14 Geeta Luthra guaranteed the repayment of those facilities.

15 Neither the demand for repayment of the facilities nor the demand for payment of the guarantee, each of which was made on or about April 25, 2015, was met. Servus therefore initiated an *ex parte* receivership application as a result of which MNP Ltd was appointed as interim receiver on May 1, 2015. In support of that application, Servus filed an affidavit from one of its senior relationship managers of commercial special loans which included the following assertion:

On April 29, 2015, due to Trimove's significantly worsening margining position, I advised Karan Luthra, a principal and director of Trimove, that Servus was no longer agreeable to the forbearance arrangements previously discussed .... In response to this statement Karan stated that "We'll make sure you get nothing".

16 When the matter came back before the court, on notice, on May 8, the court confirmed the receivership order, but, in response to the submissions of the debtors, required an undertaking from Servus not to file the order until May 22; the delay was intended to give the debtors time to retain an insolvency lawyer, to arrange alternate financing, and to comply with the terms of the Interim Receivership Order. On that date, the court explicitly reminded the debtors of their obligation to cooperate with the receiver. Up to that point, the debtors had received at least informal legal advice from Luthra Law Group.

17 On May 15, 2015, Trimove had insufficient funds to meet its payroll obligations. Trimove also had \$146,480.00 in outstanding accounts payable and no funds to pay them.

18 On May 19, 2015, Servus went back to court and obtained an order authorizing the immediate use of the receivership order in order to protect both Trimove's estate and the interests of Servus and the other creditors. Servus' application asserted that representatives of Trimove had not been fully cooperative with the receiver in that they failed to provide financial information and to identify and locate equipment. The interim receiver had been forced to send a letter to Trimove threatening a contempt application before cooperation was improved, "but there still appears to be information that has not yet been provided to the Interim Receiver". Trimove never did retain an expert insolvency lawyer; nor did it obtain alternative financing.

19 On May 19, the debtor filed an affidavit from Vishal Luthra attempting to demonstrate that Trimove had been cooperative with the receiver. Mr. Luthra swore:

[the receiver] demanded that we release to him all the data and mentioned that his team is out and about looking for our equipment. I assured him at that point, that equipment is safe and there is no risk for the lender's security....

Eric Sirrs gave me 2 hours to compile information for him to satisfy his court order demands.... I provided him the following items ... list of equipment, I recalled from my memory and locations ...

20 Another example of the kind of lack of cooperation complained of is the failure of Trimove, even up to and including the date of this application, to explain how the payment of a Trimove account receivable ended up in the hands of a stranger. At this hearing, the debtors explained that they owned a separate entity, with a very similar name to Trimove Inc., and there had perhaps been a typing error in naming the payee of the cheque.

21 Another example of the problems experienced by the receiver relates to the failure of Trimove to satisfactorily explain the transfer of two of its serial numbered pieces of equipment to a third party who asserted that he had done machinist's work for Trimove over a period of a year and not been paid. That stranger, Khullar, has provided information to the receiver, but management has failed to do so.

22 Another example of the debtor's failure to provide accurate, timely information relates to the failure of Trimove to provide GPS locations for some of its equipment moving on highways even when, by May 12, one unit was still out of the country.

23 Finally, in respect of the Aarbro issue, the debtors filed evidence at this hearing concerning their interest in that property. In light of that late dispute relating to ownership of the company owning the ranch property in question, the disposition of the Aarbro claim is deferred to a separate hearing.

24 In support of the claim for its fees, MNP filed an affidavit attaching docketed time allocations for work done on the receivership, together with an outline of the individuals who worked on the receivership and their billable cost. MNP also approved as part of its receivership expenses the fees of its lawyer.

25 The legal fees claimed are not the subject of an affidavit. There is, however, reference in the law firm's two line claim to invoices relating to the totals claimed. There is no evidence that the debtors ever asked for information about the invoices themselves.

## **2. Testing receivers' and lawyers' fees**

26 I agree with the debtors that general guidance to receivers', and their lawyers', fees can be found in *Belyea* and *Diemer*.

27 In addition to those authorities, I bring to the debtors' attention two additional cases, the first of which is *Bakemates*, which expands on some of the topics relating to the testing of fees and provides a useful outline of the processes by which any necessary examination of fees will be conducted.

28 The other case to which I must refer is *BT-PR Realty Holdings*. That decision is important in the circumstances here where there is a contract relating to fees, specifically the lawyer's fees. A court's general approach to fees must also take into account, not only the general principles as set out in decisions such as *Diemer*, but also any contract in relation to legal fees. As Farley J. said:

I do not particularly quarrel with the list of factors set out in the *Bank of Montreal v. Nicar Trading Co. (1990)*, 78 C.B.R. (N.S.) 85 (B.C.C.A.):

- (a) the nature extent and value of the cases;
- (b) the complications and difficulties encountered;
- (c) the degree of assistance provided by the parties;
- (d) time spent by the receiver;
- (e) the receiver's knowledge, experience and skill;
- (f) diligence and thoroughness;
- (g) responsibilities assumed;
- (h) results achieved; and,
- (i) the cost of comparable services.

However I would add

(j) other material considerations - for example in this case:

(i) the April 12 agreement to the fees;

(ii) the priority receivership of the Bank in this co-receivership relationship; and (iii) the apparent diversionary and distracting excessive hands on requirements of Miller who all the while is demanding efficiency (more accurately a low fee at any price).

I would think however that where there is a retainer given which indicates that the fee will be based upon the multiplicand of hourly rates and time expended this factor should receive special emphasis as it is what the parties bargained for. See above

for my views about allowing the taxi meter to run without taking the passenger along the appropriate route. In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

In other words, in *BT-PR Realty Holdings*, Farley J. emphasized that while an outrageous departure from the norm, such as a taxi driver "[taking] his fare from the Courthouse to the Royal York Hotel via Oakville", or, in Edmonton terms, taking a fare from the Law Courts to the MacDonald Hotel via Spruce Grove, will not be tolerated, an agreement about fees is usually conclusive.

### **3. Applying the principles in this case**

#### ***a) Receiver's fees***

29 Information about the receiver's fees is attached to an affidavit in the manner recommended by *Bakemates*. The debtors do not provide any evidence on the issue of fees.

30 It's true, of course, that this was not a technically complicated receivership. The receiver sold most of the debtors' assets by auction. However, even settling on that procedure entailed some work by the receiver as there were competing offers from auction businesses and the receiver had to do some research to determine why it should prefer one auctioneer's offer to the other.

31 More important than the way in which the receiver disposed of most of the assets is the unfortunate response of the debtor to the initial approach by the receiver, coupled with the nature of the debtor's assets; those two factors justify what the debtors consider to be excessive scrutiny by the receiver.

32 In addition to this main problem, which is represented by the docket in the greater expenditures at the outset of the receivership, there are the continuing problems over the course of the receivership.

33 The debtors never did retain an insolvency expert; therefore, the receiver was dealing with them personally. Dealing with self-represented litigants takes more time and care and provides less comfort than dealing with professionals.

34 Also, Mr. Luthra's affidavit of May 19, 2015 illustrates the gulf which Trimove did not recognize between verifiable information and opinion.

35 Problems of the type exemplified by the cheque which was attempted to be cashed by a stranger caused additional administration expenses since it precipitated a mail re-direction notice which then required the receiver to return mail which it received to a law firm which shared the mailing address of Trimove.

36 It's also true that, over time, Trimove and its representatives did become more cooperative without ever seeming to completely realize the importance from the receiver's perspective of getting accurate, substantiated, information promptly. Nonetheless, the failure to simply and promptly provide the information and documents required by the receiver caused the receiver to spend more time on the administration of this receivership than would otherwise be necessary.

37 Against the receiver's docketed multiplicand, the debtors have raised arguments of the "I can deliver goods to Texas for \$3,000.00 so how come did it cost the receiver so much to go around to the yard I was renting to check my equipment" variety.

38 In summary with respect to the receiver's fees, the receiver has provided detailed information about its activities and the individuals, and their rates, who have undertaken those activities. The amount of work undertaken by the receiver must be assessed in light of all of the circumstances of this case, including the unfortunate attitude expressed by the debtor at the outset, the difficulties of accounting for rolling stock, and the ongoing failure of the debtors to provide timely, accurate, information. For their part, the debtors have not provided any evidence. Given the role of court-appointed receivers, and all of the information provided about this particular receivership, the court concludes that no basis has been established for any substantive challenge to the receiver's fees. The receiver's fees are therefore approved.



***b) Lawyer's fees***

39 The receiver's lawyers' fees have not been submitted by way of affidavit in the manner suggested in *Bakemates*: see, paras 38 ff. Indeed, the only information about the lawyer's fees is contained in two lines which set out the total amount of fees claimed.

40 However, there is no suggestion that the debtors attempted to learn more about the lawyers' fees by asking for copies of the invoices which are referred to in the two lines of information.

41 More importantly, the debtors contracted to pay any lawyers' fees on a full indemnity basis. It is important to note that the contract concerning fees was clear: the language referred explicitly to "solicitor-and-his-own-client full indemnity basis". Therefore, there is no uncertainty about the level of fees the debtor agreed to pay of the type identified by our Court of Appeal in *Elephant Enterprises*.

42 As to what a contract means when one party agrees to pay "solicitor and his own client full indemnity" fees, we obtain assistance from McMahon J. in *Sidorsky*, at para. 5 where that judge, who was an expert in the matter of fees having chaired a provincial committee on the setting of Schedule C fee items, said:

5 There are three levels of costs that may be payable by one party to another:

1. Party and party costs: calculated on the basis of *Schedule C of the Alberta Rules of Court* or some multiple thereof, plus reasonable disbursements.
2. Solicitor and client costs: which provide for indemnity to the party to whom they are awarded for costs that can be said to be essential to and arising within the four corners of the litigation.
3. Solicitor and his own client costs: sometimes referred to as complete indemnity for costs. These are costs which a solicitor could tax against a resisting client and may include payment for services which may not be strictly essential to the conduct of the litigation.

43 As to whether there is any capacity for a court to depart from a contract term that obliges one party to pay an indemnity of legal fees, I note our Court of Appeal's decision in *Trinier*:

G. Any Discretion?

39 It was argued before us that the chambers judge now appealed from had a "discretion" to deny solicitor-client costs. Given the covenants here, it is doubtful.

40 But even if a discretion existed as to certain items, there is no proper legal ground to exercise such a discretion here. No misconduct or sharp practice by the appellants is even alleged. They ultimately lost no step, in my view. They did not churn, and did not pursue trivia in order to incur huge solicitor-client costs. And most of the steps whose costs were in issue had already been the subject of previous costs decisions.

41 If there was any discretion as to costs, at best it was as to the costs of the "side issue" about contribution for the first \$100,000 paid by the appellants before the suit. But any such discretion was that of the first judge (Lewis J.), not the (second) chambers judge now under appeal. So the second judge was not entitled to revisit that. And so even if he was, the Court of Appeal owes him no deference on further appeal on that topic. He purported to sit on appeal from the taxing officer who taxed solicitor-client costs.

42 Besides, the covenants here are for solicitor-and-own-client costs, so a mere immoderate amount of costs or of the appellants' steps would likely not remove the right to such costs.

This, of course, echoes the comments of Farley J. to the effect that a contract with respect to fees should be conclusive in the absence of any argument that the contract itself is invalid: *BT-Pr Realty Holdings Inc.*

44 In summary on the legal interpretation of the contract the debtors executed, the debtors agreed to pay even for legal services which may not have been strictly essential to the conduct of the receivership.

45 However, and importantly, there is no suggestion whatever that the legal fees in the circumstances here even exceeded those which could be said to be essential to and arising within the four corners of the litigation. On the contrary, the two main creditors of Trimove, creditors who have hundreds of thousands of dollars of shortfall in their secured claims against Trimove and who are the only persons who might conceivably have their financial position improved by any reduction of the legal fees, have both accepted the legal fees claimed by the receiver's lawyer. As Farley J. said all those years ago, even if a party agreed to indemnify a lawyer for their fees, the court would then, and would still step in to prevent an injustice if there were some outrageous fee claim made by a lawyer. There is no such basis for interference here. The receiver's lawyer's fees are therefore approved.

#### **4. Proposal to hire an expert to review the receiver's fees**

46 If there had been a basis on which either the receiver's or the receiver's lawyer's fees should be reviewed, the court would have followed the procedure recommended in *Bakemates* rather than the proposal made by the debtors. Since the debtors did not establish the required basis, the *Bakemates* procedure does not arise.

#### **5. Costs**

47 The debtors were unsuccessful in their application to reduce the receivership fees. If the parties are not agreed on costs, I can be spoken to within 30 days of the release of this decision.

*Application granted.*

TAB 9

2002 SCC 41, 2002 CSC 41  
Supreme Court of Canada

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

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

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

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

Heard: November 6, 2001

Judgment: April 26, 2002

Docket: 28020

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

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

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

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

**Headnote**

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

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

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

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

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

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— Salutory effects of order outweighed deleterious effects — Canadian Environmental Assessment Act, S.C. 1992, c. 37, s. 5(1)(b) — [Federal Court Rules, 1998, SOR/98-106, R. 151, 312](#).

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

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

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

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

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

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

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

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

**Held:** The appeal was allowed.

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

the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which includes public interest in open and accessible court proceedings.

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

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

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

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

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

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

Les solutions proposées par la Division de première instance et par la Cour d'appel comportaient toutes deux des problèmes. 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.

**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.*

TAB 10

2021 SCC 25, 2021 CSC 25  
Supreme Court of Canada

Sherman Estate v. Donovan

2021 CarswellOnt 8339, 2021 CarswellOnt 8340, 2021 SCC 25, 2021 CSC 25, 331 A.C.W.S. (3d) 489,  
458 D.L.R. (4th) 361, 66 C.P.C. (8th) 1, 67 E.T.R. (4th) 163, 72 C.R. (7th) 223, EYB 2021-391973

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

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

Heard: October 6, 2020

Judgment: June 11, 2021

Docket: 38695

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

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## Headnote

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

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

could not be said that risk to privacy was sufficiently serious to overcome strong presumption of openness — Same was true of risk to physical safety.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Evidence on appeal — New evidence

Juges et tribunaux --- Compétence — Compétence de la cour sur sa propre procédure — Mise sous scellés de dossiers

Couple riche et célèbre a été retrouvé sans vie dans sa résidence, et la mort du couple a suscité un vif intérêt dans le public et provoqué une attention médiatique intense — Successions ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense — Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés — Juge de première instance a accordé l'ordonnance de mise sous scellés — Journaliste et journal ont eu gain de cause en appel et l'ordonnance a été annulée — Fiduciaires ont formé un pourvoi — Pourvoi rejeté — Cour d'appel a eu raison d'annuler l'ordonnance de mise sous scellés — Renseignements contenus dans les dossiers judiciaires ne revêtaient pas un caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées — Fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées — On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires — Il en était de même du risque pour la sécurité physique.

Procédure civile --- Procédure en appel — Pouvoirs et obligations de la cour d'appel — Preuve en appel — Nouvelle preuve

A wealthy and prominent husband and wife were found dead in their home. Their deaths generated intense public interest and press scrutiny, and the following year the police service announced that the deaths were being investigated as homicides. The couple's estates and the estate trustees sought to stem the intense press scrutiny. When the time came to obtain certificates of appointment of estate trustees, the trustees sought a sealing order so that the trustees and beneficiaries might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. These sealing orders were granted, with the application judge sealing the orders for an initial period of two years with the possibility of renewal.

The sealing orders were challenged by a journalist, who had written a series of articles on the couple's death, and the newspaper for which he wrote. The Court of Appeal allowed the appeal and the sealing orders were lifted. The Court of Appeal concluded that the privacy interest for which the trustees sought protection lacked the quality of public interest and that there was no evidence that could warrant a finding that disclosure of the content of the estate files posed a real risk to anyone's physical safety. The trustees had failed the first stage of the test for obtaining orders sealing the probate files.

The trustees appealed, seeking to restore the sealing orders. The newspaper brought a motion to adduce new evidence on the appeal.

**Held:** The appeal was dismissed; the motion was dismissed as moot.

Per Kasirer J. (Wagner C.J.C., Moldaver, Karakatsanis, Brown, Rowe, Martin JJ. concurring): There is a strong presumption in favour of open courts. Notwithstanding this presumption, exceptional circumstances do arise where competing interests justified a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness was sought, the applicant must demonstrate as a threshold requirement that openness presents a serious risk to a competing interest of public importance. The applicant must show that the order was necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweighed its negative effects. For the purposes of the relevant test, an aspect of privacy was recognized as an important public interest. Proceedings in open court could lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what was seen as the public interest in protecting human dignity, was shown to be at serious risk, an exception to the open court principle may be justified. It could not be said that the risk to privacy was sufficiently serious to overcome the strong presumption of openness. The same was true of the risk to physical safety. The Court of Appeal was right to set aside the sealing orders.

The broad claims of the trustees failed to focus on the elements of privacy that were deserving of public protection in the open court context. Personal information disseminated in open court could be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy served to protect individuals from this affront, it was an important public interest relevant under the 2002 Supreme Court of Canada judgment that set out the relevant test. This public interest would only be seriously at risk where the information in question struck at what was the core identity of the individual concerned: information so sensitive that its dissemination could be an affront to dignity that the public would not tolerate, even in service

of open proceedings. The information in the court files was not of this highly sensitive character that it could be said to strike at the core identity of the affected persons. The trustees had failed to show how the lifting of the sealing orders engaged the dignity of the affected individuals.

In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that: (1) court openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and (3) as a matter of proportionality, the benefits of the order outweigh its negative effects. Only where all three of these prerequisites have been met can a discretionary limit on openness properly be ordered. Contrary to what the trustees argue, the matters in a probate file are not quintessentially private or fundamentally administrative. The fundamental rationale for openness applies to probate proceedings and thus to the transfer of property under court authority and other matters affected by that court action. The emphasis that the Court of Appeal placed on personal concerns as a means of deciding that the sealing orders failed to meet the necessity requirement was mistaken. It was inappropriate to dismiss the public interest in protecting privacy as merely a personal concern. The important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. The risk to this interest would be serious only where the information that would be disseminated as a result of court openness was sufficiently sensitive such that openness could be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity.

The failure of the application judge to assess the sensitivity of the information constituted a failure to consider a required element of the legal test, and this warranted intervention on appeal. Applying the appropriate framework to the facts of this case, it was concluded that the risk to the important public interest in the affected individuals' privacy was not serious. The information that the trustees sought to protect was not highly sensitive and this alone was sufficient to conclude that there was no serious risk to the important public interest in privacy so defined. The relevant privacy interest bearing on the dignity of the affected persons had not been shown. Merely associating the beneficiaries or trustees with the couple's unexplained deaths was not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity. The trustees did not advance any specific reason why the contents of these files were more sensitive than they may seem at first glance. While some of the material in the court files may well be broadly disseminated, the nature of the information had not been shown to give rise to a serious risk to the important public interest in privacy.

There was no controversy that there was an important public interest in protecting individuals from physical harm. Direct evidence was not necessarily required to establish a serious risk to an important interest. It was not just the probability of the feared harm but also the gravity of the harm itself that was relevant to the assessment of serious risk. There was no dispute that the feared physical harm was grave, but it was agreed that the probability of this harm was speculative. The bare assertion that such a risk exists failed to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting intervention. Even if the trustees had succeeded in showing a serious risk to the privacy interest they asserted, a publication ban would likely have been sufficient as a reasonable alternative to prevent this risk. The trustees were not entitled to any discretionary order limiting the open court principle. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the trustees had failed at this stage of the test for discretionary limits on court openness.

Les cadavres d'un homme et de sa femme, un couple riche et célèbre, ont été retrouvés dans leur résidence. Leur mort a suscité un vif intérêt dans le public et provoqué une attention médiatique intense et, au cours de l'année qui a suivi, le service de police a annoncé que les morts faisaient l'objet d'une enquête pour homicides. La succession du couple ainsi que les fiduciaires des successions ont cherché à réfréner l'attention médiatique intense. Quand le temps est venu d'obtenir leurs certificats de nomination à titre de fiduciaires des successions, les fiduciaires ont sollicité une ordonnance de mise sous scellés dans le but d'épargner aux fiduciaires des successions et aux bénéficiaires de nouvelles atteintes à leur vie privée, et de les protéger contre ce qui, selon les allégations, aurait constitué un risque pour leur sécurité. Les ordonnances de mise sous scellés ont été accordées et le juge de première instance a fait placer sous scellés les dossiers pour une période initiale de deux ans avec possibilité de renouvellement.



Les ordonnances de mise sous scellés ont été contestées par un journaliste qui avait écrit une série d'articles sur la mort du couple et par le journal pour lequel il écrivait. La Cour d'appel a accueilli l'appel et les ordonnances de mise sous scellés ont été levées. La Cour d'appel a conclu que l'intérêt en matière de vie privée à l'égard duquel les fiduciaires sollicitaient une protection ne comportait pas la qualité d'intérêt public et qu'il n'y avait aucun élément de preuve permettant de conclure que la divulgation du contenu des dossiers de succession posait un risque réel pour la sécurité physique de quiconque. Les fiduciaires n'avaient pas franchi la première étape du test relatif à l'obtention d'ordonnances de mise sous scellés des dossiers d'homologation.

Les fiduciaires ont formé un pourvoi visant à faire rétablir les ordonnances de mise sous scellés. Le journal a déposé une requête visant à introduire une nouvelle preuve dans le cadre du pourvoi.

**Arrêt:** Le pourvoi a été rejeté; la requête, devenue théorique, a été rejetée.

Kasirer, J. (Wagner, J.C.C., Moldaver, Karakatsanis, Brown, Rowe, Martin, JJ., souscrivant à son opinion) : Il existe une forte présomption en faveur de la publicité des débats judiciaires. Malgré cette présomption, il peut arriver des circonstances exceptionnelles où des intérêts opposés justifient de restreindre le principe de la publicité des débats judiciaires. Lorsqu'un demandeur sollicite une ordonnance judiciaire discrétionnaire limitant le principe constitutionnalisé de la publicité des procédures judiciaires, il doit démontrer, comme condition préliminaire, que la publicité des débats en cause présente un risque sérieux pour un intérêt opposé qui revêt une importance pour le public. Le demandeur doit démontrer que l'ordonnance est nécessaire pour écarter le risque et que, du point de vue de la proportionnalité, les avantages de cette ordonnance restreignant la publicité l'emportent sur ses effets négatifs. On a reconnu qu'un aspect de la vie privée constituait un intérêt public important pour l'application du test pertinent. La tenue de procédures judiciaires publiques était susceptible de mener à la diffusion de renseignements personnels très sensibles, laquelle entraînerait non seulement un désagrément ou de l'embarras pour la personne touchée, mais aussi une atteinte à sa dignité. Dans les cas où il est démontré que cette dimension plus restreinte de la vie privée, qui semble tirer son origine de l'intérêt du public à la protection de la dignité humaine, était sérieusement menacée, une exception au principe de la publicité des débats judiciaires peut être justifiée. On ne saurait affirmer que le risque pour la vie privée était suffisamment sérieux pour permettre de réfuter la forte présomption de publicité des débats judiciaires. Il en était de même du risque pour la sécurité physique. La Cour d'appel a eu raison d'annuler les ordonnances de mise sous scellés.

Les larges revendications des fiduciaires n'étaient pas axées sur les éléments de la vie privée qui méritaient une protection publique dans le contexte de la publicité des débats judiciaires. La diffusion de renseignements personnels dans le cadre de débats judiciaires publics peut être plus qu'une source de désagrément et peut aussi entraîner une atteinte à la dignité d'une personne. Dans la mesure où elle sert à protéger les personnes contre une telle atteinte, la vie privée constitue un intérêt public important qui est pertinent en vertu du critère établi par la Cour suprême du Canada dans une décision rendue en 2002. L'intérêt public ne serait sérieusement menacé que si les renseignements en question portaient atteinte à ce que l'on considère comme l'identité fondamentale de la personne concernée : des renseignements si sensibles que leur diffusion pourrait porter atteinte à la dignité de la personne d'une manière que le public ne tolérerait pas, pas même au nom du principe de la publicité des débats judiciaires. En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtaient pas ce caractère si sensible qu'on pourrait dire qu'ils touchaient à l'identité fondamentale des personnes concernées. Les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés mettait en jeu la dignité des personnes touchées.

Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que : 1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important; 2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et 3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs. Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires pourra dûment être rendue. Contrairement à ce que les fiduciaires soutiennent, les questions soulevées dans un dossier d'homologation ne sont pas typiquement de nature privée ou fondamentalement de nature administrative. La raison d'être fondamentale de la publicité des débats s'applique aux procédures d'homologation et donc au transfert de biens sous l'autorité d'un tribunal ainsi qu'à d'autres questions touchées par ce recours judiciaire. La Cour d'appel a eu tort de mettre l'accent sur les préoccupations personnelles pour décider que les ordonnances de mise sous scellés ne satisfaisaient pas à l'exigence de la nécessité. Il est inapproprié de rejeter l'intérêt du public à la protection de la vie privée au motif qu'il s'agit d'une simple préoccupation personnelle. L'intérêt public important en matière de vie privée, tel qu'il est considéré dans le contexte des limites à la publicité des débats, vise à permettre aux personnes de garder un contrôle sur leur identité fondamentale dans la sphère publique dans la mesure nécessaire

pour protéger leur dignité. Le public a un intérêt dans la publicité des débats, mais il a aussi un intérêt dans la protection de la dignité : l'administration de la justice exige que, lorsque la dignité est menacée de cette façon, des mesures puissent être prises pour tenir compte de cette préoccupation en matière de vie privée. Le risque pour cet intérêt ne sera sérieux que lorsque les renseignements qui seraient diffusés en raison de la publicité des débats judiciaires sont suffisamment sensibles pour que l'on puisse démontrer que la publicité porte atteinte de façon significative au coeur même des renseignements biographiques de la personne d'une manière qui menace son intégrité.

En n'examinant pas le caractère sensible des renseignements, le juge de première instance a omis de se pencher sur un élément nécessaire du test juridique, ce qui justifiait une intervention en appel. En appliquant le cadre approprié aux faits de la présente affaire, on a conclu que le risque pour l'intérêt public important à l'égard de la vie privée des personnes touchées n'était pas sérieux. Les renseignements que les fiduciaires cherchaient à protéger n'étaient pas très sensibles, ce qui suffisait en soi pour conclure qu'il n'y avait pas de risque sérieux pour l'intérêt public important en matière de vie privée tel que défini. L'intérêt pertinent en matière de vie privée se rapportant à la dignité des personnes touchées n'a pas été démontré. Le simple fait d'associer les bénéficiaires ou les fiduciaires à la mort inexpiquée du couple ne suffisait pas à constituer un risque sérieux pour l'intérêt public important en matière de dignité ayant été constaté, intérêt défini au regard de la dignité. Les fiduciaires n'ont pas fait valoir de raison précise pour laquelle le contenu de ces dossiers serait plus sensible qu'il n'y paraît à première vue. Même si certains des éléments contenus dans les dossiers judiciaires pouvaient fort bien être largement diffusés, il n'a pas été démontré que la nature des renseignements en cause entraînerait un risque sérieux pour l'intérêt public important en matière de vie privée. Nul n'a contesté l'existence d'un intérêt public important dans la protection des personnes contre un préjudice physique. Une preuve directe n'est pas nécessairement exigée pour démontrer qu'un intérêt important est sérieusement menacé. Ce n'est pas seulement la probabilité du préjudice appréhendé qui est pertinente lorsqu'il s'agit d'évaluer si un risque est sérieux, mais également la gravité du préjudice lui-même. Si nul ne contestait que le préjudice physique appréhendé fût grave, il fallait cependant reconnaître que la probabilité que ce préjudice se produise était conjecturale. Le simple fait d'affirmer qu'un tel risque existe ne permettait pas de franchir le seuil requis pour établir l'existence d'un risque sérieux de préjudice physique. La conclusion contraire tirée par le juge de première instance était une erreur justifiant l'intervention de la Cour d'appel. Même si les fiduciaires avaient réussi à démontrer l'existence d'un risque sérieux pour l'intérêt en matière de vie privée qu'ils invoquent, une interdiction de publication aurait probablement été suffisante en tant qu'autre option raisonnable pour écarter ce risque. Les fiduciaires n'ont droit à aucune ordonnance discrétionnaire limitant le principe de la publicité des débats judiciaires. La Cour d'appel a conclu à juste titre qu'il n'y avait aucune raison de demander un caviardage parce que les fiduciaires n'avaient pas franchi cette étape du test des limites discrétionnaires à la publicité des débats judiciaires.

***Kasirer J. (Wagner C.J.C. and Moldaver, Karakatsanis, Brown, Rowe and Martin JJ. concurring):***

## **I. Overview**

1 This Court has been resolute in recognizing that the open court principle is protected by the constitutionally-entrenched right of freedom of expression and, as such, it represents a central feature of a liberal democracy. As a general rule, the public can attend hearings and consult court files and the press — the eyes and ears of the public — is left free to inquire and comment on the workings of the courts, all of which helps make the justice system fair and accountable.

2 Accordingly, there is a strong presumption in favour of open courts. It is understood that this allows for public scrutiny which can be the source of inconvenience and even embarrassment to those who feel that their engagement in the justice system brings intrusion into their private lives. But this discomfort is not, as a general matter, enough to overturn the strong presumption that the public can attend hearings and that court files can be consulted and reported upon by the free press.

3 Notwithstanding this presumption, exceptional circumstances do arise where competing interests justify a restriction on the open court principle. Where a discretionary court order limiting constitutionally-protected openness is sought — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — the applicant must demonstrate, as a threshold requirement, that openness presents a serious risk to a competing interest of public importance. That this requirement is considered a high bar serves to maintain the strong presumption of open courts. Moreover, the protection of open courts does not stop there. The applicant must still show that the order is necessary to prevent the risk and that, as a matter of proportionality, the benefits of that order restricting openness outweigh its negative effects.

4 This appeal turns on whether concerns advanced by persons seeking an exception to the ordinarily open court file in probate proceedings — the concerns for privacy of the affected individuals and their physical safety — amount to important public interests that are at such serious risk that the files should be sealed. The parties to this appeal agree that physical safety is an important public interest that could justify a sealing order but disagree as to whether that interest would be at serious risk, in the circumstances of this case, should the files be unsealed. They further disagree whether privacy is in itself an important interest that could justify a sealing order. The appellants say that privacy is a public interest of sufficient import that can justify limits on openness, especially in light of the threats individuals face as technology facilitates widespread dissemination of personally sensitive information. They argue that the Court of Appeal was mistaken to say that personal concerns for privacy, without more, lack the public interest component that is properly the subject-matter of a sealing order.

5 This Court has, in different settings, consistently championed privacy as a fundamental consideration in a free society. Pointing to cases decided in other contexts, the appellants contend that privacy should be recognized here as a public interest that, on the facts of this case, substantiates their plea for orders sealing the probate files. The respondents resist, recalling that privacy has generally been seen as a poor justification for an exception to openness. After all, they say, virtually every court proceeding entails some disquiet for the lives of those concerned and these intrusions on privacy must be tolerated because open courts are essential to a healthy democracy.

6 This appeal offers, then, an occasion to decide whether privacy can amount to a public interest in the open court jurisprudence and, if so, whether openness puts privacy at serious risk here so as to justify the kind of orders sought by the appellants.

7 For the reasons that follow, I propose to recognize an aspect of privacy as an important public interest for the purposes of the relevant test from *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522. Proceedings in open court can lead to the dissemination of highly sensitive personal information that would result not just in discomfort or embarrassment, but in an affront to the affected person's dignity. Where this narrower dimension of privacy, rooted in what I see as the public interest in protecting human dignity, is shown to be at serious risk, an exception to the open court principle may be justified.

8 In this case, and with this interest in mind, it cannot be said that the risk to privacy is sufficiently serious to overcome the strong presumption of openness. The same is true of the risk to physical safety here. The Court of Appeal was right in the circumstances to set aside the sealing orders and I would therefore dismiss the appeal.

## II. Background

9 Prominent in business and philanthropic circles, Bernard Sherman and Honey Sherman were found dead in their Toronto home in December of 2017. Their deaths had no apparent explanation and generated intense public interest and press scrutiny. In January of the following year, the Toronto Police Service announced that the deaths were being investigated as homicides. As the present matter came before the courts, the identity and motive of those responsible remained unknown.

10 The couple's estates and estate trustees (collectively the "Trustees")<sup>1</sup> sought to stem the intense press scrutiny prompted by the events. The Trustees hoped to see to the orderly transfer of the couple's property, at arm's length from what they saw as the public's morbid interest in the unexplained deaths and the curiosity around apparently great sums of money involved.

11 When the time came to obtain certificates of appointment of estate trustee from the Superior Court of Justice, the Trustees sought a sealing order so that the estate trustees and beneficiaries ("affected individuals") might be spared any further intrusions into their privacy and be protected from what was alleged to be a risk to their safety. The Trustees argued that if the information in the court files was revealed to the public, the safety of the affected individuals would be at risk and their privacy compromised as long as the deaths were unexplained and those responsible for the tragedy remained at large. In support of their request, they argued that there was a real and substantial risk that the affected individuals would suffer serious harm from the public exposure of the materials in the circumstances.

12 Initially granted, the sealing orders were challenged by Kevin Donovan, a journalist who had written a series of articles on the couple's deaths, and Toronto Star Newspapers Ltd., for which he wrote (collectively the "Toronto Star").<sup>2</sup> The Toronto Star said the orders violated its constitutional rights of freedom of expression and freedom of the press, as well as the attending principle that the workings of the courts should be open to the public as a means of guaranteeing the fair and transparent administration of justice.

### III. Proceedings Below

#### *A. Ontario Superior Court of Justice, 2018 ONSC 4706, 41 E.T.R. (4th) 126 (Dunphy J.)*

13 In addressing whether the circumstances warranted interference with the open court principle, the application judge relied on this Court's judgment in *Sierra Club*. He noted that a confidentiality order should only be granted when: "(1) such an order is necessary ... to prevent a serious risk to an important interest because reasonable alternative measures will not prevent the risk; and (2) the salutary effects of the confidentiality order outweigh its deleterious effects, including the effects on the right to free expression and the public interest in open and accessible court proceedings" (para. 13(d)).

14 The application judge considered whether the Trustees' interests would be served by granting the sealing orders. In his view, the Trustees had correctly identified two legitimate interests in support of making an exception to the open court principle: "protecting the privacy and dignity of victims of crime and their loved ones" and "a reasonable apprehension of risk on behalf of those known to have an interest in receiving or administering the assets of the deceased" (paras. 22-25). With respect to the first interest, the application judge found that "[t]he degree of intrusion on that privacy and dignity has already been extreme and ... excruciating" (para. 23). For the second interest, although he noted that "it would have been preferable to include objective evidence of the gravity of that risk from, for example, the police responsible for the investigation", he concluded that "the lack of such evidence is not fatal" (para. 24). Rather, the necessary inferences could be drawn from the circumstances notably the "willingness of the perpetrator(s) of the crimes to resort to extreme violence to pursue whatever motive existed" (*ibid.*). He concluded that the "current uncertainty" was the source of a reasonable apprehension of the risk of harm and, further, that the foreseeable harm was "grave" (*ibid.*).

15 The application judge ultimately accepted the Trustees' submission that these interests "very strongly outweigh" what he called the proportionately narrow public interest in the "essentially administrative files" at issue (paras. 31 and 33). He therefore concluded that the harmful effects of the sealing orders were substantially outweighed by the salutary effects on the rights and interests of the affected individuals.

16 Finally, the application judge considered what order would protect the affected individuals while infringing upon the open court principle to the minimum extent possible. He decided no meaningful part of either file could be disclosed if one were to make the redactions necessary to protect the interests he had identified. Open-ended sealing orders did not, however, sit well with him. The application judge therefore sealed the files for an initial period of two years, with the possibility of renewal.

#### *B. Court of Appeal for Ontario, 2019 ONCA 376, 47 E.T.R. (4th) 1 (Doherty, Rouleau and Hourigan JJ.A.)*

17 The Toronto Star's appeal was allowed, unanimously, and the sealing orders were lifted.

18 The Court of Appeal considered the two interests advanced before the application judge in support of the orders to seal the probate files. As to the need to protect the privacy and dignity of the victims of violent crime and their loved ones, it recalled that the kind of interest that is properly protected by a sealing order must have a public interest component. Citing *Sierra Club*, the Court of Appeal wrote that "[p]ersonal concerns cannot, without more, justify an order sealing material that would normally be available to the public under the open court principle" (para. 10). It concluded that the privacy interest for which the Trustees sought protection lacked this quality of public interest.

19 While it recognized the personal safety of individuals as an important public interest generally, the Court of Appeal wrote that there was no evidence in this case that could warrant a finding that disclosure of the contents of the estate files posed a

real risk to anyone's physical safety. The application judge had erred on this point: "the suggestion that the beneficiaries and trustees are somehow at risk because the Shermans were murdered is not an inference, but is speculation. It provides no basis for a sealing order" (para. 16).

20 The Court of Appeal concluded that the Trustees had failed the first stage of the test for obtaining orders sealing the probate files. It therefore allowed the appeal and set aside the orders.

### ***C. Subsequent Proceedings***

21 The Court of Appeal's order setting aside the sealing orders has been stayed pending the disposition of this appeal. The Toronto Star brought a motion to adduce new evidence on this appeal, comprised of land titles documents, transcripts of the cross-examination of a detective on the murder investigation, and various news articles. This evidence, it says, supports the conclusion that the sealing orders should be lifted. The motion was referred to this panel.

## **IV. Submissions**

22 The Trustees have appealed to this Court seeking to restore the sealing orders made by the application judge. In addition to contesting the motion for new evidence, they maintain that the orders are necessary to prevent a serious risk to the privacy and physical safety of the affected individuals and that the salutary effects of sealing the court probate files outweigh the harmful effects of limiting court openness. The Trustees argue that two legal errors led the Court of Appeal to conclude otherwise.

23 First, they submit the Court of Appeal erred in holding that privacy is a personal concern that cannot, without more, constitute an important interest under *Sierra Club*. The Trustees say the application judge was right to characterize privacy and dignity as an important public interest which, as it was subject to a serious risk, justified the orders. They ask this Court to recognize that privacy in itself is an important public interest for the purposes of the analysis.

24 Second, the Trustees submit that the Court of Appeal erred in overturning the application judge's conclusion that there was a serious risk of physical harm. They argue that the Court of Appeal failed to recognize that courts have the ability to draw reasonable inferences by applying reason and logic even in the absence of specific evidence of the alleged risk.

25 The Trustees say that these errors led the Court of Appeal to mistakenly set aside the sealing orders. In answer to questions at the hearing, the Trustees acknowledged that an order redacting certain documents in the file or a publication ban could assist in addressing some of their concerns, but maintained neither is a reasonable alternative to the sealing orders in the circumstances.

26 The Trustees submit further that the protection of these interests outweighs the deleterious effects of the orders. They argue that the importance of the open court principle is attenuated by the nature of these probate proceedings. Given that it is non-contentious and not strictly speaking necessary for the transfer of property at death, probate is a court proceeding of an "administrative" character, which diminishes the imperative of applying the open court principle here (paras. 113-14).

27 The Toronto Star takes the position that the Court of Appeal made no mistake in setting aside the sealing orders and that the appeal should be dismissed. In the Toronto Star's view, while privacy can be an important interest where it evinces a public component, the Trustees have only identified a subjective desire for the affected individuals in this case to avoid further publicity, which is not inherently harmful. According to the Toronto Star and some of the interveners, the Trustees' position would allow that measure of inconvenience and embarrassment that arises in every court proceeding to take precedence over the interest in court openness protected by the *Canadian Charter of Rights and Freedoms* in which all of society has a stake. The Toronto Star argues further that the information in the court files is not highly sensitive. On the issue of whether the sealing orders were necessary to protect the affected individuals from physical harm, the Toronto Star submits that the Court of Appeal was right to conclude that the Trustees had failed to establish a serious risk to this interest.

28 In the alternative, even if there were a serious risk to one or another important interest, the Toronto Star says the sealing orders are not necessary because the risk could be addressed by an alternative, less onerous order. Furthermore, it says the orders are not proportionate. In seeking to minimize the importance of openness in probate proceedings, the Trustees invite an

inflexible approach to balancing the effects of the order that is incompatible with the principle that openness applies to all court proceedings. In any event, there is a public interest in openness specifically here, given that the certificates sought can affect the rights of third parties and that openness ensures the fairness of the proceedings, whether they are contested or not.

## V. Analysis

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

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

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

32 For the reasons that follow, I disagree with the Trustees that the ostensibly unbounded privacy interest they invoke qualifies as an important public interest within the meaning of *Sierra Club*. Their broad claim fails to focus on the elements of privacy that are deserving of public protection in the open court context. That is not to say, however, that privacy can never ground an exceptional measure such as the sealing orders sought in this case. While the mere embarrassment caused by the dissemination of personal information through the open court process does not rise to the level justifying a limit on court openness, circumstances do exist where an aspect of a person's private life has a plain public interest dimension.

33 Personal information disseminated in open court can be more than a source of discomfort and may result in an affront to a person's dignity. Insofar as privacy serves to protect individuals from this affront, it is an important public interest relevant under *Sierra Club*. Dignity in this sense is a related but narrower concern than privacy generally; it transcends the interests of the individual and, like other important public interests, is a matter that concerns the society at large. A court can make an exception



to the open court principle, notwithstanding the strong presumption in its favour, if the interest in protecting core aspects of individuals' personal lives that bear on their dignity is at serious risk by reason of the dissemination of sufficiently sensitive information. The question is not whether the information is "personal" to the individual concerned, but whether, because of its highly sensitive character, its dissemination would occasion an affront to their dignity that society as a whole has a stake in protecting.

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

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

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

#### ***A. The Test for Discretionary Limits on Court Openness***

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

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

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

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

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

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

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

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

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



immediate negative effects on the open court principle. Such balancing could be evasive of effective appellate review. To my mind, the structure provided by *Dagenais*, *Mentuck*, and *Sierra Club* remains appropriate and should be affirmed.

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

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

### ***B. The Public Importance of Privacy***

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

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

48 Like the Court of Appeal, I do agree with the view expressed particularly in the pre-*Charter* case of *MacIntyre*, that where court openness results in an intrusion on privacy which disturbs the "sensibilities of the individuals involved" (p. 185), that concern is generally insufficient to justify a sealing or like order and does not amount to an important public interest under *Sierra Club*. But I disagree with the Court of Appeal in this case and in *Williams* that this is because the intrusion only occasions "personal concerns". Certain personal concerns — even "without more" — can coincide with important public interests within

the meaning of *Sierra Club*. To invoke the expression of Binnie J. in *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at para. 10, there is a "public interest in confidentiality" that is felt, first and foremost, by the person involved and is most certainly a personal concern. Even in *Williams*, the Court of Appeal was careful to note that where, without privacy protection, an individual would face "a substantial risk of serious debilitating emotional ... harm", an exception to openness should be available (paras. 29-30). The means of discerning whether a privacy interest reflects a "public interest in confidentiality" is therefore not whether the interest reflects or is rooted in "personal concerns" for the privacy of the individuals involved. Some personal concerns relating to privacy overlap with public interests in confidentiality. These interests in privacy can be, in my view, important public interests within the meaning of *Sierra Club*. It is true that an individual's privacy is pre-eminently important to that individual. But this Court has also long recognized that the protection of privacy is, in a variety of settings, in the interest of society as a whole.

49 The proposition that privacy is important, not only to the affected individual but to our society, has deep roots in the jurisprudence of this Court outside the context of the test for discretionary limits on court openness. This background helps explain why privacy cannot be rejected as a mere personal concern. However, the key differences in these contexts are such that the public importance of privacy cannot be transposed to open courts without adaptation. Only specific aspects of privacy interests can qualify as important public interests under *Sierra Club*.

50 In the context of s. 8 of the Charter and public sector privacy legislation, La Forest J. cited American privacy scholar Alan F. Westin for the proposition that privacy is a fundamental value of the modern state, first in *R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 427-28 (concurring), and then in Dagg, at para. 65 (dissenting but not on this point). In the latter case, La Forest J. wrote: "The protection of privacy is a fundamental value in modern, democratic states. An expression of an individual's unique personality or personhood, privacy is grounded on physical and moral autonomy — the freedom to engage in one's own thoughts, actions and decisions" (para. 65 (citations omitted)). That statement was endorsed unanimously by this Court in Lavigne, at para. 25.

51 Further, in *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401* 2013 SCC 62, [2013] 3 S.C.R. 733 ("UFCW"), decided in the context of a statute regulating the use of information by organizations, the objective of providing an individual with some control over their information was recognized as "intimately connected to individual autonomy, dignity and privacy, self-evidently significant social values" (para. 24). The importance of privacy, its "quasi-constitutional status" and its role in protecting moral autonomy continues to find expression in our recent jurisprudence (see, e.g., Lavigne, at para. 24; *Bragg*, at para. 18, per Abella J., citing *TorontoStar Newspaper Ltd. v. Ontario*, 2012 ONCJ 27, 289 C.C.C. (3d) 549, at paras. 40-41 and 44; *Douez v. Facebook, Inc.*, 2017 SCC 33, [2017] 1 S.C.R. 751, at para. 59). In *Douez*, Karakatsanis, Wagner (as he then was) and Gascon JJ. underscored this same point, adding that "the growth of the Internet, virtually timeless with pervasive reach, has exacerbated the potential harm that may flow from incursions to a person's privacy interests" (para. 59).

52 Privacy as a public interest is underlined by specific aspects of privacy protection present in legislation at the federal and provincial levels (see, e.g., *Privacy Act*, R.S.C. 1985, c. P-21; *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("PIPEDA"); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; *Charter of Human Rights and Freedoms*, CQLR, c. C-12, s. 5; *Civil Code of Québec*, arts. 35 to 41).<sup>3</sup> Further, in assessing the constitutionality of a legislative exception to the open court principle, this Court has recognized that the protection of individual privacy can be a pressing and substantial objective (*Edmonton Journal*, at p. 1345, per Cory J.; see also the concurring reasons of Wilson J., at p. 1354, in which "the public interest in protecting the privacy of litigants generally in matrimonial cases against the public interest in an open court process" was explicitly noted). There is also continued support for the social and public importance of individual privacy in the academic literature (see, e.g., A. J. Cockfield, "Protecting the Social Value of Privacy in the Context of State Investigations Using New Technologies" (2007), 40 U.B.C. L. Rev. 41, at p. 41; K. Hughes, "A Behavioural Understanding of Privacy and its Implications for Privacy Law" (2012), 75 *Modern L. Rev.* 806, at p. 823; P. Gewirtz, "Privacy and Speech" (2001), *Sup. Ct. Rev.* 139, at p. 139). It is therefore inappropriate, in my respectful view, to dismiss the public interest in protecting privacy as merely a personal concern. This does not mean, however, that privacy generally is an important public interest in the context of limits on court openness.

53 The fact that the case before the application judge concerned individuals who were advancing their own privacy interests, which were undeniably important to them as individuals, does not mean that there is no public interest at stake. In *F.N. (Re)*, this was the personal interest that young offenders had in remaining anonymous in court proceedings as a means of encouraging their personal rehabilitation (para. 11). All of society had a stake, according to Binnie J., in the young person's personal prospect for rehabilitation. This same idea from *F.N. (Re)* was cited in support of finding the interest in *Sierra Club* to be a public interest. That interest, rooted first in an agreement of personal concern to the contracting parties involved, was a private matter that evinced, alongside its personal interest to the parties, a "public interest in confidentiality" (*Sierra Club*, at para. 55). Similarly, while the Trustees have a personal interest in preserving their privacy, this does not mean that the public has no stake in this same interest because — as this Court has made clear — it is related to moral autonomy and dignity which are pressing and substantial concerns.

54 In this appeal, the Toronto Star suggests that legitimate privacy concerns would be effectively protected by a discretionary order where there is "something more" to elevate them beyond personal concerns and sensibilities (R.F., at para. 73). The Income Security Advocacy Centre, by way of example, submits that privacy serves the public interests of preventing harm and of ensuring individuals are not dissuaded from accessing the courts. I agree that these concepts are related, but in my view care must be taken not to conflate the public importance of privacy with that of other interests; aspects of privacy, such as dignity, may constitute important public interests in and of themselves. A risk to personal privacy may be tied to a risk to psychological harm, as it was in *Bragg* (para. 14; see also J. Rossiter, *Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 2.4.1). But concerns for privacy may not always coincide with a desire to avoid psychological harm, and may focus instead, for example, on protecting one's professional standing (see, e.g., *R. v. Paterson*(1998), 102 B.C.A.C. 200, at paras. 76, 78 and 87-88). Similarly, there may be circumstances where the prospect of surrendering the personal information necessary to pursue a legal claim may deter an individual from bringing that claim (see *S. v. Lamontagne*, 2020 QCCA 663, at paras. 34-35 (CanLII)). In the same way, the prospect of surrendering sensitive commercial information would have impaired the conduct of the party's defence in *Sierra Club* (at para. 71), or could pressure an individual into settling a dispute prematurely (K. Eltis, *Courts, Litigants and the Digital Age* (2nd ed. 2016), at p. 86). But this does not necessarily mean that a public interest in privacy is wholly subsumed by such concerns. I note, for example, that access to justice concerns do not apply where the privacy interest to be protected is that of a third party to the litigation, such as a witness, whose access to the courts is not at stake and who has no choice available to terminate the litigation and avoid any privacy impacts (see, e.g., *Himel v. Greenberg*, 2010 ONSC 2325, 93 R.F.L. (6th) 357, at para. 58; see also Rossiter, s. 2.4.2(2)). In any event, the recognition of these related and valid important public interests does not answer the question as to whether aspects of privacy in and of themselves are important public interests and does not diminish the distinctive public character of privacy, considered above.

55 Indeed, the specific harms to privacy occasioned by open courts have not gone unnoticed nor been discounted as merely personal concerns. Courts have exercised their discretion to limit court openness in order to protect personal information from publicity, including to prevent the disclosure of sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), HIV status (see, e.g., *A.B. v. Canada (Citizenship and Immigration)*, 2017 FC 629, at para. 9 (CanLII)) and a history of substance abuse and criminality (see, e.g., *R. v. Pickton*, 2010 BCSC 1198, at paras. 11 and 20 (CanLII)). This need to reconcile the public interest in privacy with the open court principle has been highlighted by this Court (see, e.g., *Edmonton Journal*, at p. 1353, per Wilson J.). Writing extra-judicially, McLachlin C.J. explained that "[i]f we are serious about peoples' private lives, we must preserve a modicum of privacy. Equally, if we are serious about our justice system, we must have open courts. The question is how to reconcile these dual imperatives in a fair and principled way" ("Courts, Transparency and Public Confidence: To the Better Administration of Justice" (2003), 8 Deakin L. Rev. 1, at p. 4). In seeking that reconciliation, the question becomes whether the relevant dimension of privacy amounts to an important public interest that, when seriously at risk, would justify rebutting the strong presumption favouring open courts.

### ***C. The Important Public Interest in Privacy Bears on the Protection of Individual Dignity***

56 While the public importance of privacy has clearly been recognized by this Court in various settings, caution is required in deploying this concept in the test for discretionary limits on court openness. It is a matter of settled law that open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally

seen as of insufficient importance to overcome the presumption of openness. The Toronto Star has raised the concern that recognizing privacy as an important public interest will lower the burden for applicants because the privacy of litigants will, in some respects, always be at risk in court proceedings. I agree that the requirement to show a serious risk to an important interest is a key threshold component of the analysis that must be preserved in order to protect the open court principle. The recognition of a public interest in privacy could threaten the strong presumption of openness if privacy is cast too broadly without a view to its public character.

57 Privacy poses challenges in the test for discretionary limits on court openness because of the necessary dissemination of information that openness implies. It bears recalling that when Dickson J., as he then was, wrote in *MacIntyre* that "covertness is the exception and openness the rule", he was explicitly treating a privacy argument, returning to and dismissing the view, urged many times before, "that the 'privacy' of litigants *requires* that the public be excluded from court proceedings" (p. 185 (emphasis added)). Dickson J. rejected the view that personal privacy concerns require closed courtroom doors, explaining that "[a]s a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings" (p. 185).

58 Though writing before *Dagenais*, and therefore not commenting on the specific steps of the analysis as we now understand them, to my mind, Dickson J. was right to recognize that the open court principle brings necessary limits to the right to privacy. While individuals may have an expectation that information about them will not be revealed in judicial proceedings, the open court principle stands presumptively in opposition to that expectation. For example, in *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, 2001 SCC 51, [2001] 2 S.C.R. 743, LeBel J. held that "a party who institutes a legal proceeding waives his or her right to privacy, at least in part" (para. 42). *MacIntyre* and cases like it recognize — in stating that openness is the rule and covertness the exception — that the right to privacy, however defined, in some measure gives way to the open court ideal. I share the view that the open court principle presumes that this limit on the right to privacy is justified.

59 The Toronto Star is therefore right to say that the privacy of individuals will very often be at some risk in court proceedings. Disputes between and concerning individuals that play out in open court necessarily reveal information that may have otherwise remained out of public view. Indeed, much like the Court of Appeal in this case, courts have explicitly adverted to this concern when concluding that mere inconvenience is insufficient to cross the initial threshold of the test (see, e.g., *3834310 Canada inc. v. Chamberland* 2004 CanLII 4122 (Que. C.A.), at para. 30). Saying that any impact on individual privacy is sufficient to establish a serious risk to an important public interest for the purposes of the test for discretionary limits on court openness could render this initial requirement moot. Many cases would turn on the balancing at the proportionality stage. Such a development would amount to a departure from *Sierra Club*, which is the appropriate framework and one which must be preserved.

60 Further, recognizing an important interest in privacy generally could prove to be too open-ended and difficult to apply. Privacy is a complex and contextual concept (*Dagg*, at para. 67; see also B. McIsaac, K. Klein and S. Brown, *The Law of Privacy in Canada* (loose-leaf), vol. 1, at pp. 1-4; D. J. Solove, "Conceptualizing Privacy" (2002), 90 Cal. L. Rev. 1087, at p. 1090). Indeed, this Court has described the nature of limits of privacy as being in a state of "theoretical disarray" (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 35). Much turns on the context in which privacy is invoked. I agree with the Toronto Star that a bald recognition of privacy as an important interest in the context of the test for discretionary limits on court openness, as the Trustees advance here, would invite considerable confusion. It would be difficult for courts to measure a serious risk to such an interest because of its multi-faceted nature.

61 While I acknowledge these concerns have merit, I disagree that they require that privacy never be considered in determining whether there is a serious risk to an important public interest. I reach this conclusion for two reasons. First, the problem of privacy's complexity can be attenuated by focusing on the purpose underlying the public protection of privacy as it is relevant to the judicial process, in order to fix precisely on that aspect which transcends the interests of the parties in this context. That narrower dimension of privacy is the protection of dignity, an important public interest that can be threatened by open courts. Indeed, rather than attempting to apply a single unwieldy concept of privacy in all contexts, this Court has generally fixed on more specific privacy interests tailored to the particular situation (*Spencer*, at para. 35; *Edmonton Journal*, at p. 1362, per Wilson J.). That is what must be done here, with a view to identifying the public aspect of privacy that openness might inappropriately undermine.

62 Second, I recall that in order to pass the first stage of the analysis one must not simply invoke an important interest, but must also overcome the presumption of openness by showing a serious risk to this interest. The burden of showing a risk to such an interest on the facts of a given case constitutes the true initial threshold on the person seeking to restrict openness. It is never sufficient to plead a recognized important public interest on its own. The demonstration of a serious risk to this interest is still required. What is important is that the interest be accurately defined to capture only those aspects of privacy that engage legitimate public objectives such that showing a serious risk to that interest remains a high bar. In this way, courts can effectively maintain the guarantee of presumptive openness.

63 Specifically, in order to preserve the integrity of the open court principle, an important public interest concerned with the protection of dignity should be understood to be seriously at risk only in limited cases. Nothing here displaces the principle that covertness in court proceedings must be exceptional. Neither the sensibilities of individuals nor the fact that openness is disadvantageous, embarrassing or distressing to certain individuals will generally on their own warrant interference with court openness (*MacIntyre*, at p. 185; *New Brunswick*, at para. 40; *Williams*, at para. 30; *Coltsfoot Publishing Ltd. v. Foster-Jacques*, 2012 NSCA 83, 320 N.S.R. (2d) 166, at para. 97). These principles do not preclude recognizing the public character of a privacy interest as important when it is related to the protection of dignity. They merely require that a serious risk be shown to exist in respect of this interest in order to justify, exceptionally, a limit on openness, as is the case with any important public interest under *Sierra Club*. As Professors Sylvette Guillemard and Séverine Menétrey explain, [TRANSLATION] "[t]he confidentiality of the proceedings may be justified, in particular, in order to protect the parties' privacy .... However, the jurisprudence indicates that embarrassment or shame is not a sufficient reason to order that proceedings be held *in camera* or to impose a publication ban" (*Comprendre la procédure civile québécoise* (2nd ed. 2017), at p. 57).

64 How should the privacy interest at issue be understood as raising an important public interest relevant to the test for discretionary limits on court openness in this context? It is helpful to recall that the orders below were sought to limit access to documents and information in the court files. The Trustees' argument on this point focused squarely on the risk of immediate and widespread dissemination of the personally identifying and other sensitive information contained in the sealed materials by the Toronto Star. The Trustees submit that this dissemination would constitute an unwarranted intrusion into the privacy of the affected individuals beyond the upset they have already suffered as a result of the publicity associated with the death of the Shermans.

65 In my view, there is value in leaving individuals free to restrict when, how and to what extent highly sensitive information about them is communicated to others in the public sphere, because choosing how we present ourselves in public preserves our moral autonomy and dignity as individuals. This Court has had occasion to underscore the connection between the privacy interest engaged by open courts and the protection of dignity specifically. For example, in *Edmonton Journal*, Wilson J. noted that the impugned provision which would limit publication about matrimonial proceedings addressed "a somewhat different aspect of privacy, one more closely related to the protection of one's dignity ... namely the personal anguish and loss of dignity that may result from having embarrassing details of one's private life printed in the newspapers" (pp. 1363-64). In *Bragg*, as a further example, the protection of a young person's ability to control sensitive information was said to foster respect for "dignity, personal integrity and autonomy" (para. 18, citing *Toronto Star Newspaper Ltd.*, at para. 44).

66 Consistent with this jurisprudence, I note by way of example that the Quebec legislature expressly highlighted the preservation of dignity when the *Sierra Club* test was codified in the *Code of Civil Procedure*, CQLR, c. C-25.01 ("C.C.P."), art. 12 (see also Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (2015), art. 12). Under art. 12 C.C.P., a discretionary exception to the open court principle can be made by the court if "public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests", requires it.

67 The concept of public order evidences flexibility analogous to the concept of an important public interest under *Sierra Club* yet it recalls that the interest invoked transcends, in importance and consequence, the purely subjective sensibilities of the persons affected. Like the "important public interest" that must be at serious risk to justify the sealing orders in the present appeal, public order encompasses a wide array of general principles and imperative norms identified by a legislature and the



courts as fundamental to a given society (see [Goulet v. Transamerica Life Insurance Co. of Canada](#), 2002 SCC 21, [2002] 1 S.C.R. 719, at paras. 42-44, citing [Godbout v. Longueuil \(Ville de\)](#), [1995] R.J.Q. 2561 (C.A.), at p. 2570, aff'd [1997] 3 S.C.R. 844). As one Quebec judge wrote, referring to [Sierra Club](#) prior to the enactment of art. 12 C.C.P., the interest must be understood as defined [TRANSLATION] "in terms of a public interest in confidentiality" (see [3834310 Canada inc.](#), at para. 24, per Gendreau J.A. for the court of appeal). From among the various considerations that make up the concept of public order and other legitimate interests to which art. 12 C.C.P. alludes, it is significant that dignity, and not an untailored reference to either privacy, harm or access to justice, was given pride of place. Indeed, it is that narrow aspect of privacy considered to be a fundamental right that courts had fixed upon before the enactment of art. 12 C.C.P. — [TRANSLATION] "what is part of one's personal life, in short, what constitutes a minimum personal sphere" ([Godbout](#), at p. 2569, per Baudouin J.A.; see also [A. v. B.](#) 1990 CanLII 3132(Que. C.A.), at para. 20, per Rothman J.A.).

68 The "preservation of the dignity of the persons involved" is now consecrated as the archetypal public order interest in art. 12 C.C.P. It is the exemplar of the [Sierra Club](#) important public interest in confidentiality that stands as justification for an exception to openness (S. Rochette and J.-F. Côté, "Article 12", in L. Chamberland, ed., *Le grand collectif: Code de procédure civile — Commentaires et annotations* (5th ed. 2020), vol. 1, at p. 102; D. Ferland and B. Emery, *Précis de procédure civile du Québec* (6th ed. 2020), vol. 1, at para. 1-111). Dignity gives concrete expression to this public order interest because all of society has a stake in its preservation, notwithstanding its personal connections to the individuals concerned. This codification of [Sierra Club](#) 's notion of important public interest highlights the superordinate importance of human dignity and the appropriateness of limiting court openness on this basis as against an overbroad understanding of privacy that might be otherwise unsuitable to the open court context.

69 Consistent with this idea, understanding privacy as predicated on dignity has been advanced as useful in connection with challenges brought by digital communications (K. Eltis, "The Judicial System in the Digital Age: Revisiting the Relationship between Privacy and Accessibility in the Cyber Context" (2011), 56 McGill L.J. 289, at p. 314).

70 It is also significant, in my view, that the application judge in this case explicitly recognized, in response to the relevant arguments from the Trustees, an interest in "protecting the privacy *and dignity* of victims of crime and their loved ones" (para. 23 (emphasis added)). This elucidates that the central concern for the affected individuals on this point is not merely protecting their privacy for its own sake but privacy where it coincides with the public character of the dignity interests of these individuals.

71 Violations of privacy that cause a loss of control over fundamental personal information about oneself are damaging to dignity because they erode one's ability to present aspects of oneself to others in a selective manner (D. Matheson, "Dignity and Selective Self-Presentation", in I. Kerr, V. Steeves and C. Lucock, eds., *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (2009), 319, at pp. 327-28; L. M. Austin, "Re-reading Westin" (2019), 20 *Theor. Inq. L.* 53, at pp. 66-68; Eltis (2016), at p. 13). Dignity, used in this context, is a social concept that involves presenting core aspects of oneself to others in a considered and controlled manner (see generally Matheson, at pp. 327-28; Austin, at pp. 66-68). Dignity is eroded where individuals lose control over this core identity-giving information about themselves, because a highly sensitive aspect of who they are that they did not consciously decide to share is now available to others and may shape how they are seen in public. This was even alluded to by La Forest J., dissenting but not on this point, in [Dagg](#), where he referred to privacy as "[a]n expression of an individual's unique personality or personhood" (para. 65).

72 Where dignity is impaired, the impact on the individual is not theoretical but could engender real human consequences, including psychological distress (see generally Bragg, at para. 23). La Forest J., concurring, observed in [Dyment](#) that privacy is essential to the well-being of individuals (p. 427). Viewed in this way, a privacy interest, where it shields the core information associated with dignity necessary to individual well-being, begins to look much like the physical safety interest also raised in this case, the important and public nature of which is neither debated, nor, in my view, seriously debatable. The administration of justice suffers when the operation of courts threatens physical well-being because a responsible court system is attuned to the physical harm it inflicts on individuals and works to avoid such effects. Similarly, in my view, a responsible court must be attuned and responsive to the harm it causes to other core elements of individual well-being, including individual dignity. This parallel helps to understand dignity as a more limited dimension of privacy relevant as an important public interest in the open court context.

73 I am accordingly of the view that protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test.

74 Focusing on the underlying value of privacy in protecting individual dignity from the exposure of private information in open court overcomes the criticisms that privacy will always be at risk in open court proceedings and is theoretically complex. Openness brings intrusions on personal privacy in virtually all cases, but dignity as a public interest in protecting an individual's core sensibility is more rarely in play. Specifically, and consistent with the cautious approach to the recognition of important public interests, this privacy interest, while determined in reference to the broader factual setting, will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self.

75 If the interest is ultimately about safeguarding a person's dignity, that interest will be undermined when the information reveals something sensitive about them as an individual, as opposed to generic information that reveals little if anything about who they are as a person. Therefore the information that will be revealed by court openness must consist of intimate or personal details about an individual — what this Court has described in its jurisprudence on [s. 8 of the Charter](#) as the "biographical core" — if a serious risk to an important public interest is to be recognized in this context (*R. v. Plant*, [1993] 3 S.C.R. 281, at p. 293; *R. v. Tessling*, 2004 SCC 67, [2004] 3 S.C.R. 432, at para. 60; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 46). Dignity transcends personal inconvenience by reason of the highly sensitive nature of the information that might be revealed. This Court in *Cole* drew a similar line between the sensitivity of personal information and the public interest in protecting that information in reference to the biographical core. It held that "reasonable and informed Canadians" would be more willing to recognize the existence of a privacy interest where the relevant information cuts to the "biographical core" or, "[p]ut another way, the more personal and confidential the information" (para. 46). The presumption of openness means that mere discomfort associated with lesser intrusions of privacy will generally be tolerated. But there is a public interest in ensuring that openness does not unduly entail the dissemination of this core information that threatens dignity — even if it is "personal" to the affected person.

76 The test for discretionary limits on court openness imposes on the applicant the burden to show that the important public interest is at serious risk. Recognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness. This threshold is fact specific. It addresses the concern, noted above, that personal information can frequently be found in court files and yet finding this sufficient to pass the serious risk threshold in every case would undermine the structure of the test. By requiring the applicant to demonstrate the sensitivity of the information as a necessary condition to the finding of a serious risk to this interest, the scope of the interest is limited to only those cases where the rationale for not revealing core aspects of a person's private life, namely protecting individual dignity, is most actively engaged.

77 There is no need here to provide an exhaustive catalogue of the range of sensitive personal information that, if exposed, could give rise to a serious risk. It is enough to say that courts have demonstrated a willingness to recognize the sensitivity of information related to stigmatized medical conditions (see, e.g., *A.B.*, at para. 9), stigmatized work (see, e.g., *Work Safe Twerk Safe v. Her Majesty the Queen in Right of Ontario*, 2021 ONSC 1100, at para. 28 (CanLII)), sexual orientation (see, e.g., *Paterson*, at paras. 76, 78 and 87-88), and subjection to sexual assault or harassment (see, e.g., *Fedeli v. Brown*, 2020 ONSC 994, at para. 9 (CanLII)). I would also note the submission of the intervener the Income Security Advocacy Centre, that detailed information about family structure and work history could in some circumstances constitute sensitive information. The question in every case is whether the information reveals something intimate and personal about the individual, their lifestyle or their experiences.

78 I pause here to note that I refer to cases on [s. 8 of the Charter](#) above for the limited purpose of providing insight into types of information that are more or less personal and therefore deserving of public protection. If the impact on dignity as a result of disclosure is to be accurately measured, it is critical that the analysis differentiate between information in this way. Helpfully, one factor in determining whether an applicant's subjective expectation of privacy is objectively reasonable in the *s. 8* jurisprudence focuses on the degree to which information is private (see, e.g., *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at para. 31; *Cole*, at paras. 44-46). But while these decisions may assist for this limited purpose, this is not to say that the

remainder of the s. 8 analysis has any relevance to the application of the test for discretionary limits on court openness. For example, asking what the Trustees' reasonable expectation of privacy was here could invite a circular analysis of whether they reasonably expected their court files to be open to the public or whether they reasonably expected to be successful in having them sealed. Therefore, it is only for the limited purpose described above that the s. 8 jurisprudence is useful.

79 In cases where the information is sufficiently sensitive to strike at an individual's biographical core, a court must then ask whether a serious risk to the interest is made out in the full factual context of the case. While this is obviously a fact-specific determination, some general observations may be made here to guide this assessment.

80 I note that the seriousness of the risk may be affected by the extent to which information would be disseminated without an exception to the open court principle. If the applicant raises a risk that the personal information will come to be known by a large segment of the public in the absence of an order, this is a plainly more serious risk than if the result will be that a handful of people become aware of the same information, all else being equal. In the past, the requirement that one be physically present to acquire information in open court or from a court record meant that information was, to some extent, protected because it was "practically obscure" (D. S. Ardia, "Privacy and Court Records: Online Access and the Loss of Practical Obscurity" (2017), 4 U. Ill. L. Rev. 1385, at p. 1396). However, today, courts should be sensitive to the information technology context, which has increased the ease with which information can be communicated and cross-referenced (see Bailey and Burkell, at pp. 169-70; Ardia, at pp. 1450-51). In this context, it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.

81 It will be appropriate, of course, to consider the extent to which information is already in the public domain. If court openness will simply make available what is already broadly and easily accessible, it will be difficult to show that revealing the information in open court will actually result in a meaningful loss of that aspect of privacy relating to the dignity interest to which I refer here. However, just because information is already accessible to some segment of the public does not mean that making it available through the court process will not exacerbate the risk to privacy. Privacy is not a binary concept, that is, information is not simply either private or public, especially because, by reason of technology in particular, absolute confidentiality is best thought of as elusive (see generally *R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 37; *UFCW*, at para. 27). The fact that certain information is already available somewhere in the public sphere does not preclude further harm to the privacy interest by additional dissemination, particularly if the feared dissemination of highly sensitive information is broader or more easily accessible (see generally Solove, at p. 1152; Ardia, at p. 1393-94; E. Paton-Simpson, "Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places" (2000), 50 U.T.L.J. 305, at p. 346).

82 Further, the seriousness of the risk is also affected by the probability that the dissemination the applicant suggests will occur actually occurs. I hasten to say that implicit in the notion of risk is that the applicant need not establish that the feared dissemination will certainly occur. However, the risk to the privacy interest related to the protection of dignity will be more serious the more likely it is that the information will be disseminated. While decided in a different context, this Court has held that the magnitude of risk is a product of both the gravity of the feared harm and its probability (*R. v. Mabior*, 2012 SCC 47, [2012] 2 S.C.R. 584, at para. 86).

83 That said, the likelihood that an individual's highly sensitive personal information will be disseminated in the absence of privacy protection will be difficult to quantify precisely. It is best to note as well that probability in this context need not be identified in mathematical or numerical terms. Rather, courts may merely discern probability in light of the totality of the circumstances and balance this one factor alongside other relevant factors.

84 Finally, and as discussed above, individual sensitivities alone, even if they can be notionally associated with "privacy", are generally insufficient to justify a restriction on court openness where they do not rise above those inconveniences and discomforts that are inherent to court openness (*MacIntyre*, at p. 185). An applicant will only be able to establish that the risk is sufficient to justify a limit on openness in exceptional cases, where the threatened loss of control over information about oneself is so fundamental that it strikes meaningfully at individual dignity. These circumstances engage "social values of superordinate importance" beyond the more ordinary intrusions inherent to participating in the judicial process that Dickson J. acknowledged could justify curtailing public openness (pp. 186-87).



85 To summarize, the important public interest in privacy, as understood in the context of the limits on court openness, is aimed at allowing individuals to preserve control over their core identity in the public sphere to the extent necessary to preserve their dignity. The public has a stake in openness, to be sure, but it also has an interest in the preservation of dignity: the administration of justice requires that where dignity is threatened in this way, measures be taken to accommodate this privacy concern. Although measured by reference to the facts of each case, the risk to this interest will be serious only where the information that would be disseminated as a result of court openness is sufficiently sensitive such that openness can be shown to meaningfully strike at the individual's biographical core in a manner that threatens their integrity. Recognizing this interest is consistent with this Court's emphasis on the importance of privacy and the underlying value of individual dignity, but is also tailored to preserve the strong presumption of openness.

***D. The Trustees Have Failed to Establish a Serious Risk to an Important Public Interest***

86 As *Sierra Club* made plain, a discretionary order limiting court openness can only be made where there is a serious risk to an important public interest. The arguments on this appeal concerned whether privacy is an important public interest and whether the facts here disclose the existence of serious risks to privacy and safety. While the broad privacy interest invoked by the Trustees cannot be relied on to justify a limit on openness, the narrower concept of privacy understood in relation to dignity is an important public interest for the purposes of the test. I also recognize that a risk to physical safety is an important public interest, a point on which there is no dispute here. Accordingly, the relevant question at the first step is whether there is a serious risk to one or both of these interests. For reasons that follow, the Trustees have failed to establish a serious risk to either. This alone is sufficient to conclude that the sealing orders should not have been issued.

*(1) The Risk to Privacy Alleged in this Case Is Not Serious*

87 As I have said, the important public interest in privacy must be understood as one tailored to the protection of individual dignity and not the broadly defined interest the Trustees have asked this Court to recognize. In order to establish a serious risk to this interest, the information in the court files about which the Trustees are concerned must be sufficiently sensitive in that it strikes at the biographical core of the affected individuals. If it is not, there is no serious risk that would justify an exception to openness. If it is, the question becomes whether a serious risk is made out in light of the facts of this case.

88 The application judge never explicitly identified a serious risk to the privacy interest he identified but, to the extent he implicitly reached this conclusion, I respectfully do not share his view. His finding was limited to the observation that "[t]he degree of intrusion on that privacy and dignity [i.e., that of the victims and their loved ones] has already been extreme and, I am sure, excruciating" (para. 23). But the intense scrutiny faced by the Shermans up to the time of the application is only part of the equation. As the sealing orders can only protect against the disclosure of the information in these court files relating to probate, the application judge was required to consider the sensitivity of the specific information they contained. He made no such measure. His conclusion about the seriousness of the risk then focused entirely on the risk of physical harm, with no indication that he found that the Trustees met their burden as to the serious risk to the privacy interest. Said very respectfully and with the knowledge that the application judge did not have the benefit of the above framework, the failure to assess the sensitivity of the information constituted a failure to consider a required element of the legal test. This warranted intervention on appeal.

89 Applying the appropriate framework to the facts of this case, I conclude that the risk to the important public interest in the affected individuals' privacy, as I have defined it above in reference to dignity, is not serious. The information the Trustees seek to protect is not highly sensitive and this alone is sufficient to conclude that there is no serious risk to the important public interest in privacy so defined.

90 There is little controversy in this case about the likelihood and extent of dissemination of the information contained in the estate files. There is near certainty that the Toronto Star will publish at least some aspects of the estate files if it is provided access. Given the breadth of the audience of its media organization, and the high-profile nature of the events surrounding the death of the Shermans, I have no difficulty in concluding that the affected individuals would lose control over this information to a significant extent should the files be open.

91 With regard to the sensitivity of the information, however, the information contained in these files does not reveal anything particularly private about the affected individuals. What would be revealed might well cause inconvenience and perhaps embarrassment, but it has not been shown that it would strike at their biographical core in a way that would undermine their control over the expression of their identities. Their privacy would be troubled, to be sure, but the relevant privacy interest bearing on the dignity of the affected persons has not been shown to be at serious risk. At its highest, the information in these files will reveal something about the relationship between the deceased and the affected individuals, in that it may reveal to whom the deceased entrusted the administration of their estates and those who they wished or were deemed to wish to be beneficiaries of their property at death. It may also reveal some basic personal information, such as addresses. Some of the beneficiaries might well, it may fairly be presumed, bear family names other than Sherman. I am mindful that the deaths are being investigated as homicides by the Toronto Police Service. However, even in this context, none of this information provides significant insight into who they are as individuals, nor would it provoke a fundamental change in their ability to control how they are perceived by others. The fact of being linked through estate documents to victims of an unsolved murder is not in itself highly sensitive. It may be the source of discomfort but has not been shown to constitute an affront to dignity in that it does not probe deeply into the biographical core of these individuals. As a result, the Trustees have failed to establish a serious risk to an important public interest as required by *Sierra Club*.

92 The fact that some of the affected individuals may be minors is also insufficient to cross the seriousness threshold. While the law recognizes that minors are especially vulnerable to intrusions of privacy (see Bragg, at para. 17), the mere fact that information concerns minors does not displace the generally applicable analysis (see, e.g., Bragg, at para. 11). Even taking into account the increased vulnerability of minors who may be affected individuals in the probate files, there is no evidence that they would lose control of information about themselves that reveals something close to the core of their identities. Merely associating the beneficiaries or trustees with the Shermans' unexplained deaths is not enough to constitute a serious risk to the identified important public interest in privacy, defined in reference to dignity.

93 Further, while the intense media scrutiny on the family following the deaths suggests that the information would likely be widely disseminated, it is not in itself indicative of the sensitivity of the information contained in the probate files.

94 Showing that the information that would be revealed by court openness is sufficiently sensitive and private such that it goes to the biographical core of the affected individual is a necessary prerequisite to showing a serious risk to the relevant public interest aspect of privacy. The Trustees did not advance any specific reason why the contents of these files are more sensitive than they may seem at first glance. When asserting a privacy risk, it is essential to show not only that information about individuals will escape the control of the person concerned — which will be true in every case — but that this particular information concerns who the individuals are as people in a manner that undermines their dignity. This the Trustees have not done.

95 Therefore, while some of the material in the court files may well be broadly disseminated, the nature of the information has not been shown to give rise to a serious risk to the important public interest in privacy, as appropriately defined in this context in reference to dignity. For that reason alone, I conclude that the Trustees have failed to show a serious risk to this interest.

## *(2) The Risk to Physical Safety Alleged in this Case is Not Serious*

96 Unlike the privacy interest raised in this case, there was no controversy that there is an important public interest in protecting individuals from physical harm. It is worth underscoring that the application judge correctly treated the protection from physical harm as a distinct important interest from that of the protection of privacy and found that this risk of harm was "foreseeable" and "grave" (paras. 22-24). The issue is whether the Trustees have established a serious risk to this interest for the purpose of the test for discretionary limits on court openness. The application judge observed that it would have been preferable to include objective evidence of the seriousness of the risk from the police service conducting the homicide investigation. He nevertheless concluded there was sufficient proof of risk to the physical safety of the affected individuals to meet the test. The Court of Appeal says that was a misreading of the evidence, and the Toronto Star agrees that the application judge's conclusion as to the existence of a serious risk to safety was mere speculation.

97 At the outset, I note that direct evidence is not necessarily required to establish a serious risk to an important interest. This Court has held that it is possible to identify objectively discernable harm on the basis of logical inferences (*Bragg*, at paras. 15-16). But this process of inferential reasoning is not a licence to engage in impermissible speculation. An inference must still be grounded in objective circumstantial facts that reasonably allow the finding to be made inferentially. Where the inference cannot reasonably be drawn from the circumstances, it amounts to speculation (*R. v. Chanmany*, 2016 ONCA 576, 352 O.A.C. 121, at para. 45).

98 As the Trustees correctly argue, it is not just the probability of the feared harm, but also the gravity of the harm itself that is relevant to the assessment of serious risk. Where the feared harm is particularly serious, the probability that this harm materialize need not be shown to be likely, but must still be more than negligible, fanciful or speculative. The question is ultimately whether this record allowed the application judge to objectively discern a serious risk of physical harm.

99 This conclusion was not open to the application judge on this record. There is no dispute that the feared physical harm is grave. I agree with the *Toronto Star*, however, that the probability of this harm occurring was speculative. The application judge's conclusion as to the seriousness of the risk of physical harm was grounded on what he called "the degree of mystery that persists regarding both the perpetrator and the motives" associated with the deaths of the Shermans and his supposition that this motive might be "transported" to the trustees and beneficiaries (para. 5; see also paras. 19 and 23). The further step in reasoning that the unsealed estate files would lead to the perpetrator's next crime, to be visited upon someone mentioned in the files, is based on speculation, not the available affidavit evidence, and cannot be said to be a proper inference or some kind of objectively discerned harm or risk thereof. If that were the case, the estate files of every victim of an unsolved murder would pass the initial threshold of the test for a sealing order.

100 Further, I recall that what is at issue here is not whether the affected individuals face a safety risk in general, but rather whether they face such a risk as a result of the openness of these court files. In light of the contents of these files, the Trustees had to point to some further reason why the risk posed by this information becoming publicly available was more than negligible.

101 The speculative character of the chain of reasoning leading to the conclusion that a serious risk of physical harm exists in this case is underlined by differences between these facts and those cases relied on by the Trustees. In *X. v. Y.*, 2011 BCSC 943, 21 B.C.L.R. (5th) 410, the risk of physical harm was inferred on the basis that the plaintiff was a police officer who had investigated "cases involving gang violence and dangerous firearms" and wrote sentencing reports for such offenders which identified him by full name (para. 6). In *R. v. Esseghaier*, 2017 ONCA 970, 356 C.C.C. (3d) 455, Watt J.A. considered it "self-evident" that the disclosure of identifiers of an undercover operative working in counter-terrorism would compromise the safety of the operative (para. 41). In both cases, the danger flowed from facts establishing that the applicants were in antagonistic relationships with alleged criminal or terrorist organizations. But in this case, the Trustees asked the application judge to infer not only the fact that harm would befall the affected individuals, but also that a person or persons exist who wish to harm them. To infer all this on the basis of the Shermans' deaths and the association of the affected individuals with the deceased is not reasonably possible on this record. It is not a reasonable inference but, as the Court of Appeal noted, a conclusion resting on speculation.

102 Were the mere assertion of grave physical harm sufficient to show a serious risk to an important interest, there would be no meaningful threshold in the analysis. Instead, the test requires the serious risk asserted to be well grounded in the record or the circumstances of the particular case (*Sierra Club*, at para. 54; *Bragg*, at para. 15). This contributes to maintaining the strong presumption of openness.

103 Again, in other cases, circumstantial facts may allow a court to infer the existence of a serious risk of physical harm. Applicants do not necessarily need to retain experts who will attest to the physical or psychological risk related to the disclosure. But on this record, the bare assertion that such a risk exists fails to meet the threshold necessary to establish a serious risk of physical harm. The application judge's conclusion to the contrary was an error warranting the intervention of the Court of Appeal.

***E. There Would Be Additional Barriers to a Sealing Order on the Basis of the Alleged Risk to Privacy***

104 While not necessary to dispose of the appeal, it bears mention that the Trustees would have faced additional barriers in seeking the sealing orders on the basis of the privacy interest they advanced. I recall that to meet the test for discretionary limits on court openness, a person must show, in addition to a serious risk to an important interest, that the particular order sought is necessary to address the risk and that the benefits of the order outweigh its negative effects as a matter of proportionality (*Sierra Club*, at para. 53).

105 Even if the Trustees had succeeded in showing a serious risk to the privacy interest they assert, a publication ban — less constraining on openness than the sealing orders — would have likely been sufficient as a reasonable alternative to prevent this risk. The condition that the order be necessary requires the court to consider whether there are alternatives to the order sought and to restrict the order as much as reasonably possible to prevent the serious risk (*Sierra Club*, at para. 57). An order imposing a publication ban could restrict the dissemination of personal information to only those persons consulting the court record for themselves and prohibit those individuals from spreading the information any further. As I have noted, the likelihood and extent of dissemination may be relevant factors in determining the seriousness of a risk to privacy in this context. While the Toronto Star would be able to consult the files subject to a publication ban, for example, which may assist it in its investigations, it would not be able to publish and thereby broadly disseminate the contents of the files. A publication ban would seem to protect against this latter harm, which has been the focus of the Trustees' argument, while allowing some access to the file, which is not possible under the sealing orders. Therefore, even if a serious risk to the privacy interest had been made out, it would likely not have justified a sealing order, because a less onerous order would have likely been sufficient to mitigate this risk effectively. I hasten to add, however, that a publication ban is not available here since, as noted, the seriousness of the risk to the privacy interest at play has not been made out.

106 Further, the Trustees would have had to show that the benefits of any order necessary to protect from a serious risk to the important public interest outweighed the harmful effects of the order, including the negative impact on the open court principle (*Sierra Club*, at para. 53). In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process (paras. 78 and 86; *Bragg*, at paras. 28-29). There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection.

## **VI. Conclusion**

107 The conclusion that the Trustees have failed to establish a serious risk to an important public interest ends the analysis. In such circumstances, the Trustees are not entitled to any discretionary order limiting the open court principle, including the sealing orders they initially obtained. The Court of Appeal rightly concluded that there was no basis for asking for redactions because the Trustees had failed at this stage of the test for discretionary limits on court openness. This is dispositive of the appeal. The decision to set aside the sealing orders rendered by the application judge should be affirmed. Given that I propose to dismiss the appeal on the existing record, I would dismiss the Toronto Star's motion for new evidence as being moot.

108 For the foregoing reasons, I would dismiss the appeal. The Toronto Star requests no costs given the important public issues in dispute. As such, there will be no order as to costs.

*Appeal dismissed.*

*Pourvoi rejeté.*

- 1 As noted in the title of proceedings, the appellants in this matter have been referred to consistently as the "Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate." In these reasons the appellants are referred to throughout as the "Trustees" for convenience.
- 2 The use of "Toronto Star" as a collective term referring to both respondents should not be taken to suggest that only Toronto Star Newspapers Ltd. is participating in this appeal. Mr. Donovan is the only respondent to have been a party throughout. Toronto Star Newspapers Ltd. was a party in first instance, but was removed as a party on consent at the Court of Appeal. By order of Karakatsanis J. dated March 25, 2020, Toronto Star Newspapers Ltd. was added as a respondent in this Court.
- 3 At the time of writing the House of Commons is considering a bill that would replace part one of *PIPEDA*: Bill C-11, *An Act to enact the Consumer Privacy Protection Act and the Personal Information and Data Protection Tribunal Act and to make consequential and related amendments to other Acts*, 2nd Sess., 43rd Parl., 2020.