COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	2101-0004AC
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APPLICANTS:	**BEHROKH AZARIAN, HOMAYOUN HODAIE, MANDANA REZAIE, MEHRAN POOLADI-DARVISH, MEYSAM OVAICI, FIROOZ ABBASZADEH, MEHRAN JOOZDANI, LAYLA AMJADI, MEER TAHER SHABANI-RAD, ZAHRA AHMADI-NAGHDEHI, AFSHIN SHAMELI, MARYAM MOHSEN ZADEH, PARHAM MINOO, HALEH PEIRAVI, MOHAMMAD AHADZADEH ARDEBILI, RAMIN JALALPOOR, ELHAM VAKILI AZGHANDI, TARIQ MAHMOOD ROSHAN, AMIN JALALPOOR, FAISAL KHAN, POONAM DHARMANI AND ALI NILFOROUSH**
STATUS ON APPEAL:	Appellants
STATUS ON APPLICATION:	Respondents
RESPONDENTS:	**GREENFIRE OIL & GAS LTD. AND GREENFIRE HANGINGSTONE OPERATING CORPORATION**
STATUS ON APPEAL:	Respondents
STATUS ON APPLICATION:	Applicant
NON-PARTY:	**ALVAREZ & MARSAL CANADA INC. IN ITS CAPACITY AS PROPOSAL TRUSTEE OF GREENFIRE OIL & GAS LTD. AND GREENFIRE HANINGSTONE OPERATING CORPORATION**
STATUS ON APPEAL:	Respondent
DOCUMENT	**MEMORANDUM OF ARGUMENT**
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PART I – INTRODUCTION

1. This memorandum of argument is submitted on behalf of the Appellants, Behrokh Azarian, Homayoun Hodaie, Mandana Rezaie, Mehran Pooladi-Darvish, Meysam Ovaici, Firooz Abbaszadeh, Mehran Joozdani, Layla Amjadi, Meer Taher Shabani-Rad, Zahra Ahmadi-Naghdehi, Afshin Shameli, Maryam Mohsen Zadeh, Parham Minoo, Haleh Peiravi, Mohammad Ahadzadeh Ardebili, Ramin Jalalpoor, Elham Vakili Azghandi, Tariq Mahmood Roshan, Amin Jalalpoor, Faisal Khan, Poonam Dharmani and Ali Nilforoush (collectively referred to as the "**Investors**" and/or the "**Investor Group**"), in support of an application for a declaration that they have a right to appeal pursuant to subsection 193(a) (b) and (c) of the *Bankruptcy and Insolvency Act* (the "***BIA***"),[1] or in the alternative, leave to appeal pursuant to subsection 193(e) of the *BIA*, with regards to the orders of Justice D.B. Nixon (the "**Application Judge**") granted December 17, 2020, being a sale approval and vesting order and approval of the interim financing/ interim financing change order (respectively, the "**SAVO**" and "**Interim Financing Order**", and collectively the "**Orders**") in an application (the "**Application**") brought by Greenfire Oil & Gas Ltd. and Greenfire Hangingstone Operating Corporation (collectively, "**Greenfire**").

2. The Investors seek leave to appeal on the basis that the Application Judge made errors in law by incorrectly applying the test and the factors set out in subsections 50.6(5) and 65.13(4) of the *BIA* in granting the Orders and the SAVO, and by incorrectly altering or ignoring well established principles for the approval of a sale of assets in an insolvency proceeding as set out in *Royal Bank of Canada v Soundair*, [1991] CanLII 2727 (ON CA) ("***Soundair***")[2]. The Application Judge further approved interim financing for use by the Purchaser to pay the purchase price for the Assets as set out in the APA.

3. It is submitted that the Application Judge made several palpable and overriding errors. These include:

    a. Making legal conclusions based on facts that were not in evidence;

    b. Drawing inferences which were not based on evidence;

[1] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("***BIA***"), s. 193, at **TAB 1** of the Book of Authorities (the "**BOA**").
[2] *Royal Bank of Canada v Soundair*, [1991] CanLII 2727 (ON CA) at **TAB 2** of the BOA

c. Making unwarranted assumptions regarding the position of certain parties, some of which were contrary to their stated position;

d. Giving inappropriate weight to untested evidence after refusing an adjournment to question such evidence, and in the face of contradictory evidence from the creditors; and

e. Ignoring or failing to consider evidence on required elements of the BIA provisions in question.

PART II – STATEMENT OF FACTS

4. The Investor Group was approached by Greenfire in late 2019, in respect of a "short term financing investment opportunity" of a $3 million bridge financing to close a $50 million loan for expansion of Greenfire's ongoing business project. It was described as a bridge financing which would be repaid within two weeks from a new loan Greenfire was obtaining from Summit (ABC Funding LLC) ("**Summit**"). The financing was to proceed through issuance of Debentures.

5. The management of Greenfire wrote to the Investor Group, responding to a request by the latter to hold the Investors' money in trust until the transaction was completed and the proper paperwork was issued. He said that the cheque could not be marked "in trust" because Greenfire had no trust account but, at closing, once all the paperwork was done, a cheque exchange would occur. However, notwithstanding this representation, no Debentures were ever issued to the Plaintiffs and Greenfire proceeded to use the funds provided by the Investors for its own business purposes.

6. After several queries by the Investors, Greenfire advised that payment would be delayed and that Summit had conditions for repayment to the Investors, which had never been disclosed to the Investor Group. Greenfire further represented that Summit had provided Greenfire with an extra USD $5.0 million, for the sole purpose of Greenfire paying the Investors on or before March 31, 2020. Greenfire advised that the Summit conditions were going to be met within a week or so.

7. On March 23, 2020, management of Greenfire had a meeting with the Investor Group and told the Investor Group that Greenfire would not be able to pay back the debt on March 31, 2020. At various times thereafter, Greenfire advised of further proposed new financings it had been pursuing (none of which occurred) and later dates of repayment, none of which were met.

8. In early October 2020 Greenfire admitted that the $5 million which was to be set aside to pay the Investors was not held in trust or otherwise protected. Instead, those funds were used for business purposes of Greenfire.

9. On October 8, 2020, Greenfire filed a Notice of Intention to Make a Proposal (the "**NOI**") pursuant to the BIA. Since filing its NOI on October 8, 2020, Greenfire opted not to initiate a sales process but instead privately pursued financing and interim financing from potential lenders. While it doing so, Greenfire applied to extend its time to submit a proposal to its creditors four times between November 4, 2020 and December 11, 2020. In several applications interim financing approval was sought but then withdrawn.

10. On December 11, 2020, Greenfire filed the Application. Together, the Orders created a mechanism for Greenfire to fund the sale of certain of Greenfire's assets, including an oil and gas processing plant (the "**Assets**"), to the newly incorporated Greenfire Acquisition Company Ltd. (the "**Purchaser**"). Under the Interim Financing Order, first charge interim financing in the amount of $20,000,000.00 was permitted, the vast majority of which was to be used to fund the purchase of the Assets (the "**Transaction**") and used for general operation of the Assets for the benefit of the Purchaser.

11. The actual sale price of the Assets was never disclosed, and there was no method for Greenfire's creditors to calculate the sale price. It seems clear that the majority of the Interim Financing Funds would be used by the Purchaser to purchase the Assets and to re-start operations for the sole benefit of the Purchaser.

12. After a hearing on December 14 and 17, 2020 the Application Judge approved the Orders.

PART III – LAW AND ARGUMENT

13. Pursuant to section 193 of the *BIA*, any order or decision of a judge made under the *BIA* can be appealed in specific circumstances under subsections 193(a) to 193(d), or if a judge of the Court of Appeal grants leave under subsection 193(e).[3] The Investors submits they have a right to appeal the Orders under subsection 193(a) and (c), and in the alternative, submits it should be granted leave to appeal pursuant to section 193(e).

A. 193(a) – The Point at Issue Involves Future Rights

14. The SAVO approves the vesting of title to the assets in the Purchaser free and clear of all charges and claims, including those of the Investors. The Interim Financing Order grants a charge against all assets of Greenfire in priority to all other creditors, including the Investors. Accordingly, the Orders affect the future rights of the Investors.

15. In *Alternative Fuel Systems Inc. v. EDO (Canada) Limited*,[4] this Honourable Court held that the sale approval order therein did not affect the future rights of the proposed appellant. However, that appellant was an unsuccessful bidder, and not a creditor, therefore the rights affected by the order were immediate, not future rights.

16. Here, due to the vague and imprecise nature of the values under the Orders, the impact of the Orders on creditor rights will only occur in the future, after the total financing and purchase price is known, and therefore at a time when creditors will no longer be able to complain about the effect of the Orders. This will also affect whether a proposal will be even made to creditors, leaving creditors with no practical rights at all.

B. 193(c) – The Value of the Property Involved Exceeds Ten Thousand Dollars

17. Section 193(c) of the *BIA* grants a right to appeal where "the property involved in the appeal exceeds in value ten thousand dollars".[5] Clearly, the proposed financing and the sale of the Assets involves more than $10,000.

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[3] *BIA*, s. 193 **[TAB 1]**
[4] *Alternative Fuel Systems Inc. v. EDO (Canada) Limited,* 1997 ABCA 273 (CanLii) at **TAB 3** of the BOA
[5] *BIA*, s. 193(c) **[TAB 1]**

18. The Ontario Court of Appeal has stated that subsection 193(c) does not apply to: (i) procedural orders, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.[6] Accordingly, orders which do not fall under the foregoing, but involve $10,000 or more, may be appealed as of right.

19. The Orders have a substantive effect on all of Greenfire's creditors, bring into play the value of the assets being sold and result in a loss to creditors. It is clear that the vast majority of the available Interim Financing, being $20,000,000.00, will be directed towards the purchase and the operation of the assets for the sole benefit of the Purchaser. This virtually guarantees that the Investors and all other creditors will have no recovery, without any evidence that there is no greater value available. Therefore s. 193(c) is satisfied.

C. The Investors Should be Granted Leave to Appeal

20. Any appeal may be brought under the BIA may be brought with leave of a judge of this Honourable Court under subsection 193(e).7 This Honourable Court set out the test to be considered in such an application.

a. Is the point of appeal of significance to the bankruptcy practice generally?

b. Is the point appeal of significance to the action itself?

c. Is the appeal *prima facie* meritorious?

d. Will the appeal unduly hinder the progress of the action?

e. Does the judgement or order appear to be contrary to law, amounting to an abuse of judicial power, or involve an obvious error causing prejudice, for which there is no other remedy?[8]

21. For the reasons set out herein, each of the above factors is satisfied.

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[6] *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 at para 53, at **TAB 4** of the BOA.
[7] *BIA*, at s. 193(e), [**TAB 1**].
[8] *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2020 ABCA 442 at para. 18 ("***Third Eye***"), at **TAB 5** of the BOA.

D. The Appeal is Significant to the Bankruptcy Practice

22. These Orders, in combination, even in the Application Judge's view, are novel, in that approval of the Interim Financing Order required the approval of the proposed sale of Assets as a condition. Therefore the SAVO was granted despite a proper sales process being conducted, and with inadequate evidence of value. Interim financing is an extraordinary remedy and must be limited to that which is necessary to preserve assets and to permit the debtor to achieve a restructuring. There must be cogent evidence that the benefits of the financing outweigh the potential prejudice to creditors.[9][10] However, the Application Judge approved the Interim Financing, not to preserve the Assets, but to dispose of them in a sale, since the Purchaser was to use the Interim Financing Funds to fund its purchase, and in the absence of cogent evidence that the benefits outweighed the prejudice.

23. The Application Judge purported to approve the foregoing based on evidence of urgency provided by Greenfire. Parties opposing the application were not permitted to question Greenfire's affiant, and, further adduced contrary evidence. There was no evidence to support the Interim Financing in the amount sought, nor was there evidence that its use by the Purchaser to purchase the Assets was necessary.

24. If left uncorrected, the Application Judge's decision will have serious impacts on future interim financings and sale applications. Debtors could avoid the strict requirements of section 65.13(4) of the BIA and the *Soundair* test by asking the court to approve a transaction without a proper sales process or appraisal of value of the assets simply based on the need for interim financing, so long as the financing and the sale are tied.

25. Further, it is contrary to the principles of section 50.6 to approve interim financing where the majority of the interim financing is not directed towards the goals stated above, but rather, is advanced to the Purchaser to fund its acquisition of the assets of a debtor, to the detriment of the creditors.

26. Accordingly, the proposed appeal is significant to bankruptcy law practice.

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[9] *Hunters Trailer & Marine Ltd. (Re)*, 2000 ABQB 952 (CanLII) at par. 6 at **TAB 6** of the BOA
[10] *1252206 Alberta Ltd. v. Bank of Montreal*, 2009 ABQB 355 (CanLII) at par. 17 and 27] at **TAB 7** of the BOA

E. The Appeal is Significant in this Action

27. The proposed appeal is obviously significant to this action. All but one of Greenfire's creditors who took a position opposed the Orders and advocated a sales process be directed. The Orders effectively put an end to the NOI proceedings.

F. The Appeal is *Prima Facie* Meritorious

28. The appeal is *prima facie* meritorious. The Application Judge made several errors in law and palpable and overriding errors in respect of the facts in evidence when he granted the Orders. While both the SAVO and the Interim Financing Orders are discretionary, they arise from provisions and criteria set out in the BIA. Less appellate deference is owed when a judge's discretionary order may be contrary to the terms of statute.[11]

29. It is submitted the Application Judge's conclusions and discretion were based upon incorrect inferences relating to the parties' positions and upon unwarranted findings on the filed evidence, and are therefore contrary to the *BIA*. As such, the Application Judge's decision to grant the Appealed Orders should be owed little deference.

30. It is an error of law where a judge finds facts for which there is no supporting evidence or relies on facts not in evidence for a conclusion.[12] Further, where an affiant is not questioned his or her evidence should be approached cautiously, especially where that evidence is contradicted.[13]

31. In applying section 50.6 of the *BIA* and approving the interim financing, the Application Judge made the following errors:

    (a) finding that there was "no better recovery for the creditors", without any evidence to support that conclusion, and despite the sworn evidence of the Investors that they were ready, willing and able to make an offer for the assets;

    (b) concluding that Greenfire had the confidence of its major creditors, when only the Municipality of Wood Buffalo supported the Application, and where all other secured and unsecured creditors who made submissions opposed the application;

[11] *Third Eye Capital Corporation,* at paras. 30-31 and 37-38 [**TAB 5]**.
[12] *Barclay v. Kodiak Heating & Air Conditioning Ltd.*, 2019 ABQB 850 at para 30, at **TAB 8** of the BOA.
[13] *Saskatchewan Wheat Pool v. Steffenson*, 2006 SKQB 103 at para. 28(CanLII) at **TAB 9** of the BOA

b. concluding the interim financing enhanced the prospects of a viable proposal, despite there being no evidence on record that a proposal would ever be made, and in the face of evidence to the contrary;

c. approving the amount of interim financing without any evidence regarding the value of the assets;

d. concluding that, contrary to creditors' submissions (and even the evidence of the debtor) that the sale would benefit the creditors; and

e. concluding that if the Interim Financing Order were not approved, the most likely outcome would be the transfer of Greenfire's assets to the Orphan Well Association ("**OWA**"), despite there being no evidence or argument on record on this point, and despite the evidence that the Investors would make an offer for the assets.

32. In approving the SAVO under section 65.13(4) of the *BIA*, the Application Judge made the following errors:

(a) finding the assets were exposed <u>for sale</u> prior to the NOI period, despite there being no evidence to support this conclusion. In fact evidence to the contrary was cited by an opposing creditor, and it was admitted by Greenfire in argument that the previous efforts were aimed only at financing. No evidence was adduced as to any advertisements or sales materials which were distributed , where such advertisement occurred, or the number of parties approached for a sale.

a. concluding the price for the assets was fair and reasonable, despite there being no appraisal evidence, and no sales process.

b. incorrectly interpreting the law regarding sale of assets, in concluding that the principles in *Royal Bank of Canada v. Soundair* could be altered in the circumstances.

c. concluding the sale was in the best interest of the stakeholders, thereby failing to consider the interest of all of the creditors who opposed the Application.

d. stating that the opposing parties did not put any alternatives to the Court, but failing to appreciate this was because there was no opportunity for other parties to participate in respect of a sale of the Sale Assets, and dismissing the evidence and submissions of the Investors on this point.

33. In addition to the above palpable and overriding errors and errors in fact, the Application Judge also drew an inappropriate inference when he concluded the Alberta Energy Regulator ("**AER**") supported the Application, when in fact, the AER merely took no position on the record and simply required that its regulatory obligations be observed.

34. Finally, the Application Judge inappropriately relied heavily on the affidavit evidence of Robert Logan, the affiant for Greenfire. The Application Judge dismissed the parties' request for an adjournment to cross-examine Robert Logan, and went on to prefer his untested evidence over contradicting evidence from other parties. The Application Judge also ignored the evidence provided by the Investors regarding the pre and post NOI conduct of Greenfire and its failure to engage with key stakeholders in obtaining interim financing or seeking a sale of the Assets.

G. The Affidavit of Meer Taher Shabani Rad Should be Admitted

35. The Investors have provided a further affidavit of Meer Taher Shabani Rad in this application. There is no procedural impediment to the filing of this affidavit for the purposes of the within application. In addition, the material in the affidavit was not available at the Application, as the term sheet contained therein was not completed, it bears on a decisive issue in the Application (being further options for Interim Financing), is credible and could reasonably have affected the result. Accordingly, it is submitted that it is appropriate for the Affidavit to be relied upon in the Appeal.[14]

PART IV – RELIEF SOUGHT

36. For the reasons set out above, the Investors respectfully seek that this Honourable Court grant their Application for a declaration that they have a right to appeal the Appealed Orders under subsection 193(a) or (c) of the BIA, or in the alternative, granting leave to appeal the Appealed

[14] *Roswell Group Inc. v. 1353141 Alberta Ltd.,* [2020] ABCA 428 (Canlii) at par. 31-33 at **TAB 10** of the BOA

Orders under subsection 193(e) of the BIA, and that, in such appeal the December 28, 2020 Affidavit of Meer Taher Rabani-Shad may be adduced.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of December 2020.

FIELD LLP

Douglas S. Nishimura, Solicitor for the Applicants

BOOK OF AUTHORITIES

1. *Bankruptcy and Insolvency Act,* RSC 1985, c B-3 at sections 50.6, 65.13 and 193

2. *Royal Bank of Canada v. Soundair,* 1991 CanLii 2727 (ON CA) (CanLii)

3. *Alternative Fuel Systems Inc. v. EDO (Canada) Limited,* 1997 ABCA 273 (CanLii)

4. *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.,* 2016 ONCA 225 (CanLii)

5. *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation, 2020 ABCA 442* (CanLii)

6. *Hunters Trailer & Marine Ltd. (Re),* 2000 ABQB 952 (CanLii)

7. *1252206 Alberta Ltd. v. Bank of Montreal, 2009 ABQB 355* (CanLii)

8. *Barclay v. Kodiak Heating & Air Conditioning Ltd.*, 2019 ABQB 850 (CanLII)

9. *Saskatchewan Wheat Pool v. Steffenson*, 2006 SKQB 103 (CanLII)

10. *Roswell Group Inc. v. 1353141 Alberta Ltd.*, [2020] ABCA 428 (Canlii)

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

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(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted.

Court may not extend time

(10) Subsection 187(11) does not apply in respect of time limitations imposed by subsection (9).

Court may terminate period for making proposal

(11) The court may, on application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that

(a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,

(b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,

(c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or

(d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected,

and where the court declares the period in question terminated, paragraphs (8)(a) to (c) thereupon apply as if that period had expired.

1992, c. 27, s. 19; 1997, c. 12, s. 32; 2004, c. 25, s. 33(F); 2005, c. 47, s. 35; 2007, c. 36, s. 17; 2017, c. 26, s. 6(E).

Trustee to help prepare proposal

50.5 The trustee under a notice of intention shall, between the filing of the notice of intention and the filing of a proposal, advise on and participate in the preparation of the proposal, including negotiations thereon.

1992, c. 27, s. 19.

Order — interim financing

50.6 (1) On application by a debtor in respect of whom a notice of intention was filed under section 50.4 or a proposal was filed under subsection 62(1) and on notice to the secured creditors who are likely to be affected by the

a) la personne insolvable a agi — et continue d'agir — de bonne foi et avec toute la diligence voulue;

b) elle serait vraisemblablement en mesure de faire une proposition viable si la prorogation demandée était accordée;

c) la prorogation demandée ne saurait causer de préjudice sérieux à l'un ou l'autre des créanciers.

Non-application du paragraphe 187(11)

(10) Le paragraphe 187(11) ne s'applique pas aux délais prévus par le paragraphe (9).

Interruption de délai

(11) À la demande du syndic, d'un créancier ou, le cas échéant, du séquestre intérimaire nommé aux termes de l'article 47.1, le tribunal peut mettre fin, avant son expiration normale, au délai de trente jours — prorogé, le cas échéant — prévu au paragraphe (8), s'il est convaincu que, selon le cas :

a) la personne insolvable n'agit pas — ou n'a pas agi — de bonne foi et avec toute la diligence voulue;

b) elle ne sera vraisemblablement pas en mesure de faire une proposition viable avant l'expiration du délai;

c) elle ne sera vraisemblablement pas en mesure de faire, avant l'expiration du délai, une proposition qui sera acceptée des créanciers;

d) le rejet de la demande causerait un préjudice sérieux à l'ensemble des créanciers.

Si le tribunal acquiesce à la demande qui lui est présentée, les alinéas (8)a) à c) s'appliquent alors comme si le délai avait expiré normalement.

1992, ch. 27, art. 19; 1997, ch. 12, art. 32; 2004, ch. 25, art. 33(F); 2005, ch. 47, art. 35; 2007, ch. 36, art. 17; 2017, ch. 26, art. 6(A).

Préparation de la proposition

50.5 Le syndic désigné dans un avis d'intention doit, entre le dépôt de l'avis d'intention et celui de la proposition, participer, notamment comme conseiller, à la préparation de celle-ci, y compris aux négociations pertinentes.

1992, ch. 27, art. 19.

Financement temporaire

50.6 (1) Sur demande du débiteur à l'égard duquel a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1), le tribunal peut par ordonnance, sur préavis de la demande

security or charge, a court may make an order declaring that all or part of the debtor's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the debtor an amount approved by the court as being required by the debtor, having regard to the debtor's cash-flow statement referred to in paragraph 50(6)(a) or 50.4(2)(a), as the case may be. The security or charge may not secure an obligation that exists before the order is made.

aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer que tout ou partie des biens du débiteur sont grevés d'une charge ou sûreté — d'un montant qu'il estime indiqué — en faveur de la personne nommée dans l'ordonnance qui accepte de prêter au débiteur la somme qu'il approuve compte tenu de l'état — visé à l'alinéa 50(6)a) ou 50.4(2)a), selon le cas — portant sur l'évolution de l'encaisse et des besoins de celui-ci. La charge ou sûreté ne peut garantir qu'une obligation postérieure au prononcé de l'ordonnance.

Individuals

(2) In the case of an individual,

(a) they may not make an application under subsection (1) unless they are carrying on a business; and

(b) only property acquired for or used in relation to the business may be subject to a security or charge.

Personne physique

(2) Toutefois, lorsque le débiteur est une personne physique, il ne peut présenter la demande que s'il exploite une entreprise et, le cas échéant, seuls les biens acquis ou utilisés dans le cadre de l'exploitation de l'entreprise peuvent être grevés.

Priority

(3) The court may order that the security or charge rank in priority over the claim of any secured creditor of the debtor.

Priorité — créanciers garantis

(3) Le tribunal peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis du débiteur.

Priority — previous orders

(4) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Priorité — autres ordonnances

(4) Il peut également y préciser que la charge ou sûreté n'a priorité sur toute autre charge ou sûreté grevant les biens du débiteur au titre d'une ordonnance déjà rendue en vertu du paragraphe (1) que sur consentement de la personne en faveur de qui cette ordonnance a été rendue.

Factors to be considered

(5) In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the debtor is expected to be subject to proceedings under this Act;

(b) how the debtor's business and financial affairs are to be managed during the proceedings;

(c) whether the debtor's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable proposal being made in respect of the debtor;

(e) the nature and value of the debtor's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the trustee's report referred to in paragraph 50(6)(b) or 50.4(2)(b), as the case may be.

Facteurs à prendre en considération

(5) Pour décider s'il rend l'ordonnance, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la durée prévue des procédures intentées à l'égard du débiteur sous le régime de la présente loi;

b) la façon dont les affaires financières et autres du débiteur seront gérées au cours de ces procédures;

c) la question de savoir si ses dirigeants ont la confiance de ses créanciers les plus importants;

d) la question de savoir si le prêt favorisera la présentation d'une proposition viable à l'égard du débiteur;

e) la nature et la valeur des biens du débiteur;

f) la question de savoir si la charge ou sûreté causera un préjudice sérieux à l'un ou l'autre des créanciers du débiteur;

2005, c. 47, s. 36; 2007, c. 36, s. 18.

Order to disclose information

(5) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the insolvent person's business or financial affairs and that is relevant to the collective bargaining between the insolvent person and the bargaining agent. The court may make the order only after the insolvent person has been authorized to serve a notice to bargain under subsection (1).

Unrevised collective agreements remain in force

(6) For greater certainty, any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force.

Parties

(7) For the purpose of this section, the parties to a collective agreement are the insolvent person and the bargaining agent who are bound by the collective agreement.

2005, c. 47, s. 44.

Restriction on disposition of assets

65.13 (1) An insolvent person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Individuals

(2) In the case of an individual who is carrying on a business, the court may authorize the sale or disposition only if the assets were acquired for or used in relation to the business.

Notice to secured creditors

(3) An insolvent person who applies to the court for an authorization shall give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Ordonnance visant la communication de renseignements

(5) Sur demande de l'agent négociateur partie à la convention collective et sur avis aux personnes intéressées, le tribunal peut ordonner à celles-ci de communiquer au demandeur, aux conditions qu'il précise, tous renseignements qu'elles ont en leur possession ou à leur disposition — sur les affaires et la situation financière de la personne insolvable — qui ont un intérêt pour les négociations collectives. Le tribunal ne peut rendre l'ordonnance qu'après l'envoi à l'agent négociateur de l'avis de négociations collectives visé au paragraphe (1).

Maintien en vigueur des conventions collectives

(6) Il est entendu que toute convention collective que la personne insolvable et l'agent négociateur n'ont pas convenu de réviser demeure en vigueur.

Parties

(7) Pour l'application du présent article, les parties à la convention collective sont la personne insolvable et l'agent négociateur liés par elle.

2005, ch. 47, art. 44.

Restriction à la disposition d'actifs

65.13 (1) Il est interdit à la personne insolvable à l'égard de laquelle a été déposé un avis d'intention aux termes de l'article 50.4 ou une proposition aux termes du paragraphe 62(1) de disposer, notamment par vente, d'actifs hors du cours ordinaire de ses affaires sans l'autorisation du tribunal. Le tribunal peut accorder l'autorisation sans qu'il soit nécessaire d'obtenir l'acquiescement des actionnaires, et ce malgré toute exigence à cet effet, notamment en vertu d'une règle de droit fédérale ou provinciale.

Personne physique

(2) Toutefois, lorsque l'autorisation est demandée par une personne physique qui exploite une entreprise, elle ne peut viser que les actifs acquis ou utilisés dans le cadre de l'exploitation de celle-ci.

Avis aux créanciers

(3) La personne insolvable qui demande l'autorisation au tribunal en avise les créanciers garantis qui peuvent vraisemblablement être touchés par le projet de disposition.

Factors to be considered

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

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the trustee approved the process leading to the proposed sale or disposition;

(c) whether the trustee filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Facteurs à prendre en considération

(4) Pour décider s'il accorde l'autorisation, le tribunal prend en considération, entre autres, les facteurs suivants :

a) la justification des circonstances ayant mené au projet de disposition;

b) l'acquiescement du syndic au processus ayant mené au projet de disposition, le cas échéant;

c) le dépôt par celui-ci d'un rapport précisant que, à son avis, la disposition sera plus avantageuse pour les créanciers que si elle était faite dans le cadre de la faillite;

d) la suffisance des consultations menées auprès des créanciers;

e) les effets du projet de disposition sur les droits de tout intéressé, notamment les créanciers;

f) le caractère juste et raisonnable de la contrepartie reçue pour les actifs compte tenu de leur valeur marchande.

Additional factors — related persons

(5) If the proposed sale or disposition is to a person who is related to the insolvent person, the court may, after considering the factors referred to in subsection (4), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the insolvent person; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Autres facteurs

(5) Si la personne insolvable projette de disposer d'actifs en faveur d'une personne à laquelle elle est liée, le tribunal, après avoir pris ces facteurs en considération, ne peut accorder l'autorisation que s'il est convaincu :

a) d'une part, que les efforts voulus ont été faits pour disposer des actifs en faveur d'une personne qui n'est pas liée à la personne insolvable;

b) d'autre part, que la contrepartie offerte pour les actifs est plus avantageuse que celle qui découlerait de toute autre offre reçue dans le cadre du projet de disposition.

Related persons

(6) For the purpose of subsection (5), a person who is related to the insolvent person includes

(a) a director or officer of the insolvent person;

(b) a person who has or has had, directly or indirectly, control in fact of the insolvent person; and

(c) a person who is related to a person described in paragraph (a) or (b).

Personnes liées

(6) Pour l'application du paragraphe (5), les personnes ci-après sont considérées comme liées à la personne insolvable :

a) le dirigeant ou l'administrateur de celle-ci;

b) la personne qui, directement ou indirectement, en a ou en a eu le contrôle de fait;

c) la personne liée à toute personne visée aux alinéas a) ou b).

(m) to perform all necessary administrative duties relating to the practice and procedure in the courts; and

(n) to hear and determine appeals from the decision of a trustee allowing or disallowing a claim.

l) de régler et de signer toutes ordonnances et jugements des tribunaux qu'un juge n'a pas réglés ou signés, et d'émettre toutes ordonnances, tous jugements, mandats ou autres procédures des tribunaux;

m) d'exercer toutes les fonctions administratives nécessaires relativement à la pratique et à la procédure devant les tribunaux;

n) d'entendre et de décider les appels de la décision d'un syndic accordant ou refusant une réclamation.

May be exercised by judge

(2) The powers and jurisdiction conferred by this section or otherwise on a registrar may at any time be exercised by a judge.

Peuvent être exercés par un juge

(2) Les pouvoirs et la juridiction, conférés à un registraire par le présent article ou autrement, peuvent être exercés par un juge.

Registrar may not commit

(3) A registrar has no power to commit for contempt of court.

Mandat de dépôt

(3) Un registraire n'a pas le pouvoir de délivrer un mandat de dépôt pour outrage au tribunal.

Appeal from registrar

(4) A person dissatisfied with an order or decision of a registrar may appeal therefrom to a judge.

Appel du registraire

(4) Toute personne mécontente d'une ordonnance ou d'une décision du registraire peut en interjeter appel à un juge.

Order of registrar

(5) An order made or act done by a registrar in the exercise of his powers and jurisdiction shall be deemed the order or act of the court.

Ordonnance du registraire

(5) Toute ordonnance rendue ou tout acte fait par un registraire dans l'exercice de ses pouvoirs et de sa juridiction est réputé être une ordonnance ou un acte du tribunal.

Reference to judge

(6) A registrar may refer any matter ordinarily within his jurisdiction to a judge for disposition.

Renvoi à un juge par un registraire

(6) Un registraire peut renvoyer toute affaire qui relève ordinairement de sa compétence à un juge pour qu'il en dispose.

Judge may hear

(7) A judge may direct that any matter before a registrar be brought before the judge for hearing and determination.

Renvoi à un juge

(7) Un juge peut ordonner que toute affaire devant un registraire soit portée devant le juge pour audition et décision.

Registrars to act for each other

(8) Any registrar in bankruptcy may act for any other registrar.

Peuvent agir l'un pour l'autre

(8) Tout registraire en matière de faillite peut agir pour tout autre registraire.

R.S., 1985, c. B-3, s. 192; 1992, c. 27, s. 67; 2004, c. 25, s. 88.

L.R. (1985), ch. B-3, art. 192; 1992, ch. 27, art. 67; 2004, ch. 25, art. 88.

Appeals

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

Appels

Cour d'appel

193 Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants :

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

R.S., 1985, c. B-3, s. 193; 1992, c. 27, s. 68.

a) le point en litige concerne des droits futurs;

b) l'ordonnance ou la décision influera vraisemblablement sur d'autres causes de nature semblable en matière de faillite;

c) les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars;

d) la libération est accordée ou refusée, lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;

e) dans tout autre cas, avec la permission d'un juge de la Cour d'appel.

L.R. (1985), ch. B-3, art. 193; 1992, ch. 27, art. 68.

Appeal to Supreme Court

194 The decision of the Court of Appeal on any appeal is final and conclusive unless special leave to appeal therefrom to the Supreme Court of Canada is granted by that Court.

R.S., c. B-3, s. 164; R.S., c. 44(1st Supp.), s. 10.

Cour suprême du Canada

194 La décision de la Cour d'appel sur tout appel est définitive et sans appel, sauf autorisation spéciale, accordée par la Cour suprême du Canada, d'en appeler à ce tribunal.

S.R., ch. B-3, art. 164; S.R., ch. 44(1er suppl.), art. 10.

Stay of proceedings on filing of appeal

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

R.S., 1985, c. B-3, s. 195; 1992, c. 27, s. 69.

Suspension d'instance sur un appel

195 Sauf dans la mesure où le jugement dont il est interjeté appel est sujet à exécution provisoire malgré l'appel, toutes les procédures exercées en vertu d'une ordonnance ou d'un jugement dont il est appelé sont suspendues jusqu'à ce qu'il soit disposé de l'appel; mais la Cour d'appel, ou un juge de ce tribunal, peut modifier ou annuler la suspension ou l'ordonnance d'exécution provisoire s'il apparaît que l'appel n'est pas poursuivi avec diligence, ou pour toute autre raison qui peut être jugée convenable.

L.R. (1985), ch. B-3, art. 195; 1992, ch. 27, art. 69.

No stay of proceedings unless ordered

196 An appeal to the Supreme Court of Canada does not operate as a stay of proceedings, except to the extent ordered by that Court.

R.S., c. B-3, s. 166; R.S., c. 44(1st Supp.), s. 10.

Aucune suspension de procédures, à moins d'ordonnance

196 Un appel à la Cour suprême du Canada ne peut avoir pour effet de suspendre les procédures, sauf dans la mesure où celle-ci l'ordonne.

S.R., ch. B-3, art. 166; S.R., ch. 44(1er suppl.), art. 10.

Legal Costs

Costs in discretion of court

197 (1) Subject to this Act and to the General Rules, the costs of and incidental to any proceedings in court under this Act are in the discretion of the court.

Frais judiciaires

Frais à la discrétion du tribunal

197 (1) Sous réserve des autres dispositions de la présente loi et des Règles générales, les frais de toutes procédures judiciaires intentées sous le régime de la présente loi, ou les frais s'y rapportant, sont laissés à la discrétion du tribunal.

Royal Bank of Canada v. Soundair Corp., Canadian Pension Capital Ltd. and Canadian Insurers Capital Corp.

Indexed as: Royal Bank of Canada v. Soundair Corp. (C.A.)

4 O.R. (3d) 1
[1991] O.J. No. 1137
Action No. 318/91

ONTARIO
Court of Appeal for Ontario
Goodman, McKinlay and Galligan JJ.A.
July 3, 1991

Debtor and creditor -- Receivers -- Court-appointed receiver accepting offer to purchase assets against wishes of secured creditors -- Receiver acting properly and prudently -- Wishes of creditors not determinative -- Court approval of sale confirmed on appeal.

Air Toronto was a division of Soundair. In April 1990, one of Soundair's creditors, the Royal Bank, appointed a receiver to operate Air Toronto and sell it as a going concern. The receiver was authorized to sell Air Toronto to Air Canada, or, if that sale could not be completed, to negotiate and sell Air Toronto to another person. Air Canada made an offer which the receiver rejected. The receiver then entered into negotiations with Canadian Airlines International (Canadian); two subsidiaries of Canadian, Ontario Express Ltd. and Frontier Airlines Ltd., made an offer to purchase on March 6, 1991 (the OEL offer). Air Canada and a creditor of Soundair, CCFL, presented an offer to purchase to the receiver on March 7, 1991 through 922, a company formed for that purpose (the 922 offer). The receiver declined the 922 offer because it contained an unacceptable condition and accepted the OEL offer. 922 made a

second offer, which was virtually identical to the first one except that the unacceptable condition had been removed. In proceedings before Rosenberg J., an order was made approving the sale of Air Toronto to OEL and dismissing the 922 offer. CCFL appealed.

Held, the appeal should be dismissed.

Per Galligan J.A.: When deciding whether a receiver has 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, and 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. The decision to sell to OEL was a sound one in the circumstances faced by the receiver on March 8, 1991. Prices in other offers received after the receiver has agreed to a sale have relevance only if they show that the price contained in the accepted offer was so unreasonably low as to demonstrate that the receiver was improvident in accepting it. If they do not do so, they should not be considered upon a motion to confirm a sale recommended by a court-appointed receiver. If the 922 offer was better than the OEL offer, it was only marginally better and did not lead to an inference that the disposition strategy of the receiver was improvident.

While the primary concern of a receiver is the protecting of the interests of creditors, a secondary but important consideration is the integrity of the process by which the sale is effected. 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.

The failure of the receiver to give an offering memorandum to those who expressed an interest in the purchase of Air Toronto did not result in the process being unfair, as there was no 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.

The fact that the 922 offer was supported by Soundair's secured creditors did not mean that the court should have given effect to their wishes. Creditors who asked the court to appoint a receiver to dispose of assets (and therefore insulated themselves from the risks of acting privately) 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 by the receiver. If the court decides that a court-appointed receiver has acted providently and properly (as the receiver did in this case), the views of creditors should not be determinative.

Per McKinlay J.A. (concurring in the result): While the procedure carried out by the receiver in this case was appropriate, given the unfolding of events and the unique nature of the assets involved, it was not a procedure which was likely to be appropriate in many receivership sales.

Per Goodman J.A. (dissenting): 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. The creditors in this case were convinced that acceptance of the 922 offer was in their best interest and the evidence supported that belief. Although the receiver acted in good faith, the process which it used was unfair insofar as 922 was concerned and improvident insofar as the secured creditors were concerned.

Cases referred to

Beauty Counsellors of Canada Ltd. (Re) (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.); British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.); 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.); Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C.

(2d) 131, 67 C.B.R. (N.S.) 320 (note), 39 D.L.R. (4th) 526 (H.C.J.); Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 65 A.R. 372, 59 C.B.R. (N.S.) 242, 21 D.L.R. (4th) 473 (C.A.); Selkirk (Re) (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.); Selkirk (Re) (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.)

Statutes referred to

Employment Standards Act, R.S.O. 1980, c. 137
Environmental Protection Act, R.S.O. 1980, c. 141

APPEAL from the judgment of the General Division, Rosenberg J., May 1, 1991, approving the sale of an airline by a receiver.

J.B. Berkow and Steven H. Goldman, for appellants.

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

L.A.J. Barnes and Lawrence E. Ritchie, for Royal Bank of Canada.

Sean F. Dunphy and G.K. Ketcheson for Ernst & Young Inc., receiver of Soundair Corp., respondent.

W.G. Horton, for Ontario Express Ltd.

Nancy J. Spies, for Frontier Air Ltd.

GALLIGAN J.A.:-- This is an appeal from the order of Rosenberg J. made on May 1, 1991 (Gen. Div.). 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.

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.

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 $65,000,000. 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 $50,000,000 on the winding-up of Soundair.

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.

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.

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.

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.

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, 1991. 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.

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.

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.

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.

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?

I will deal with the two issues separately.

I. DID THE RECEIVER ACT PROPERLY

IN AGREEING TO SELL TO OEL?

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.

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.

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, 39 D.L.R. (4th) 526 (H.C.J.), at pp. 92-94 O.R., pp. 531-33 D.L.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.

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?

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.

When the receiver got the OEL offer on March 6, 1991, it was over ten 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.

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.

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 v. Rosenberg, supra, at p. 112 O.R., p. 551 D.L.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)

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 (C.A.), at p. 11 C.B.R., p. 314 N.S.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)

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 to 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.

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 ten 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.

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.

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 v. Rosenberg, supra, Anderson J., at p. 113 O.R., p. 551 D.L.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.

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. Bkcy.), 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.

The second is Re Beauty Counsellors of Canada Ltd. (1986), 58 C.B.R. (N.S.) 237 (Ont. Bkcy.), 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.

In Re Selkirk (1987), 64 C.B.R. (N.S.) 140 (Ont. Bkcy.), 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)

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.

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.

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.

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.

The 922 offer provided for $6,000,000 cash to be paid on closing with a royalty based upon a percentage of Air Toronto profits over a period of five years up to a maximum of $3,000,000. The OEL offer provided for a payment of $2,000,000 on closing with a royalty paid on gross revenues over a five-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.

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.

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.

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.

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

2. Consideration of the interests of all parties

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 (1986, Saunders J.), supra. 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".

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, Saunders J.), supra, Re Beauty Counsellors, supra, Re Selkirk (1987, McRae J.), 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.

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

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.

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 (1986), 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 finding 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.

In Salima Investments Ltd. v. Bank of Montreal (1985), 41 Alta. L.R. (2d) 58, 21 D.L.R. (4th) 473 (C.A.), at p. 61 Alta. L.R., 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.

Finally, I refer to the reasoning of Anderson J. in Crown Trust Co. v. Rosenberg, supra, at p. 124 O.R., pp. 562-63 D.L.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)

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.

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., p. 548 D.L.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.

It would be a futile and duplicitous exercise for this court to examine in minute detail all of the 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?

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.

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.

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.

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.

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.

Moreover, I am not prepared top 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.

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

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.

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.

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., p. 548 D.L.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., p. 550 D.L.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.

In his reasons for judgment, after discussing the circumstances leading to the 922 offer, Rosenberg J. said this [at p. 31 of the reasons]:

> They created a situation as of March 8, 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.

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

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.

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.

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.

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 debtors' assets.

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 interlender 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 interlender 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 $6,000,000 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.

On April 5, 1991, the Royal Bank and CCFL agreed to settle the interlender dispute. The settlement was that if the 922 offer was accepted by the court, CCFL would receive only $1,000,000 and the Royal Bank would receive $5,000,000 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.

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 interlender dispute that, in my opinion, its support is devoid of any objectivity. I think it has no weight.

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.

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.

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.

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-and-client scale. I would make no order as to the costs of any of the other parties or interveners.

MCKINLAY J.A. (concurring in the result):-- 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), 60 O.R. (2d) 87, 39 D.L.R. (4th) 526 (H.C.J.). 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.

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 therefrom), 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):-- 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.

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 Frontier Airlines Ltd. and Ontario Express Limited (OEL) and that of 922246 Ontario Limited (922), a company incorporated for the purpose of acquiring Air Toronto. Its shares were owned equally by Canadian Pension Capital Limited and Canadian Insurers Capital Corporation (collectively 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 (the Bank). 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.

In British Columbia Development Corp. v. Spun Cast Industries Inc. (1977), 5 B.C.L.R. 94, 26 C.B.R. (N.S.) 28 (S.C.), Berger J. said at p. 95 B.C.L.R., 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 having 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.

I agree with that statement. It is particularly apt to this case. The two secured creditors will suffer a shortfall of approximately $50,000,000. They have a tremendous interest in the sale of assets which form part of their security. I agree with the finding of Rosenberg J., Gen. Div., May 1, 1991, 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 [pp. 17-18]:

> 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.

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 $3,000,000 to $4,000,000. 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 downpayment on closing.

In Cameron v. Bank of Nova Scotia (1981), 38 C.B.R. (N.S.) 1, 45 N.S.R. (2d) 303 (C.A.), Hart J.A., speaking for the majority

of the court, said at p. 10 C.B.R., p. 312 N.S.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 the 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.

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.

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.

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.

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. Bkcy.) 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.

I agree with that statement of the law. In Re Selkirk (1986), 58 C.B.R. (N.S.) 245 (Ont. Bkcy.) Saunders J. heard an application for court approval for 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 C.B.R.:

> 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 the commercial efficacy and integrity.

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, at pp. 92-94 O.R., pp. 531-33 D.L.R., 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., p. 314 N.S.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.

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.

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.

It is important to note at the outset that Rosenberg J. made the following statement in his reasons [p. 15]:

> 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 1. 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.

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 this 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 "hard ball" 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.

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.

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.

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.

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.

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 $18,000,000. 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.

As a result of due diligence investigations carried out by Air Canada during the month of April, May and June of 1990, Air Canada reduced its offer to 8.1 million dollars conditional upon there being $4,000,000 in tangible assets. The offer was made on June 14, 1990 and was open for acceptance until June

29, 1990.

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.

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.

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 $10,000,000 and $12,000,000.

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 $3,000,000 for the good will relating to certain Air Toronto routes but did not

include the purchase of any tangible assets or leasehold interests.

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.

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.

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.

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.

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.

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 any 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.

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.

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 interlender 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.

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 three 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.

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.

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.

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 three 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.

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 three 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.

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 [p. 31]:

> They created a situation as of March 8, 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.

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".

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 interlender condition removed.

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 approximately 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 $3,000,000 to $4,000,000.

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.

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.

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 a 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.

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.

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.

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.

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, it knew that CCFL was interested in purchasing Air Toronto.

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.

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.

For the above reasons I would allow the appeal with 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-and-client basis. I would make no order as to costs of any of the other parties or interveners.

Appeal dismissed.

In the Court of Appeal of Alberta

Citation: Alternative Fuel Systems Inc. v. EDO (Canada) Limited, 1997 ABCA 273

Date: 19970904
Docket: 17298
Registry: Calgary

Between:

Alternative Fuel Systems Inc.

Appellant

- and -

J. Stephens Allan, Trustee in Bankruptcy of EDO (Canada) Limited and IMPCO Technologies Inc.

Respondents

Reasons for Judgment of
The Honourable Mr. Justice O'Leary
In Chambers

COUNSEL:

T. L. Czechowskyj, for the Appellant

B. A. R. Smith, Q.C., for the Respondents Trustee in Bankruptcy of Edo (Canada) Limited)

L. B. Robinson, for the Respondent, Impco Technologies Inc.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE O'LEARY IN CHAMBERS

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[1] A judge of the Court of Queen's Bench sitting in bankruptcy ordered that certain equipment of Edo (Canada) Limited, in Bankruptcy, be sold by the estate to Impco Technologies Inc. ("Impco"). Alternative Fuel Systems Inc. ("Alternative") objected and filed a Notice of Appeal. Its right to appeal without leave was questioned and it has moved for a ruling that leave is not required or, alternatively, for leave to appeal.

[2] Section 193 of the ***Bankruptcy and Insolvency Act,*** R.S.C. 1985, c. B-3, says:

> 193. Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

[3] The first question is whether Alternative has an appeal as of right under either of sub-clauses (a) or (c), as it claims, or must seek leave under sub-clause (e). A threshold issue is whether I have jurisdiction to decide that question. The Respondent Impco maintains that leave is required and should be denied in these circumstances.

JURISDICTION

[4] Section 193(e) confers jurisdiction on a single judge of the Court of Appeal to grant or withhold leave where the matter cannot be brought within one or more sub-clauses (a) to (d) inclusive. There are obviously many cases where the question of whether or not leave to appeal is required must be determined as a preliminary issue. In my view it is implicit in s. 193 that a single judge of the Court has jurisdiction to make that threshold decision. Otherwise, the issue could not be determined except by bringing it before a panel of the Court. If leave were found necessary, it could be granted at that point or the matter referred to a single judge for decision. Such a cumbersome and time-consuming procedure could hardly have been intended. It would be inconsistent with a fundamental goal of the ***Act*** - the expeditious administration of bankrupt estates. Counsel have not referred me to specific authority on point, however there are reported cases in which single judges have assumed jurisdiction to decide the preliminary issue: See, e.g. ***Re Baker,*** [1995] O.J. No. 580 (Osborne, J.A.). The only sensible construction of s. 193 is that a single judge of the Court of Appeal can decide the threshold issue of whether leave is required.

[5] Is leave to appeal required in these circumstances? If so, should it be granted?

FACTS

[6] The Trustee invited tenders for the purchase of the bankrupt's equipment. Tenders closed on June 20, 1997. Three bids were received, including one from each of Alternative and Impco. Alternative's tender of $770,000 was the highest. The Trustee advised Alternative that it had submitted the highest bid and both parties proceeded on the assumption that the Inspector would accept the tender. Alternative arranged financing while waiting for the Inspector's approval and the preparation of a formal agreement. After

tenders closed and Impco realized it was not the highest bidder, it submitted a second tender or offer in the amount of $1,175,000. The Trustee referred the second Impco tender to the Inspector. He did not accept either bid and the Trustee applied to the Court for directions.

[7] The Bankruptcy Judge directed that the equipment be sold to Impco. Reasons for Judgment were not available at the time of this application, however counsel agreed that the Bankruptcy Judge felt he was bound to direct that the equipment be sold so as to realize the greatest amount for the benefit of creditors. He refused to accept a suggestion that Alternative be permitted to submit a further tender or that the tender procedure be repeated.

[8] Alternative claims it may appeal the Order as of right pursuant to s. 193(a) as the point at issue involves “future rights”, or pursuant to sub-clause (c) as the value of the property involved in the appeal exceeds $10,000.00.

DISCUSSION

(a) future rights

[9] The “future rights” referred to in sub-clause (a) are future legal rights, not future commercial advantages or benefits which may be affected by the decision: ***Re Ditchburn*** (1938), 19 C.B.R. 240 (Ont. C.A.). The words do not contemplate rights which presently exist, but, rather, rights that will come into existence at a future time: ***Elias v. Hutchison*** (1981), 14 Alta. L.R. (2d) 268, 37 C.B.R. (N.S.) 149 (C.A.).

[10] The decision under appeal does not involve future rights. The Bankruptcy Judge directed a sale of the assets to Impco in accordance with Impco’s second tender. The rights affected were present rights - either conferred on Impco or taken from Alternative. No future rights of either were or could be affected. Alternative cannot appeal as of right pursuant to sub-clause (a).

(c) value of property

[11] In ***Re Dominion Foundry Co.; Commercial Forwarding Ltd. v. C.C.M.A.*** (1965), 8 C.B.R. (N.S.) 74, 51 W.W.R. 679 (Man. C.A.), it was held that an order to sell assets in a certain manner is a procedural direction and cannot be appealed as of right even though the assets in question exceed $10,000 in value. The Order sought to be appealed here is essentially a procedural direction. Alternative challenges the method by which the equipment is to be sold, namely by-passing the tender procedure. Accordingly, Alternative has no right of appeal under sub-clause (c).

(e) leave to appeal

[12] Sub-clause (e) gives no guidance as to the factors to be taken into account in deciding whether leave should be granted or withheld. The authorities have established broad guidelines for deciding the issue. These are summarized in Houlden & Morawetz, ***Bankruptcy and Insolvency Law of Canada*** (3rd edition), Vol. II, at page 7-56:

> The factors to be considered on an application for leave to appeal are (a) whether the point of appeal is of significance to the practice; (b) whether the point raised is of significance to the action itself; (c) whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous and (d) whether the appeal will unduly hinder the progress of the action: ***Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.*** (1988), 19 C.P.C. (3d) 396 (B.C.C.A.); ***Med Finance Co. S.A. v. Bank of Montreal*** (1993), 22 C.B.R. (3d) 279, 24 B.C.A.C. 318, 40 W.A.C. 318 (C.A.).
>
> Section 193(e) gives a judge of the Court of Appeal a discretion, but leave should only be granted in the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error, causing prejudice, for which there is no remedy: ***MacNab v. B.S. & B. Enterprises Ltd.*** (1951), 32 C.B.R. 53 (Que. K.B.); Re Leard (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135 (Ont. C.A.). If the order sought to be appealed from is discretionary, leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to litigation: ***Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.*** (1992), 22 C.B.R. (3d) 291, 84 B.C.L.R. (2d) 283, 18 B.C.A.C. 221, 31 W.A.C. 221 (C.A.).

[13] In my opinion, the point Alternative wishes to raise on appeal is one of significance to bankruptcy practice as well as to the parties. Alternative submitted the highest tender and argues that if the equipment is sold pursuant to the tendering process, it must be sold to it for the amount it tendered. It appears that Impco purported to make its second bid in response to the invitation to tender, but after tenders had closed and it realized its first bid had been unsuccessful. It was made after Alternative had been led to believe that it was the successful tenderer and had taken steps to arrange financing to complete the transaction. Alternative contends that the second tender was really an offer to buy the equipment and the effect of the Order under appeal is to condone “shopping” against Alternative’s tender in order to obtain a higher price. It is said this was an error in principle even though it would result in a higher dividend to creditors; ***Re Pretty Fashions Inc.*** (1951), 31 C.B.R. 217 (Que.). Further, Alternative claims that the public’s faith in the integrity of the tendering system will be undermined if the sale to Impco is approved: ***Druker v. Godin*** (1992), 16 C.B.R. (3d) 281 (Que. S.C.), ***Bank of Nova Scotia v. Yoshikumi Lbr. Ltd.*** (1992), 16 C.B.R. (3d) 10 (B.C.C.A.). It appears that Alternative has no recourse against either the Trustee or the Inspector as the bid was, by law, subject to acceptance by the Inspector (Act, s. 30(1)(a)).

[14] In my view, these circumstances raise a question sufficiently serious and important to justify granting leave.

CONCLUSION

[15] Leave to appeal is granted. The appeal will inevitably result in a delay in realization of the assets of the estate and the payment of dividends to creditors. The parties may have the appeal expedited by consultation with the Deputy Registrar and the List Manager.

CHAMBERS APPLICATION
HEARD August 20, 1997

DATED at CALGARY, Alberta,
this 4th day of September,
A.D. 1997

COURT OF APPEAL FOR ONTARIO

CITATION: 2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225
DATE: 20160322
DOCKET: M46061 (C61637)

Brown J.A. (In Chambers)

BETWEEN

2403177 Ontario Inc.

Applicant (Respondent/
Responding Party)

and

Bending Lake Iron Group Limited

Respondent (Appellant/
Responding Party)

Kenneth Kraft, for the moving party, A. Farber & Partners Inc.

Robert MacRae, for the responding party, Bending Lake Iron Group Limited

Heard: March 8, 2016

ENDORSEMENT

I. OVERVIEW

[1] This motion considers the somewhat awkward and anachronistic appeal provisions contained in s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A. Farber & Partners Inc. was appointed receiver of the

property of Bending Lake Iron Group Limited (the "Debtor") pursuant to s. 243(1) of the *BIA*. The Receiver moves for directions whether the Debtor requires leave to appeal under s. 193(e) of the *BIA* from the approval and vesting order made by the motion judge on January 8, 2016, 2016 ONSC 199, transferring all the Debtor's property to an unrelated purchaser, Legacy Hill Resources Ltd. ("Legacy Hill"). At the conclusion of the hearing, I held that the Debtor did require leave to appeal and set a timetable for its leave motion. These are my reasons for so ordering.

II. HISTORY OF THE RECEIVERSHIP

[2] The Debtor went into receivership on September 11, 2014 on the application of its secured creditor, 2403177 Ontario Inc. (the "Receivership Order"). The Debtor's major asset is an undeveloped iron ore mine site located northwest of Thunder Bay, Ontario.

[3] By order dated November 27, 2014, the court approved a Sales and Investor Solicitation Process for the Debtor's property (the "SISP Order"). Significantly, the Debtor consented to the SISP Order.

[4] In November 2015, the Receiver moved for court approval of an asset purchase agreement it had entered into with Legacy Hill for substantially all of the Debtor's property (the "Sale Agreement"). The Debtor opposed the motion and,

in turn, brought its own motion seeking a variety of relief, including the postponement of the sale of its property.

[5] The motion judge approved the Sale Agreement and ordered the vesting of the Debtor's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order"). As well, the motion judge dismissed the Debtor's motion to postpone the sale and for other relief.

[6] The Debtor filed a notice of appeal dated January 13, 2016 seeking to set aside the Approval and Vesting Order. Section 195 of the *BIA* provides that all proceedings under an order appealed from are stayed until the appeal is disposed of. However, the Debtor did not perfect its appeal within the time required by the *Rules of Civil Procedure*, and this court has issued a notice of intention to dismiss the appeal for delay unless it is perfected by March 22, 2016.

[7] Legacy Hill is not prepared to close the Sale Agreement until the Debtor has exhausted its appeal rights in this court.

[8] The Receiver moves for a declaration that the Debtor requires leave to appeal. Granting such relief would quash the Debtor's existing notice of appeal.

III. ISSUE ON THE MOTION

[9] The central issue on this motion is whether the Approval and Vesting Order falls into any of the categories of cases identified in s. 193 of the *BIA* in

which an appeal lies as of right to this court, or whether the Debtor must obtain leave to appeal under s. 193(e). Section 193 of the *BIA* provides:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) in any other case by leave of a judge of the Court of Appeal.

[10] The Debtor submits that the Approval and Vesting Order falls within ss. 193(a), (b), and (c), and therefore an appeal lies as of right. I shall consider the Debtor's submissions on each sub-section in turn.

IV. SECTION 193(A): DOES THE APPROVAL AND VESTING ORDER INVOLVE FUTURE RIGHTS?

A. Positions of the parties

[11] The Debtor submits the point in issue in its appeal involves future rights. The Debtor makes the following submissions in its factum:

> [T]here remains outstanding a Notice of Motion seeking a finding that the Receiver has violated the Crown's fiduciary duty to Aboriginal Peoples, as well as the

> Honour of the Crown, such duties being owed by the Receiver as an Officer of the Court. This motion has not been heard as of yet.
>
> …
>
> The future rights of the "affected Aboriginal communities" will very much be affected by the confirmation of the Vesting Order as granted by [the motion judge].

[12] In order to assess this submission, some review is required of the evidence the Debtor placed before the motion judge on the sale approval motion about "affected Aboriginal communities" and of the relief the Debtor plans to seek in a further motion before the motion judge.

B. Debtor's evidence concerning "affected Aboriginal communities"

[13] Mr. Henry Wetelainen, the President and CEO of the Debtor, swore an affidavit which was filed in opposition to the Receiver's motion to approve the Sale Agreement. In it, he deposed that, in early 2015, after the Receivership Order had been made, he held discussions with Legacy Hill about a possible "partnership/co-operative development in rescuing [the Debtor] from receivership." He described his discussions with Legacy Hill as attempts to attract a financial partner to assist in the refinancing of the Debtor in order to terminate the Receivership.

[14] At various points in his affidavit, Mr. Wetelainen stated he had pursued those discussions as part of his "continued efforts on behalf of [the Debtor] and

its creditors, shareholders, stakeholders and affected Aboriginal communities." He deposed that the termination of the receivership would have a "concurrent benefit to [the Debtor], its creditors, shareholders, stakeholders and affected Aboriginal communities."

[15] Despite having pursued discussions with Legacy Hill in early 2015, Mr. Wetelainen opposed the Sale Agreement. He took the position that Legacy Hill had breached a fiduciary duty owed to the Debtor by dealing with the Receiver. Frankly, it is difficult to understand that position given that under the Receivership Order and the SISP Order, Mr. Wetelainen, as an officer of the Debtor, was not permitted to pursue the discussions he did with Legacy Hill without the knowledge and concurrence of the Receiver.

[16] In any event, Mr. Wetelainen's evidence disclosed that the main reason he opposed the Sale Agreement was that he wanted more time for the Debtor to find financing to take out its secured creditors and terminate the receivership. In his affidavit, he explained why the Debtor was seeking orders to postpone approval of the Sale Agreement:

> The Orders being sought from the Court will ensure that all of the creditors, shareholders, stakeholders and affected Aboriginal communities be given an appropriate period of time pursuant to Court Order to permit [the Debtor] to complete the Corporate requirement for the purpose of providing the creditors, shareholders, stakeholders and affected Aboriginal communities to invest in Special Shares in [the Debtor]

> in order to retire the debt that [the applicant] has agreed to reduce to the amount as reflected in the Assets Purchase Agreement.
>
> …
>
> The net result of the successful refinancing of [the Debtor] will be that all the shareholders will have their share value protected and [the Debtor] will be required to deal with unsecured creditors in a fair fashion. At all times during the financing proceedings with [Legacy Hill], I anticipated that there would be a compromise with respect to the amount of debt owed to the Applicant.

[17] In Mr. Wetelainen's view, the Sale Agreement is a "disasterous agreement that will wipe out millions of dollars of shareholder value, creditor obligations to stakeholders and various Aboriginal communities."

[18] A further reason given by Mr. Wetelainen for his opposition to the Receiver's sale was that an asset purchase by Legacy Hill ran "a very substantial risk of [Legacy Hill] alienating all of the affected Aboriginal communities as well as the members of the communities where a workforce would have been drawn from and whose cooperation would have been received. The Aboriginal Employment Preferences Policy identifies these clearly articulated goals."

C. The Debtor's pending motion

[19] The Debtor intends to bring a motion before the motion judge at the end of May seeking an order that it be granted leave to commence an action against the Receiver "for damages as a result of the failure of the Receiver to uphold the

honour of the Crown and the Crown's fiduciary duties to Aboriginal peoples including the Aboriginal communities affected by the actions of the Receiver." In its notice of motion, the Debtor asserts it had provided "continual notice" to the Receiver that Aboriginal communities were directly affected by the receivership, yet the Receiver failed to maintain the honour of the Crown by not notifying affected Aboriginal communities of its intention to seek a sale of the Debtor's assets.

D. Analysis

[20] The concept of "future rights" as a category of cases appealable to this court as of right traces its origins to the late nineteenth century federal *Winding-Up Act*.[1] The passage of time has not improved the clarity of the concept. In *Elias v. Hutchinson*,[2] McGillivray C.J.A. commented, at para. 20, that "the authorities leave me in a state of uncertainty as to what a future right is at all, let alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights."

[21] Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts

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[1] Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *In re Union Fire Insurance Co.* (1886), 13 O.A.R. 268, (C.A.) at pp. 294-295.
[2] (1981), 14 Alta. L.R. (2d) 268; 121 D.L.R. (3d) 95, [1981] A.J. No. 896 (C.A.).

have attempted to cloak the term “future rights” with some practical meaning. In *Re Ravelston Corp.,*[3] Doherty J.A. stated, at para. 18:

> The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal … Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights… [Citations omitted.]

[22] Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* “must refer to rights which could not at the present time be asserted but which will come into existence at a future time.”

[23] More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*,[4] stated, at para. 15:

> “Future rights” are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future.

[24] The Debtor’s argument that the Approval and Vesting Order involves the future rights of “affected Aboriginal communities” is vague and difficult to follow. Nevertheless, I do not accept it for several reasons.

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[3] (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)
[4] 2013 ONCA 282, 115 OR (3d) 617.

[25] First, for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company – i.e. its creditors or shareholders.[5] On the sale approval motion, the Debtor did not adduce evidence that any "affected Aboriginal community" had such an economic interest in the Debtor, nor did any "affected Aboriginal community" adduce such evidence on the motion. The Receiver, in its December 21, 2015 Supplemental Report to its Third Report, informed the court that based on its review of the Debtor's creditors listing, "no Aboriginal groups are creditors of [the Debtor]."

[26] Second, at this stage of the process it does not lie in the Debtor's mouth to contend that the Receiver failed to give proper notice to "affected Aboriginal communities". The time to raise such an issue was when the Receiver sought approval of the SISP Order, yet the Debtor consented to that order.

[27] Third, to the extent that the Approval and Vesting Order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor's creditors and shareholders, not their future rights.

[28] Finally, it is clear from Mr. Wetelainen's affidavit that the Debtor's real complaint about the effect of the Approval and Vesting Order is one concerning the "commercial advantages or disadvantages that may accrue from the order challenged on appeal." Mr. Wetelainen objected to the Sale Agreement because

[5] See *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at p. 242 quoting with approval *In Re Kern Agencies Ltd.* (1931), 12 C.B.R. 279 (Sask. C.A.), at p. 281.

its approval would wipe out shareholder equity and preclude efforts by the shareholders to raise financing to pay out the Debtor's secured creditors. That has nothing to do with "future rights" within the meaning of s. 193(a).

[29] I conclude that the point in issue in the Debtor's challenge of the Approval and Vesting Order does not involve future rights within the meaning of s. 193(a) of the *BIA*.

V. SECTION 193(B): WILL THE APPROVAL AND VESTING ORDER AFFECT OTHER CASES OF A SIMILAR NATURE IN THIS PROCEEDING?

A. Positions of the parties

[30] The Debtor submits that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceeding. In its factum, the Debtor argues that in granting the Approval and Vesting Order the motion judge failed "to deal with the rights of the affected Aboriginal communities," an issue the Debtor wishes to raise on its appeal. The Debtor argues that the same issue will lie at the heart of its motion before the motion judge later in May seeking leave to sue the Receiver. The Debtor contends that because the Approval and Vesting Order likely will affect its motion for leave to sue the Receiver, s. 193(b) of the *BIA* applies.

[31] The Receiver disputes that the issues on appeal would impact other issues in the receivership.

B. Analysis

[32] The jurisprudence under s. 193(b) of the *BIA* has consistently interpreted the section as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings."[6] The cases have expressed different views on whether the decisions covered by s. 193(b) can only concern rights asserted against the bankrupt by parties other than the bankrupt, or whether the issue may concern rights asserted by multiple persons against the bankrupt, rather than one person's rights arising in multiple contexts.[7] Regardless, s. 193(b) must concern "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings.[8]

[33] Section 193(b) possesses several anachronistic features. First, while permitting an appeal of right on an issue that likely will arise again in an insolvency proceeding might appear to foster the efficient conduct of insolvency proceedings, in reality any automatic appeal right will slow down insolvency proceedings which usually operate on a "real-time" basis. As well, the language of s. 193(b) does not measure the overall significance of the issue to the proceeding – minor issues which might arise again are treated in the same fashion as major ones. Finally, most contemporary insolvency litigation sees one

[6] *Wong v. Luu*, 2013 BCCA 547, at para. 21.
[7] See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Re Norbourg Gestion d'actifs inc.,* 2006 QCCA 752, 33 C.B.R. (5th) 144 at paras. 9-11.
[8] *Global Royalties Ltd. v. Brook*, 2016 ONCA 50, at para. 19.

judge assigned to manage the proceeding from its inception to its end. Under a "one judge" model of case management, common or repeat issues tend to get grouped together for adjudication at one time, not at different stages of the proceeding.

[34] I do not accept the Debtor's submission that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceedings.

[35] The Receiver filed evidence on this motion which shows the Debtor did not raise any issue about a receiver's constitutional duty to consult "affected Aboriginal communities" either in its materials or during its submissions on the sale approval motion. The Debtor does not dispute this evidence. Accordingly, the Debtor will be seeking to raise the duty to consult issue for the first time on appeal.

[36] In the normal course, appeals are not the proper forum in which to raise brand new issues that significantly expand or alter the landscape of the litigation.[9] The burden rests on an appellant to persuade the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised in the court below.[10] It is far from clear that the Debtor would

[9] *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (C.A.), at para. 11.
[10] *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130, at para. 18.

succeed in persuading this court that the interests of justice require an exception to this normal course of litigation. The Debtor faces several high hurdles.

[37] First, the Debtor consented to the SISP Order which authorized the Receiver to proceed with the sales process. The Debtor did not raise the issue of a duty to consult "affected Aboriginal communities" about a sale at that time; it is difficult to conceive how it can do so now.

[38] Second, it is very doubtful that the Debtor has standing to advance on appeal an argument based on the duty to consult. As the Supreme Court of Canada explained in *Behn v. Moulton Contracting Ltd.*,[11] at para. 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature… But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights. [Citations omitted.]

[39] No evidence was led on this motion to suggest that any Aboriginal group had authorized the Debtor to represent it for the purpose of asserting rights under s. 35 of the *Constitution Act*, *1982*.

[40] Third, s. 193(b) of the *BIA* requires that the order sought to be appealed is likely to affect "other cases of a similar nature in the bankruptcy proceedings." Here, the Approval and Vesting Order disposed of all the property of the Debtor.

[11] 2013 SCC 26, [2013] 2 S.C.R. 227.

Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

[41] The final hurdle is that only after the Debtor received the January 8, 2016 reasons of the motion judge granting the Approval and Vesting Order did it launch its motion for leave to sue the Receiver for its alleged breach of the duty to consult. That sequence of events strongly suggests that, having unsuccessfully opposed the Receiver's sale, the Debtor looked for some procedural device to fit itself into s. 193(b). Its motion for leave to sue the Receiver was the result. In my view, a party cannot create a "case" after the impugned order was made in order to invoke s. 193(b). Consequently, the Debtor's pending motion for leave to sue does not qualify as a case of a similar nature in the receivership.

[42] For those reasons, the Approval and Vesting Order does not fall within s. 193(b) of the *BIA*.

VI. SECTION 193(C): DOES THE PROPERTY INVOLVED IN THE APPEAL EXCEED IN VALUE $10,000?

A. Positions of the parties

[43] The Debtor submits that the Approval and Vesting Order will transfer property in excess of $10,000 and, therefore, falls within s. 193(c) of the *BIA* because "the property involved in the appeal exceeds in value ten thousand dollars."

[44] While the actual sale price is subject to a confidentiality order pending the closing of the transaction, there is no dispute that the sale price significantly exceeds $10,000. Nor is there any dispute that if the transaction closes, the Debtor's secured lenders will suffer a significant shortfall.[12]

[45] On its part, the Receiver submits that an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).

B. Analysis

[46] The history of the interpretation of s. 193(c) is an unusual one. Under the modern approach to statutory interpretation, the words in a statute must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act.[13] By contrast, as the Manitoba Court of Appeal observed at para. 9 in *Re Dominion Foundry Co.,*[14] the interpretation of the phrase "the property involved in the appeal" found in s. 193(c) historically has proceeded in a different fashion, drawing heavily upon cases interpreting a similar provision in the federal *Winding-Up Act*,[15] as well as on the jurisprudence

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[12] In its Third Report dated November 30, 2015, the Receiver informed the court that the Debtor's liabilities totaled approximately $12.4 million consisting of (i) secured loans from the applicant in excess of $3.5 million, (ii) payroll deduction and HST claims by the Canada Revenue Agency of approximately $405,000, and (iii) unsecured liabilities of close to $8.5 million.

[13] *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex* 2002 SCC 42, 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

[14] (1965), 51 W.W.R. 679.

[15] Such as *Faillis and Deacon v. United Fuel Investments Ltd*, [1962] S.C.R. 771, at p. 774.

considering former provisions in the *Supreme Court of Canada Act* which linked the right to appeal to "the amount or value of the matter in controversy."[16]

[47] Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.[17] However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) – with the bar set low to fall within s. 193(c)[18] – or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings.[19]

[48] In my view, two contextual factors should inform any application of the sub-section.

[49] First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek

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[16] *Trimor Mortgage Investment Corporation v. Fox*, 2015 ABCA 44, at para. 8; *Galaxy Sports Inc. v. Abakhan & Associates Inc.*, 2003 BCCA 322, 44 C.B.R. (4th) 218 at para. 12; *Newfoundland and Labrador Refining Corporation v. IJK Consortium*, 20098 NLCA 23, 52 C.B.R. (5th) 8 at para. 18.

[17] *Wong v. Luu,* at para. 23; *Re Norbourg Gestion d'actifs inc*, at para. 9.

[18] *Wong v. Luu*, at para. 23.

[19] *Re Stelco Inc*. (2005), 8 C.B.R. (5th) 150 (Ont. C.A.), at para. 4.

leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.*, the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.

[50] Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

[51] For example, if one were to accept the Debtor's argument that whenever the value of the property transferred by a sales approval and vesting order exceeded $10,000 an appeal as of right to this court exists, then, as the Manitoba Court of Appeal noted, at para. 7, in *Re Dominion Foundry Co.*, an appeal as of right would exist in almost every case because very few insolvency cases would involve property that did not exceed the statutory threshold. Blair J.A. repeated that concern in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, at para. 17. By contrast, a challenge to a sales approval and

vesting order obtained by a debtor company under the *CCAA* would require obtaining leave to appeal under s. 13 of that Act.

[52] In my view, no principled basis exists to distinguish the treatment of a sale by a receiver or trustee, from that by a *CCAA* debtor company. In each case, approval of the sale would require consideration of the types of principles articulated in *Royal Bank of Canada v. Soundair*.[20] A need for the legislative harmonization of appeal rights in insolvencies is apparent.

[53] In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.

Is the order procedural in nature?

[54] The caselaw holds that s. 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate's assets.

[20] (1991), 4 O.R. (3d) 1 (C.A.).

[55] In *Re Dominion Foundry Co.*, the motion judge had dismissed a request to set aside a sale of assets by a trustee in bankruptcy on the grounds that the sale was improvident and the trustee had acted improperly. The Manitoba Court of Appeal held, at para. 20, that although the sale involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c). Consequently, where a person seeks to challenge an order on appeal by calling into question the methods employed by a trustee to dispose of the assets of the bankrupt, the order involves a matter of procedure which does not fall within s. 193(c).

[56] The Alberta Court of Appeal reached a similar result in *Alternative Fuel Systems Inc. v. EDO (Canada) Ltd. (Trustee of)*.[21] There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.

[21] 1997 ABCA 273, 48 C.B.R. (3d) 171.

[57] O'Leary J.A., following *Re Dominion Foundry Co.*, held that Alternative had no right of appeal under s. 193(c). He reasoned, at para. 12, that the bankruptcy judge's order was essentially a procedural direction to the trustee in the face of Alternative's challenge to the method by which the equipment was sold, by-passing the tender process.

[58] In the present case, the overwhelming majority of the Debtor's grounds of appeal are process-related, involving issues concerning the Debtor's dealings with Legacy Hill following the Receivership Order, the Receiver's disclosure of information about the Sale Agreement, the negotiation process it followed with Legacy Hill, its treatment of persons affected by the Sale Agreement, and the adequacy of notice it gave to "affected Aboriginal communities." Those grounds of appeal are procedural in nature and do not fall within s. 193(c).

Does the order put into play the value of the Debtor's property?

[59] The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not call into play the value of the debtor's property. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.,* Blair J.A. considered whether an order appointing a receiver over assets of debtor corporations that exceeded $10,000 in value fell within s. 193(c). He concluded that it did not stating, at para. 17, that "an order appointing a receiver does not bring into play the value of the property; it simply appoints an

officer of the court to preserve and monetize those assets, subject to court approval."

[60] In the present case, the Approval and Vesting Order marked the final step in the Receiver's monetization of the Debtor's assets. The property of the Debtor is to be converted through the Sale Agreement into a pool of cash and, as stated in the Approval and Vesting Order, "the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets." The ground of appeal advanced by the Debtor to the effect that the sale process should be postponed to let shareholders re-finance the company does not bring into play the value of the Debtor's property, so s. 193(c) does not apply.

Does the order result in a gain or loss?

[61] Finally, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. In *Trimor Mortgage Investment Corporation v. Fox*,[22] Paperny J.A. described this aspect of s. 193(c) at para. 8:

> The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

[22] 2015 ABCA 44.

[62] The Approval and Vesting Order did not determine the entitlement of any party with an economic interest in the Debtor to the sale proceeds. In that sense, no interested party gained or lost as a result of the order.

[63] However, one ground of appeal set out in the Debtor's notice of appeal is that the motion judge erred in law in finding that the Receiver had not acted improvidently. In its factum, the Debtor contends that the Receiver's sale of its property is improvident because it would result in a loss of $125 million to its shareholders. In support of that ground of appeal, on this motion the Debtor relied on a memo prepared by Broad Oak Associates dated February 3, 2014, half a year before the Receivership Order was made. Using an iron ore pellet price of US$100 per tonne, Board Oak placed the value of a fully-developed Bending Lake iron ore project in the range of US$100 million to $300 million. This, the Debtor argues, shows that the Approval and Vesting Order selling its undeveloped mine site assets resulted in a loss to shareholders of an amount exceeding $10,000 in value, giving it a right to appeal under s. 193(c).

[64] I do not accept the Debtor's submission. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the Debtor must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The Debtor must demonstrate some basis in the

evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal.[23]

[65] In the present case, the evidentiary record discloses that there were no competing bids for the Debtor's property for the motion judge to consider; only Legacy Hill expressed a serious enough interest to lead to a Sale Agreement with the Receiver.

[66] Neither the Debtor nor its shareholders put before the motion judge a valuation of the Debtor made near in time to the execution of the Sale Agreement. Mr. Wetelainen did not attach the pre-receivership Broad Oak memo to the affidavit he placed before the motion judge. By contrast, the Receiver reported to the motion judge that the market price of iron ore had declined to the mid-US$50 per tonne range, making a court sanctioned sales process "very challenging in the current market conditions." The market price for iron ore

[23] See, for example, *Faillis and Deacon v. United Fuel Investments Ltd.* where, at pp. 773-774 the Supreme Court of Canada described the specific evidence of loss contained in the record.

reported by the Receiver was far below the pre-receivership assumptions used by Broad Oak.

[67] Nor did Mr. Wetelainen depose on the sale approval motion that the Debtor's property was worth over $100 million. Instead, in his affidavit he stressed the need to postpone the sale to allow the Debtor's shareholders time to negotiate a compromise of the secured debt and then pay off the compromised debt.

[68] Finally, the Debtor's secured lenders supported the Sale Agreement, notwithstanding that they would suffer a significant shortfall on the sale.

[69] Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than $10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

[70] I conclude that the Approval and Vesting Order does not fall within s. 193(c) of the *BIA*.

VII. DISPOSITION

[71] For these reasons, I granted the Receiver's motion and ordered that the Debtor requires leave to appeal from the Approval and Vesting Order. The Debtor's notice of appeal dated January 13, 2016 is quashed.

[72] The parties agreed to the following timetable for the filing of materials on the Debtor's leave to appeal motion:

(i) The Debtor would file its leave materials by March 28, 2016;

(ii) The Receiver would file any responding materials by April 4, 2016;

(iii) The Debtor would file reply materials, if any, by April 11, 2016.

[73] I directed that the leave materials be placed before a panel for consideration on April 12, 2016. I did so, in part, to obviate the need for Debtor's counsel to travel down to Toronto for an oral Chambers leave motion.

[74] The parties may serve their leave materials electronically. Although the parties will need to file the appropriate number of hard copies of their materials in accordance with the *Rules of Civil Procedure*, they may file with the court an electronic copy either by email or by USB key. The date of electronic filing will be deemed the date of the filing of the materials with the court.

[75] The parties agreed that the costs of this motion would be reserved to the panel hearing the leave to appeal motion.

"David Brown J.A."

In the Court of Appeal of Alberta

Citation: DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2020 ABCA 442

Date: 20201204
Docket: 2001-0125-AC
Registry: Calgary

Between:

DGDP-BC Holdings Ltd.

Applicant

- and -

Third Eye Capital Corporation

Respondent

- and -

Accel Canada Holdings Limited and Accel Energy Canada Limited

Respondent

- and -

Pricewaterhousecoopers Inc.

Respondent

Oral Reasons for Decision of The Honourable Mr. Justice J.D. Bruce McDonald

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Application for Permission to Appeal

Oral Reasons for Decision of
The Honourable Mr. Justice J.D. Bruce McDonald

Introduction

[1] This application is brought by the Applicant, DGDP–BC Holdings Ltd, pursuant to section 193(e) of the *Bankruptcy and Insolvency Act* (*BIA*) for permission to appeal a portion of the Receivership Order granted by the supervising judge on June 12, 2020.

[2] The Receivership Order determined, amongst other matters, the ranking of charges including subordinating the charges that had previously been set forth in an earlier order granted in proceedings commenced under of the *Companies' Creditors Arrangement Act (CCAA)*.

[3] This application is being opposed by both Third Eye Capital Corporation (TECC) as well as Pricewaterhousecoopers Inc (PWC).

[4] The interest of 228139 Alberta Ltd (228) in the interim financing loan and all of its claims relating thereto, were formally assigned to the applicant pursuant to the Assignment of DIP Indebtedness and Security Agreement dated June 10, 2020.

Facts

[5] Accel Canada Holdings Limited and Accel Energy Canada Limited (collectively the Accel Entities) encountered financial difficulties in 2019 and on October 21, 2019, the companies filed Notices of Intention to make a proposal pursuant to section 50.4 of the *BIA*.

[6] On November 22, 2019, the proceedings were taken up and continued under the *CCAA* and PWC was appointed as Monitor over the assets of the Accel Entities.

[7] As part of the *CCAA* proceedings, an interim financing loan was approved by the court in November 2019. The interim financing lenders at that time were TECC and 228.

[8] Subsequent to the interim financing loan being approved, 228 approached the applicant to fund its portion of the interim financing which it did. 228 subsequently assigned its interest in the loan facility to the applicant as mentioned previously. The applicant ultimately funded the entire amount required to be advanced by 228 throughout the *CCAA* proceedings.

[9] The approval in November 2019 provided that the interim financing loans were ordered priority over the other debts of the Accel Entities.

[10] At the time of the Receivership Order, the applicant was a co-interim lender with TECC. The amount outstanding was approximately $38,000,000 with the applicant funding approximately 46% of that amount and TECC the balance.

[11] On December 13, 2019, the supervising judge approved the Sale and Investment Solicitation Process (SISP) for the sale of the assets of the Accel entities.

[12] Prior to the *BIA* proceedings in October 2019, ICC Credit Holdings (ICC) had been a lender to the Accel Entities but had assigned that loan to another company Stream Asset Financial Winterfresh (Stream Asset Financial).

[13] The supervising judge granted an order enabling the Accel Entities, ICC and Stream Asset Financial to make cooperative bids for the assets of the Accel Entities. Ultimately, Stream Asset Financial, ICC, and TECC submitted competing bids.

[14] On April 29, 2020 the supervising judge granted an order that affirmed ICC's elimination from the process. The remaining two bidders for the assets of the Accel Entities were TECC and Stream Asset Financial. By court order granted on May 29, 2020, TECC's bid for the assets was declared to be the successful bid. TECC's bid was, in part, a credit bid.

[15] On June 5, 2020 TECC filed and served an application seeking to appoint PWC (which had been the monitor in the *CCAA* Proceedings) to be the Receiver of the Accel Entities. This was to facilitate the sale of the Accel Entity assets to TECC. This application was heard by the supervising judge on June 12, 2020. It was opposed by the applicant. Notwithstanding that opposition however, the supervising judge granted the Receivership Order.

[16] In addition to appointing PWC as the Receiver of the Accel Entities, the Receivership Order provided in paragraph 28 the following priorities:

i. Receiver's Charge;

ii. The Receiver's Borrowings Charge;

iii. The Administrative Charge as defined in the *CCAA* Proceedings;

iv. The Interim Lenders' Charge as defined in the *CCAA* Proceedings;

v. The Intercompany Advance Charged as defined in the *CCAA* Proceedings;

vi. The Directors Charge as defined in the *CCAA* Proceedings.

[17] Subsequent to the Receivership Order, TECC has funded an additional $7,200,000 in interim financing required by the Receiver and this is secured by the Receivers Borrowings Charge.

Decision

[18] This application is brought pursuant to section 193(e) of the *BIA* seeking permission to appeal paragraph 28 of the Receivership Order. The factors to be considered on an application for permission to appeal under section 193(e) of the *BIA* are as follows:

- Is the point of appeal of significance to the bankruptcy practice generally?
- Is the point of significance to the action itself?
- Is the appeal *prima facie* meritorious?
- Will the appeal will unduly hinder the progress of the action? And,
- Does the judgment or order appear to be contrary to law, amounting to an abuse of judicial power, or involve an obvious error causing prejudice, for which there is no other remedy?

See *Alternate Fuel Systems Inc v EDO (Canada) Ltd*, 1997 ABCA 273 at para 12; see also *Dykaun v Odishaw*, 1998 ABCA 220 at para 4; *Smith v Pricewaterhouse Coopers Inc*, 2013 ABCA 280 at para 11; *2003945 Alberta Ltd v 1951584 Ontario Inc.*, 2018 ABCA 40 at para 31.

[19] It is the applicant's position that the supervising judge erred when she provided in the Receivership Order what, in effect, amounted to a reorganization of the security priorities that had been previously established in the original *CCAA* proceedings. In support of its contention, the applicant asserts that the court considered no provision of the *BIA* or any other statute allowing a Receiver's Borrowings charges to be granted, let alone be granted a priority to existing court charges.

[20] The applicant further argues that section 243(7) of the *BIA* is clear that the discretion in section 243(6) to grant a charge securing the Receiver's fees, does not extend to a Receiver's Borrowing charges incurred in the operation of the debtor's business. Furthermore, the applicant asserts that the reshuffling of the priorities in this case is prohibited by section 11.2(3) of the *CCAA* since it never consented to this re-ordering. Section 11.2(3) of the *CCAA* provides:

> (3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

[21] Simply put, the applicant's position is that the court cannot grant an order in Receivership proceedings that would have the effect of changing the ranking of interim financing charges so that it would take priority over the original interim financing charge without its consent as one of the original interim financers.

[22] The applicant also argues that there is a danger in permitting the terms of the Receivership Order to stand, as it would set a dangerous precedent that could unduly hinder, if not kill altogether, the ability of a debtor's insolvency proceedings under the *CCAA* or otherwise to obtain any form of interim financing.

[23] In other words, the issue that is being raised can be stated as follows:

Can an order made in proceedings under the BIA or pursuant to section 13(2) of the Judicature Act, legally override the validity and priority of the charges contained in an earlier order granted under the CCAA in the same insolvency proceedings, without the consent of the person in whose favour the provision relating to validity and priority was given?

[24] As mentioned a moment ago, there are five factors used to consider in determining whether permission to appeal ought to be granted. To reiterate, these are: whether the point raised on appeal is significant to the bankruptcy practice generally; whether the point on appeal is significant to the action itself; whether the appeal is *prima facie meritorious*; whether the appeal will unduly hinder the progress of the action; whether the order appealed seems to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error causing prejudice for which there was no remedy.

[25] I will now deal with each factor in turn.

Is the point raised on appeal significant to the bankruptcy practice generally?

[26] There has been no authority cited to me dealing with judicial interpretation of section 11.2(3) of the *CCAA*. Indeed no such authority seems to exist.

[27] It seems evident that 228 and the applicant did proceed with the interim financing on the basis of the *CCAA* order as to the priority of the security charges for the advancement of their funds.

[28] It is further evident that this issue will be of importance to the bankruptcy practice generally. Namely, whether a subsequent Receivership order can re-order the priorities previously granted in a *CCAA* order without the consent of one of the parties for whose benefit it was.

Is the point raised of significance to the action itself?

[29] Again it seems clear to me that the applicant and its assignor 228, in advancing the interim funds, relied upon the provisions contained in the *CCAA* order and to have that varied after they have advanced millions of dollars under the assurance of the earlier order, is clearly a matter that is significant to this action as well.

Is the prospective appeal prima facie meritorious?

[30] It is argued that the granting of a Receivership Order pursuant to either section 241 of the *BIA* or section 13(2) of the *Judicature Act*, is a discretionary one and that the judge's discretion is owed deference on appeal.

[31] However, it seems that there is a credible argument that a judge's discretion cannot override the clear provision of a statute in this case section 11.2(3) of the *CCAA*. As stated previously, no authority has been cited to me dealing with this section and I have not been able to locate any either. Therefore, it seems to me that the applicant has an arguable case and that is all that is required to satisfy this requirement: *Third Eye Capital v B.E.S.T. Active 365 Fund*, 2020 ABCA 160 at para 10.

Will the appeal unduly hinder the process of the insolvency proceedings?

[32] PWC argued against the application and asserts that the onus is on the applicant to establish, through affirmative evidence, that the appeal will not unduly hinder the progress of the Receivership.

[33] Court was advised that PWC has brought an application returnable on December 4 for an order to approve the sale of the assets of Accel Energy Canada Limited. It is asserted that a significant portion of the interim borrowings will be repaid from the sales proceeds.

[34] Court was further advised that it is anticipated that the sale of the assets of Accel Holdings Limited, will occur in the first quarter of 2021. At that time likely all the interim financing will be repaid.

[35] Presently, nothing is certain regarding the ultimate sale of the assets or the anticipated amount of the proceeds available to repay the interim financing. It may well be that by the time an appeal is argued before this Court, the applicant has been paid out in full and therefore the issue in one sense would be moot. However, we do not know at this time whether that will happen or not.

[36] Moreover, the point is an important one to the bankruptcy practice generally and a matter that should be determined.

Is the Receivership Order at paragraph 28 contrary to the law?

[37] It has been argued that the Receivership Order was a discretionary one and that the supervising judge's discretion ought to be accorded deference. This generally speaking is quite correct.

[38] However, what is being asserted here is that paragraph 28 of the Receivership Order flies in the face of the express provision of section 11.2(3) of the *CCAA* and accordingly cannot stand given the applicant's lack of consent.

[39] In conclusion, it seems to me that having regard to the totality of the factors but in particular the first and the fact that there is no authority on point, that the application for permission to appeal ought to be granted and it is on the following issue:

- *Can an order made in proceedings under the BIA or pursuant to section 13(2) of the Judicature Act, legally override the validity and priority of the charges contained in an earlier order granted pursuant to the CCAA in the same insolvency proceedings, without the consent of the person in whose favour the provision relating to validity and priority was given?*

Discussion Re Costs

[40] Each party will bear their own costs of this application.

Application heard on December 2, 2020

Reasons filed at Calgary, Alberta
this 4th day of December, 2020

McDonald J.A.

Appearances:

S. Babe
I. Aversa
T.L. Czechowskyj, Q.C.
for the Applicant, DGDP-BC Holdings Ltd

C.D. Simard
K.R. Cameron
A.E. Teasdale (no appearance)
I. Rosu (no appearance)
for the Respondent, Third Eye Capital Corporation

J. Cameron
R. Gurofsky (no appearance)
for the Respondent, Pricewaterhouse Coopers Inc.

Respondent, Accel Canada Holdings Limited, self-represented (no appearance)

Respondent, Accel Energy Canada Limited, self-represented (no appearance)

Hunters Trailer & Marine Ltd., 2000 ABQB 952

Date: 20001201
Action No. 0003 19315

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

IN THE MATTER OF the Companies' Creditors Arrangement Act,
R.S.C. 1985, c. C-36, as amended

AND IN THE MATTER OF Hunters Trailer & Marine Ltd.

MEMORANDUM OF DECISION
OF THE HONOURABLE ALLAN H. WACHOWICH
ASSOCIATE CHIEF JUSTICE

APPEARANCES:

Michael J. McCabe
Reynolds Mirth Richards & Farmer

Kentigern A. Rowan
Ogilvie & Company

Darcy G. Readman
Duncan & Craig

Terrence M. Warner
Miller Thompson

John L. Ircandia
Borden Ladner Gervais LLP

Douglas H. Shell
Lucas Bowker & White

Jeremy Hockin
Parlee McLaws

Background

[1] Hunters Trailer & Marine Ltd. ("Hunters") applied for and was granted a stay of proceedings, *ex parte*, on October 11, 2000, pursuant to the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "*CCAA*"). The order permitted Hunters to carry on business in a manner consistent with the preservation of Hunters' business and property for 30

days, under the supervision of a court-appointed Monitor, and within the terms of the order. The order authorized "debtor in possession" ("DIP") financing up to $1.5 Million which would have "super-priority" status over any other claims. An Administration Charge of up to $1 Million was also granted, and was given priority over every other security except for the DIP financing.

[2] A short-term extension of the stay, to November 17, 2000, was granted by the Honourable Mr. Justice W.E. Wilson on November 8, 2000. His amendments to the original order included a reduction in the maximum amount available for DIP financing to $800,000.00, and a reduction in the maximum Administration Charge to $350,000.00.

Current Application

[3] Hunters seeks to extend the stay of proceedings to at least February 28, 2001. They also seek an increase in the maximum amount of DIP financing and Administrative Charge available. Three of Hunters' major creditors (the "Objecting Creditors"), who are floor plan financiers, oppose the applications. The Objecting Creditors are Deutsche Financial Services, the Bank of America Specialty Group Ltd. and C.I.T. Financial Ltd. Hunters owes them in excess of $2,000,000.00, $3,085,728.80, and $4,567,239.00 respectively. All three are first charge creditors, but it is not yet clear how they rank in terms of priority. Two other major creditors support Hunters' application for an extension. One is Canada Western Bank, whom Hunters owes $1,061,000.00 on a line of credit, and who is currently providing DIP financing. The other is U.M.C. Financial Management Inc., whom Hunters owes $3,400,000.00, principally secured by a real estate mortgage.

[4] The onus in a stay application under the *CCAA* is dictated by s. 11(6) of the *CCAA*:

> 11 (6) The court shall not make an order under subsection (3) or (4) unless
>
> (a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and
>
> (b) in the case of an order under subsection (4), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

[5] In this case, it will be unnecessary to deal with subsection (b). In light of the evidence before me, I find that the applicant, Hunters, has not satisfied its onus of showing that a stay would be appropriate in the circumstances. In arriving at this conclusion, I considered two issues - first, whether DIP financing should continue, and second, whether the purpose of the *CCAA* would be achieved by granting an extension of the stay.

DIP Financing

[6] In *Re United Used Auto & Truck Parts Ltd*. (1999), 12 C.B.R. (4th) 144 (B.C.S.C.), Tysoe J. articulated the test for when DIP financing should be permitted: there must be cogent evidence that the benefit of DIP financing clearly outweighs the potential prejudice to the lenders whose security is being subordinated: p. 153, para. 28. In that case, Tysoe J. found that DIP financing

would benefit the business, but was not critical for the operation or restructuring of the business. As well, he did not have sufficient confidence in the cash flow projections and appraised value of the realty to conclude that the benefit clearly outweighed the potential prejudice to the secured lenders: p. 153, para. 29.

[7] This reasoning was not objected to on appeal: *Re United Used Auto & Truck Parts Ltd.* (2000), 16 C.B.R. (4th) 141 (B.C.C.A.). The issue in the appeal was whether the court has jurisdiction to grant priority to a monitor's fees and expenses. Mackenzie J.A., speaking for the Court, held that the court's jurisdiction is found in equity, as is its jurisdiction to order super-priority for DIP financing: p. 152, paras. 30-31. On the issue of when this priority should be granted, Mackenzie J.A. stated, at para. 30:

> It is a time honoured function of equity to adapt to new exigencies. At the same time it should not be overlooked that costs of administration and DIP financing can erode the security of creditors and *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring.

[8] Determining whether DIP financing is appropriate requires a careful balancing of interests.

[9] In *Re Royal Oak Mines Inc.* (1999), 6 C.B.R. (4th) 314 (Ont. Gen. Div.), Blair J. made the following comments at pp. 321-322, para. 24:

> It follows from what I have said that, in my opinion, extraordinary relief such as DIP financing with super priority status should be kept, in Initial Orders, to what is reasonably necessary to meet the debtor company's urgent needs over the sorting-out period. Such measures involve what may be a significant re-ordering of priorities from those in place before the application is made, not in the sense of altering the existing priorities as between the various secured creditors but in the sense of placing encumbrances ahead of those presently in existence. Such changes should not be imported lightly, if at all, into the creditors mix; and affected parties are entitled to a reasonable opportunity to think about their potential impact, and to consider such things as whether or not the CCAA approach to the insolvency is the appropriate one in the circumstances - as opposed, for instance. to a receivership or bankruptcy - and whether or not, or to what extent, they are prepared to have their positions affected by DIP or super priority financing. As Mr. Dunphy noted, in the context of this case, the object should be to "keep the lights [of the company] on" and enable it to keep up with appropriate preventative maintenance measures, but the Initial Order itself should approach that objective in a judicious and cautious matter.

[10] In my view, the evidence provided by Hunters does not show that the benefits of DIP financing will clearly outweigh potential prejudice to the Objecting Creditors. While DIP financing is the only means for Hunters to continue operating, it is impossible to conclude that this short-term benefit will culminate in Hunters' financial recovery, due to a number of deficiencies in the evidence. First, there are no appraisals of the real estate or rolling stock in evidence to support Hunters' financial projections. Second, because Hunters' computer services provider shut down Hunters' computer based accounting system, Hunters and the Monitor have

had extremely limited access to Hunters' books and records. As a result, final financial statements for the year ended February 29, 2000 are unavailable, and current, reliable balance sheets cannot be provided. The Monitor cannot verify Hunters' financial situation because reliable data cannot be accessed.

[11] Third, the value of a major asset is uncertain. According to Hunters, the insurance policies on the life of Mr. Bondar's father are worth $2,300,000.00, and security is held against them by the mortgagee of the lands to the extent of $1,800,000.00. However, the policies are not in evidence, so the value and terms are uncertain. Also, apparently Mr. Bondar's wife is a beneficiary, but the percentage of her interest is not in evidence.

[12] Fourth, Hunters' cashflow projections are not supported by evidence from the Monitor or any other independent third party, which would verify their reasonableness or accuracy. Already, it appears that the Monitor's fees will be $100,000.00 greater than the cashflow projections anticipated. In light of all of the above deficiencies in Hunters' evidence, Hunters has not satisfied its onus of showing that DIP financing would be beneficial, or indeed, that a stay would be appropriate in the circumstances.

[13] Another consideration in assessing the benefit of DIP financing is that even if Hunters' projected cashflows are accurate, they show a continuing net deficit, suggesting that the benefit of DIP financing is merely prolonging the inevitable. Even as of September 2001, following the months when the volume of Recreational Vehicle ("RV") sales is highest, Hunters expects a cash flow deficit. After September, the RV sales will slow down significantly as Hunters enters the low season, so cash flow is not likely to increase after September. Hunters can expect continuing difficulties in meeting operating expenses well into the foreseeable future. The sources of Hunters' cash flow problems, as identified by Blair Bondar, the company president, will likely continue to exist. Mr. Bondar states that RV sales have decreased as a result of, in part, increasing gas prices, a weak Canadian dollar, and increased competition. Hunters has no control over these systemic problems, and there is no evidence or reason to believe that they will be resolved in the foreseeable future. As a result, I am not convinced that the cash flow projections themselves are accurate. The Monitor does not verify the accuracy or reasonableness of the projections. Therefore, it is impossible to conclude that the DIP financing will benefit Hunters and its creditors in the long run.

[14] The prejudice caused by DIP financing to the Objecting Creditors could be significant. The Objecting Creditors hold Purchase Money Security Interests and therefore their claims rank ahead of all other creditors', but their ability to realize on this statute-granted priority will be reduced further every time increases in DIP financing and Administrative Charges are approved to fund Hunters' operating costs. Extending the stay until February, 2001 would place the Objecting Creditors at risk during a period when RV sales are very slow and minimal cash flow will be generated. In order for Hunters to carry on its business, further increases in DIP financing are inevitable. This financing, which has now exceeded $800,000.00 in order to cover payroll for November, and the Administrative Charges of $350,000, are eroding the security of the Creditors while the financial position of Hunters is precarious and uncertain. Given these circumstances, and the principle from *Re Royal Oak Mines Inc., supra.* that DIP financing and its super-priority should not be granted lightly, DIP financing is not appropriate. The potential prejudice of DIP financing to the Objecting Creditors is not outweighed by the benefit to Hunters, and there is insufficient evidence of a reasonable possibility of a successful restructuring.

Purpose of the *CCAA*

[15] I described the purpose of the *CCAA* in *Meridian Developments Inc. v. Toronto Dominion Bank* (1984), 52 C.B.R. (N.S.) 109 (Alta. Q.B.) as follows, at p. 114:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[16] In this case, an extension of the stay will not maintain the status quo for the Objecting Creditors. Their priority status and ability to recover their losses will be jeopardized. At least two of the Objecting Creditors have buy-back agreements with manufacturers that will be impaired or disappear with the passage of time. These Creditors could then only recover their costs if Hunters is able to sell all of this inventory at cost or higher, a prospect that appears to be unrealistic. The *CCAA* should not be used where, as in this case, it will put the financial well-being of the majority of the creditors at risk.

[17] Another factor influencing my decision is the possibility that the inventory that is not subject to buy-back agreements will decline in value over the period of the stay. The other creditors will not face a decline in their interests in real estate and DIP financing, and it would be unfair to maintain the status quo for these creditors while the interest of the Objecting Creditors deteriorates. Another circumstance that could result in prejudice to the Objecting Creditors is the requirement in the Order that 10% of the proceeds from the sale of the Creditors' collateral shall be paid to Hunters for operating costs. This reduces the security available to the Objecting Creditors, who are inventory suppliers, while Hunter endures the slow season in RV sales.

[18] A stay of proceedings should not be granted under the *CCAA* where it would only prolong the inevitable, or where the position of the objecting respondents would be unduly jeopardized: *Timber Lodge Ltd. v. All Creditors of Timber Lodge Ltd.* (1992), 15 C.B.R. (3d) 244 (P.E.I. S.C.T. D.) at p. 252, para. 21; p. 253, para. 24. The B.C. Court of Appeal said that *CCAA* orders should only be made if there is a reasonable prospect of a successful restructuring: *Re United Used Auto & Truck Parts Ltd.*, *supra*. at p. 152, para. 30. Given my conclusion that further DIP financing should not be permitted, it is clear that Hunters will be unable to finance its operating costs, and therefore the business is doomed to failure. But even if DIP financing continued, the problems with cashflow, discussed above, suggest that Hunters has no reasonable prospect of becoming viable again.

[19] The jurisprudence makes it clear that the objection of a few recalcitrant creditors should not prevent the petitioner from proceeding to attempt to work out a plan under the *CCAA*: *Icor Oil & Gas Co. v. Canadian Imperial Bank of Commerce* (1989), 102 A.R. 161 (Q.B.) at p. 164, para. 21. The court should consider the interests of all affected constituencies in deciding whether a stay is appropriate, including secured, preferred and unsecured creditors, employees, landlords, shareholders, and the public generally: *Bargain Harold's Discount Ltd. v. Paribas Bank of Canada* (1992), 7 O.R. (3d) 362 (Ont. Ct. G.D.) at p. 369.

[20] However, in *Bargain Harold's Discount*, *supra.*, Austin J. also stated that where no plan will be acceptable to the required percentage of creditors, the *CCAA* application should be

refused: p. 369. Put another way, one factor to be considered in the context of s. 11(6) is whether the attempt to reach a compromise is doomed to failure, or is a realistic ambition: *Re Starcom International Optics Corp.* (1998), 3 C.B.R. (4th) 177 (B.C.S.C.) at p. 184, para. 22. I am satisfied that in this case, no compromise will be reached between the Objecting Creditors and the other major secured creditors, nor between the Objecting Creditors and Hunters.

[21] For all of these reasons, Hunters' application for an extension of the stay of proceedings is denied. However, in order to allow creditors time to prepare, the effect of my dismissal of Hunters' application will be suspended for one week. Therefore, I order a short-term extension of the stay of proceedings to December 8, 2000.

HEARD on the 17th day of November, 2000.
DATED at Edmonton, Alberta this 1st day of December, 2000.

_____

A.C.J.C.Q.B.A.

Court of Queen's Bench of Alberta

Citation: 1252206 Alberta Ltd. v. Bank of Montreal, 2009 ABQB 355

Date: 20090610
Docket: BE03 1203160
Registry: Edmonton

In the Matter of a Notice of Intention to Make a Proposal filed by 1252206 Alberta Ltd. under Section 50.4 of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3

Between:

1252206 Alberta Ltd.

Applicant

- and -

Bank of Montreal

Respondent

And Between:

Bank of Montreal

Applicant

- and -

1252206 Alberta Ltd.

Respondent

Reasons for Judgment
of the
Honourable Madam Justice M.B. Bielby

Decision:

[1] The 30-day period following the filing of a Notice of Intention to make a proposal pursuant to s. 50.4 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, ("the BIA") was terminated early pursuant to the provisions of s. 50.4(11) of that legislation. The Court concluded that the insolvent debtor would not likely be able to make a viable proposal before the expiry of that period and that it would not be likely, before the expiry of that period, to make a proposal that would be accepted by its creditors. The debtor's companion application

for approval for $1.1 million in Debtor-in-Possession (DIP) financing to rank ahead of the sole secured creditor and for an extension of time to file a proposal was dismissed.

[2] The Respondent Bank is the sole secured creditor, owed approximately $2.9 million. It also holds 97% of the unsecured debt. The debtor was incorporated to build a single residential real estate project. In support of its applications it outlined a planned proposal which would permit it to use the DIP financing to complete the real estate project. If sold, the sale proceeds might allow it to repay the Bank prior to the expiry of the period within which the debtor was required to produce a proposal.

[3] The Bank maintained it would vote against this proposal if produced and that it would not approve any other proposal advanced by the debtor because it had lost confidence in its management. That management made misrepresentations to it in the past, including misrepresenting that it had received deposits from purchasers.

[4] The debtor's plan would see its proposal, in effect, be completed before the creditors were given an opportunity to vote upon it. Support for such initiatives is not within the legislative intent of the proposal provisions of the BIA which is to permit the restructuring of businesses to permit them to remain in operation for the benefit of both themselves and their creditors, rather than to pass a further financing risk onto unwilling creditors to the ultimate benefit of only the debtor and its shareholders.

Facts:

[5] These are the reasons for a decision made by me in open court on May 4, 2009.

[6] The Applicant company is indebted to the Respondent Bank in the approximate amount of $2.9 million borrowed pursuant to a demand loan made July 16, 2007 ("the loan agreement"). That debt is secured by a general security agreement, a demand collateral mortgage registered on lands which were purchased with a portion of the borrowed money and various personal guarantees. The lands in question comprise 38 serviced lots in Edmonton, Alberta upon which the Applicant originally planned to build a 38-unit wood-framed duplex project.

[7] It was incorporated solely for the purpose of constructing and selling this project. Therefore, the ultimate acceptance and implementation of any proposal would not serve to ensure it was able to continue to do business in the long term as it had no such intention.

[8] The Applicant commenced construction on only 12 of the planned units. Those are said to be 40% to 45% completed to date. Construction stopped sometime last autumn due to a shortfall of funds in the hands of the Applicant. The loan agreement required the loan from the Bank to be repaid in full by December 1, 2008. It was not.

[9] On April 20, 2009 the Bank demanded the Applicant repay the loan within 10 days. It responded on May 7, 2009 by filing a Notice of Intention under s. 50.4 of the BIA. Meyers

Norris Penny Limited agreed to act as its trustee. The Applicant now applies for an order allowing it to borrow up to $1.1 million in DIP financing from a third party lender, Echo Merchant Fund Ltd., on the basis that funding will assume priority ahead of that held by the Bank.

[10] The Applicant has obtained an evaluation from Glen Cowan & Associates as of April 16, 2009 which, although not directly in evidence, indicates:

a. the 26 serviced lots have a fair market value of approximately $2.54 million;

b. the 12 partially constructed units have a fair market "as is" value of approximately $1.79 million;

c. should the construction on these 12 units be completed they will then have an aggregate market value of $3.695 million;

d. should that construction be completed the aggregate value of the 26 serviced lots and 12 completed units will be approximately $6.235 million.

[11] The Applicant outlined the contents of the proposal it hoped to eventually be in a position to make if the DIP financing were granted and it was allowed the extension it sought. That proposal would involve using the $1.1 million in DIP financing, or part of it, to complete the 12 units. It would hope to sell at least two of those units per month for the next six months at prices of at least $300,000 a unit. Its own shareholders would inject equity of $175,000 in December 2009 and of $400,000 in January 2010. In December 2009 the DIP financing would be repaid in full. In January 2010 a land loan would be obtained from an as yet unidentified lender in the amount of $1 million to be secured against the 26 bare land lots. The Bank would be paid in full at that time. Thus all creditors would be repaid in full by, or shortly after, the 6-month period established in s. 50.4(9) of the BIA, the maximum period to which the current stay could be extended. The shareholders of the Applicant would also be repaid their shareholders' equity in full and would earn a $2.2 million profit generated if the Cowan & Associates valuations proved correct.

[12] The Applicant owes minimal unsecured debt to 10 trade creditors in the aggregate amount of $28,670.19. Two potential purchasers have provided it with deposits totaling $59,625. The Bank holds 100% of its secured debt and 97% of its unsecured debt.

[13] The Bank opposed this application. It brought a counter-application asking for the immediate termination of the 30-day period for making a proposal with the result that the assets of the Applicant would be liquidated forthwith.

[14] It did so because it believed the Applicant had breached its obligations under the loan agreement. In particular that agreement provided that the funding would be initially advanced by the Bank on condition that the Applicant provide confirmed presales of the 12 units to arm's

length purchasers in the total amount of $3.888 million with the provision of non-refundable purchasers' deposits of a minimum of 5% of the purchase price for most units. The Applicant also agreed to seek and obtain the Bank's approval to all changes or cancellations to those presale agreements.

[15] The Bank was not provided with the actual presale agreements until September 24, 2008; it now challenges some of them as colorable. Further, each of the presale agreements purported to provide for the payment of deposits by the purchasers but the Applicant did not receive most of those deposits. When examined on his affidavit tendered in support of the Applicant's application, Terry Regenwetter admitted that deposits were in fact received by the Applicant on only three of the 12 presales. Those deposits were used to pay for certain construction costs without the knowledge or permission of the Bank. He also testified that nine of the presale contracts were cancelled by the Applicant due to construction delays without his having approached the Bank for its consent to those cancellations.

[16] Mr. Regenwetter testified that the Applicant has approached five other lenders in order to obtain financing to finish the townhouse units but no lender has been willing to provide financing which would be subordinate to that of the Bank, even at a high interest rate.

[17] Assuming for the moment that I have inherent jurisdiction to order that creditors advancing DIP financing take priority over the debtor's secured lenders in this BIA proceeding, such an order should be granted only after concluding that, on balance, the prejudice to secured creditors created by removing their priority claim to the debtor's assets is outweighed by the value of the opportunity to bring greater value to the enterprise as a whole than would be afforded by liquidation at the hands of the secured creditor. In conducting that balancing exercise I must consider the following:

a. will the benefit afforded by the DIP financing clearly outweigh the prejudice to the creditors whose security is being subordinated to the financing; see *Re Bearcat Explorations Ltd.* [2004] 3 C.B.R. (5th) 167 (Alta. QB);

b. will the benefit afforded by the DIP financing bring greater value to the enterprise as a whole than bankrupting the Applicant and liquidating its assets through that bankruptcy; further considerations here include whether the major secured creditor tendered evidence demonstrating that its security would realistically be at risk during the period of financing, whether there was a demonstrated significant net value in the assets after the security registered against it was taken into account, whether the sale of the assets as would be provided for in the ultimate proposal would likely pay out all secured creditors and the DIP lender and whether the unsecured creditors would benefit only if the DIP financing allows the business to be continued so that it can be sold as a going concern; see *Re Manderley Corp*. (2005) 10 C.B.R. (5th) 48 (Ont. S.C.J.); *Re Farmpure Seeds Inc*. 2008 CarswellSask 639;

c. can limitations be placed upon the advancement of DIP financing to minimize its impact on the secured creditors, such as limiting the amount of drawdowns on that financing rather than allowing it to be advanced in one tranche; see *Re Manderley*;

d. is the DIP financing required to permit the Applicant's business to survive the proposal period; see *Re Farmpure*.

[18] The Bank argued that if circumstances exist which justify the granting of an order terminating the stay created by the Applicant filing its Notice of Intention on May 7th then DIP financing must not be approved, the stay must be terminated and the Applicant therefore placed into bankruptcy notwithstanding the results of any balancing exercise. I accepted that if circumstances exist which justify terminating the stay forthwith then no proposal could be created which would allow the Applicant to continue to operate, with the result that any balancing of interests undertaken could not ultimately justify the granting of priority to any DIP financing, nor to extending the time for the filing of a proposal.

[19] Section 50.4(11) of the BIA governs the circumstances under which early termination can be ordered. It provides:

> (11) The court may, on an application by the trustee, the interim receiver, if any, appointed under section 47.1, or a creditor, declare terminated, before its actual expiration, the thirty day period mentioned in subsection (8) or any extension thereof granted under subsection (9) if the court is satisfied that
>
> (a) the insolvent person has not acted, or is not acting, in good faith and with due diligence,
>
> (b) the insolvent person will not likely be able to make a viable proposal before the expiration of the period in question,
>
> (c) the insolvent person will not likely be able to make a proposal, before the expiration of the period in question, that will be accepted by the creditors, or
>
> (d) the creditors as a whole would be materially prejudiced were the application under this subsection rejected ...

[20] The Applicant admitted to being insolvent. I was satisfied that it would not likely be able to make a viable proposal nor one which would be accepted by its creditors. The Bank thus made out the criteria under s. 50.4(11) (b) and (c). The order for early termination was granted.

[21] Section 62(2) of the BIA sets criteria for the approval of a proposal which the Applicant cannot meet without the approval of the Bank. It provides:

> (2) A proposal accepted by the creditors and approved by the court is binding on creditors in respect of ...
>
> > (b) the secured claims in respect of which the proposal was made and that were in classes in which the secured creditors voted for the acceptance of the proposal by a majority in number and two thirds in the value of the secured creditors present, personally or by proxy, at the meeting and voting on the resolution to accept the proposal ...

[22] The Bank is the only secured creditor and thus holds 100% of the majority in number and value of the secured debt. It stated that is because it had lost faith in the management of the Applicant and gave good reasons for that loss of faith, i.e. the misrepresentations in relation to the taking of deposits from the presale purchasers. Therefore, even if a proposal was made it will not be viable in that it would not be binding on the Bank which would vote against it. The Bank could then proceed to liquidate on the Applicant's only asset, the developed and undeveloped land which is the subject of its mortgage; see s. 69.1(b) of the BIA. The Applicant could not then carry on in business.

[23] Precedent can be found for early termination of a stay in the decision of Farley J. of the Ontario General Division in *Re Cumberland Trading Inc.* [1994] O.J. No. 132 where the Court was similarly presented with a termination application by a secured creditor that represented 95% of the value of the secured claims and 67% of all creditors claims. The secured creditor asserted that there was no proposal which the debtor could make which it would approve.

[24] Justice Farley noted that a proposal need not be in progress nor proposed before an application under s. 50.4(11) could be brought. A creditor need not wait to see what a proposal contains before it can take the position to vote against it. In allowing the termination application he stated at para. 9:

> ... I do not see anything in the BIA which would affect a creditor (or group of creditors) with a veto position from reaching the conclusion that nothing the insolvent debtor does will persuade the creditor to vote in favour of whatever proposal may be forthcoming.

[25] Similarly in *Re Com/Mit Hitech Services Inc.* [1997] O.J. No. 3360 Justice Farley allowed the creditor's application recognizing it was the overwhelming creditor and thus in a veto position with respect to any proposal. He stated at para. 9:

> As for [s. 50.4(11)] (b) and (c) the Bank is the overwhelming creditor and thus is in a veto position. It has seen what the Debtor has done in the past and what it is proposing to do with respect to New Clean. It is justifiably not impressed; to the contrary it has in all fairness lost all confidence in the Debtor....

[26] Similarly here the Bank is the overwhelming creditor, is in a veto position and advises it has lost all confidence in the Applicant.

[27] I am not troubled by the effect of refusing the Applicant's applications for DIP financing and a stay extension because its plans are not reflective of the legislative purpose for enactment of the proposal provisions of the BIA. Rather than aiming at restructuring a viable enterprise so that jobs can be maintained and a business preserved, the effect of allowing its application for DIP financing would have been to remove control from a secured lender of the means of recovery upon its loan. It would allow the insolvent debtor another opportunity to complete this building project without the party bearing the greatest risk, the secured creditor, having any control over the decisions made in relation to same. It would impose, in effect, a lending regime on the Bank which no other lender has been prepared to entertain.

[28] While in *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.* 2008 BCCA 327 the British Columbia Court of Appeal was considering the legislative purpose behind the proposal provisions of the BIA's companion legislation, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended, rather than the BIA, the description of legislative purpose given there applies to the BIA as well. The Court held, at para. 28:

> The legislation is intended to have wide scope and allow a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

[29] There, as here, the creditors had lost confidence in a debtor which was seeking to reorganize to allow it control over completing a real estate development. The Court went on to say:

> 37. The failure of the chambers judge to consider the fundamental purpose of the CCAA and his error in extending the stay also infects his exercise of discretion in authorizing the DIP financing. If a stay under the CCAA should not be extended because the debtor company is not proposing an arrangement or compromise with its creditors, it follows that DIP financing should not be authorized to permit the debtor company to pursue a restructuring plan that does not involve an arrangement or compromise with its creditors. It also follows that expanded powers should not have been given to the Monitor.
>
> 38. ...What the Debtor Company was endeavoring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The CCAA was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[30] That is essentially what the Applicant hoped for here. With the DIP financing in place it hoped to finish construction of the 12 units, sell them and use the proceeds to pay off the Bank during the period of the stay without any proposal being developed or at least voted upon.

[31] Applicant's counsel sought to distinguish the *Cliffs Over Maple Bay* decision by arguing that he has already presented a plan for a proposal and that that proposal would go to a vote, albeit at a point where it would be able to repay the Bank in full. He thus considered the requirement for a vote on a proposal as a technicality.

[32] The Court in *Cliffs Over Maple Bay* was not concerned with the absence of a technical requirement, however. It was concerned with a scenario which would see a proposal implemented through the use of DIP financing before any creditor would be able to cast a negative vote against it. That, in substance, is exactly what the Applicant proposed here.

[33] If DIP financing were given priority over the Bank's debt here there would be no guarantee that the Applicant will be able to complete the project and sell the units at the projected profit. It was unable to do so in 2008. Five lenders have refused its applications for refinancing which suggests that they were not convinced of the profitability of this venture.

[34] Any social benefits which might ensue from putting the Applicant in funds to finish this project itself are more than set off by the negatives. The Applicant argued that the completion of the project would increase taxes paid to the City of Edmonton, would offer tradesmen employment and would remove an unsightly partially finished development from the view of its neighbors. Allowing the Applicants to proceed, however, does not guarantee this plan would have been successful. It would not only be the Bank which would be impacted by failure. These residences would have been marketed at prices designed to attract often young, first time buyers who would put down deposits on a presale basis and terminate their leases on rental accommodation in anticipation of moving in by the stated completion date. If that did not happen those purchasers will be seriously impacted. Even if given possession they would face the risk of builders' liens being filed by unpaid trades. Had it been necessary to consider the question of whether permitting the Applicant to complete and sell the 12 partially completed units would likely bring greater value to the enterprise as a whole than would be the case if the proposal were made and accepted I might well have not concluded that it did. Rather, the Applicant's valuation shows that the Bank and other creditors will most likely be fully repaid and a surplus produced in an orderly liquidation of the real estate in question. DIP financing with priority over the Bank can only cause uncertainty and prejudice to those creditors with no corresponding benefit.

[35] The purpose for requesting DIP financing here was not simply to provide operating funds to allow the Applicant to prepare a proposal and keep its business in operation in the meantime. That business has not been in operation since late 2008. It has not been able to find any other lender, at any cost, who would assume the risk after replacing the Bank's financing or as a subordinate lender to the Bank. Its application was an attempt to do indirectly what it had not been able to achieve directly.

Conclusion:

[36] The application for approval of DIP financing in priority to the security held by the Bank was therefore refused. The application to extend the time for the making of a proposal was similarly refused. The time granted to the Applicant to make a proposal was terminated as of the date the applications were argued, May 4, 2009.

Heard on the 4th day of June 2009.
Dated at the City of Edmonton, Alberta this 10th day of June 2009.

M.B. Bielby
J.C.Q.B.A.

Appearances:

Jeffrey Lee
for 1252206 Alberta Ltd.

Kenneth Lenz
for Echo Merchant Fund Ltd.

Ray Rutman & Roberto de Guzman
for Bank of Montreal

Darren R. Bieganek
for the Trustee, Meyers Norris Penny Limited

Court of Queen's Bench of Alberta

Citation: Barclay v Kodiak Heating & Air Conditioning Ltd, 2019 ABQB 850

Date: 20191108
Docket: 1806 00729
Registry: Lethbridge

Between:

Shelly Barclay

Appellant (Plaintiff)

- and -

Kodiak Heating & Air Conditioning Ltd. and Ramton Homes Ltd.

Respondents (Defendants)

Corrected judgment: A corrigendum was issued on November 18, 2019; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice D.B. Nixon

I. Introduction

[1] This is an appeal from a Provincial Court decision. It is an appeal on the record.

[2] The Trial Judge in the Provincial Court granted the Application by Kodiak Heating & Air Conditioning Ltd ("**Kodiak**") for summary dismissal of the claim that Ms. Shelly Barclay had made against it: ***Barclay v Kodiak Heating & Air Conditioning Ltd***, 2018 ABPC 233 [***Barclay* PC**]

[3] The Trial Judge found that there was no merit to the claim by Ms. Barclay against Kodiak. In particular, that decision effectively states that Ms. Barclay did not specify a cause of action in the pleadings, and the facts do not suggest one. The Trial Judge then concluded that a fair and just adjudication of the Application was to summarily dismiss the action by Ms. Barclay against Kodiak.

II. Facts

[4] Ms. Barclay was building a house. She hired Ramton Homes Ltd ("**Ramton**") to construct the home (the "**Barclay Home**").

[5] Ramton hired Kodiak to supply and install two fireplaces (collectively, the "**Fireplaces**") into the Barclay Home.

[6] Kodiak purchased the Fireplaces from 4 Seasons Home Comfort. Those Fireplaces were installed into the Barclay Home by Kodiak.

[7] After taking possession of the Barclay Home, Ms. Barclay encountered operational problems with both Fireplaces.

[8] All parties agree that the operational challenges with the Fireplaces continue. No one has been able to determine why the Fireplaces do not operate properly. In particular, Kodiak states that no one knows if the faulty operations stem from the manufacture of the Fireplaces or from their installation.

[9] On July 22, 2016, Ms. Barclay filed a civil claim in the Provincial Court of Alberta (the "**Barclay Claim**").

[10] Ms. Barclay was a self-represented litigant during the proceedings within the Provincial Court. The pleadings that she filed concerning the Barclay Claim state that the Fireplaces have had continuous issues, and that they are still not functioning properly. The pleadings also state that she is seeking new fireplaces, with proper installation and warranty.

[11] Kodiak filed a Notice of Application on September 13, 2018 in the Provincial Court of Alberta. In that Application, Kodiak sought summary judgment pursuant to rule 7.3 of the Alberta Rules of Court (the "**Rules**").

[12] Ms. Barclay filed an Affidavit on September 21, 2018 (the "**Barclay 2018 Affidavit**"). That Barclay 2018 Affidavit states that it was filed to "...[k]eep ...Kodiak...on the Civil Claim".

[13] The Barclay 2018 Affidavit included the following statements:

a. That Kodiak attended the Barclay Home to begin the warranty work on the Fireplaces.

b. That the original warranty claim was still ongoing because both Fireplaces were not operating.

c. That there were more than 35 attempts at warranty repair.

[14] The Barclay 2018 Affidavit included the following particulars:

a. That Kodiak indicated on April 24, 2017 that it would do everything possible to get the Fireplaces running to the manufacturer's specifications.

b. That Ms. Barclay communicated to Kodiak on June 10, 2017 that she was looking forward to hearing from Kodiak concerning the warranty, and to ensuring that the Fireplaces would be fixed.

III. Standard of Review

[15] The standard of review for civil appeals from the Provincial Court Civil Division to the Alberta Court of Queen's Bench falls into one of three categories:

a. The standard of review for questions of law is correctness.

b. The standard of review for factual inferences is one of palpable and overriding error.

c. The standard of review for questions of mixed fact and law is palpable and overriding error.

See ***McCallum v Edmonton Frame and Suspension (2002) Ltd***, 2016 ABQB 271 at paras 48 to 50.

[16] The question for determination on a summary disposition is whether there is a genuine issue requiring a trial. This is a question of mixed fact and law, which is subject to the standard of palpable and overriding error: ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 10; see also ***Amack v Wishewan***, 2015 ABCA 147 at para 27; see also ***Hryniak v Mauldin***, 2014 SCC 7 at paras 81-84; see also ***Housen v Nikolaisen***, 2002 SCC 33 at para 36.

IV. Issues

[17] Ms. Barclay frames her appeal on the following three grounds:

a. That the Trial Judge failed to properly consider the entirety of the evidence before her.

b. That the Trial Judge failed to apply the correct principles of law with respect to negligence.

c. That the factual record before the Trial Judge was insufficient to allow her to summarily dismiss the Plaintiff's claims as against Kodiak.

V. Analysis

A. The Provincial Court Decision

[18] In their application to the Provincial Court, Kodiak sought summary dismissal of the Barclay Claim on the basis that Ms. Barclay did not allege any cause of action, including neither breach of contract nor negligence.

[19] In her decision, the Trial Judge acknowledged that Ms. Barclay referred to an ongoing warranty. However, the Trial Judge reported that Ms. Barclay conceded in oral argument that she did not know the source of the warranty. The Trial Judge also found that there was neither evidence of the alleged warranty nor evidence that Kodiak had granted a warranty.

[20] Kodiak described its work with respect to the Fireplaces as "diagnosis and repair". In her pleadings, Ms. Barclay stated, "…during diagnosing and attempted repair, both fireplaces incurred damages".

[21] Ms. Barclay did not particularize or describe the damage or the cause of the purported damage in her pleadings or in the Barclay 2018 Affidavit.

[22] The Trial Judge reported that Ms. Barclay made no reference to negligence on the part of Kodiak, nor did she allege a contractual relationship between herself and Kodiak or any breach of any such relationship.

[23] The Trial Judge found that the record was deficient. In particular, the record did not present evidence of negligence or of a breach of contract. As such, the Trial Judge asserted that no cause of action was revealed.

[24] In her analysis, the Trial Judge referenced Rule 7.3(1) which allows a party to apply for summary judgment if there is no merit to a claim. The Trial Judge also canvassed the legal framework for summary judgment.

[25] The Trial Judge stated that summary judgment is appropriate where there is no genuine issue requiring a trial. The Trial Judge went on to state that there is no genuine issue requiring a trial when a judge is able to reach a fair and just determination on the merits on a motion for summary judgment. It stated that this is the case when the process (a) allows the judge to make the necessary findings of fact, (b) allows the judge to apply the law to the facts, and (c) is a proportionate, more expeditious and less expensive means to achieve a just result.

[26] On the basis of the findings that (a) Ms. Barclay did not specify a cause of action, and (b) the facts did not suggest a cause of action, the Trial Judge found that there was no merit to the Barclay Claim. Given these determinations, the Trial Judge concluded that the fair and just adjudication was to summarily dismiss the Barclay Claim.

[27] In addition to addressing the cause of action argument, the Trial Judge also accepted Kodiak's argument that there was no privity of contract between Kodiak, a subcontractor, and Ms. Barclay. The privity of contract was between Ramton and Ms. Barclay and therefore Ms. Barclay did not have a cause of action for breach of contract against Kodiak.

B. The Law

[28] A pleading requires facts, not conclusions: ***JO v Alberta***, 2012 ABQB 599 at para 137. A pleading need only include salient facts: ***Klemke Mining Corporation v Shell Canada Limited***, 2008 ABCA 257 at para 30; see also ***677960 Alberta Ltd v Petrokazakhstan Inc***, 2013 ABQB

47 at para 46. It need not name the cause of action: ***Petrokazakhstan*** at para 48; see also ***MDI Industrial Sale Ltd v McLean***, 2000 ABQB 521 at para 7. While the difference between facts and evidence is sometimes a question of degree, the general rule is that evidence is not to be pleaded: ***Wenzel v Nenshi***, 2015 ABQB 788 at para 12.

[29] While pleadings need not name a cause of action, they do govern (*i.e.*, regulate) the evidence to be led at trial: ***WAR v AG Alta***, 2006 ABCA 219 at para 26. However, in order to have a cause of action, a pleading must include every fact that would be necessary for the plaintiff to prove in order to support his or her right to a judgment: see ***Read v Brown*** (1888), 22 QBD at 128, Lord Esher M. The classical definition of a cause of action is simply a factual situation, the existence of which entitles one person to obtain from a judicial forum a remedy against another person: see ***Letang v Cooper,*** [1964] 2 All ER 929 at 934, 1 QB 232 (HL), Diplock LJ; and ***Consumers Glass Co Ltd v Foundation Co of Canada Ltd*** (1985), 51 OR (2d) 385 at 8, 20 DLR (4th) 126 (CA). If the pleadings do not include the facts necessary to establish an entitlement to a remedy (*i.e.*, negligence), then no cause of action exists.

C. The Application of the Law to the Record

1. Did the Trial Judge fail to properly consider the entirety of the evidence before her?

[30] In making its decision, the Trial Judge can only consider the evidence before it. It would be an error of law for that court to make a decision that is based on alleged facts that are not in evidence: ***R v Bentley***, 2015 BCCA 251 at para 33. Further, it is an error of law for a trial judge to assess the evidence piecemeal: ***R v JMH***, 2011 SCC 45 at para 40.

[31] Evidence in our Courts only comes in two forms. Evidence that is provided in affidavit format and evidence that is provided in *viva voce* format. The evidence provided in each of these formats may be subject to cross-examination. Documents can be introduced as evidence under either format.

[32] In this case, the Trial Judge found that there was neither evidence of negligence nor breach of contract.

[33] The Trial Judge noted that Ms. Barclay made no reference to negligence in the Barclay 2018 Affidavit nor was any evidence of negligence provided at the hearing. I comment further on the negligence allegation below.

[34] The Trial Judge also found that there was no evidence concerning the alleged damages. The Trial Judge noted that Ms. Barclay stated in her pleadings that the Fireplaces incurred damages during diagnosing and attempted repair. However, the Trial Judge noted that Ms. Barclay did not particularize the damage in her pleadings nor did she do so in the Barclay 2018 Affidavit. ***Barclay* PC** at para 11.

[35] The Trial Judge also acknowledged that Ms. Barclay referred to an ongoing warranty. However, the Trial Judge noted that during oral argument Ms. Barclay conceded she did not know the source of the alleged warranty: ***Barclay* PC** at para 10. As such, the Trial Judge effectively found that there was neither evidence of the alleged warranty nor evidence that Kodiak had granted a warranty.

[36] In addition, the Trial Judge acknowledged the assertion advanced by Kodiak that Ms. Barclay did not allege a breach of contract: ***Barclay* PC** at para 7. The Trial Judge further found

that there was no evidence that a contract had been breached: ***Barclay* PC** at para 10. In the circumstances, the Trial Judge dismissed the breach of contract claim against Kodiak on the basis that the Ms. Barclay did not specify a cause of action and the evidence did not suggest one: ***Barclay* PC** at para 13. This conclusion by the Trial Judge is supported by an inference that I find appropriate to make that Ms. Barclay had no documentation to evidence the alleged warranty. This inference is strongly supported by the fact that Ms. Barclay effectively conceded during oral argument that she did not know of the source the alleged warranty.

[37] I return to the question posed by Ms. Barclay, as I have framed it above. That is, did the Trial Judge fail to properly consider the entirety of the evidence before her.

[38] I find no evidence that the Trial Judge did not consider all of the evidence before her. To the extent that she was assessing the evidence before her, the Trial Judge was performing her function as the trier of fact. That function is not a question of law alone: ***Bentley*** at para 60. That being the case, this evidentiary question in the context of this appeal is subject to the standard of palpable and overriding error: ***Weir-Jones*** at para 10.

[39] Given my review of the record before me, I find that there is no palpable and overriding error in respect of the evidence that the Trial Judge reviewed.

2. Did the Trial Judge fail to apply the correct principles of law with respect to negligence?

[40] To be successful in a negligence action, Ms. Barclay would need to prove four elements on a balance of probabilities: ***Brough v Yipp***, 2016 ABQB at para 7. Those elements are as follows:

a. That Kodiak owed Ms. Barclay a duty of care.

b. That Kodiak breached the applicable standard of care.

c. That Ms. Barclay suffered a loss.

d. That Kodiak's actions were the actual and legal cause of Ms. Barclay's loss.

[41] I have reviewed the pleadings and the Barclay 2018 Affidavit, both of which were before the Trial Judge. In my view, those documents do not raise particulars of the alleged negligence. That is, those documents do not establish a duty of care, a standard of care or causation. Ms. Barclay's evidence simply contained claims that Kodiak is bound by an alleged warranty that is not in evidence. That is a contractual argument, rather than a negligence argument.

[42] A trial court is not required to engage in its own investigation to identify possible causes of action: see ***Meads v Meads***, 2012 ABQB 571 at para 632. In circumstances such as these, the Trial Judge was not required to engage in an extensive review of the law of negligence when neither the claim has been alleged nor the evidence apparent on record. Indeed, it would be an error of law for a trial judge to do so. A trial judge is a referee in judicial proceeding, and not an advocate of either side. In order for a court to address a claim of negligence, the necessary prerequisites must be included in the pleadings and necessary evidence must be before the trial judge.

[43] Given my review of the record before me, I find that the Trial Judge did not fail to apply the correct principles of law with respect to negligence. To the contrary, I find that the Trial Judge had a lack of evidence concerning the negligence that Ms. Barclay now alleges. Indeed, the Trial Judge specifically found that there was no evidence concerning the negligence allegation: ***Barclay* PC** at para 10.

3. Was the factual record before the Trial Judge insufficient to allow summary dismissal of the Plaintiff's claims as against Kodiak?

[44] In a summary judgment application, the parties must "put their best foot forward": ***Canada (Attorney General) v Lameman***, 2008 SCC 14 at para 11. This case is no exception. Ms. Barclay cannot resist summary judgment merely by speculating as to what may arise at trial: ***Weir-Jones*** at para 37.

[45] A full trial may be necessary in the following circumstances:

a. Where there is a dispute concerning material facts or one depending on credibility: ***Weir-Jones*** at para 35.

b. Where a trial will create a better record: ***Weir-Jones*** at para 39.

c. Where the factual issues are sufficiently complicated that a trial is appropriate (*i.e.*, scientific matters): ***Weir-Jones*** at para 45.

[46] Based on my review of the case advanced by Ms. Barclay, it is not complicated. Further, I see no reason why a trial would create a better record.

[47] The question for determination on a summary disposition is whether there is a genuine issue requiring a trial. This is a question of mixed fact and law. A question of that nature is subject to the standard of palpable and overriding error.

[48] The sufficiency of the record will depend on the issues, the source and continuity of the evidence, and other relevant considerations: ***Weir-Jones*** at para 36. I also acknowledge that summary judgment may be appropriate where the facts are not seriously in dispute, and the real question is how the law applies to those facts: ***Weir-Jones*** at para 21.

[49] In any event, the presiding judge retains the discretion to send a matter to trial if necessary to achieve a just result. However, doing so should not be used as a pretext to avoid resolving the dispute when possible: ***Weir-Jones*** at para 21.

[50] The fundamental question is whether a trial is required as a matter of fairness, taking into account that there is no right to take an unmeritorious claim to trial: ***Weir-Jones*** at paras 42 and 46. Where a defendant, such as Kodiak, can show that a claim does not have merit, it should not have to suffer a trial: ***Weir-Jones*** at para 43.

[51] The Alberta Court of Appeal summarized the test as follows:

a. Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b. Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial?

At a threshold level, the facts of the case must be proven on a balance of probabilities or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c. If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d. In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute: ***Weir-Jones*** at para 47.

[52] In this case, Kodiak sought summary dismissal of the Barclay Claim. The Trial Judge was required to assess whether Kodiak had established, with respect to the issues raised by the Barclay Claim, that the record made it possible to resolve the dispute on a summary basis.

[53] I must assess whether Kodiak demonstrated on a balance of probabilities that, on the facts as proven, there is no merit to Ms. Barclay's claim. Assuming Kodiak discharged this burden in the decision of the Provincial Court, I must assess whether Ms. Barclay nonetheless established that there is a genuine issue requiring a trial, based on the nature of the issue or its merits. Finally, I must determine whether I am sufficiently confident in the state of the record that the Trial Judge properly exercised her discretion to summarily dismiss the claims of Ms. Barclay.

[54] I am of the view that the record allowed the Trial Judge to summarily assess the claims of Ms. Barclay. There was little dispute on the facts and, where there was, the dispute was either immaterial or could be satisfactorily resolved based on the materials before the Trial Judge or through the use of appropriate assumptions.

[55] A central issue in this case concerned the warranty. The Trial Judge acknowledged that Ms. Barclay referred to an ongoing warranty. However, that Trial Judge effectively found that there was neither evidence of the alleged warranty nor evidence that Kodiak had granted a warranty. This finding of the Trial Judge was supported by the concessions made in Ms. Barclay's oral argument. Overall, the Trial Judge found that there was no cause of action.

[56] In conclusion, I am satisfied that the record was sufficient for Kodiak to prove, on a balance of probabilities, that there was no merit to Ms. Barclay's claim. I am also satisfied that the Trial Judge determined on the record that Ms. Barclay did not establish a genuine issue requiring trial.

[57] The factual record was sufficient for the Trial Judge to summarily dismiss the claims Ms. Barclay was making against Kodiak in this action. I find that there is no palpable and overriding error in respect of the assessment of the factual record by the Trial Judge

VI. Conclusion

[58] In summary, I conclude as follows:

a. First, I find no evidence that the Trial Judge did not consider all of the evidence before her. To the extent that she was assessing the evidence before her, the Trial Judge was performing her function as the trier of fact. That function is not a question of law alone. That being the case, this evidentiary question in the context of this appeal is subject to the standard of palpable and overriding error. Given that standard, I find that there is no palpable and overriding error in respect of the evidence that the Trial Judge reviewed.

b. Second, the Trial Judge did not fail to apply the correct principles of law with respect to negligence. To the contrary, I find that the Trial Judge had a lack of evidence concerning the negligence that Ms. Barclay now alleges. Regarding this matter, a trial court is not required to engage an investigation to identify possible causes of action

c. Third, I find that the factual record before the Trial Judge was sufficient to allow her to summarily dismiss the Barclay Claim. In this regard, there is no palpable and overriding error in respect of the assessment of the factual record.

Heard on the 6th day of June, 2019.
Dated at the City of Calgary, Alberta this 8th day of November, 2019.

D.B. Nixon
J.C.Q.B.A.

Appearances:

Alexander G. McKay, QC
North & Company LLP
for the Applicant (Plaintiff)

Nolan B. Johnson
Huckvale LLP
for the Respondent (Defendant) Kodiak Heating & Air Conditioning Ltd.

Steven G. Osmond
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for the Defendant Ramton Homes Ltd.

Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice D.B. Nixon

The name for Counsel's law firm was corrected as follows:

Steven G. Osmond
Stringham LLP
for the Defendant Ramton Homes Ltd.

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2006 SKQB 103**

Date: **2006 03 09**
Docket: Q.B. 504/98
Judicial Centre: Yorkton

BETWEEN:

SASKATCHEWAN WHEAT POOL

PLAINTIFF
(DEFENDANT BY COUNTER-CLAIM)

- and -

ROBERT STEFFENSON

DEFENDANT
(PLAINTIFF BY COUNTER-CLAIM)

Counsel:

Yens Pedersen & Noah P. Evanchuk — for the plaintiff
Christina Rosowsky — for the defendant

JUDGMENT — SANDOMIRSKY J.
March 9, 2006

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[1] The plaintiff, Saskatchewan Wheat Pool, sues the defendant, Robert Steffenson, for the cost of goods sold by the plaintiff to the defendant between April 4, 1997, and June 9, 1997, the sum of which amounted to $30,397.73 as at July 31, 2004. The matter proceeded to trial pursuant to the Simplified Procedure Rules of this Court. The statement of claim, which was issued on August 27, 1998, claims that the defendant is indebted to the plaintiff for the outstanding balance of his account, which at that date was $11,729.94, plus interest in the

amount of 1.33% per month calculated and compounded monthly from August 1, 1998, to the date of judgment or payment, whichever occurs first. The products sold by the plaintiff to the defendant which gives rise to this dispute includes a quantity of Innovator canola seed.

[2] The defendant filed his statement of defence and counter-claim on December 2, 1998. He claims that the planted canola seed which he purchased from the plaintiff in the spring of 1997 was sown upon 155 acres of his land. He says that the "canola crop failed to germinate, emerge and develop in a normal manner and that the seed germination was poor and emergence was slow. The emerging plants lacked vigour and failed to produce seed of acceptable quantity".

[3] The statement of defence sets forth that the plaintiff represented and warranted that the said Innovator canola seed was of good and merchantable quality and was suitable for the purpose that it was intended, and furthermore, would produce a high yield canola crop. However, the court notes that Exhibit "A" to the affidavit of Tanya Perkins is a copy of the Credit Application and Credit Agreement made by the plaintiff and defendant. Paragraph 8 of that Credit Application and Credit Agreement states that "NO WARRANTY, CONDITION OR REPRESENTATION, EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE, OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, MANNER OF APPLICATION, OR OTHERWISE, IS MADE BY SWP in respect of any . . . product, seed . . . sold by SWP."

[4] The defendant claims he harvested the said crop which yielded 5.3 bushels per acre over the entire 155 acres. Conversely, the average canola yield

in the immediate area is alleged to have been 32 bushels per acre that year. The defendant claimed he suffered losses as a result of the poor yielding crop, which losses exceed the plaintiff's claim in value. The defendant consequently pleads that he is not liable to pay any interest charges to the plaintiff in the circumstances. His counter-claim repeats the salient facts stated in his defence.

[5] After a lapse of nearly seven years, the solicitors filed a certificate of readiness on November 25, 2005. The matter came on for trial before this Court on January 17, 2006.

[6] In addition to the certificate of readiness endorsed by the plaintiff and defendant, the plaintiff filed affidavits of the following persons:

1. Affidavit of Robert Steffenson
2. Affidavit of Robert Payne
3. Affidavit of J. Wallace Hamm
4. Affidavit of Ernie Semeniuk
5. Affidavit of Tanya Perkins
6. Affidavit of Tom Black
7. Affidavit of Carlyle Topliss
8. Affidavit of Charlie Munro
9. Affidavit of Kevin Hursh

[7] To frame the dispute and affidavit evidence succinctly, the defendant deposes that he seeded the said canola seed on 36 acres of the SE 17-29-6-W2nd on or about May 28, 1997. He says the previous year the same plot of 36 acres had been summerfallowed. In addition, the defendant says he seeded 119 acres of the SE 6-29-6-W2nd on May 30, 1997, of which 76 acres had been

summerfallowed in 1996 and the remaining 43 acres had been seeded to wheat in 1996.

[8] At paragraphs 12 and 16 of the defendant's affidavit sworn March 26, 2001, he deposes:

> 12. That I noticed that my crop was emerging very slowly which appeared to be caused by poor seed germination. My crop was extremely variable in the growth stages and the late emerging plants lacked vigor and failed to produce seed of any quality.
>
> . . .
>
> 16. That the aforementioned grain tickets indicate that I delivered total net tonnage of 22.78 tonnes which translated into bushels is 22.78 x 44.092 = 1004.4157 bushels. Accordingly, my average yield from the one hundred and fifty five acre (155) canola field was 6.48 bushels per acre.

[9] The defendant testified under cross-examination that he had grown canola crops in various of the preceding 20 years. He stated the canola seed will germinate within one week under appropriate weather conditions and that it was his custom to inspect his crops on a regular basis. It was the defendant's opinion that when the sprout pierces the soil surface and develops two or three leaves that it was in an emergent state.

[10] The defendant deposed at paragraph 12, supra, that within the first month, that is June of 1997, that he was uncertain what the problem was a that point in time. While he did not depose to mentioning his observations to the plaintiff in his affidavit, under cross-examination, Mr. Steffenson stated that he believed he mentioned the fact to Carlyle Topliss, the plaintiff's elevator manager

at Theodore, Saskatchewan. This is the elevator where the seed had been purchased. However, it was not until October 31, 1997, that the defendant filed his first written complaint with the plaintiff.

[11] The defendant recalled that for the first 10 days after seeding the canola seed there was no rain but after there was a good thundershower. Consequently, the defendant says he expected good emergence but that did not occur. The defendant says there was no outstanding evidence of disease within the crop that was evident to the eye. He stated that his seeding and treatment of the growing crop was consistent with his customary practice. The only comment that he could make peculiar to this crop year was that “it just took a while for the first rain”. The harvest was uneventful, there was no frost and the defendant described the 1997 harvest season as “beautiful”. In summary, the defendant had no explanation for the sparse crop and poor yield.

[12] The defendant believed that following his casual conversation with Carlyle Topliss that it was up to the plaintiff to do something. By October 31 no one from the plaintiff’s organization had contacted the defendant and, therefore, he filed his formal complaint. The defendant did nothing more to alert the plaintiff during the growing season nor prior to harvesting the canola crop that fall.

[13] The defendant filed an affidavit sworn by his neighbour, Robert Payne, on or about March 3, 2001. Mr. Payne deposed that he was a farmer in the Theodore district. Under cross-examination, Mr. Payne stated that he farmed for 30 years and that his land was near the defendant’s, and some of it was abutting the defendant’s land. He deposed that he had driven by the defendant’s land

most days during the 1997 crop year and observed the defendant's canola crop "was very thin and spindly. It appeared to me like there had been poor germination and furthermore there were excessive weeds growing in his crop".

[14] Under cross-examination, Mr. Payne testified that he had grown canola since 1971 and that he still does. Further, he conceded that his choice of words "poor germination" were misleading and that "poor emergence" of the defendant's crop is a more accurate observation. Mr. Payne claimed rainfall as a factor affecting emergence and that a thunderstorm that spring might have been spotty. Finally, Mr. Payne testified that there are different types of canola with different properties. He himself planted Innovator canola seed that same year and that he had a yield of half what he had expected. Therefore, he now uses other varieties of canola seed. Mr. Payne admitted that he could not testify his Innovator canola seed was from the same batch lots as the defendant's canola seeds. He did say that Innovator canola which he used that year on abutting land produced dismal results. Mr. Payne examined his own land and found too many of the Innovator seeds had failed to germinate. However, Mr. Payne did not examine the defendant's land in the same manner.

[15] The defendant filed an affidavit of Ernie Semeniuk sworn March 3, 2001. Mr. Semeniuk deposed that in 1997 he was hired by the defendant to combine the canola crop. Prior to doing so he says that he had driven past the crop on numerous occasions and noticed that it was lighter, thinner and shorter than a normal canola crop. Mr. Semeniuk had observed the defendant to have grown good crops on his land in other years. He further deposed that one of the

defendant's neighbours, Allan Frederickson, grew a very full canola crop in 1997 which he would have characterized as being bumper crop.

[16] The plaintiff had served a notice of intent to cross-examine Mr. Semeniuk on his affidavit pursuant to Queen's Bench Rule 487(2). However, Mr. Semeniuk had died after swearing his affidavit and before the date of trial. This circumstance gives rise to the first of two evidentiary issues which are relevant to this case and judgment.

[17] The events surrounding this case arose in 1997. The affidavit of Mr. Semeniuk was sworn March 3, 2001, a lapse of four years after the events in question. The trial of this matter was held a further four and one-half years after Mr. Semeniuk had sworn his affidavit. No explanation for this considerable delay was provided to the court.

[18] Counsel referred me to the decision *Pierre v. Mount Currie Indian Band*, [1999] 10 W.W.R. 174 (B.C.S.C.) wherein Fraser J. reviews a similar scenario and is asked to decide whether an affidavit is admissible in evidence at trial where the deponent died after swearing the affidavit. Fraser J. states that the admissibility of the deceased's affidavit is to be based upon the balance of convenience. At para. 49 he says:

> ¶49 The evidence of Mr. Joseph is vulnerable to attack because of the frailties I have already mentioned. It may well be that, at the conclusion of the trial of the issue, I will find myself unable to place any reliance on it. Ultimately, however, the prejudice of Mr. Pierre which would flow from refusing to admit the affidavit is substantially more severe than the prejudice to the defendants which would flow

> from admitting it. Without the affidavit, Mr. Pierre has nothing from Mr. Joseph. With the affidavit, the defendants still may persuade me that it ought not to be given any weight. Even if there had been no opportunity for cross-examination, my conclusion would be the same.

[19] Though the *Pierre* decision was not a simplified procedure involving affidavit evidence, I choose to follow the test set forth. I admit Mr. Semeniuk's affidavit into evidence. The contents of this affidavit are not material to the defendant's case as Mr. Semeniuk provides no new evidence touching on the material issue why the crop failed. Nevertheless, the prejudice to the defendant in not allowing the affidavit outweighs the prejudice to the plaintiff in allowing it into evidence. As to the hearsay rule, in my opinion the principled approach of necessity and reliability are met. The affidavit has little probative value for this case. It sheds no light as to whether the canola seed was fit or the crop failed due to other extraneous circumstances.

[20] The second evidentiary issue which arises in this case is the more important of the two. The defendant tendered the affidavit of J. Wallace Hamm, which was sworn on April 9, 2001. Mr. Hamm is a consulting agrologist who was retained by the defendant in 1998. Mr. Hamm conducted a field inspection on or about July 8, 1998 – a full year after the instant problem arose.

[21] The plaintiff served a notice pursuant to Rule 487(2) requiring that the defendant produce Mr. Hamm to be cross-examined at trial. The defendant was unable to do so.

[22] Neither party issued and served a subpoena upon Mr. Hamm to compel his attendance at trial. Mr. Hamm had produced a letter which stated that with the passage of time, 1998 to 2006, his health had declined and he was under medical advice not to travel to the Judicial Centre of Yorkton from his home in Saskatoon and that it was not advisable to testify. The defendant seeks to rely on Mr. Hamm's affidavit and preliminary report which was attached as Exhibit "A" to his affidavit. There is no final report. Further, no effort was made by either party to have Mr. Hamm testify by telephone nor to be cross-examined at Saskatoon as would be permissible under Rule 289 and 300.

[23] What is the effect of the failure of the defendant to produce Mr. Hamm after receiving the requisite notice to produce? Rule 487 reads:

> **487**(1) An affidavit for use on an application for summary judgment or for a summary trial may be made on information and belief, as permitted by Rule 319, but on the hearing of the motion or at the summary trial an adverse inference may be drawn from the failure of a party to provide the evidence of persons having personal knowledge of contested facts.
>
> (2) A party who intends to cross-examine the deponent of an affidavit at a summary trial shall, at least 20 days before the date of the trial, give notice of that intention to the party who filed the affidavit, who shall arrange for the deponent's attendance at the trial.

[24] A review of the defendant's case reveals that it hinges in large measure upon the admissibility and weight of Mr. Hamm's affidavit and report. If admissible, the defendant's counter-claim hinges in large measure upon the probative weight and value to be given to Mr. Hamm's opinion as to the fitness of the canola seed.

[25] There is no Saskatchewan case law to be found touching upon the consequences of the non-production of a deponent following service of the requisite notice to cross-examine. The burden to produce the witness is that of the party filing the affidavit, in this instance the defendant, Steffenson.

[26] This issue attains even greater important where the evidence of a non-appearing deponent is material to the defendant's defence and counter-claim. The non-appearance is of even greater import where the evidence of the non-appearing deponent is contradicted.

[27] A review of decisions addressing the standard of evidence in simplified procedure cases does not provide assistance to the court in addressing the issue of non-appearance by an affiant to be cross-examined. The decisions canvassed include *Best v. Hanna* 2000 SKQB 107; (2000), 45 C.P.C. (4th) 387 (Sask. Q.B.); *UGG v. 6134710 Sask. Ltd.* 2001 SKQB 111 (Sask. Q.B.); *Perepelkin v. Urbanski* 2000 SKQB 206; (2000), 50 C.P.C. (4th) 326 (Sask. Q.B.); *Craig Gilchrist Equipment Rental Ltd. v. Robertson* (1997), 10 C.P.C. (4th) 372 (Ont. Gen. Div.); and *Jasnoch v. Provincial Plating Ltd.*2000 SKQB 44; (2000), 190 Sask. R. 250 (Sask. Q.B.). In the *UGG* case, Krueger J. said at para. 10:

> [10] The procedure on summary trial has been simplified, but the evidence required to prove the essential elements of the claim have not been relaxed. I am not able to attach any weight to the hearsay evidence.

[28] In my opinion, the simplified procedure rules require that Mr. Hamm's affidavit be admitted into evidence at the summary trial despite his non-appearance. However, when the party adducing this affidavit evidence fails to produce the affiant for the purpose of cross-examination, the court must be extremely cautious if it is to rely on the affidavit evidence. Further, when the affidavit evidence is critical to the resolution of the case, and particularly when the opinions contained therein are contradicted by evidence adduced by the opposing party, such caution must be all the greater. Where the affiant fails to attend to be cross-examined the issue is not one of admissibility but the weight or probative value to be given to such affidavit evidence.

[29] The affidavit and preliminary report of Mr. Hamm is troublesome to the court.

[30] The Hamm affidavit sworn April 9, 2001, itself reads at paras 5 to 7 as follows:

> 5. That my report outlines the procedures that I followed. In investigating this matter, I noted that Mr. Steffenson's canola fields failed to germinate, emerge and develop in a normal manner. More specifically seed germination was poor and emergence was slow. As a result, the crop was extremely variable in growth stage. Inspection of the stubble revealed that 70% of the plants were thin stalked and short. There were very few normal plants in the field.
>
> 6. That I determined that the cause of the problem of the 1997 canola crop germination, emergence and development indicated that poor quality seed was responsible for the crop failure. The crop performance problem is consistent with seed that has been treated with a pesticide mixture for an extended period of time. In the alternative, the problem is consistent with seed that has been injured by frost damage, premature harvest or mechanical damage during processing.

7. That I adopt my report and the findings contained therein.

[31] The preliminary report indicates that a field inspection conducted on July 8, 1998, indicated to the observer that 70% of the plants were thin stocked and short. From the observation of the stubble fields on that date the report further states that, “control of wild oats by the Liberty herbicide was just adequate on the summerfallow fields and extremely poor on the stubble field”. That is the sum of the direct or personal knowledge of Mr. Hamm. All other facts which he relied upon are hearsay. Three field record sheets and maps were filled in with the required information that the defendant could recall from his memory. Those forms, prepared by Mr. Hamm’s firm, are nothing but hearsay. Mr. Steffenson provided direct evidence of most of these facts in any event.

[32] The preliminary report consisted of four pages. In fairness to darWall Consultants Inc. I repeat the whole of those four pages.

> This is our **preliminary report** on the above matter based on information available to date. The tasks and objectives of in the assessment include:
>
> 1. the inspection and photography of the problem fields and comparable fields in the immediate area (July 8, 1998);
> 2. the collection and review of historic and 1997 crop management practices;
> 3. the determination of probable cause(s) via the systematic examination of the agronomic and environmental factors which determine canola crop performance;
> 4. the review of similar case files in the darWall archives;
> 5. the compilation of **preliminary** and **final** written reports on the findings of this study.

This is one of a series of similar assessments conducted on 1997 canola performance A closely related case in your area include that of Mr. Robert Payne.

Nature of the Problem

Mr. Steffenson purchased some Argentine canola seed (var. Innovator) from a local supplier in the spring of 1997. He proceeded to establish and nurture a canola crop on some 155 acres, 112 acres of which was summerfallowed in 1996 and 43 which was cropped in 1996.

The three fields were established and nurtured using accepted and proven agricultural practices as described on the attached field record sheets.

The canola crops failed to germinate, emerge and develop in a normal manner. More specifically seed germination was poor and emergence was slow. As a result, the crop was extremely variable in growth stage. The late emerging plants lacked vigour and failed to produce seed of acceptable quantity. Inspection of the stubble in July of 1998 indicated that 70% of the plants were thin stalked and short. There were very few normal plants in the field.

Control of wild oats by the Liberty herbicide was just adequate on the summerfallow fields and extremely poor on the stubble field.

As a result of the combined seed vigour and herbicide failure problem, the actual seed yields were drastically below those of comparable fields in the area. The average yield of the entire crop was 5.3 bus/ac whereas comparable fields in the immediate vicinity yielded 25± bus/ac on stubble and 30± bus/ac on fallow land.

Cause of the Problem

The nature of the 1997 canola crop germination, emergence and development on the problem fields and the contrast with comparable field results clearly indicate that poor quality seed is responsible for the crop failure. The crop performance problem is consistent with seed that has been treated with a pesticide mixture for an extended period of time. In the alternative, the problem is consistent with seed that has been injured by frost damage, premature harvest or mechanical damage during processing.

The determination of the specific nature of the seed quality/vigour problem in this case is beyond the scope of this assessment. It is sufficient to state that there are a host of factors which can effect the vigour of canola seed and seedlings. These include:

1. nature of and time of exposure to pesticide seed treatment and seed coatings;

2. canola seed maturity at the time of swathing (ie. green count);
3. seed size;
4. seed coat thickness and condition;
5. seed weathering;
6. seed storage conditions (ie. moisture, temperature and aeration);
7. seed storage time (ie. age);
8. seed weight;
9. seed oil and protein content.

In further assessing the seed quality problem which Mr. Steffenson encountered in 1997, it is apparent that the seed certification program which the supplier and Mr. Steffenson relied on to guarantee quality is inadequate. This program which is administered by the CSGA appears to rely solely on a seed germination test to determine seed quality. It ignores other seed quality factors such as seed size, seed weight, seed color (green count) and seed age which largely determine canola seed vigour and, hence, seed quality. Many of these factors were included in the "General Quality Standards" which were used for seed grading purposes by the Canadian seed industry prior to 1988. The exclusion of these critical factors from the Canadian seed quality assurance program by the Canadian seed regulatory agencies after 1988 was a negative and erroneous decision and is at the root of Mr. Steffenson's 1997 seed quality problem.

The importance and influence of readily determined seed quality factors such as "green count" which reflects the physiological maturity of the seed at the time of swathing is discussed in the attached article published in the Canola Guide.

It should also be noted that the assessor in this matter has investigated dozens of similar canola performance cases since 1988 and invariably determined that seed quality as related to seed age, length of time exposed to pesticide treatment and seed maturity was the prime causal factor.

Economic Impact of the Problem

The seed quality problem caused a significant reduction in crop return on the Steffenson farm. The accepted formula for estimating economic loss in cases of this nature is as follows:

Economic Loss = Expected Returns - actual returns + Documentation costs

Where:

Expected Returns = Expected Yields x Expected Prices

Actual Returns = Actual Yields x Actual Prices

Expected Returns = Yields of comparable stubble fields in the area for that crop year

Expected Prices = prices received for comparable crops in the area for that crop year

Actual Yields = actual yields of the problem fields

Actual Prices = actual prices received for problem field costs

Documentation Costs

The **stubble seeded** canola crop loss is estimated as follows:

Economic Loss = (43 ac x 25 bus/ac x 7.27/bus) – (43 ac x 5.3 bus/ac x $7.27/bus)

= $7,815 – $1,659

= **$6,156**

The **summerfallow seeded** canola crop loss is estimated as follows:

Economic Loss = (112 ac x 30 bus/ac @ $7.27/bus) – (112 ac x 5.3 bus/ac x $7.27/bus)

= $24,427 – $4,315

= **$20,112**

The **total** crop loss caused by the canola seed vigour and herbicide efficacy problem is $6,156 + 20,112 = **$26,268**.

[33] I find the report faulty for these reasons:

(i) The evidence relied upon is hearsay with the exception of the photographs and visual observations, presumably those of Mr. Hamm one year after the fact;

(ii) In his affidavit Mr. Hamm attributes the crop failure due to any one of five factors described at paragraph 6 above. This is not helpful to the court. Three of the possible causes are unrelated to the seed sold by the plaintiff. None of the seed was tested by Mr. Hamm or his firm. The herbicide was not tested by Mr. Hamm or his firm. There is no evidence that the canola seed in question had been treated with a pesticide for an extended period of time. There was no evidence of frost damage – to the contrary the defendant said that the harvest weather had been beautiful. Nor was there evidence of the timing of the harvest being premature. Finally, there was no evidence of mechanical damage during processing.

[34] The preliminary report exhibited to Mr. Hamm's affidavit uses the same language and has the same ambiguity as paragraph 6 of his affidavit. However, the preliminary report is notable in that it expressly disclaims the opinion offered earlier with the following language:

> The determination of the specific nature of the seed quality/vigour problem in this case is beyond the scope of this assessment. It is sufficient to state that there are a host of factors which can effect the vigour of canola seed and seedlings. . .

No evidence was tendered at trial relating to any of the nine factors Mr. Hamm said might affect the vigour of canola seed and seedlings.

[35] As to the “economic impact of the problem” the preliminary report is again predicated upon hearsay evidence. There was no evidence adduced at the trial to establish, as fact, that the expected yields of Innovator canola for these fields should have been 25 bushels per acre on stubble crop nor 30 bushels per acre upon summerfallowed land. These are assumptions made by Mr. Hamm. His conclusion that “The total crop loss caused by the canola seed vigour and herbicide efficacy problem is $6,156 + 20,112 = $26,268” is again a matter of speculation. He fails to attribute the degree of loss to seed vigour from the degree of loss attributable to herbicide efficacy or any of the other contingencies that he identified.

[36] For all of the above reasons, the most significant of which is the disclaimer that “the determination of the specific nature of the seed quality/vigour problem in this case is beyond the scope of this assessment” together with the non-attendance of Mr. Hamm for cross-examination at trial, I find that Mr. Hamm’s evidence fails to prove to the court, upon the balance of probabilities, what the cause of the defendant’s crop failure. The defendant has failed to meet the burden of proof necessary to succeed upon his counterclaim.

[37] Aside from Mr. Hamm’s evidence, circumstantial evidence does not permit me to draw the necessary inference to invoke the doctrine of *res ipsa loquitur*. The defendant’s own evidence militates against such inferences.

[38] In the text *The Law of Evidence in Canada*, Sopinka, Lederman & Bryant, 2nd ed. (Butterworths: 1999) at paras. 3.55 to 3.57 inclusive, the learned authors say:

> **§3.55** The former tort doctrine of *res ipsa loquitur* illustrates the confusion which results when a legal doctrine is uncertain as to its evidentiary effect or which burden it allocates. *Res ipsa loquitur* applied in situations where the thing which inflicted the damage was under the sole management and control of the defendant, or of someone for whom the defendant was responsible or had a right to control, and the occurrence was such that it would not have happened without negligence.
>
> **§3.56** *Res ipsa loquitur*, correctly understood, meant that circumstantial evidence constituted reasonable evidence of negligence. Accordingly, the plaintiff was able to overcome a motion for a non-suit and the trial judge was required to instruct the jury on the issue of negligence. The jury could, but need not, find negligence: a permissible fact inference. If, at the conclusion of the case, it was equally reasonable to infer negligence or no negligence, the plaintiff would lose since he or she had the legal burden on this issue. Under this construction, the maxim was superfluous as it was simply a case of circumstantial evidence.
>
> **§3.57** This interpretation of the effect of the doctrine called *res ipsa loquitur* was recently confirmed by the Supreme Court of Canada. In *Fontaine v. British Columbia (Official Administrator)*, [[1998] 1 S.C.R. 424] the Court held that, since attempts to apply the doctrine of *res ipsa loquitur* have been more confusing than helpful, the law is better served if the maxim is treated as expired and no longer a separate component in negligence actions. The circumstantial evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with direct evidence, if any, to determine whether the plaintiff has established, on a balance of probabilities, negligence against the defendant.

[39] It is not necessary for me to review the evidence of the plaintiff in great detail. Affidavits were filed by the plaintiff deposed by Tom Black, who was manager of the plaintiff's Nipawin Seed Plant, by Carlyle Topliss, manager of the Theodore elevator, by Charlie Munro, also manager of the Theodore elevator, and by Kevin Hursh, the plaintiff's expert agrologist and certified agricultural

consultant. Messrs. Black, Topliss, Munro and Hursh were all cross-examined by the defendant.

[40] Tom Black deposes to germination tests which were conducted on the Innovator canola seed batches from which the defendant's seed was taken. He states that the canola seed in question was tested at the facility which he managed at Nipawin, Saskatchewan, after it was received from the grower, before it was treated, after it was treated, and periodically during the 1997 crop year and following year. A total of 24 certificates of periodic seed analysis were annexed to Mr. Black's affidavit which reveal that germination rates were as high as 99% to a low of 86%, the average germination rate being 93.75%.

[41] Carlyle Topliss deposed that the defendant never made a complaint to him about the canola crop while he was elevator manager. He further states that no other customer complained to him about the canola seed purchased from the plaintiff that year.

[42] Charlie Munro deposed and testified that he received the defendant's formal complaint on or about October 31, 1997. He testified that he was not aware of any other complaint from a customer who purchased Innovator canola seed from the plaintiff in 1997.

[43] Kevin Hursh provided an affidavit to the plaintiff and was cross-examined by the defendant. In his professional opinion, possible causes of poor germination of the defendant's crop might have been attributed to the poor quality of seed, seeding too deep, placing too much fertilizer with the seed, heavy weed

pressure, herbicide residue in the soil, herbicide residue in the spray tank when the crop was sprayed with Liberty and, damage from flea beatles or cutworms.

[44] Mr. Hursh states at paragraphs 4 and 10 of his affidavit sworn September 16, 2004:

> 4. No specific evidence has been presented in the previously mentioned affidavits to show this particular canola seed had poor quality. An examination of the stubble residue 14 months after the crop was seeded would have been too late to determine the cause of the problem. Thin stems and a low plant count can be caused by many factors. Seed quality could have been a cause, but so could a multitude of other factors.
>
> . . .
>
> 10. **Expected Yields** — Statistics from Saskatchewan Agriculture show average canola yields ranging from about 18 to about 22 bushels an acre for the rural municipalities in that area of Saskatchewan for the 1997 growing season. Canola crops with heavy wild oats infestations would be more likely to yield less than the average. A printout of the Saskatchewan Agriculture statistics for this area is attached hereto as Exhibit "B".

[45] Mr. Hursh further states his conclusion at paragraph 11 of his affidavit:

> 11. **Conclusion** – Seeding too deeply, heavy weed pressure at an early stage of crop development and poor quality seed are the three most probable causes of the poor plant stand and poor yield. Often factors work in combination. Two or even three of these factors may have been involved. However, there is no way to rule out any of the possible causes, or make a definite determination from the information provided.

[46] The evidence of the plaintiff's claim for the amount of its account for goods sold is set forth in the affidavit of Tanya Perkins. The defendant admits

that he entered into a credit application and credit agreement with the plaintiff on or about April 5, 1988, and does not dispute the terms of the agreement nor the plaintiff's calculation of interest. Between April 4 and June 9 of 1997 the defendant purchased and received goods from the plaintiff at a cost of $10,726.26. While the credit agreement prescribes a rate of interest of 1.75% per month, compounded monthly (23.15% per annum) such rate was voluntarily reduced by the Saskatchewan Wheat Pool to 1.33333% per month, compounded monthly (17.23% per annum). The plaintiff states that the sum of the principal and interest as of July 31, 2004, was $30,397.73. The plaintiff seeks interest at the contractual rate to the date of judgment.

THE LAW

[47] The claim of the plaintiff to recover the liquidated sum of its debt is unremarkable.

[48] The defendant's counter-claim is based upon the allegation that the Innovator canola seed sold was not of merchantable quality and fit for its intended purpose.

[49] Counsel for the plaintiff cite an excerpt from the text, *Sale of Goods in Canada*, 4th ed (Toronto: Carswell, 1995) where at p. 213 the author, Professor Fridman, states:

> . . . The onus on the buyer is to establish the defective quality of the goods on the balance of probabilities, once the buyer has proved that the court should reject other probable causes of the alleged

> defect in the goods in question. In the absence of satisfactory evidence, no finding that the goods are not merchantable can be made.

[50] The quality of seed sold to farmers which fails to produce are reasonable crop has been a recurring cause of action before the courts.

[51] In the decision *United Grain Growers v. Frank Palfy*, 2001 SKQB 342, [2001] S.J. No. 446 QL (Sask. Q.B.) the plaintiff sued for the price of seed and other agriculture products it sold to the defendant Palfy. Much like the defendant Steffenson, the defendant Palfy defended UGG's claim and counter-claimed that the seed was not fit for the purpose and was not of merchantable quality. He too sought damages for his losses. In that decision Mr. Justice Zarzeczny stated at para. 5 of his judgment the following:

> [5] In the cases of *United Grain Growers Limited v. 613470 Saskatchewan Ltd.*, 2001 SKQB 111; [2001] S.J. No. 126 (QL); *United Grain Growers Limited v. Johansen*, 2001 SKQB 145; [2001] S.J. No. 164 (QL) and *Ulrich v. Saskatchewan Wheat Pool*, [1997] S.J. No. 760 (QL) (Q.B.), the Court of Queen's Bench affirmed the view that a simple deposition of or claim by a party to an opinion that crop losses or yield reduction are attributable to poor seed grain, pesticides or herbicides sold is not acceptable as evidence of that opinion. A reduction in yield can occur for any number of reasons. No objective or independent evidence was presented by the defendant to support the opinion which he apparently holds.

[52] In this case, Steffenson makes the same assertions as the defendant, Palfy. However, in addition, Mr. Steffenson relies on the evidence of Mr. Hamm of darWall Consultants Inc. The latter opinion is of little assistance for the reasons set forth earlier.

[53] The court will not speculate as to what factors or combination of factors were operative and contributed to the lack of seed performance. The germination tests attest to the quality of the seed to germinate an average of 93.4% of the time. Both experts for the plaintiff and defendant advise the court that numerous other factors may have caused the failure of the seed to produce a viable and acceptable canola crop.

[54] The decision, *Kolibab v. Tenneco Canada Inc.* (1996), 147 Sask. R. 67 (Sask. Q.B.), while not a seed case, addresses the evidentiary problem of failing to adduce sufficient evidence to explain defective goods. At para. 21 of that decision Klebuc J. states:

> [21] . . .
>
> The evidence in the instant case falls far short of directly identifying a manufacturing or design error with respect to the Case seeder. Consequently for Kolibab to succeed, the evidence must eliminate, on a balance of probabilities, all other probable causes for his losses in order that I may infer that his losses are attributable to an unidentified defect in the Case seeder of a nature that breaches either implied condition.

[55] In an Alberta decision, *United Grain Growers Ltd. v. Tom Genenis* 2002 ABQB 851; [2002] A.J. No. 1146 QL (Sask. Q.B.) a similar analysis was given by the court where a defendant, upon being sued for the price of feed, counter-claimed alleging that the feed was not of merchantable quality and fit for its intended purpose. The evidence adduced by the defendant upon counterclaim was neither definitive nor suffice to establish his claim. Again, the court proceeds

with a similar analysis of how the law and causation is to be approached. At paras. 58 and 59 Verville J. writes:

> ¶58 In the sale of goods context, one may infer that the cause of damage was defective goods if other possible causes, including the buyer's conduct, are ruled out as possible causes of damage: See *Schreiber Brothers v. Currie Products*, [1980] 2 S.C.R. 78, (1980), 108 D.L.R. (3d) 1 at 6, where Laskin C.J. stated "the plaintiff purchaser, suing for damages for breach of the implied condition of merchantable quality, had the burden of proof, in the light of the pleadings, of excluding its faulty workmanship as a probable cause of the blistering of the asphalt"; and see Fridman, where the case is summarized as follows:
>
> > Where a buyer alleges that goods are not of merchantable quality it may not be necessary for the buyer to prove affirmatively that the goods were defective. The trial court is entitled to draw the inference of defective quality even though the cause of the defect remains unknown, as long as the buyer provides evidence from which the buyer's own faulty workmanship is excluded as a possible cause of the defect in the goods: *Sale of Goods* at 212-13.
>
> ¶59 For Genesis to succeed, then, he must prove not only that the feed was not fit for the purpose or that it was of unmerchantable quality but also that the feed was an effective or dominant cause of his losses. In absence of evidence of faulty feed, Genesis can only succeed if his own practices are excluded as a cause of the damage. If Genesis' own conduct or practices contributed to the loss in a substantial enough fashion, he may not be able to prove causation. Further, if the Unifeed feed caused the losses, but Genesis' practices also contributed to the losses, his damages may be reduced.

CONCLUSION

[56] This case poses the question — what caused the canola seed to perform as poorly as it did? The defendant relied upon Mr. Hamm to determine the cause of the crop failure. He was unable to do so. Mr. Hamm expressly stated that the determination was beyond the scope of his assessment. Mr. Hamm, like

Mr. Hursh, both being agrologists, identified to the court a list of factors which might explain the instant crop failure. Neither was able to proffer an opinion of the cause of this particular crop failure. Was it the lack of moisture? Was it a herbicide failure? Was the failure to control wild oats a contributing causal factor? Might any of the other factors attested to by either Messrs. Hamm or Hursh be causally related to the loss? Would the cross-examination of Mr. Hamm have benefited the plaintiff or the defendant or added nothing more?

[57] The defendant has not established, upon the balance of probabilities, that the Innovator canola seed sold to him by the plaintiff was defective. The defendant has not proved that the court should reject the other probable causes of the crop failure. The evidence must eliminate, on the balance of probabilities, all other causes for the defendant's crop failure attributable to his conduct in order that the court may infer that the crop failure was attributable to defective seed. Accordingly, the counter-claim is dismissed.

[58] The plaintiff shall have judgment for the sum of $30,397.73 plus interest to be calculated from August 1, 2004, to the date of judgment at 17.23% per annum.

[59] The plaintiff shall have its costs to be paid by the defendant as taxed.

[60] Finally, the plaintiff moved for a non-suit at the conclusion of the evidence led by the defendant upon his counter-claim. At that stage of the trial the court must determine whether there was any evidence, if left uncontradicted, upon which the court must reasonably find for the plaintiff by counter-claim. If

there was such evidence the non-suit motion should be dismissed. If there was not such evidence, the non-suit motion should be granted, sparing the defendant by counter-claim the need to call evidence.

[61] Again, from the text, *Law of Evidence in Canada*, the learned author stated at paras. 5.4 and 5.5 the following:

> **§5.4** The trial judge, in performing this function, does not decide whether he or she believes the evidence. Rather, the judge decides whether there is any evidence, if left uncontradicted, to satisfy a reasonable person. The judge must conclude whether a reasonable trier of fact could find in the plaintiff's favour if it believed the evidence given in the trial up to that point. The judge does not decide whether the trier of fact should accept the evidence, but whether the inference that the plaintiff seeks in his or her favour could be drawn from the evidence adduced, if the trier of fact chose to accept it:
>
> > It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever.
>
> **§5.5** The ruling by the trial judge on the non-suit motion is a question of law. The judge is not ruling upon whether he or she is satisfied to a balance of probabilities or upon the believability of the evidence, since these issues are questions for the trier of fact. If the plaintiff has failed to adduce any evidence in his or her case in chief and the defendant brings a successful non-suit motion, then the plaintiff's action will be dismissed. Because it is a question of law, the judge's assessment of the plaintiff's evidence, or the defendant's evidence on the counter-claim for that matter, is subject to review by an appellate court.

[62] I reserved on the non-suit motion. Weighing the evidence adduced by the defendant on the counter-claim I would have granted the non-suit motion and dismissed the counter-claim.

_____J.
N.S. Sandomirsky

In the Court of Appeal of Alberta

Citation: Roswell Group Inc v 1353141 Alberta Ltd, 2020 ABCA 428

Date: 20201204
Docket: 1903-0218-AC
Registry: Edmonton

Between:

1353141 Alberta Ltd
Adarsh Gupta and Dervinder Gupta

Respondents
(Plaintiffs/ Defendants by Counterclaim)

- and -

Roswell Group Inc and Raj Kumar

Appellants
(Defendants/ Plaintiffs by Counterclaim)

The Court:

The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Jo'Anne Strekaf

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Madam Justice B.L. Bokenfohr
Dated the 24th day of July, 2019
Filed on the 20th day of September, 2019
(2019 ABQB 559, Docket: 1103 16585; 1103 02638)

Memorandum of Judgment

Introduction

[1] The appellants, Roswell Group Inc (Roswell) and Raj Kumar (Kumar), appeal the decision of the trial judge rendered on July 24, 2019 (the Judgment) in Court of Queen's Bench action numbers 1103 02638 (the First Action) and 1103 16585 (the Second Action). None of the findings in the First Action are being appealed.

[2] In addition, the respondents 1353141 Alberta Ltd (135 Alta) and Adarsh Gupta and Dervinder Gupta bring two applications. The first is an application to permit the late filing of an application to admit new evidence, and second if successful, is an application to admit new evidence.

[3] These two applications are required since counsel for Roswell and Kumar refused to provide written permission to allow into evidence on the appeal nine items of correspondence exchanged between counsel and the trial judge subsequent to the Judgment.

[4] For the reasons that follow, both applications are granted and the appeal dismissed.

Background Facts

[5] Kumar is the brother of Adarsh Gupta. In 2006, the individual parties purchased a business condominium (the Condominium Property) which they intended to develop. There was no dispute that they had an agreement to be partners in a joint venture but the agreement was unwritten.

[6] In 2018, the Condominium Property was transferred into the names of the two corporate parties: 135 Alta, owned by Adarsh Gupta and Devinder Gupta and Roswell, owned by Kumar. The corporations thereby became parties to the unwritten partnership agreement. Renovations were made to the Condominium Property and portions rented to tenants. The rental payments went into the joint bank account used by the partnership.

[7] Sometime in 2009, Adarsh Gupta became suspicious regarding some withdrawals paid to Roswell from the joint account. Consequently, in December 2010, the Guptas changed the signing authority for the joint account. At trial, they testified that they had intended to change the signing authority to require that withdrawals be signed by Kumar and either Adarsh or Devinder Gupta. However, the bank mistakenly changed the signing authority for the joint account so that any two of the three partners could sign. The Guptas returned to the bank to rectify the error. However, Kumar claimed that the Guptas were trying to defraud him and would not accept their explanation for the mistake.

[8] Indeed, on December 20, 2010, Kumar sent the Guptas the following email:

> Thank you for changing the bank profile Be prepared to pay for all the auto withdraw! payments to bounce, checks I have written to bounce. I will not deposit any money to the account from here on wards. I will be billing the partnership $130,000 for services rendered so far I will not lease both units upstairs. The subdivision process will stop in its tracks. The interest will mount at of all monies owed to Roswell Group Inc. I will not put a cent for Jan 1, 2011 payments They will bounce and you will be held responsible due to the fact that you. I took money out of the account without considering that all accounts payables have to be dealt with first.
>
> **I was making money for you but too much greed got you. Now you will see nothing coming in. Watch me in action to destroy everything I built for you so far.** [emphasis added]

[9] Commencing late December 2010 onwards, Kumar and Roswell began to deposit rent payments from the Condominium Property tenants into their personal bank accounts rather than the partnership joint account.

[10] On February 15, 2011, 135 Alta and the Guptas commenced the First Action naming Roswell and Kumar as defendants. In the First Action, 135 Alta and the Guptas alleged that Roswell and Kumar wrongfully paid themselves monies that neither were entitled to and sought special damages in the amount of $83,476.60 and further punitive damages in the amount of $100,000.

[11] During the course of the First Action, counsel for Roswell and Kumar sent an email dated September 23, 2011 (the September 23 email) to counsel for 135 Alta and the Guptas which provided as follows:

> **From:** Gary Zimmerman [mail to:gzimntermann@mross.com]
>
> **Sent:** September-23-11 11:48 AM
>
> **To:** Stew Baker
>
> **Subject:** Gupta v. Roswell - Offer
>
> Stewart, please find attached documents supporting my client's assessment and forming the background to the multi-faceted offer.
>
> Option 1. Raj can buy their one half share for the price of $315,225. The offer is fully supported with factual sources of data. The data is most current, in the same area of the subject property, similar in quality and amenities. The subject property

has less parking spaces than the properties compared with. See all seven sheets attached herewith.

Option 2. They can buy Raj's share for the same price and terms.

Option 3. They can divide the property in an amicable manner. Then, your clients can list their one half share in MLS and sell it or keep it.

Option 4. Connected to number 3 (above). **There are two identical floors. Each partner can take one floor, however the main floor will cost $45000 to whoever takes it Raj can take the main floor and pay them $45000 or they can take the main floor and pay me $45,000.** This is again based on the main floor costs $20/sq ft more than the upper floor.

Further, I can advise that Raj applied for a first mortgage with Royal bank of Canada on Sept 7, 2011. Further, he applied to Canada Mortgage on Sept 8, 2011

The offers to buy is [sic] subject for raising first mortgage within 90 days. He will offer the same to them should they decide to buy his share.

Please note that the property has four titles, however the four titles are no longer legal as the City has revoked the Permit to Build and subdivide. (See Page A1 and A2 attached herewith). As such, splitting the property seems like a viable option.

The court should be notified that it is pointless to appoint a receiver as Raj has managed the property without compensation professionally and he is ready to defend and account for every penny collected as rent. There are no outstanding debts at this time and there is no money in the bank account to be disbursed. The expenses made were to ensure that the owner comply with City's requirement to obtain an occupancy permit. There are a few small things that still need to be done and only then can the City officers attend for a final inspection to obtain an occupancy permit.

Of course, this is all premised on the fact that the litigation will continue, regardless of the state of ownership of the property.

I look forward to your reply. Please feel free to contact me at your convenience and preferably before Monday at noon.

[emphasis added]

[12] On Monday, September 26, 2011, 135 Alta's counsel by letter accepted option 2 to purchase Roswell's half interest and in so doing stated:

> I wish to confirm that my client has accepted your client's offer to sell his share of the lands and building for the sum of $315,225. Our client's purchase of your client's interest can be carried out very quickly. We would expect to be in a position to close the transaction by October 15, or October 31, 2011, at the latest. Your client is to vacate the premises and provide all keys to the building and internal offices.

[13] However, on October 5, 2011, counsel for Roswell and Kumar replied stating in part:

> I have been advised and instructed to notify you that the correspondence forwarded on September 23, 2011 did not constitute an offer. It was forwarded for discussion purposes only. Additional terms for discussion purposes, as listed by Mr. Kumar include…

[14] On October 7, 2011 by letter of even date, 135 Alta tendered $315,225 to Roswell's counsel along with the transfer of land for Roswell's signature. Roswell refused to sign and returned the monies and transfer documents instead.

[15] On October 20, 2011, 135 Alta commenced the Second Action alleging breach of the purchase and sale agreement and seeking specific performance as well as punitive damages. An application for specific performance was brought by 135 Alta but dismissed by the Master in May 2012. Thereafter, 135 Alta amended its Statement of Claim in the Second Action to seek, in the alternative to specific performance, general damages for loss of profit from the rentals or resale.

[16] On August 2017, the Condominium Property was sold by court order and the monies held in trust until further court order. It was sold for more than twice its original purchase price of $500,000.

Decision of the Trial Judge

[17] Regarding the First Action, the trial judge found the parties contributed equally in compliance with their unwritten partnership agreement. She accepted the testimony of the Guptas regarding changing the signing authority for the joint bank account. She found Kumar and Roswell comingled partnership monies with personal accounts and in the result awarded judgment in favour of 135 Alta in the amount of $149,646.31. In addition, she concluded that Kumar's misconduct justified an award of punitive damages in the further amount of $50,000.

[18] Regarding the Second Action, the primary issue at trial was whether there was a binding agreement as a result of the exchange of correspondence between the parties' counsel. The trial judge further identified at para 155 of the Judgment the following sub-issues:

> i. Was there a valid Offer and Acceptance between the parties in this case?
>
> ii. Are the three essential terms present?

iii. Are the requirements of the *Statute of Frauds* met in this case? and

iv. Is a formal memorandum – Transfer of Land – required in Alberta for a valid transfer of interest in land?

[19] The trial judge rejected Roswell's argument that the September 23, 2011 email was only a starting point for discussion and that the price tag of $315,225 was for raw, undeveloped land. She found nothing referred to raw land as opposed to the Condominium Property; in particular there was reference to the main floor costs. She found the email clearly was referring to the Condominium Property.

[20] The trial judge found the September 23 email was structured in a "buy and sell, shotgun" manner. She found it was not a misconstrued proposal as Roswell had argued as there was nothing to misconstrue. She also found that Roswell's counsel did not require written authorization to act as agent for Roswell as the authorization was implicit in the circumstances of the case.

[21] Additionally, Kumar testified that he instructed his counsel and there was no evidence suggesting any limitation on the authority of Roswell's counsel to 135 Alta's counsel. She concluded that Roswell intended to and did make an initial offer to 135 Alta as the receiving party. She further found that 135 Alta validly accepted the offer and once accepted, it could not be withdrawn by Roswell.

[22] The trial judge also found that Roswell's counsel had the lawful authority to sign on Roswell's behalf as its agent. She concluded that the emailed signature of Roswell's counsel, appended to the September 23 email, satisfactorily met the signature requirement under section 4 of the *Statute of Frauds* since the purpose of the signature requirement was met as the source and authenticity of the document was clear. She also found that a formal contract for transfer of an interest in land is not required as long as there is compliance with the *Statute of Frauds*.

[23] The trial judge found that the first two of the three essential terms for a contract were clear: the parties were Roswell and 135 Alta and the property was the Condominium Property. Whether the price was certain because there was no reference to GST, the trial judge found that the GST issue was made certain by operation of law. Since 135 Alta had a GST registration, it is the party with the statutory obligation to pay the GST, citing section 221 and 228 of the *Excise Tax Act* (Canada). Specifically, the trial judge found that the purchase price was $315,225 with GST payable by the purchaser 135 Alta being a registrant under the *Excise Tax Act* (Canada). Therefore, she found the three essential terms for a valid contract were present. She further found that in the context of a transfer of an interest in land in relation to a jointly owned commercial property, the terms of payment, closing date and possession date were not essential.

[24] The trial judge rejected Roswell's argument as it relates to the "subject to financing" provisions. She pointed out that 135 Alta did not seek to finance the purchase of Roswell's interest in the Condominium Property; it was Roswell that potentially required financing and sought to

extend that same optional condition to 135 Alta. She held that in the circumstances, financing was neither an essential term for a transfer of land nor a mandatory condition for all and every real estate transaction. In any event, she found that even if it had been a condition of sale, it was available to 135 Alta to waive that condition by paying the purchase price in cash, which is what it did.

[25] In the result, she found that 135 Alta was entitled to the ultimate sale price of $1,003,280 less the email price tag offer of $315,225. She also awarded damages for lost rental revenue from October 2011 to August 2017, which she calculated at paras 242 to 246 of the Judgment to be as follows:

> Unit 102 was occupied October 2011 to August 2014 at a constant rental rate of $3,728.33. Unit 102 was unoccupied September 2014 to August 2017. 135 Alta is entitled to lost rental revenue for the time period that Unit 102 was unoccupied. Given that the rental rate was constant for a three year period, it is appropriate and fair to use that rental rate ($3,728.33) for that period. The Unit did have a historical vacancy rate of 20% therefore it is appropriate and fair to adjust the damages awarded for lost rental revenue for this Unit to account for a 20% vacancy rate.
>
> Unit 201 was unoccupied October 2011 to August 2017. The Unit had an actual historical average rental rate of $2,075.00. Lost rental revenue is awarded using the actual historical average rental rate. The pattern of occupancy does not lend itself to calculating a historical vacancy rate; however, some vacancy rate is appropriate. Therefore, the 20% vacancy rate of Unit 102 shall be used.
>
> In [the First Action], I found that Unit 202 was occupied by the Defendants – Roswell Group Inc and Raj Kumar – and held that the Defendants owe the Partnership for unpaid rents for the period between August 2009 and August 2017.
>
> The damages awarded to 135 Alta for lost rental revenue in [the Second Action] must be offset by the actual amount of rent received in [the First Action] during the time period.
>
> The damages awarded for lost rental revenue must be adjusted to take into account the condo fees, property taxes and utilities that 135 Alta would have been required to pay.

[26] The trial judge then directed at para 247 that the parties were to prepare the mathematical calculations that resulted from these findings and to seek assistance of the expert if necessary. She also gave leave to the parties to come back before her for resolution of any issues that might arise.

Respondents' Application to Adduce New Evidence

[27] As indicated above, the trial judge left it to the parties to prepare the mathematical calculations of the damages and encouraged them to seek the assistance of an expert if necessary. Gregory M. Bendall, CPA, CA of SVC Group LLP had been previously retained as an expert with agreement of the parties. Counsel for 135 Alta and the Guptas and the trial judge made repeated requests for comments from Roswell and Kumar with respect to the calculations and the draft Judgment Roll over a period of five weeks. Roswell and Kumar choose not to respond.

[28] There are nine specific items of correspondence that counsel for 135 Alta and the Guptas wished to refer to. The correspondence originated subsequent to the filing of the Judgment. Counsel for Roswell and Kumar refused to give the requisite written consent to permit the correspondence to be referred to on appeal and accordingly, 135 Alta and the Guptas were required to bring two applications, that being an application to permit the late filing of the application to admit new evidence and the actual application to admit new evidence. Counsel were advised by the Case Management Officer that both applications would be heard in conjunction with the appeal itself.

[29] Counsel for Roswell and Kumar were advised of rule 14.49 which provides that "A respondent who fails to respond to an application or who elects not to file a memorandum in response to the application may not present oral argument at the hearing of the application unless the single appeal judge, or the panel of the Court of Appeal otherwise permits." Notwithstanding this however, counsel for Roswell and Kumar declined to provide any written submissions in opposition to the applications. At the commencement of oral argument, counsel for Roswell and Kumar was advised that in keeping with this Court's practice in *Carbone v McMahon*, 2015 ABCA 263, he would not be allowed to make oral submissions opposing the two applications.

[30] The Guptas and 135 Alta rely upon rules 14.45(1), 14.70, and 14.73. They concede that they failed to file an application to adduce new evidence in a timely manner. However, they assert that Roswell and Kumar had received notice of the new evidence when they filed their factum in May and thus were not prejudiced.

[31] The test to be met in order to succeed on an application to admit new evidence on appeal was stated by this Court in *Santoro v Bank of Montreal*, 2019 ABCA 322 at para 23 as follows:

> The test for the admission of fresh evidence on appeal, as set out in *Palmer v The Queen*, [1980] 1 SCR 759 at 775, and *Public School Boards' Assn. of Alberta v Alberta (Attorney General)*, 2000 SCC 2 at para 6, is as follows:
>
> > (a) the evidence should not generally be admitted if, by due diligence, it could have been adduced at trial;

> (b) the evidence must bear upon a decisive or potentially decisive issue in the trial;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence, if believed could reasonably, when taken with other evidence adduced at trial, be expected to have affected the result.

In our view all four requirements of the test for the admission of new evidence on appeal have been met and accordingly, the application is granted.

[32] First, the proposed new evidence refers to matters that occurred after the trial was concluded. Second, at para 247 of the Judgment, the trial judge left it to the parties to agree on the mathematical calculations and encouraged them to seek the assistance of an expert.

[33] Third, the new evidence consists of a series of correspondence between the two counsel and the trial judge and as a result, the new evidence is reasonably capable of belief. Fourth, the new evidence, if believed, could reasonably be expected to affect the result of the issues raised by Kumar and Roswell regarding the calculation of damages.

Grounds of Appeal

[34] The first ground of appeal raised by Roswell and Kumar was that the trial judge erred in law in finding that there was a binding contract to transfer Roswell's interest in the Condominium Property to 135 Alta.

[35] In the alternative, Roswell and Kumar raise the following three grounds of appeal:

a) The trial judge erred in calculating damages for breach of contract by failing to account for the closing costs incurred to liquidate the Condominium Property and the calculation of the damages for breach of contract;

b) The trial judge erred by awarding damages for lost rent for units 102 and 201 when the Guptas and 135 Alta's failed to prove damages; and

c) The calculation used to determine damages for lost rent in the Judgment Roll mistakenly included damages for lost rent for unit 202 when the trial judge did not award such damages.

Standard of Review

[36] Contractual interpretation involves issues of mixed fact and law and it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract,

considered in light of the factual matrix: *Creston Molly Corp v Sattva Capital Corp*, 2014 SCC 53 at para 50.

[37] Nevertheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law. Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor". Moreover, there are many questions that do engage substantive rules of law: *Sattva Capital* at para 53.

[38] The standard of review for damage awards is high and assessment of damages should only be interfered with when a wrong principle of law was applied or the overall amount was a wholly erroneous estimate: *Robinson v Williams (Estate of)*, 2007 ABCA 19 at para 10.

Analysis

[39] No appeal has been taken from the findings with respect to the First Action. As a result, the damages awarded in the First Action, being in the amount of $149,646.31 for general damages is not being challenged nor is the award of punitive damages in the further amount of $50,000.

[40] That being so, the only issues to consider are those being raised with respect to the Second Action.

Did the trial judge err in law by finding that there was a binding contract to transfer Roswell's interest in the property to 135 Alta?

[41] In their factum, Roswell and Kumar argue there was no binding agreement because there was no agreement on the price (whether GST was included or not), adjustment date for rents, closing date and possession date.

[42] They argue that whether or not GST is included in the sale price is not determined by statute as the trial judge found. There was a tenant paying rent in Unit 102, which would have to be adjusted. There was no reference to a closing or possession date, which they submit are essential terms. They further argue that the trial judge's reasons for departing from the traditional law that the adjustments of rent, the closing date and the possession date are material terms, was because the parties were business partners, the offer was in a "shot gun" format, and the purchase price was tendered within a reasonable time, did not constitute principled reasons for ruling that these were not essential terms.

[43] For their part, the Guptas and 135 Alta point to the fact that the subject line of the September 23 email read "Gupta v Roswell - Offer" and that there were repeated references in the September 23 email to it being an offer. In addition, there was no wording that it was not to be construed as an offer. They further submit that the essential terms were found and the other terms

were not essential. Lastly, they submit that Kumar and Roswell rely on arm's length real estate purchase contract cases, which the trial judge found inapplicable in the circumstances of this case.

[44] Counsel for Roswell and Kumar cite this Court's decision in *Ko v Hillview Homes Ltd,* 2012 ABCA 245 at para 101, for the proposition that "Even uncertainty in other important matters beyond parties, property or price renders the supposed contract void."

[45] However, the facts in *Ko* were very different from the facts of this case. Ko contracted Hillview Homes Ltd (Hillview) to build a house. The house was never built. The written agreement between the parties contained several documents that included a one-page Addendum A which listed some 16 extra items. There was no issue with respect to 15 of those items and the lawsuit devolved to the other item which simply read: add 1666 x 80.

[46] It was agreed (and stated in Addendum A) that the house to be built was Hillview's existing standard plan "Los Cabos II" which plan was introduced into evidence. However, the effect of the item in Addendum A was that the agreement did not call for the construction of the standard 2834 square foot "Los Cabos II" house but rather one that was 1666 square feet bigger. The matter proceeded to trial and Ko was successful against Hillview. The relief granted, however, was rather unusual and included: a declaration in the abstract that the contract was valid and enforceable; a second declaration that Hillview had unilaterally breached the agreement; specific performance of only the part of the agreement calling for the sale of the lot and payment at an unspecified price; an award of damages to be assessed at a second trial; and a declaration of a caveatable interest.

[47] This Court allowed the appeal and declared that the agreement failed for lack of a material term. This Court noted specifically at para 91 that what terms are essential depends upon the type of contract so that what may be sufficient specificity to make a valid contract to purchase an existing lawnmower may not be enough for a contract to construct a new house. In our opinion, *Ko* does not assist Roswell and Kumar. This case does not involve the construction of a new building but rather a non-arm's length offer made by one partner/co-owner to another to acquire the other's interest in the pre-existing building.

[48] The September 23 email was prepared and sent in the context of the First Action by the counsel/agent for one co-owner of the Condominium Property (Roswell) to the counsel/agent of the other co-owner (135 Alta). It was described to be an offer both in its subject line and also in the body of the email itself. There was certainty of parties, namely, Roswell as offeror and 135 Alta as offeree; and there was certainty of the subject matter, namely, the Condominium Property. The argument that the September 23 email somehow pertained to raw property is clearly untenable. Furthermore, there was certainty of the purchase price and the burden of paying the GST was properly resolved by statutory considerations as found by the trial judge, i.e. sections 221 and 228 of the *Excise Tax Act* (Canada).

[49] The argument that the contract was void because there was no condition dealing with adjustments for rent was not raised in the court below nor was it even pleaded by Roswell and Kumar. Accordingly, it will not be considered on appeal.

[50] The trial judge's holding that neither the closing date nor possession date were essential terms given the rather particular nature of this contract represents no error in our opinion. This after all was not an arm's length transaction between third parties; rather an offer extended by Roswell in the context of the existing litigation in the First Action.

[51] We therefore conclude that the trial judge's finding that there was a valid offer and acceptance and that all essential terms were present, discloses no basis warranting appellate intervention.

Did the trial judge err in calculating damages for breach of contract by failing to account for the closing costs incurred in the sale of the Condominium Property and the calculation of damages for breach of contract?

[52] Roswell and Kumar submit there was an error made by the trial judge in not recognizing the closing costs to sell the Condominium Property, which totalled $113,070.37. These costs were incurred for the benefit of 135 Alta but have not been accounted for. The costs were largely incurred due to the fact that the Condominium Property had to be sold pursuant to a judicial sale.

[53] For their part, the Guptas and 135 Alta argue that if Roswell had not breached the contract for sale, the Condominium Property would have been transferred with only nominal costs and the $113,070.37 closing costs would not have been incurred.

[54] The testimony of the Guptas was that they intended to keep the Condominium Property for the long term and had no plans to sell it. The fact that 135 Alta elected to purchase Roswell's interest in the Condominium Property rather than selling its interest to Roswell, underscores this point. Furthermore, there was no evidence as to what closing costs would be in any future sale. It is noteworthy that the Condominium Property was sold pursuant to judicial proceedings and the closing costs greatly enhanced as a result. We agree with the trial judge's treatment of this item.

[55] There is no merit to this ground of appeal and it is dismissed.

Did the trial judge err in the calculation used to determine damages in the lost rent in the Judgment Roll by mistakenly including damages for units 102 and 201?

[56] Roswell and Kumar submit that the Guptas and 135 Alta failed to prove damages for loss of rent for units 102 and 201. Roswell and Kumar submit that the evidence at trial confirmed 135 Alta took no steps to find tenants and adduced no evidence to support this claim for damages.

[57] The Guptas and 135 Alta submit that entitlement to damages for rental revenue is a finding of fact, and the appellants have not shown palpable and overriding error. Further, evidence establishing the units could or should have been rented is a mitigation issue, the onus of which lies upon Roswell and Kumar to establish and which they failed to do.

[58] We note that the trial judge had previously held (at para 142), that subsequent to his email of September 20, 2010, Kumar was "grinding the partnership business to a halt". Given this fact finding, it is hardly surprising that the trial judge did not make any finding that the Guptas and 135 Alta failed to mitigate their damages. To the contrary, it was due to Kumar's actions that the business virtually ceased to exist.

[59] In the result, we see no merit to this argument and it is dismissed.

Did the trial judge err in calculations used to determine damages for lost rent in the Judgment Roll by mistakenly including damages for unit 202?

[60] Roswell and Kumar claim that the Judgment Roll improperly added damages for lost rent on unit 202. These were not ordered but were included in the SVS calculations and erroneously relied upon by the trial judge when signing off on the Judgment Roll.

[61] The Guptas and 135 Alta submit that the trial judge did award damages for lost rent for unit 202 and refer to paragraphs 240-246 of the Judgment (reproduced at para 25 *supra*). The Guptas and 135 Alta further submit the actual calculation of damages was left to the parties who were to be assisted by the expert from SVS Group LLP. Despite repeated requests from the Guptas and 135 Alta and the trial judge for Roswell and Kumar to comment on the draft form of the Judgment Roll and proposed calculations of damages, they chose not to.

[62] Given their decision not to respond, it ill-behooves Roswell and Kumar for the first time on appeal to argue what should be the proper calculation of damages in this matter. Be that as it may, it is clear from paragraphs 244 and 245 of the Judgment that the trial judge found in the First Action that Roswell and Kumar owed the partnership for unpaid rents for the period August 2009-August 2017. This had been previously calculated by her to be in the amount of $152,755 (para 144(f)). She then went on to award 135 Alta for lost revenue with respect to unit 202 in the Second Action but directed that it must be off set by the actual amount of rent received during the same time period. In any event, despite extensive arguments advanced during oral argument, we find there to have been no palpable and overriding error made by the trial judge in her assessment of damages on this matter. Therefore, appellate intervention is not warranted.

[63] We therefore dismiss this ground of appeal.

Conclusion

[64] For the reasons set out above, the applications brought by 135 Alta and the Guptas are allowed and the appeal itself is dismissed.

Appeal heard on November 3, 2020

Memorandum filed at Edmonton, Alberta
this 4th day of December, 2020

McDonald J.A.

Schutz J.A.

Strekaf J.A.

Appearances:

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