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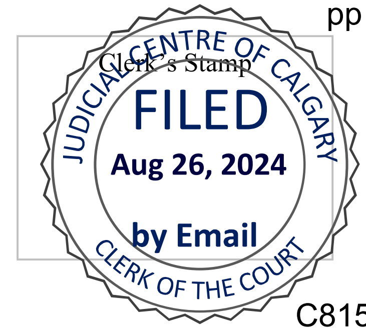

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JUDICIAL CENTRE	CALGARY
PLAINTIFF	**CANADIAN IMPERIAL BANK OF COMMERCE**
DEFENDANT	**KORITE INTERNATIONAL LIMITED PARTNERSHIP AND KORITE INTERNATIONAL GP INC.**

BENCH BRIEF OF CANADIAN IMPERIAL BANK OF COMMERCE

APPLICATION TO BE HEARD BY THE HONOURABLE JUSTICE K.M. HORNER

September 5, 2024 at 2:00 P.M. (Commercial List)

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BORDEN LADNER GERVAIS LLP** Ryan Laity/Jennifer Pepper Borden Ladner Gervais LLP 1900, 520 – 3rd Avenue SW Calgary, AB T2P 0R3 Telephone: (604) 632-3544/ (604) 640-4106 Email: rlaity@blg.com/ jpepper@blg.com File No. 500007/005947

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I. INTRODUCTION

1. This Bench Brief is submitted in support of the application of Canadian Imperial Bank of Commerce ("**CIBC**") for, *inter alia*:

   (a) an Order (the "**Receivership Order**") appointing KSV Restructuring Inc. ("**KSV**") as receiver (when referred to in such capacity, the "**Receiver**") of Korite International Limited Partnership ("**Korite LP**") and its general partner, Korite International GP Inc. (the "**General Partner**" and, together with Korite LP, the "**Debtors**");

   (b) an Order (the "**Approval and Vesting Order**") approving the sale transaction (the **"Transaction**") contemplated by the asset purchase agreement dated August 23, 2024 (the "**Asset Purchase Agreement**") between Korite LP and Buffalo Rock Mining Co. Ltd. (the "**Purchaser**");

   (c) an Order (the "**Restrictive Court Access Order**") temporarily sealing the confidential exhibits (the "**Confidential Exhibits**") attached to the proposed Receiver's report dated on or about August 26, 2024 (the "**Proposed Receiver's Report**"); and

   (d) an Order (the "**Discharge Order**") discharging the proposed Receiver, as receiver of the Debtors, conditional upon the completion of certain administrative tasks, as well as various related relief including, *inter alia*, authorizing the Receiver to make distributions to CIBC from the net sale proceeds of the Transaction, and approving the proposed Receiver's actions, conduct and activities.

2. The Asset Purchase Agreement, the Transaction and the Discharge Order are supported by CIBC and should be approved because all contemplated steps: (i) are commercially reasonable and appropriate, and (ii) facilitate the best outcome for the Debtors and their stakeholders in the circumstances.

II. FACTUAL BACKGROUND

3. The facts and background for the Application are set out in the Affidavit of Kadira Carter sworn on August 26, 2024 (the "**Carter Affidavit**") and the Proposed Receiver's Report. A summary of these facts are set out below.

4. Unless otherwise indicated, capitalized terms used herein have the meanings given to them in the

Carter Affidavit and the Proposed Receiver's Report, as applicable.

A. Background

5. Korite LP operates an independent production and distribution company focused on the mining and refining of ammolite gemstones and ammonite fossils, the finishing of ammolite gemstones into jewelry and ammonite fossils into finished specimens, and the sale of these products to both wholesale distributors and end users.[1]

6. The Debtors are indebted to CIBC, pursuant to the Credit Agreement (as defined below) in the amount of CAD$4,752,951.00 and US$3,824,501.59 as of August 1, 2024.[2]

7. Such liabilities relate to certain credit facilities provided by CIBC (collectively, the "**Loans**") to Korite LP pursuant to a credit agreement dated as of December 18, 2020, as amended (collectively, the "**Credit Agreement**").[3]

8. Furthermore, the Loans are secured by certain Security, which has been properly registered in the appropriate Alberta registry.[4] The Security includes, *inter alia:*

   (a) a debenture granted by Korite LP in the principal secured amount of $8,750,000, encumbering certain mineral agreements and mineral rights (the "**Debenture**"); and

   (b) general security agreements from each of the Debtors, whereby the Debtors granted CIBC a security interest in all their present and after-acquired personal property (together, the "**Security Agreements**").[5]

9. CIBC has been the senior secured creditor to the "Korite" business since August 31, 2015, whereby CIBC acted as senior creditor to Korite's predecessor entity, Korite Minerals Ltd. The "Korite" business was negatively impacted by the COVID-19 pandemic as a substantial portion of its business revenue was from tourist sales on cruise ships sailing the Vancouver-to-Alaska route, which cruises had been banned by the Government of Canada.[6] To address their financial distress, the predecessor to Korite LP completed a strategic sale of its assets and business to Korite LP through a proceeding under the *Companies' Creditors Arrangement Act* (Canada), and the Credit

[1] Affidavit of Kadira Carter sworn on August 26, 2024 [**Carter Affidavit**], at para 5.
[2] Carter Affidavit, at para 28.
[3] Carter Affidavit, at para 6.
[4] Carter Affidavit, at paras 14-16.
[5] Carter Affidavit, at para 14.
[6] Carter Affidavit, at para 18.

Agreement was executed between CIBC and Korite LP.[7] In the years following the entering into of the Credit Agreement, Korite LP attempted to restructure its operations. However, these restructuring efforts were largely unsuccessful and Korite LP's general financial distress persisted.[8]

10. Pursuant to the Credit Agreement, the Loans were due and owing on or before March 31, 2024 (the "**Maturity Date**", as amended). Korite LP has failed to pay CIBC the indebtedness owed pursuant to the Credit Agreement by the Maturity Date, or at all.[9]

11. As a result of Korite LP's payment defaults, CIBC and the Debtors entered into a Forbearance Agreement dated as of April 1, 2024 (the "**Forbearance Agreement**"), whereby CIBC agreed to forbear from enforcing on the Security until June 30, 2024 (the "**Termination Date**"), on the basis that the Debtors strictly complied with the terms of the Forbearance Agreement. However, contrary to the Forbearance Agreement, the Debtors have failed to make payment of the debt owed, including interest and costs, on or before the Termination Date.[10]

12. Consequently, on July 24, 2024, CIBC issued (through its legal counsel, Borden Ladner Gervais LLP) letters to the Debtors demanding the immediate repayment of all debts, liabilities and obligations outstanding pursuant to the Credit Agreement, together with all interest, fees and other chargeable costs that continue to accrue (collectively, the "**Demand Letters**"). Enclosed in the Demand Letters were "Notices of Intention to Enforce Security" pursuant to Section 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "***BIA***").[11]

13. Notwithstanding the Demand Letters, the Debtors have failed to pay the amounts owing. Accordingly, the Debtors continue to be in default on their obligations under the Loans and the Security.[12]

B. The Sales Process

14. On February 25, 2024, CIBC engaged KSV as a financial consultant to assist CIBC and Korite LP conclude a strategic sale of Korite LP's business or otherwise wind-down operations in a manner that would maximize recovery to CIBC and stakeholders generally.[13] Since June 2023, the

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[7] Carter Affidavit, at para 19.
[8] Carter Affidavit, at para 20.
[9] Carter Affidavit, at para 21.
[10] Carter Affidavit, at paras 22 and 23.
[11] Carter Affidavit, at para 25.
[12] Carter Affidavit, at para 27.
[13] Carter Affidavit, at para 29; Proposed Receiver's Report dated August 26, 2024, at para 1.1(1) [**Proposed Receiver's Report**].

principals of Korite LP (with the assistance from a sale broker, Tailwind Ventures ("**Tailwind**") and oversight from KSV since February 2024) have undertaken a process to market for sale substantially all of Korite LP's business (the "**Sales Process**").[14]

15. As is more fully set out in the Proposed Receiver's Report, Tailwind undertook a number of steps to facilitate and carry out the Sales Process, including by:

    (a) assembling a list of 71 prospective purchasers located in Canada and abroad, including strategic parties, financial targets and art collectors;

    (b) launching the Sales Process in September 2023 by sending a "teaser" to the 71 parties it identified, which provided prospective purchasers with a description of the Debtors' business and the potential benefits resulting from a sale transaction; and

    (c) providing a detailed confidential information memorandum concerning the Debtors to nine interested parties, who were, prior to receipt of the memorandum, required to sign a non-disclosure agreement.[15]

16. The Sales Process resulted in multiple prior attempts to conclude a transaction. On April 2, 2024, Tailwind delivered a letter to prospective purchasers requesting binding offers by June 14, 2024 (the "**Bid Deadline**"). Korite LP did receive an acceptable offer by the Bid Deadline that it was actively pursuing, but was unable to advance the bid to closing.[16]

17. After the Bid Deadline, Tailwind followed up again with the potential purchasers and ultimately Korite LP entered into the Asset Purchase Agreement with the Purchaser.[17]

18. Tailwind has advised the proposed Receiver that it believes that the Transaction is (i) the best available in the circumstances, (ii) maximizes the value of the Debtors' business and assets, and (iii) that further time marketing the business would not result in a superior transaction.[18]

C. The Proposed Transaction

19. Pursuant to the Asset Purchase Agreement, the Purchaser seeks to acquire substantially all of the Debtors' business for the total cash consideration as set out in the unredacted Asset Purchase

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[14] Carter Affidavit, at para 31; Proposed Receiver's Report, at para 5.0(1).
[15] Proposed Receiver's Report, at para 5.0(2).
[16] Proposed Receiver's Report, at para 5.0(4).
[17] Proposed Receiver's Report, at para 5.0(5).
[18] Proposed Receiver's Report, at para 5.0(7).

Agreement (attached as Confidential Appendix "2" to the Proposed Receiver's Report).[19] As is more fully set out in the Proposed Receiver's Report, the Asset Purchase Agreement provides that:

(a) the Purchased Assets (as defined in the Asset Purchase Agreement) include substantially all of the Debtors' rights, title and interest in its property and assets as well as the Assumed Liabilities, and excludes the Excluded Assets and Excluded Liabilities (each as defined in the Asset Purchase Agreement);[20]

(b) the Purchased Assets will be sold on an "as is, where is" basis with limited representations and warranties;[21]

(c) the closing date is required to occur by no later than one day following court approval, with an outside date of September 20, 2024;[22] and

(d) the only material conditions precedent are that the Court shall have issued the Receivership Order and the Approval and Vesting Order, which will vest free and clear all the Debtors' interest in the Purchased Assets in the name of the Purchaser, except for certain permitted encumbrances. [23]

20. The Transaction is projected to result in a significant net loss to CIBC under its Security. Despite this anticipated outcome, CIBC is nonetheless supportive of concluding the Transaction because, among other things, it results in the best recovery for CIBC and is in the best interest of the Debtors and their stakeholders.[24]

III. ISSUES

21. The issues before this Honourable Court are as follows:

(a) whether the Receivership Order should be granted to help facilitate the Asset Purchase Agreement and the Transaction;

(b) whether the Asset Purchase Agreement and proposed Transaction should be approved and

[19] Proposed Receiver's Report, at para 6.0(1)(c).
[20] Proposed Receiver's Report, at para 6.0(1)(d)-(f).
[21] Proposed Receiver's Report, at para 6.0(1)(g).
[22] Proposed Receiver's Report, at para 6.0(1)(h).
[23] Proposed Receiver's Report, at para 6.0(1)(i).
[24] Proposed Receiver's Report, at paras 8.0(1)(f) and 10.0(1); Carter Affidavit, at paras 33 and 35.

should the requested Approval and Vesting Order be granted;

(c) whether the Restrictive Court Access Order for the Confidential Exhibits should be approved; and

(d) whether the proposed Receiver should be subsequently discharged, its actions and activities be approved, and a distribution of net proceeds from the Transaction paid to CIBC (as senior secured creditor).

IV. LAW AND ARGUMENT

A. The Receivership Order Should be Approved

<u>This Court has Discretion to Appoint a Receiver Where Just or Convenient</u>

22. Under Section 243(1) of the *BIA*, on the application of a "secured creditor" who has complied with the statutory notice period, the Court may appoint a receiver over the property of an "insolvent person". The Court may authorize the appointment of a receiver where it considers that it is "just or convenient" to do so.[25]

23. Alberta's Provincial legislation contemplates a similar test for the appointment of a receiver. Section 13(2) of the *Judicature Act* allows the Court to grant an order appointing a receiver "in all cases in which it appears to the Court to be just or convenient" and provides that the "order may be made either unconditionally or on any terms and conditions the Court thinks just".[26]

24. In *Paragon Capital Corp v Merchants & Traders Assurance Co* ("**Paragon**"),[27] Justice Romaine of this Court held that, in analyzing whether a receiver is "just or convenient", the Court may consider various factors enumerated in Bennett on Receiverships. The applicability of those factors depends on the particular factual matrix. The factors include, *inter alia*:

(a) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection/safeguarding of the assets while litigation takes place;

(b) the nature of the property;

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[25] *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 243(1) **[*BIA*] [TAB 1].**
[26] *Judicature Act*, RSA 2000, c J-2, s 13(2) [***Judicature Act***] [**TAB 2**].
[27] *Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430 [**TAB 3**].

(c) the balance of convenience to the parties;

(d) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

(e) the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently; and

(f) the likelihood of maximizing returns to the parties.[28]

25. Notably, while some authority indicates that the Court should apply the tripartite test for injunctive relief when considering a receivership application, those requirements are not required where the applicant is a security holder.[29] Similarly, where the security documents authorize the appointment of a receiver, the inquiry should be whether the Court appointment of a receiver is "preferable", not whether it is "essential".[30]

The Appointment of KSV as Receiver is Just and Convenient

26. To begin, CIBC has satisfied the requirements for the appointment of a Receiver, including certain Bennett factors (as applied in *Paragon* and other jurisprudence of this Court). Specifically:

(a) CIBC is a secured creditor of the Debtors;[31]

(b) the Debtors are insolvent, by having ceased to pay their current obligations in the ordinary course of business as they generally become due, including repayment of the indebtedness owed under the Credit Agreement by the Maturity Date and/or the Termination Date;[32]

(c) CIBC has satisfied the notice requirement under Section 244 of the *BIA* by, *inter alia*, having delivered the Demand Letters containing the Section 244 Notices to the Debtors on or about July 24, 2024;[33]

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[28] *Ibid,* at para 27, citing Frank Bennett, Bennett on Receiverships, 2nd ed (Toronto: Thompson Canada, 1995) at 130.
[29] *Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43, at para 17 [**TAB 4**].
[30] *Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19, at para 37 [**TAB 5**].
[31] Carter Affidavit, at paras 6, 18 and 34(b); Proposed Receiver's Report, at para 4.1.2(1).
[32] Carter Affidavit, at paras 23, 27, 28 and 30; Proposed Receiver's Report, at paras 3.1(5) and 4.1.1(2).
[33] Carter Affidavit, at para 25; Proposed Receiver's Report, at para 4.1.1(1).

(d) CIBC has tried to work with Korite LP to rehabilitate the corporate relationship, including entering into the Forbearance Agreement, which term has since ended without receiving payment of the amounts owed by the Debtors;[34]

(e) the Security Agreements, the Debenture and the Forbearance Agreement, provided by the Debtors, include the contractual right to appoint or seek the appointment of a Receiver in respect of the Debtors. This contractual entitlement is a significant factor supporting the appointment of the Receiver in the present case;[35]

(f) if a Receiver is not appointed over the Debtors, there is a real risk of substantial loss and prejudice to CIBC, as the Transaction will not be able to conclude. As outlined above, the Transaction provides CIBC with the best chance of recovery on its Security and is practically and commercially preferrable to the piecemeal realization process of a liquidation;[36]

(g) in any event, CIBC has lost confidence in the Debtors ability to carry on a profitable business and their ability to remedy Korite LP's financial distress;[37]

(h) the balance of convenience favours the appointment of the proposed Receiver; and

(i) KSV is a licensed insolvency trustee with considerable experience in such matters, and has consented to act as Receiver.[38]

27. Additionally, the proposed Transaction negotiated between Korite LP and the proposed Purchaser contemplates the appointment of a receiver to close the Transaction.[39]

28. In sum, CIBC has demonstrated that the appointment of KSV as Receiver of the Debtors is just, convenient and the order so presented should be granted.

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[34] Carter Affidavit, at para 30 and 34(c).
[35] Carter Affidavit, at paras 17, 24 and 34(b).
[36] Carter Affidavit, at paras 33 and 35; Proposed Receiver's Report, at paras 8.0(1)(e) and (f) and 10.0(1).
[37] Carter Affidavit, at para 30.
[38] Carter Affidavit, at para 37.
[39] Proposed Receiver's Report, at para 6.0(1)(i).

B. The Proposed Transaction Should be Approved

Principles Governing Receivership Sales

29. The proposed Receiver is empowered and authorized by the Receivership Order to sell the Debtors' assets outside the ordinary course of business. Specifically, paragraph 3(l) of the Receivership Order provides that the proposed Receiver is authorized "to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business…" subject to approval of this Honourable Court.[40]

30. As our Court of Appeal has held, a court-appointed receiver is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owned money".[41]

31. When presented with a proposed sale transaction in a receivership, this Court has discretion to approve or decline the transaction.[42] Further, it is well-established that this Court's discretion with respect to a proposed transaction is to be guided by the *Soundair* principles, being:

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

    (b) the interests of all parties;

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

    (d) whether there has been unfairness in the working out of the process.[43]

32. The *Soundair* principles are not to be applied formulaically. Among other things, they do not require a formal court-approved sale process in every case.[44] Rather, courts apply the *Soundair* analysis flexibly, in a manner that gives deference to a receiver's commercial expertise in a given fact-pattern, including such things as the prevailing economic environment, and the risk/reward

[40] Receivership Order dated September 5, 2024, at para 3(l).
[41] *Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109, at para 22 [**TAB 6**], citing Frank Bennett, Bennett on Receiverships, 3rd ed (Toronto: Thompson Canada, 2011) at 6.
[42] *Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47, at para 20 [***Jaycap***] [**TAB 7**].
[43] *Sydco Energy Inc (Re)*, 2018 ABQB 75, at para 50 [**TAB 8**], citing *Royal Bank v Soundair Corp*, 1991 CarswellOnt 205, at para 6, 1991 CanLII 2727 (ON CA) [***Soundair***] [**TAB 9**].
[44] *Calpine Canada Energy Ltd, Re*, 2007 ABQB 49, at para 29 [**TAB 10**].

associated with an extended or additional sales process.[45]

33. Finally, it is well-established that the court should give the recommendation of the receiver, as its officer, significant weight and should accept such recommendation absent exceptional circumstances.[46] Indeed, the court should generally defer to the commercial judgment of a receiver in respect of a proposed sale transaction,[47] and exercise "considerable caution" before intervening in a sale transaction.[48] Were the court to substitute its own view, in place of the receiver's commercial expertise, court-supervised insolvency sales processes would be materially undermined.[49]

The Proposed Transaction Satisfies the *Soundair* Test

34. In this matter, the Asset Purchase Agreement and the proposed Transaction are commercially reasonable and fair, and satisfy the *Soundair* principles, since:

(a) the Debtors' business and assets were sufficiently marketed by Tailwind through the Sales Process, as described above. Although the Sales Process was not a sales process that was pre-approved by this Court, it was commercially reasonable, including the timelines, breadth of the marketing process, and information made available to interested parties;[50]

(b) the evidence presented to the proposed Receiver suggests the Sales Process was fair;[51]

(c) Tailwind is of the view that the Transaction maximizes recoveries and is the best available transaction in the circumstances. Based on the process conducted, the proposed Receiver does not believe a superior transaction is likely to materialize if the Sales Process is continued, and in any event, the Debtors are without liquidity to continue the Sales Process;[52]

(d) the Transaction will see the business of Korite LP continue which will provide Korite LP's

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[45] *Sanjel Corp, Re*, 2016 ABQB 257, at para 112 [**TAB 11**]; see also *Tool-Plas Systems Inc, Re*, 2008 CanLII 54791 (ON SC), 48 CBR (5th) 91, at paras 15–20 [**TAB 12**]; *PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433, at paras 13-14 [***1905393 Alberta***] [**TAB 13**]; *Skyepharma PLC v Hyal Pharmaceutical Corp*, 1999 CanLII 15007 (ON SC), 92 ACWS (3d) 455, at para 3 [**TAB 14**].
[46] *Jaycap*, *supra* note 42, at para 20; *1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144, at para 22 [**TAB 15**].
[47] *Soundair, supra* note 43, at paras 21 and 46.
[48] *B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581, at para 43 [**TAB 16**].
[49] *Soundair, supra* note 43, at paras 21 and 46; *1905393 Alberta*, *supra* note 45, at para 14.
[50] Proposed Receiver's Report, at para 8.0(1)(a).
[51] Proposed Receiver's Report, at para 8.0(1)(b).
[52] Proposed Receiver's Report, at para 8.0(1)(c).

customers with a continuing vendor and its suppliers with a continuing customer;[53]

(e) the purchase price under the Transaction exceeds the liquidation value of the Debtors' business and assets;[54] and

(f) the proposed transaction is supported by CIBC, regardless of the resulting shortfall. Absent the Transaction, CIBC has advised the proposed Receiver and the Debtors that it is not prepared to continue to fund the Debtors' business and operations.[55]

35. For all these reasons, CIBC respectfully submits that the *Soundair* principles have been met, the proposed Transaction is commercially fair and reasonable, and should be approved in the form of the Approval and Vesting Order sought.

<u>The Receiver's Authority to Assign Contracts</u>

36. The proposed Approval and Vesting Order provides the proposed Receiver with the authority to assign the Debtors' rights and obligations under the Assumed Contracts (as defined in the Asset Purchase Agreement) to the Purchaser, without the contracts' counterparty consent.

37. Although there is no express statutory provision that authorizes the court to grant such an order upon the application by a receiver in receivership proceedings, section 84.1 of the *BIA* and section 11.3 of the *Companies' Creditors Arrangement Act* ("***CCAA***") each contain provisions explicitly authorizing the Court on an application by a bankruptcy trustee or CCAA debtor, to make an order assigning the rights and obligations of a bankrupt or debtor company under a contract.[56]

38. In *Urbancorp Cumberland 1 GP Inc. (Re),*[57] Chief Justice Morawetz of the Ontario Superior Court held that section 243 of the *BIA:*

> **243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so**… (c)** take any other action that the court considers advisable,

together with section 100 of the *Court of Justice Act,* RSO 1990, c C-43[58]:

[53] Proposed Receiver's Report, at para 8.0(1)(d).
[54] Proposed Receiver's Report, at para 8.0(1)(e).
[55] Proposed Receiver's Report, at para 8.0(1)(f).
[56] *BIA*, *supra* note 25, s 84.1(1); *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s 11.3(1) [***CCAA***] [**TAB 17**].
[57] *Urbancorp Cumberland 1 GP Inc. (Re)*, 2020 ONSC 7920 [***Urbancorp***] [**TAB 18**].
[58] *Court of Justice Act,* RSO 1990, c C-43, s 100 [**TAB 19**].

> **100** A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed,

are "broad enough to form the basis of the [r]eceiver's request for the [a]ssignment [o]rder and for the court to make such an order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context".[59]

39. Although Alberta's *Court of Justice Act*, RSA 2000, c C-30.5 does not have a similar provision to its aforementioned Ontario equivalent, section 13(2) of Alberta's *Judicature Act* provides the court with wide ranging powers to make an order where it is considered "just and convenient".[60] The Alberta Court of Appeal in *DGDP-BC Holdings Ltd v Third Eye Capital Corporation* equated the open-ended jurisdiction granted to the Court under section 13(2) of the *Judicature Act* to the authority granting the supervising judge pursuant to section 243(1)(c) of the *BIA*, which as noted above, authorises the supervising judge to "take any other action that the court considers advisable".[61]

40. Alternatively, the Court could also resort to the inherent jurisdiction of the court as the basis for such authority.[62]

41. Section 84.1 of the *BIA* and section 11.3 of the *CCAA*, set out a list of factors to be considered when determining whether the assignment of a contract by a bankruptcy trustee or CCAA debtor is appropriate in the circumstances, notably:

    (a) whether the applicable court officer approved the proposed assignment;

    (b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

    (c) whether it would be appropriate to assign the rights and obligations to that person.[63]

42. The *BIA* and *CCAA* also set out a list of exceptions to which the authority to grant an assignment of a contract do not apply, including rights and obligations that are not assignable by reason of their

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[59] *Urbancorp, supra* note 57, at para 31.
[60] *Judicature Act*, *supra* note 26, s 13(2).
[61] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation,* 2021 ABCA 226, at para 17 [**TAB 20**].
[62] *Urbancorp, supra* note 57, at para 32.
[63] *BIA*, *supra* note 25, s 84.1(4); *CCAA*, *supra* note 56, s 11.3(3).

nature or that arise under (a) an agreement entered into on or after the day on which proceedings commence under the Acts, (b) an eligible financial contract, or (c) a collective agreement.[64] A further restriction is also noted that the Court may not make the order unless it is satisfied that all monetary defaults in relation to the contract – other than those arising by reason of the insolvency, the commencement of proceedings under the *BIA* or *CCAA* or the debtors' failure to perform a non-monetary obligation, will be remedied on or before the day fixed by the court.[65]

43. As a result of the above analysis and certain factors to be discussed at the Application hearing, CIBC respectfully submits that the assignment order sought with respect to the assignment of the Debtors' Assumed Contracts by the proposed Receiver to the Purchaser is necessary and appropriate in the circumstances and should be granted.

C. The Restrictive Court Access Order for the Confidential Exhibits Should be Approved

44. The Supreme Court of Canada reframed the two-part *Sierra Club* test for the granting of a sealing order in *Sherman Estate v Donovan*.[66] In *Sherman Estate*, the Court clarified that the test for a sealing order is predicated upon the following core requisites:

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

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

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[67]

45. In insolvency matters decided since *Sherman Estate*, Courts have continued to find that sealing orders are justified to protect the integrity of a receiver's sales or marketing efforts and to avoid the misuse of information.[68] For example, in *Yukon (Government of) v Yukon Zinc Corporation*, Chief Justice Duncan of the Yukon Supreme Court, held:

> In the insolvency context, especially where there is a sale process, it is a standard practice to keep all aspects of the bidding or sales process confidential. Courts have found this appropriately meets the *Sierra Club*

[64] *BIA*, *supra* note 25, s 84.1(3); *CCAA*, *supra* note 56, s 11.3(2).
[65] *BIA*, *supra* note 25, s 84.1(5); *CCAA*, *supra* note 56, s 11.3(4).
[66] *Sherman Estate v Donovan*, 2021 SCC 25, at para 38 [**TAB 21**].
[67] *Ibid.*
[68] *Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2, at para 39 [**TAB 22**].

> test as modified by *Sherman Estate*, as sealing this information ensures the integrity of the sales and marketing process and avoids misuse of information by bidders in a subsequent process to obtain an unfair advantage. The important public interest at stake is described as the commercial interests of the Receiver, bidders, creditors and stakeholders in ensuring a fair sales and marketing process is carried out, with all bidders on a level playing field.[69] [underlining added]

46. In *Ontario Securities Commission v Bridging Finance Inc*, Chief Justice Morawetz of the Ontario Superior Court likewise characterized the interest at stake as being the "Receiver's efforts to maximize value for stakeholders."[70] In granting the requested sealing order, Chief Justice Morawetz found that "there are no reasonable alternatives to the sealing order in the circumstances and … [that] no stakeholders will be materially prejudiced by sealing the [c]onfidential [s]upplement and the salutary effects of granting the relief outweigh any deleterious effects".[71]

47. In this case, CIBC seeks the Restricted Court Access Order, on behalf of the proposed Receiver, with respect to the Confidential Exhibits, which contains the commercially sensitive and confidential information regarding the Sales Process, terms of the Asset Purchase Agreement and a liquidation analysis for the Debtors' business (the "**Confidential Information**").[72] CIBC submits that all three parts of the *Sherman Estate* test have been satisfied with respect to the Confidential Exhibits. In particular:

(a) there are important public interests at stake in ensuring a fair sale process for all participants, and in allowing the proposed Receiver to maintain an expectation of confidentiality with respect to the Confidential Information;

(b) there are no adequate alternatives to prevent the negative effects that would result should the Confidential Exhibits be disclosed to the public. Further, CIBC seeks only to seal the Confidential Exhibits until the earlier of (i) the filing of a receiver's certificate confirming the completion of the Transaction (the "**Receiver's Certificate**"); (ii) the discharge of the proposed Receiver; or (iii) further Order of this Court,[73] at which time the proposed Receiver will have completed its mandate and all realization efforts will have concluded; and

---

[69] *Ibid.*
[70] *Ontario Securities Commission v Bridging Finance Inc*, 2022 ONSC 1857, at para 53 [**TAB 23**]
[71] *Ibid.*
[72] Proposed Receiver's Report, at para 9.0(1).
[73] Proposed Receiver's Report, at para 9.0(1).

(c) finally, as a matter of proportionality, no stakeholder will be materially prejudiced, and any further negative effects are limited by the temporary nature of the sealing order. The benefits of protecting the integrity of the sales process outweigh any deleterious effects arising from limiting the open court principle.[74]

48. In all these circumstances, CIBC respectfully submits the proposed Restrictive Court Access Order should be granted.

D. The Proposed Receiver Should be Subsequently Discharged and its Actions and Activities Should be Approved

49. Finally, it is well established that this Honourable Court has jurisdiction to review and approve the activities of a court-appointed receiver.[75] Specifically, a receiver's conduct is to be assessed objectively, and if reasonable, prudent, and not arbitrary, then this Honourable Court has the authority to approve the activities set out in a receiver's report.[76]

50. Further, where a receiver has fulfilled the purpose of obtaining as high a value for the debtor's assets that it could, the court will find that the receiver has acted properly and within the mandate given to it by the court.[77]

51. In the instant case, as detailed in the Proposed Receiver's Report, the proposed Receiver will undertake significant efforts to carry out its mandate, as set out in the Receivership Order. These activities will include, *inter alia*, completing the Transaction and distributing the sale proceeds in connection therewith, as well as any other final duties and ancillary matters relating to the estate if the Debtors as may be necessary or prudent, including the administration of the Wage Earner Protection Program (collectively, the "**Concluding Activities**").[78]

52. The CIBC respectfully submits that these activities are reasonable and prudent, and consistent with the proposed Receiver's mandate, and should be approved.

53. Finally, CIBC seeks an order discharging the proposed Receiver subject to the filing of the Receiver's Certificate confirming the completion of the Concluding Activities. Of course, it is the

[74] Proposed Receiver's Report, at para 9.0(2).
[75] *Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855 at para 54 [**TAB 24**].
[76] *Ibid*.
[77] *Re Regal Constellation Hotel Ltd.*, 2004 CanLII 206 (ON CA), 50 CBR (4th) 258, at para 11 [**TAB 25**]; aff'd (2004), 71 OR (3d) 355, 242 DLR (4th) 689 (CA) at para 23 [**TAB 26**].
[78] Proposed Receiver's Report, at paras 10.0(1) and (2).

practice of this Court to approve the discharge of a receiver where they only have relatively minor activities to complete.[79] In the present instance, the Concluding Activities concern such outstanding matters that the proposed Receiver intends to attend should the requested Order be granted, and can be readily completed by the proposed Receiver without further direction from the Court.

54. Upon the completion of the Concluding Activities, the proposed Receiver will have fulfilled its mandate as set out in the Receivership Order. Further, notwithstanding its discharge, the proposed Receiver shall remain the Receiver for the performance of such incidental duties as may be required for the administration of the receivership proceedings. In these circumstances, it is just and appropriate for the proposed Receiver to be discharged subject to the filing of the proposed Receiver's Certificate, as a further discharge application would result in unnecessary costs for the receivership estate.

55. Accordingly, CIBC respectfully submits that the Court approve the Receiver's discharge once the Concluding Activities have been completed and the Receiver's Certificate is filed.

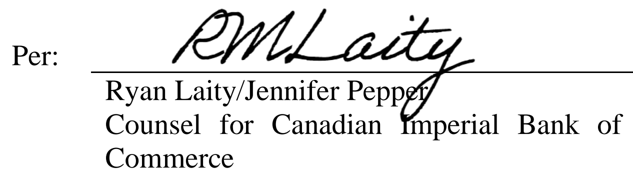
56. Finally, as upon the completion of the Concluding Activities, the Debtors shall cease to continue their operations, CIBC also seeks in connection with the Orders sought herein, the authorization for the proposed Receiver to bankrupt the Debtors in order to facilitate an efficient winding-up of the companies' operations and administration of the claims against the companies, including, but not limited to, reversing the priority of claims with respect to GST (if applicable).

57. **CONCLUSION**

58. In light of the foregoing, CIBC respectfully requests that this Honourable Court grant the relief sought in the Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Vancouver, British Columbia this 26th day of August, 2024.

BORDEN LADNER GERVAIS LLP

Per: 

Ryan Laity/Jennifer Pepper
Counsel for Canadian Imperial Bank of Commerce

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[79] *Re Leigh Commercial Builders Inc* (8 September 2021), Court File Number 2003-01472 Judicial Centre Edmonton (Burns J) at para 8 [**TAB 27**]; *Re Copperline Excavating Ltd* (25 October 2021), Court File Number 2003-03284 Judicial Centre Edmonton (Shelley J) at para 9 [**TAB 28**].

LIST OF AUTHORITIES

TAB No.	AUTHORITY
1.	*Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 84.1 and 243
2.	*Judicature Act*, RSA 2000, c J-2, s 13(2)
3.	*Paragon Capital Corp v Merchants & Traders Assurance Co*, 2002 ABQB 430
4.	*Alberta Treasury Branches v COGI Limited Partnership*, 2016 ABQB 43
5.	*Pillar Capital Corp v Harmon International Industries Inc*, 2020 SKQB 19
6.	*Edmonton (City) v Alvarez & Marsal Canada Inc*, 2019 ABCA 109
7.	*Jaycap Financial Ltd v Snowdon Block Inc*, 2019 ABCA 47
8.	*Sydco Energy Inc (Re)*, 2018 ABQB 75
9.	*Royal Bank v Soundair Corp*, 1991 CarswellOnt 205, 1991 CanLII 2727
10.	*Calpine Canada Energy Ltd, Re*, 2007 ABQB 49
11.	*Sanjel Corp, Re*, 2016 ABQB 257
12.	*Tool-Plas Systems Inc, Re*, 2008 CanLII 54791 (ON SC), 48 CBR (5th) 91
13.	*PricewaterhouseCoopers Inc v 1905393 Alberta Ltd*, 2019 ABCA 433
14.	*Skyepharma PLC v Hyal Pharmaceutical Corp*, 1999 CanLII 15007 (ON SC), 92 ACWS (3d) 455
15.	*1705221 Alberta Ltd v Three M Mortgages Inc*, 2021 ABCA 144
16.	*B&M Handelman Investments Limited v Drotos*, 2018 ONCA 581
17.	*Companies' Creditors Arrangement Act*, RSC, 1985, c. C-36, s 11.3
18.	*Urbancorp Cumberland 1 GP Inc (Re)*, 2020 ONSC 7920
19.	*Court of Justice Act,* RSO 1990, c C-43, s 100
20.	*DGDP-BC Holdings Ltd v Third Eye Capital Corporation,* 2021 ABCA 226
21.	*Sherman Estate v Donovan*, 2021 SCC 25
22.	*Yukon (Government of) v Yukon Zinc Corporation*, 2022 YKSC 2
23.	*Ontario Securities Commission v Bridging Finance Inc*, 2022 ONSC 1857
24.	*Leslie & Irene Dube Foundation Inc v P218 Enterprises Ltd*, 2014 BCSC 1855
25.	*Re Regal Constellation Hotel Ltd.*, 2004 CanLII 206 (ON CA), 50 CBR (4th) 258
26.	*Re Regal Constellation Hotel Ltd.*, (2004), 71 OR (3d) 355, 242 DLR (4th) 689 (CA)
27.	*Re Leigh Commercial Builders Inc* (8 September 2021), Court File Number 2003-01472 Judicial Centre Edmonton (Burns J)
28.	*Re Copperline Excavating Ltd* (25 October 2021), Court File Number 2003-03284 Judicial Centre Edmonton (Shelley J)

TAB 1

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l’insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to June 19, 2024

Last amended on April 27, 2023

À jour au 19 juin 2024

Dernière modification le 27 avril 2023

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Marketable copies to be first offered for sale to the author

(3) The trustee shall offer in writing to the author or his heirs the right to purchase the manufactured or marketable copies of the copyright work comprised in the estate of the bankrupt at such price and on such terms and conditions as the trustee may deem fair and proper before disposing of the manufactured and marketable copies in the manner prescribed in this section.

R.S., 1985, c. B-3, s. 83; 2004, c. 25, s. 50.

Les exemplaires destinés au commerce sont d'abord offerts en vente à l'auteur

(3) Avant d'aliéner, conformément au présent article, des exemplaires manufacturés et destinés au commerce de l'ouvrage faisant l'objet d'un droit d'auteur et qui tombe dans l'actif du failli, le syndic offre par écrit à l'auteur ou à ses héritiers l'option d'acheter ces exemplaires aux prix et conditions que le syndic peut juger justes et raisonnables.

L.R. (1985), ch. B-3, art. 83; 2004, ch. 25, art. 50.

Effect of sales by trustee

84 All sales of property made by a trustee vest in the purchaser all the legal and equitable estate of the bankrupt therein.

R.S., 1985, c. B-3, s. 84; 2004, c. 25, s. 51(F).

Effets des ventes par syndic

84 Les droits de propriété, en droit et en equity, du failli sur les biens qui font l'objet d'une vente par le syndic sont dévolus à l'acheteur.

L.R. (1985), ch. B-3, art. 84; 2004, ch. 25, art. 51(F).

Assignment of agreements

84.1 (1) On application by a trustee and on notice to every party to an agreement, a court may make an order assigning the rights and obligations of a bankrupt under the agreement to any person who is specified by the court and agrees to the assignment.

Cessions

84.1 (1) Sur demande du syndic et sur préavis à toutes les parties à un contrat, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations du failli découlant du contrat.

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 rights and obligations in relation to the business may be assigned.

Personne physique

(2) Toutefois, lorsque le failli est une personne physique, la demande de cession ne peut être présentée que si celui-ci exploite une entreprise et, le cas échéant, seuls les droits et obligations découlant de contrats relatifs à l'entreprise peuvent être cédés.

Exceptions

(3) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

- **(a)** an agreement entered into on or after the date of the bankruptcy;
- **(b)** an eligible financial contract; or
- **(c)** a collective agreement.

Exceptions

(3) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date de la faillite ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Factors to be considered

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

- **(a)** whether the person to whom the rights and obligations are to be assigned is able to perform the obligations; and
- **(b)** whether it is appropriate to assign the rights and obligations to that person.

Facteurs à prendre en considération

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

- **a)** la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;
- **b)** l'opportunité de lui céder les droits et obligations.

Restriction

(5) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the person's bankruptcy, insolvency or failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(6) The applicant is to send a copy of the order to every party to the agreement.

2005, c. 47, s. 68; 2007, c. 29, s. 97; 2009, c. 31, s. 64.

Certain rights limited

84.2 (1) No person may terminate or amend — or claim an accelerated payment or forfeiture of the term under — any agreement, including a security agreement, with a bankrupt individual by reason only of the individual's bankruptcy or insolvency.

Lease

(2) If the agreement referred to in subsection (1) is a lease, the lessor may not terminate or amend, or claim an accelerated payment or forfeiture of the term under, the lease by reason only of the bankruptcy or insolvency or of the fact that the bankrupt has not paid rent in respect of any period before the time of the bankruptcy.

Public utilities

(3) No public utility may discontinue service to a bankrupt individual by reason only of the individual's bankruptcy or insolvency or of the fact that the bankrupt individual has not paid for services rendered or material provided before the time of the bankruptcy.

Certain acts not prevented

(4) Nothing in this section is to be construed as

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the time of the bankruptcy; or

(b) requiring the further advance of money or credit.

Provisions of section override agreement

(5) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

Restriction

(5) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la personne a fait faillite, est insolvable ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(6) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

2005, ch. 47, art. 68; 2007, ch. 29, art. 97; 2009, ch. 31, art. 64.

Limitation de certains droits

84.2 (1) Il est interdit de résilier ou de modifier un contrat — notamment un contrat de garantie — conclu avec un failli qui est une personne physique, ou de se prévaloir d'une clause de déchéance du terme figurant dans un tel contrat, au seul motif qu'il a fait faillite ou est insolvable.

Baux

(2) Lorsque le contrat visé au paragraphe (1) est un bail, l'interdiction prévue à ce paragraphe vaut également dans le cas où le failli n'a pas payé son loyer à l'égard d'une période antérieure au moment de la faillite.

Entreprise de service public

(3) Il est interdit à toute entreprise de service public d'interrompre la prestation de ses services auprès d'un failli qui est une personne physique au seul motif qu'il a fait faillite, qu'il est insolvable ou qu'il n'a pas payé certains services ou du matériel fournis avant le moment de la faillite.

Exceptions

(4) Le présent article n'a pas pour effet :

a) d'empêcher une personne d'exiger que soient effectués des paiements en espèces pour toute contrepartie de valeur — marchandises, services, biens loués ou autres — fournie après le moment de la faillite;

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

Incompatibilité

(5) Le présent article l'emporte sur les dispositions incompatibles de tout contrat, celles-ci étant sans effet.

province, if this Part is in force in the province immediately before that subsection comes into force, this Part applies in respect of the province.

R.S., 1985, c. B-3, s. 242; 2002, c. 7, s. 85; 2007, c. 36, s. 57.

PART XI

Secured Creditors and Receivers

Court may appoint receiver

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

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

Restriction on appointment of receiver

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

> **(a)** the insolvent person consents to an earlier enforcement under subsection 244(2); or
>
> **(b)** the court considers it appropriate to appoint a receiver before then.

Definition of *receiver*

(2) Subject to subsections (3) and (4), in this Part, ***receiver*** means a person who

> **(a)** is appointed under subsection (1); or
>
> **(b)** is appointed to take or takes possession or control — of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a

s'appliquer à la province en cause, la présente partie s'applique à toute province dans laquelle elle était en vigueur à l'entrée en vigueur de ce paragraphe.

L.R. (1985), ch. B-3, art. 242; 2002, ch. 7, art. 85; 2007, ch. 36, art. 57.

PARTIE XI

Créanciers garantis et séquestres

Nomination d'un séquestre

243 (1) Sous réserve du paragraphe (1.1), sur demande d'un créancier garanti, le tribunal peut, s'il est convaincu que cela est juste ou opportun, nommer un séquestre qu'il habilite :

> **a)** à prendre possession de la totalité ou de la quasi-totalité des biens — notamment des stocks et comptes à recevoir — qu'une personne insolvable ou un failli a acquis ou utilisés dans le cadre de ses affaires;
>
> **b)** à exercer sur ces biens ainsi que sur les affaires de la personne insolvable ou du failli le degré de prise en charge qu'il estime indiqué;
>
> **c)** à prendre toute autre mesure qu'il estime indiquée.

Restriction relative à la nomination d'un séquestre

(1.1) Dans le cas d'une personne insolvable dont les biens sont visés par le préavis qui doit être donné par le créancier garanti aux termes du paragraphe 244(1), le tribunal ne peut faire la nomination avant l'expiration d'un délai de dix jours après l'envoi de ce préavis, à moins :

> **a)** que la personne insolvable ne consente, aux termes du paragraphe 244(2), à l'exécution de la garantie à une date plus rapprochée;
>
> **b)** qu'il soit indiqué, selon lui, de nommer un séquestre à une date plus rapprochée.

Définition de *séquestre*

(2) Dans la présente partie, mais sous réserve des paragraphes (3) et (4), ***séquestre*** s'entend de toute personne qui :

> **a)** soit est nommée en vertu du paragraphe (1);
>
> **b)** soit est nommément habilitée à prendre — ou a pris — en sa possession ou sous sa responsabilité, aux termes d'un contrat créant une garantie sur des biens, appelé « contrat de garantie » dans la présente partie,

TAB 2

R.S.A. 2000, c. J-2, s. 13

s 13. Part performance

Currency

13.Part performance
13(1) Part performance of an obligation either before or after a breach thereof shall be held to extinguish the obligation

(a) when expressly accepted by a creditor in satisfaction, or

(b) when rendered pursuant to an agreement for that purpose though without any new consideration.

13(2) An order in the nature of a mandamus or injunction may be granted or a receiver appointed by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that the order should be made, and the order may be made either unconditionally or on any terms and conditions the Court thinks just.

Currency
Alberta Current to Gazette Vol. 116:6 (March 31, 2020)

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TAB 3

Paragon Capital Corporation Ltd. v. Merchants & Traders Assurance Company, 2002 ABQB 430

Date: 20020429
Action No. 0101 05444

2002 ABQB 430 (CanLII)

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

BETWEEN:

PARAGON CAPITAL CORPORATION LTD.

Plaintiff

- and -

MERCHANTS &TRADERS ASSURANCE COMPANY, INSURCOM FINANCIAL CORPORATION, 782640 ALBERTA LTD., 586335 BRITISH COLUMBIA LTD. AND GARRY TIGHE

Defendants

REASONS FOR JUDGMENT
of the
HONOURABLE MADAM JUSTICE B. E. ROMAINE

APPEARANCES:

Judy D. Burke
for the Plaintiff

Robert W. Hladun, Q.C.
for the Defendants

INTRODUCTION

for inclusion in the affirmed receivership order. While there may have been a potential for conflict in Hudson & Company's appointment, there is no evidence that Hudson & Company showed any undue preference to Paragon while serving as a receiver, or failed in its duties as receiver in any way.

2002 ABQB 430 (CanLII)

[24] The Defendants also submit that the Bench Brief used by Paragon's counsel in making the application for the *ex parte* order showed that such counsel was not impartial, but acted as an advocate on this application. Paragon's counsel did indeed advocate that a receiver should be appointed by the court, as he was retained to do, and there was nothing improper in him doing so. I have already said that full disclosure was made of the material facts in that application, including the previous involvement of both the proposed receiver and Paragon's counsel in this matter.

[25] I therefore find that there was nothing wrong or improper in the appointment of Hudson & Company as receiver or in Paragon's previous counsel acting as receiver's counsel, or in their administration of the receivership. It may be preferable to avoid an appearance of conflict in these situations, but a finding of conflict or improper preference requires more than just the appearance of it. In situations where it is highly possible that the creditors will not be paid out in full, the use of a party already familiar with the facts to act as receiver may be attractive to all creditors. I note that it is not the creditors who raise the issue of conflict in this case, but the debtors.

Should the *ex parte* order now be set aside?

[26] The general rule is that when an application to set aside an *ex parte* order is made, the reviewing court should hear the motion *de novo* as to both the law and the facts involved. Even if the order should not have been granted *ex parte*, which is not the case here, I may refuse to set it aside if from the material I am of the view that the application would have succeeded on notice: ***Edmonton Northlands v. Edmonton Oilers Hockey Corp***., 1993, 15 Alta. L.R. (3rd) 179 (paragraphs 30 and 31).

[27] The factors a court may consider in determining whether it is appropriate to appoint a receiver include the following:

a) whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed, particularly where the appointment of a receiver is authorized by the security documentation;

b) the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

c) the nature of the property;

d) the apprehended or actual waste of the debtor's assets;

e) the preservation and protection of the property pending judicial resolution;

f) the balance of convenience to the parties;

g) the fact that the creditor has the right to appoint a receiver under the documentation provided for the loan;

h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;

i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;

j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;

k) the effect of the order upon the parties;

l) the conduct of the parties;

m) the length of time that a receiver may be in place;

n) the cost to the parties;

o) the likelihood of maximizing return to the parties;

p) the goal of facilitating the duties of the receiver.

Bennett, Frank, ***Bennett on Receiverships***, 2nd edition, (1995), Thompson Canada Ltd., page 130 (cited from various cases)

[28] In cases where the security documentation provides for the appointment of a receiver, which is the case here with respect to the General Security Agreement and the Extension Agreement, the extraordinary nature of the remedy sought is less essential to the inquiry : ***Bank of Nova Scotia v. Freure Village on Clair Creek***, [1996] O.J. No. 5088, paragraph 12.

[29] It appears from the evidence before me that the Georgia Pacific shares may be the only asset of real value pledged on this loan. Shares are by their nature vulnerable assets. These shares are in a business that is itself highly sensitive to variations in value. At the time of the application, the business appeared to have been suffering certain financial constraints. The business is situated in British Columbia, and regulated by the Investment Dealers Association of Canada and other entities, giving additional force to the argument of the necessity of a

2002 ABQB 430 (CanLII)

TAB 4

Court of Queen's Bench of Alberta

Citation: Alberta Treasury Branches v COGI Limited Partnership, 2016 ABQB 43

2016 ABQB 43 (CanLII)

Date: 20160121
Docket: 1501 12220
Registry: Calgary

Between:

Alberta Treasury Branches

Applicant

- and -

COGI Limited Partnership, Canadian Oil & Gas International Inc., and Conserve Oil Group Inc.

Respondents

Oral Reasons for Judgment
of the
Honourable Madam Justice K.M. Eidsvik

Background

[1] On January 14 and 15, 2016 I heard the applications of the receiver dated November 6, 2015 and January 4, 2016.

[2] The November 6 application was to clarify and expand the receiver's powers under the Receivership Order that was granted on October 26, 2015 with respect to several subsidiaries of Conserve Oil Group Inc. (Conserve) including Conserve Oil 1st Corporation (Conserve 1st) and Proven Oil Asia Ltd (POA).

corporation or any of its affiliates

(a) Any act or omission of the corporation or any of its affiliates effects a result,

(b) The business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or

(c) The powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner

that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the Court may make an order to rectify the matters complained of.

[13] This Order may, according to 242 (3) (b), include an order for a receiver manager.

[14] The ***Judicature Act*** s 13 (2) allows the Court wide discretion to appoint a receiver when it is "just and convenient".

[15] Oppressive conduct has been interpreted by the Supreme Court in ***BCE Inc v 1976 Debentureholders*** 2008 SCC 69. This case emphasises that the oppression remedy is an equitable discretionary remedy that must look to the fairness of the situation to all parties involved in the business in question. A two part test is outlined where the Court must determine the reasonable expectation of the parties and whether the conduct complained of amounts to a violation of those expectations.

[16] A myriad of factors are set out in ***Bennett on Receiverships*** to aid in the decision about whether a receiver should be appointed. They are often repeated in decisions so I won't do so now. I have applied the relevant factors which I will detail shortly.

[17] In addition, it is said that applications brought by a person other than a security holder, is an extraordinary remedy which should only be used sparingly. It is compared to injunctive relief and the tripartite test that is used in those cases is recommended to be used here (see ***Murphy v Cahill*** 2013 ABQB 335 at para 7).

Analysis.

Serious issue to be tried

[18] Is there a serious issue to be tried? Or more specifically, is there evidence that the actions taken by POA in the last 10 months violate the reasonable expectations of Conserve and COGI that amount to oppressive conduct?

[19] As noted above, the Receiver has two main concerns **1**. That shares in POA were issued without due notice, at the hands of directors who were in a conflict of interest and without evidence of fair value, and **2**. An asset purchase of wells from COGI by POA has left some potential liability to the AER in COGI's hands.

2016 ABQB 43 (CanLII)

TAB 5

QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2020 SKQB 19**

Date: **2020 01 22**
Docket: QBG 1401 of 2019
Judicial Centre: Saskatoon

BETWEEN:

PILLAR CAPITAL CORP.

APPLICANT

- and -

HARMON INTERNATIONAL INDUSTRIES INC.

RESPONDENT

Counsel:

Michael J. Russell and Kevin N. Hoy for the applicant
Jared D. Epp for the respondent

FIAT ELSON J.
January 22, 2020

Introduction

[1] In a brief fiat, dated January 16, 2020, I directed the issue of an order for the appointment of a receiver of all assets, undertakings and property of Harmon International Industries Inc. [Harmon]. In that fiat, I stated that reasons would follow in a published decision. This fiat contains those reasons.

[2] Harmon is a Saskatoon company that has been engaged in the manufacture of various equipment, including light agricultural equipment. It stopped operating as a going concern on an undisclosed date, in late 2018 or early 2019.

2020 SKQB 19 (CanLII)

> h) the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulty with the debtor and others;
>
> i) the principle that the appointment of a receiver is extraordinary relief which should be granted cautiously and sparingly;
>
> j) the consideration of whether a court appointment is necessary to enable the receiver to carry out its' duties more efficiently;
>
> k) the effect of the order upon the parties;
>
> l) the conduct of the parties;
>
> m) the length of time that a receiver may be in place;
>
> n) the cost to the parties;
>
> o) the likelihood of maximizing return to the parties;
>
> p) the goal of facilitating the duties of the receiver.
>
> See also, *Lindsey Estate v. Strategic Metals Corp.*, 2010 ABQB 242 (Alta. Q.B.) at para 32, aff'd 2010 ABCA 191 (Alta. C.A.); and *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.) at para 20.

[36] In the consideration of the non-exhaustive factors cited in *Kasten*, it is important to observe that, while the factors vary in their importance, no one factor is determinative. This includes the presence, or not, of irreparable harm to the applicant or the applicant's security. See *Swiss Bank Corp. (Canada) v Odyssey Industries Inc.* (1995), 30 CBR (3d) 49 (Ont Ct J). By and large, courts have taken a contextual approach to the consideration of these factors. A court is expected to have consideration for all attendant circumstances, including the interests of all concerned, in the "just or convenient" analysis.

[37] A question that often arises in the "just or convenient" analysis pertains to whether a court should appoint a receiver where the applicant's security provides for the private appointment of a receiver, as the security does in the present case.

2020 SKQB 19 (CanLII)

While the right to make such an appointment is a factor, the real inquiry is whether a court appointment is the "preferable" option – not the "essential" one. This point was also addressed in *Carnival*, where, at para. 27, Newbould J. recited the following passage from the decision of Blair J. in *Bank of Nova Scotia v Freure Village on Clair Creek* (1996), 40 CBR (3d) 274 (Ont Ct J):

> **27** …
>
> 12. While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver – and even contemplate, as this one does, the secured creditor seeking a court appointed receiver – and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

[38] Turning to the application at bar, I am satisfied that it is both just and convenient that the requested application be granted. In my view, most of the factors identified in *Kasten* favour court appointment of a receiver. Given that Harmon has not carried on active business for some time, with no stated intention of doing so, the balance of convenience clearly favours the application.

[39] More importantly, however, I am persuaded that the nature and condition of the property factors heavily in favour of a court appointed receiver – in preference to one appointed under the security agreement. It is now reasonably clear

2020 SKQB 19 (CanLII)

TAB 6

In the Court of Appeal of Alberta

Citation: Edmonton (City) v Alvarez & Marsal Canada Inc, 2019 ABCA 109

Date: 20190325
Docket: 1803-0050-AC
Registry: Edmonton

2019 ABCA 109 (CanLII)

Between:

City of Edmonton

Respondent
(Applicant)

- and -

Alvarez & Marsal Canada Inc., in its capacity as Court-appointed Receiver of the current and future assets, undertakings and properties of Reid-Built Homes Ltd, 1679775 Alberta Ltd, Reid Worldwide Corporation, Builder's Direct Supply Ltd, Reid Built Homes Calgary Ltd, Reid Investments Ltd, and Reid Capital Corp.

Appellants
(Defendants)

- and –

Royal Bank of Canada

Not a Party to the Appeal
(Plaintiff)

- and -

Reid-Built Homes Ltd and Emilie Reid

Not Parties to the Appeal
(Defendants)

The Court:

The Honourable Madam Justice Marina Paperny
The Honourable Madam Justice Sheila Greckol
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order of
The Honourable Mr. Justice R.A. Graesser
Dated the 21st day of February, 2018
Filed the 11th day of April, 2018
(2018 ABQB 124, Docket: 1703 21274)

2019 ABCA 109 (CanLII)

[21] There is, in our view, no principled reason for drawing this distinction between Edmonton's position and that of the mortgage and lien holders. The chambers judge's reasons for granting Edmonton's application are summarized at para 171:

> On the facts of this case, it being a liquidating process and there being no apparent benefit to Edmonton arising out of the Receivership, Edmonton's priority for property taxes is not subordinate to the Receiver's fees or approved borrowings.

[22] We agree with the Receiver that the chambers judge's conclusion that "there is a less convincing case for secured creditors to participate in the Receiver's costs when the intent is to liquidate" is not supported by the law. The use of the term "liquidating receivership" suggests that there is some other type of receivership with a different intent. As is stated in *Bennett on Receivership*, "the purpose of the receivership is to enhance and facilitate the preservation and realization, if necessary, of the debtor's assets for the benefit of all creditors". A court-appointed receiver of an insolvent company is expected "to realize on the debtor's assets and pay the security holders and the other creditors who are owed money": Frank Bennett, *Bennett on Receiverships*, 3d ed (Toronto: Carswell, 2011) at 6.

[23] The policy behind receiverships is that collective action is preferable to unilateral action. The receiver maximizes the returns for the benefit of all creditors and streamlines the process of liquidation. As was noted recently in *Royal Bank v Delta Logistics*, 2017 ONSC 368 at para 26:

> The whole point of a court-appointed receivership is that one person ... is appointed to deal with all of the assets of an insolvent debtor, realize upon them, and then distribute the proceeds of that realization to the creditors.

[24] With respect to ICI's claim, the chambers judge held:

> I do not see that it is appropriate at this stage to exempt ICI from potential liability for whatever portion of the Receiver's fees, disbursements, and approved borrowings may be apportioned to ICI on any of the properties it holds mortgages on. ICI does stand to benefit from the Receivership in that the Receiver will preserve and protect the properties, collect rents and ultimately monetize the security. ICI would have to be doing these things themselves if the Receiver were not doing so. (para 159)

[25] This is a reasonable conclusion. However, the same could be said for Edmonton's claim for priority. There is nothing on the record to suggest that Edmonton will receive no benefit from the process undertaken by the Receiver on behalf of all creditors. What is known is that Edmonton would have to run individual auction proceedings for each property over which it has a municipal tax claim, and would incur costs in doing so. Under the receivership process, Edmonton's outstanding taxes are being paid out as properties are sold in an orderly fashion. Edmonton acknowledges its security is not at risk in this process. There is no evidence that the running of

2019 ABCA 109 (CanLII)

TAB 7

In the Court of Appeal of Alberta

Citation: Jaycap Financial Ltd v Snowdon Block Inc, 2019 ABCA 47

Date: 20190204
Docket: 1701-0314-AC
Registry: Calgary

2019 ABCA 47 (CanLII)

Between:

Jaycap Financial Ltd.

Respondent
(Plaintiff)

- and -

**Snowdon Block Inc., Neil John Richardson,
Hugh Daryl Richardson and Heritage Property Corporation**

Appellants
(Defendants)

The Court:

**The Honourable Mr. Justice Brian O'Ferrall
The Honourable Madam Justice Barbara Lea Veldhuis
The Honourable Madam Justice Ritu Khullar**

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice B.E.C. Romaine
Dated the 2nd day of November, 2017
Filed on the 2nd day of November, 2017
(Docket: 1601-01658)

requirements for mutual mistake. She also found that they could rely on the termination provisions of the first asset purchase agreement.

[15] The chambers judge then considered the merits of the second asset purchase agreement and whether it met the criteria established in *Royal Bank of Canada v Soundair Corp* (1991), 4 OR (3d) 1, 83 DLR (4th) 76. She was satisfied the second asset purchase agreement was reasonable in the circumstances, and that the Receiver had made sufficient efforts to obtain the best price and was not acting improvidently. She noted the lack of offers, the inability to close an earlier conditional offer, the earlier order approving the sale, and the revised purchase price, which was still higher than the asset's appraised value.

[16] The guarantors now appeal stating that the chambers judge erred in finding mutual mistake. Further, given the lack of information and Jaycap's instructions in the August 2, 2017 email to the Receiver to conceal from the guarantors their liability under the guarantee, the guarantors argue that the Receiver's conduct casts doubt on the integrity of the process. They argue that the Receiver did not discharge its independent duty and was following instructions from Jaycap, who had a change of heart about the transaction and wanted a reduced price. As a result, the second approval and vesting order should be set aside, the first asset purchase agreement should be reinstated, and the guarantors should be relieved of their liability under the guarantee.

[17] Jaycap responds that the only real issue is whether the exercise of the court's discretion to accept the second asset purchase agreement was reasonable in the circumstances. Jaycap argues that notwithstanding the lengthy marketing process for the debtor's assets, there were no foreseeable offers. Further, there was no indication that relisting the assets would benefit either the secured creditors or the guarantors and that the chambers judge properly relied upon the Receiver's expertise in this regard.

[18] Jaycap also raises a number of contractual law difficulties with the guarantors' position. First, the termination provisions were duly exercised and the first asset purchase agreement no longer exists. Jaycap submits that neither this Court nor the court below can revive or reinstate a contract against the wishes of the actual parties or create a contract on their behalf. As a result, whether there was a mutual mistake or an error in finding mutual mistake is irrelevant. Second, the guarantors do not have standing to force a rectification as strangers to the contract.

Standard of Review

[19] The grounds of appeal that challenge facts and inferences are subject to palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at paras 10 and 23, [2002] 2 SCR 235. Those issues which involve determining whether the facts satisfy a legal test are also reviewed for palpable and overriding error absent an extricable error of law: *Housen* at paras 36-37.

[20] The decision to approve the second asset purchase agreement was a matter of discretion. A discretionary decision will only be reversed where that court misdirected itself on the law, or came

2019 ABCA 47 (CanLII)

to a decision that is so clearly wrong it amounts to an injustice, or where the court gave no, or insufficient, weight to relevant considerations: *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19 at para 27, [2013] 2 SCR 125.

2019 ABCA 47 (CanLII)

Analysis

There was no mutual mistake

[21] We agree with the guarantors that the evidence does not establish mutual mistake and it was a palpable and overriding error for the chambers judge to conclude that the test was met. The evidence establishes that on August 2, 2017, the day the first asset purchase agreement was signed, the parties may have had *different* understandings about the purchase price and the Receiver's understanding of the purchase price was incorporated into the agreement. A different understanding is not a common misapprehension as to the facts: *Beazer v Tollestrup Estate*, 2017 ABCA 429 at para 28, [2018] 4 WWR 513.

[22] This difference was due, in part, to the imprecise language used by Jaycap in its communications with the Receiver about the amount. Jaycap described the purchase price as its "current cost" in July 2017, and later as the "full debt" and "carrying value" in August 2017. Jaycap's counsel could not explain the differences among these terms to this Court nor was he able to explain how the amounts were determined or what the $1.3 million difference was comprised of. As the guarantors went from facing no deficiency, to a deficiency of over a million dollars, the $1.3 million difference cried out for an explanation before this Court and the court below.

[23] While the guarantors are successful on this ground of appeal, this does not end the matter as mutual mistake was an alternative argument. The appeal cannot succeed unless the guarantors establish a reviewable error in the chambers judge's *Soundair* analysis.

Lack of fairness and integrity of the process

[24] The guarantors raise two issues supporting their allegation that the integrity of the process was compromised. First, the Receiver failed to disclose relevant and material documents about what transpired after August 2, 2017. Second, the Receiver did not appear to be acting independently of Jaycap.

[25] We agree that the Receiver's evidence about what transpired after August 2, 2017 is not satisfactory, even considering the evidence contained in the confidential supplement to the third report. Legal counsel's conclusion that there was a common mistake does not provide the evidentiary foundation to establish mutual mistake. That is for the court to decide.

[26] A number of the documents and information Mr. Richardson sought while the application was pending is exactly the information that ought to have been provided to the court in support of the Receiver's application. Certainly the different understandings of the parties about the purchase

TAB 8

Court of Queen's Bench of Alberta

Citation: Sydco Energy Inc (Re), 2018 ABQB 75

2018 ABQB 75 (CanLII)

Date: 20180131
Docket: 1701 02520
Registry: Calgary

In the matter of the Receivership of Sydco Energy Inc

MNP Ltd, in its capacity as the Court-Appointed Receiver and Manager of Sydco Energy Inc

Applicant

Memorandum of Decision of the Honourable Madam Justice B.E. Romaine

---

I. Introduction

[1] In this application, the Receiver of Sydco Energy Inc sought an order approving a sale of assets. The approval and vesting order proposed by the Receiver departed from the usual order of its kind by specifically including certain declarations relating to the Alberta Energy Regulator ("AER") arising from the decisions in *Re Redwater Energy Corporation* and the Receiver's experiences and communications with the AER leading up to the application. I approved the sale of assets, and allowed the order to include the specific provisions sought by the Receiver, given the conduct of the AER lending up to the sale application, the evidence of AER's intentions with respect to the sale and its view of the scope of its regulatory authority. These are my reasons.

[48] The AER submitted that this Court does not have the jurisdiction to restrain the AER from exercising its discretion regarding license transfer application except with respect to certain provisions that were found to be inoperative by the *Redwater* decisions.

[49] It submitted that its statutorily conferred discretion to consider the compliance history of the transferee and its principals needs to be preserved. The AER noted that Directive 006, with an effective date of February 17, 2016 (promulgated shortly after the release of the *Redwater Trial Decision)* specifically provides that the AER may determine that it is not in the public interest to approve a license transfer application based on the compliance history of one or both parties or their directors, officers or security holders. It stated in its brief that "[p]rincipals of AER licencees who leave outstanding non-compliances (regardless of the nature and type of the non-compliance) will receive additional scrutiny from the AER if they seek to continue to engage or re-engage in activities that are regulated by the AER".

2018 ABQB 75 (CanLII)

IV. Analysis

A. Approval of the Wormwood Transaction

[50] The four factors a court should consider in approving a proposed sale of assets by a Receiver, as set out in *Royal Bank of Canada v Soundair Corp,* (1991) 4 OR (3d) 1 (CA) at 6, and endorsed in *River Rentals Group Ltd v Hutterian Brethren Church of Codesa,* 2010 ABCA 16 at para 12, are as follows:

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

b) the interests of all parties;

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

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

[51] The only issue with respect to the whether the Wormwood transaction meets the *Soundair* principles is whether the Receiver acted prudently in accepting the Wormwood transaction after being faced with the AER's position on the 203 bid. I am satisfied that the Receiver acted appropriately. A thorough sales process failed to give rise to any bids that would be better than the Wormwood bid; there was no realistic possibility of selling the assets that Wormwood refused to accept to any other party; and the Wormwood transaction includes many more assets than did other bids, with the result that the impact on the Orphan Well Fund is significantly less burdensome and more arrears of pre-insolvency municipal taxes will be assumed. I also note the absence of any viable alternatives and the delay of six months since the sales process order was granted.

B. Precedential Value of the Redwater Order

[52] Counsel for the Receiver, who was involved in the *Redwater* decisions and in the drafting of the order that arose from the trial decision, submits that the *Redwater* order, which was consensual, does not have precedential effect. He argues that the Respondents in *Redwater* consented to the exception set out in section 11(d) of the order because it was unlikely to be a factor in the Redwater situation. However, I must consider the wording of the order on its face,

TAB 9

Most Negative Treatment: Distinguished
Most Recent Distinguished: PCAS Patient Care Automation Services Inc., Re | 2012 ONSC 3367, 2012 CarswellOnt 7248, 91 C.B.R. (5th) 285, 216 A.C.W.S. (3d) 551 | (Ont. S.C.J. [Commercial List], Jun 9, 2012)

1991 CarswellOnt 205
Ontario Court of Appeal

Royal Bank v. Soundair Corp.

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

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

Goodman, McKinlay and Galligan JJ.A.

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

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

Related Abridgment Classifications
Debtors and creditors
VII Receivers
  VII.6 Conduct and liability of receiver
    VII.6.a General conduct of receiver

Headnote
Receivers --- Conduct and liability of receiver — General conduct of receiver
Court considering its position when approving sale recommended by receiver.
S Corp., which engaged in the air transport business, had a division known as AT. When S Corp. experienced financial difficulties, one of the secured creditors, who had an interest in the assets of AT, brought a motion for the appointment of a receiver. The receiver was ordered to operate AT and to sell it as a going concern. The receiver had two offers. It accepted the offer made by OEL and rejected an offer by 922 which contained an unacceptable condition. Subsequently, 922 obtained an order allowing it to make a second offer removing the condition. The secured creditors supported acceptance of the 922 offer. The court approved the sale to OEL and dismissed the motion to approve the 922 offer. An appeal was brought from this order.
Held:
The appeal was dismissed.
Per Galligan J.A.: When a court appoints a receiver to use its commercial expertise to sell an airline, it is inescapable that it intends to rely upon the receiver's expertise and not upon its own. The court should be reluctant to second-guess, with the benefit of hindsight, the considered business decisions made by its receiver.

called "CCFL") are owed approximately $9,500,000. Those creditors will have a deficiency expected to be in excess of $50 million on the winding up of Soundair.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Emphasis added.]

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

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

[Emphasis added.]

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

> 24. An asset purchase agreement was received by Ernst & Young on March 7, 1991 which was dated March 6, 1991. This agreement was received from CCFL in respect of their offer to purchase the assets and undertaking of Air Toronto. Apart from financial considerations, which will be considered in a subsequent affidavit, the *Receiver determined that it would not be prudent to delay acceptance of the OEL agreement to negotiate a highly uncertain arrangement with Air Canada and CCFL* . Air Canada had the benefit of an 'exclusive' in negotiations for Air Toronto and had clearly indicated its intention take itself out of the running while ensuring that no other party could seek to purchase Air Toronto and maintain the Air Canada connector arrangement vital to its survival. The CCFL offer represented a radical reversal of this position by Air

[Emphasis added.]

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

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

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

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

4. Was there unfairness in the process?

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

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

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

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

53 I do not think that the conduct of the receiver shows any unfairness towards 922. When I speak of 922, I do so in the context that Air Canada and CCFL are identified with it. I start by saying that the receiver acted reasonably when it entered into exclusive negotiations with OEL. I find it strange that a company, with which Air Canada is closely and intimately involved, would say that it was unfair for the receiver to enter into a time-limited agreement to negotiate exclusively with OEL. That is precisely the arrangement which Air Canada insisted upon when it negotiated with the receiver in the spring and summer of 1990. If it was not unfair for Air Canada to have such an agreement, I do not understand why it was unfair for OEL to have a similar one. In fact, both Air Canada and OEL in its turn were acting reasonably when they required exclusive negotiating rights to prevent their negotiations from being used as a bargaining lever with other potential purchasers. The fact that Air Canada insisted upon an exclusive negotiating right while it was negotiating with the receiver demonstrates the commercial efficacy of

TAB 10

Court of Queen's Bench of Alberta

Citation: Calpine Canada Energy Limited (Companies' Creditors Arrangements Act), 2007 ABQB 49

Date: 20070208
Docket: 0501 17864
Registry: Calgary

2007 ABQB 49 (CanLII)

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

And in the Matter of Calpine Canada Energy Limited, Calpine Canada Power Ltd., Calpine Canada Energy Finance ULC, Calpine Energy Services Canada Ltd., Calpine Canada Resources Company, Calpine Canada Power Services Ltd., Calpine Canada Energy Finance II ULC, Calpine Natural Gas Services Limited, and 3094479 Nova Scotia Company

Applicants

Reasons for Judgment
of the
Honourable Madam Justice B.E. Romaine

Introduction

[1] These reasons describe the complicated and controversial course of an application to sell certain assets. The application was made by the above-noted applicants (collectively, the "Calpine Applicants"), who, pursuant to an initial order dated December 20, 2005, are under the protection of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA").

Facts

[2] This saga began when the Calpine Applicants decided to attempt to sell certain assets that form part of the complex, intertwined relationship of Calpine Canada Power Ltd. ("CCPL") with the Calpine Commercial Trust (the "Trust") and the Calpine Power Income Fund (the "Fund").

[29] The duties a court must perform when deciding whether a receiver has acted appropriately in selling an asset are summarized succinctly in *Royal Bank v. Soundair Corp.*, 7 C.B.R. (3d) 1, 4 O.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321 at para. 16 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.

While the *Soundair* case involved a receivership and this is a situation of a debtor-in-possession under the CCAA overseen by a Monitor, these duties remain relevant to the issues before me, with some adaptation for the differences in the form of proceedings. It is noteworthy that *Soundair* did not suggest that a formal auction process was necessary or advisable in every case, and the Court in fact referred to *Salima Investments Ltd v. Bank of Montreal* (1985), 59 C.B.R. (N.S.) 242, 41 Alta. L.R. 58, 65 A.R. 372, 21 D.L.R. (4th) 473, where the Alberta Court of Appeal suggests that a court on an application to approve a sale is not necessarily bound to conduct a judicial auction.

[30] I have no doubt that in negotiating the Settlement Agreement with the Fund, the Calpine Applicants made efforts to get the best price possible, and that they did not act improvidently. While there were submissions to the contrary, it is telling that the Monitor was prepared to recommend the Settlement Agreement despite the lack of negotiation with parties other than the Fund, due primarily to the unique and difficult character of the Fund-related Assets and the backdrop of the Harbinger take-over bid for the Fund's public trust units, which created a time-limited window of opportunity. I also am not persuaded that the Settlement Agreement was not responsive to the interests of all parties, particularly to the primary interest of the creditors in maximizing value, given the circumstances facing the Calpine Applicants at the time the Settlement Agreement was negotiated.

[31] There was, however, a lack of sufficient transparency and open disclosure, which resulted in a process lacking the degree of integrity and fairness necessary when the court is involved in a public sale of assets under the CCAA. The CCAA insulates a debtor from its creditors for a period of time to allow it to attempt to resolve its financial problems through an acceptable plan of arrangement. It allows the debtor to carry on business during that period of time and to exercise a degree of normal business judgment under the supervision of the court and a Monitor. What may be commercially reasonable and even advantageous when undertaken by parties outside the litigation process, however, may be restricted by the requirement that fairness be done, and be seen to be done, when the process is supervised by the court. While a more open

2007 ABQB 49 (CanLII)

TAB 11

Court of Queen's Bench of Alberta

Citation: Sanjel Corporation (Re), 2016 ABQB 257

Date: 05162016
Docket: 1601 03143
Registry: Calgary

2016 ABQB 257 (CanLII)

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

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

Reasons for Decision
of the
Honourable Madam Justice B.E. Romaine

I. Introduction

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

[2] The Trustee of the Bonds challenged the process under which the SISP was conducted, and the use of what he characterized as a liquidating CCAA in this situation. He alleged that the use of the CCAA to effect a pre-packaged sale of the debtors' assets for the benefit of the secured creditor was an abuse of the letter and spirit of the CCAA. He also alleged that bad faith and collusion tainted the integrity of the SISP.

[3] After reviewing extensive evidence and hearing submissions from interested parties, I decided to allow the application to approve the sales, and dismiss the application of the Trustee. These are my reasons.

negotiations with respect to potential sales or other transactions. It was only on March 14, 2016 that the Ad Hoc Bondholders requested third party bid information.

[111] The Ad Hoc Bondholders were not improperly denied access to information, and would not have been entitled to know details of the third party bids.

V. Conclusion

[112] I am satisfied by the evidence before me that the factors set out in section 36(3) of the CCAA and Soundair favour the approval of the proposed sales. Specifically:

(a) the process, while not conducted under the CCAA, was nevertheless reasonable in the circumstances, as established by the evidence. It was brief, but not unreasonably brief, given the previous BAML process, current economic climate and the deteriorating financial position of the Sanjel Group;

(b) while the Monitor was not directly involved and did not actively participate in the SISP process prior to February 24, 2016, the Monitor has reviewed the process and is of the opinion that the SISP was a robust process run fairly and reasonably, and that sufficient efforts were made to obtain the best price possible for the Sanjel Group's assets in that process. I agree with the Monitor's assessment from my review of the evidence.

It is the Monitor's view, based on (i) the advice of CS and PJT, (ii) the nature of the Sanjel Group's operations and assets, (iii) the market conditions over the past year, (iv) the proposals received in the context of the SISP and from the Ad Hoc Bondholders, (v) the current ongoing depressed condition of the market and (vi) the underlying value of the Sanjel Group's assets, it is highly improbable that another post-filing sales process would yield offers for the Canadian and U.S. operations materially in excess of the values contained in the STEP and Liberty APAs.

I accept the Monitor's opinion in that regard, and nothing in my review of the evidence and the submissions of interested parties causes me to doubt that opinion.

(c) The Monitor has provided an opinion that the proposed sales are more beneficial to creditors than a sale or disposition under bankruptcy.

(d) Creditors, other than trade creditors, were consulted and involved in the process.

(e) While the sales provide no return to any creditor other than the Syndicate, I am satisfied that all other viable or reasonable options were considered. While there is no guarantee of further employment arising from the sale, there is the prospect that since the business will continue to operate until the sale, there will be an opportunity for employment for Sanjel employees with the new enterprises, and an opportunity for suppliers to continue to supply them.

(f) I am satisfied from the evidence that the consideration to be received for the assets is reasonable and fair.

I therefore approve the sale approval and vesting orders sought by the Sanjel Group.

2016 ABQB 257 (CanLII)

TAB 12

COURT FILE NO.: CV-08-7746-00-CL
DATE: 20081024

2008 CanLII 54791 (ON SC)

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE RECEIVERSHIP OF TOOL-PLAS SYSTEMS INC. (Applicant)**

AND IN THE MATTER OF SECTION 101 OF THE *COURTS OF JUSTICE ACT*, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **D. Bish, for the Applicant, Tool-Plas**

T. Reyes, for the Receiver, RSM Richter Inc.

R. van Kessel for EDC and Comerica

C. Staples for BDC

M. Weinczok for Roynat

HEARD
& RELEASED: **SEPTEMBER 29, 2008**

E N D O R S E M E N T

[1] This morning, RSM Richter Inc. ("Richter" or the "Receiver") was appointed receiver of Tool-Plas, (the "Company"). In the application hearing, Mr. Bish in his submissions on behalf of the Company made it clear that the purpose of the receivership was to implement a 'quick flip' transaction, which if granted would result in the sale of assets to a new corporate entity in which the existing shareholders of the Company would be participating. The endorsement appointing the Receiver should be read in conjunction with this endorsement.

[2] The Receiver moves for approval of the sale transaction. The Receiver has filed a comprehensive report in support of its position – which recommends approval of the sale.

[3] The transaction has the support of four Secured Lenders – EDC, Comerica, Roynat and BDC.

2008 CanLII 54791 (ON SC)

employees and suppliers to the die division will receive different treatment than employees and suppliers to the mould business. However, as the Receiver points out, these decisions are, in fact, business decisions which are made by the purchaser and not by the Receiver. The Receiver also stresses the fact that the die business employees and suppliers are unsecured creditors and under no scenario would they be receiving any reward from the sales process.

[13] This motion proceeded with limited service. Employees and unsecured creditors (with the exception of certain litigants) were not served. The materials were served on Mr. Brian Szucs, who was formerly employed as an Account Manager. Mr. Szucs has issued a Statement of Claim against the Company claiming damages as a result of wrongful dismissal. His employment contract provides for a severance package in the amount of his base salary ($120,000) plus bonuses.

[14] Mr. Szucs appeared on the motion arguing that his Claim should be exempted from the approval and vesting order – specifically that his claim should not be vested out, rather it should be treated as unaffected. Regretfully for Mr. Szucs, he is an unsecured creditor. There is nothing in his material to suggest otherwise. His position is subordinate to the secured creditors and the purchaser has made a business decision not to assume the Company's obligations to Mr. Szucs. If the sale is approved, the relief requested by Mr. Szucs cannot be granted.

[15] A 'quick flip' transaction is not the usual transaction. In certain circumstances, however, it may be the best, or the only, alternative. In considering whether to approve a 'quick flip' transaction, the Court should consider the impact on various parties and assess whether their respective positions and the proposed treatment that they will receive in the 'quick flip' transaction would realistically be any different if an extended sales process were followed.

[16] In this case certain parties will benefit if this transaction proceeds. These parties include the Secured Lenders, equipment and vehicle lessors, unsecured creditors of the mould division, the landlord, employees of the mould division, suppliers to the mould division, and finally – the customers of the mould division who stand to benefit from continued supply.

[17] On the other hand, certain parties involved in litigation, former employees of the die division and suppliers to the die division will, in all likelihood, have no possibility of recovery. This outcome is regrettable, but in the circumstances of this case, would appear to be inevitable. I am satisfied that there is no realistic scenario under which these parties would have any prospect of recovery.

[18] I am satisfied that, having considered the positions of the above-mentioned parties, the proposed sale is reasonable. I accept the view of the Receiver that there is a risk if there is a delay in the process. I am also satisfied that the sale price exceeds the going concern and the liquidation value of the assets and that, on balance, the proposed transaction is in the best interests of the stakeholders. I am also satisfied that the prior involvement of Richter has resulted in a process where alternative courses of action have been considered.

[19] I am also mindful that the Secured Lenders have supported the proposed transaction and that the subordinated secured lenders are not objecting.

[20] In these circumstances the process can be said to be fair and in the circumstances of this case I am satisfied that the principles set out in *Royal Bank of Canada v. Soundair Corp*., (1991), 4 O.R. (3d) 1 (C.A.) have been followed.

[21] In the result, the motion of the Receiver is granted and an Approval and Vesting Order shall issue in the requested form.

[22] The confidential customer and product information contained in the Offer is such that it is appropriate for a redacted copy to be placed in the record with an unredacted copy to be filed separately, under seal, subject to further order.

MORAWETZ J.

DATE: October 24, 2008

2008 CanLII 54791 (ON SC)

TAB 13

In the Court of Appeal of Alberta

Citation: Pricewaterhousecoopers Inc v 1905393 Alberta Ltd, 2019 ABCA 433

Date: 20191114
Docket: 1903-0134-AC
Registry: Edmonton

2019 ABCA 433 (CanLII)

Between:

Pricewaterhousecoopers Inc. in its capacity as Receiver of 1905393 Alberta Ltd.

Respondent/Cross-Appellants
(Applicant)

- and -

1905393 Alberta Ltd., David Podollan and Steller One Holdings Ltd.

Appellants/Cross-Respondents
(Respondents)

- and -

Servus Credit Union Ltd., Ducor Properties Ltd., Northern Electric Ltd. and Fancy Doors & Mouldings Ltd.

Respondents
(Interested Parties)

The Court:

The Honourable Mr. Justice Thomas W. Wakeling
The Honourable Madam Justice Dawn Pentelechuk
The Honourable Madam Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice J.E. Topolniski
Dated the 21st day of May, 2019
Filed on the 22nd day of May, 2019
(Docket: 1803 13229)

2019 ABCA 433 (CanLII)

2019 ABCA 433 (CanLII)

[10] As regards the first question, the parties agree that Court approval requires the Receiver to satisfy the well-known test in ***Royal Bank of Canada v Soundair Corporation***, [1991] OJ No 1137 at para 16, 46 OAC 321 ("***Soundair***"). That test requires the Court to consider four factors: (i) whether the receiver has made a sufficient effort to get the best price and has not acted improvidently; (ii) whether the interests of all parties have been considered, not just the interests of the creditors of the debtor; (iii) the efficacy and integrity of the process by which offers are obtained; and (iv) whether there has been unfairness in the working out of the process.

[11] The appellants suggest that ***Soundair*** has been modified by our Court in ***Bank of Montreal v River Rentals Group Ltd,*** 2010 ABCA 16 at para 13, 469 AR 333, to require an additional four factors in assessing whether a receiver has complied with its duties: (a) whether the offer accepted is so low in relation to the appraised value as to be unrealistic; (b) whether the circumstances indicate that insufficient time was allowed for the making of bids; (c) whether inadequate notice of sale by bid was given; and (d) whether it can be said that the proposed sale is not in the best interests of either the creditor or the owner. The appellants argue that, although the chambers judge considered the ***Soundair*** factors, she erred by failing to consider the additional ***River Rentals*** factors and, in so doing, in effect applied the "wrong law".

[12] We disagree. The chambers judge expressly referred to the ***River Rentals*** case. ***River Rentals***, it must be recalled, simply identified a subset of factors that a Court might also consider when considering the first prong of the ***Soundair*** test as to whether a receiver failed to get the best price and has not acted providently. Moreover, the type of factors that might be considered is by no means a closed category and there may be other relevant factors that might lead a court to refuse to approve a sale: ***Salima Investments Ltd v Bank of Montreal*** (1985), 65 AR 372 at paras 12-13. At its core, ***River Rentals*** highlights the need for a Court to balance several factors in determining whether a receiver complied with its duties and to confirm a sale. It did not purport to modify the ***Soundair*** test, establish a hierarchy of factors, nor limit the types of things that a Court might consider. The chambers judge applied the correct test. This ground of appeal is dismissed.

[13] At its core, then, the appellants challenge how the chambers judge applied and weighed the relevant factors in this case. The appellants suggest that the failure to obtain a price at or close to the appraised value of the Hotels is an overriding factor that trumps all the others in assessing whether the Receiver acted improvidently. That is not the test. A reviewing Court's function is not to consider whether a Receiver has failed to get the best price. Rather, a Receiver's duty is to act in a commercially reasonable manner in the circumstances with a view to obtaining the best price having regard to the competing interests of the interested parties: ***Skyepharma PLC v Hyal Pharmaceutical Corp*** (1999), 12 CBR (4th) 84 at para 4, [1999] OJ No 4300, aff'd on appeal 15 CBR (4th) 298 (ONCA).

[14] Nor is it the Court's function to substitute its view of how a marketing process should proceed. The appellants suggest that if the Hotels were re-marketed with an exposure period closer to that which the appraisals were based on, then a better offer might be obtained. Again, that is not

the test. The Receiver's decision to enter into an agreement for sale must be assessed under the circumstances then existing. The chambers judge was aware that the Receiver considered the risk of not accepting the approved offer to be significant. There was no assurance that a longer marketing period would generate a better offer and, in the interim, the Receiver was incurring significant carrying costs. To ignore these circumstances would improperly call into question a receiver's expertise and authority in the receivership process and thereby compromise the integrity of a sales process and would undermine the commercial certainty upon which court-supervised insolvency sales are based: ***Soundair*** at para 43. In such a case, chaos in the commercial world would result and "receivers and purchasers would never be sure they had a binding agreement": ***Soundair*** at para 22.

2019 ABCA 433 (CanLII)

[15] The fact that three of the four offers came in so close together in terms of amount, with the fourth one being even lower, is significant. Absent evidence of impropriety or collusion in the preparation of those confidential offers – of which there is absolutely none – the fact that those offers were all substantially lower than the appraised value speaks loudly to the existing hotel market in Grande Prairie. Moreover, the appellants have not brought any fresh evidence application to admit cogent evidence that a better offer might materialize if the Hotels were re-marketed. Indeed, the appellants have indicated that they do not rely on what the leave judge described as a "fairly continuous flow of material", the scent of which was to suggest that there were better offers waiting in the wings but were prevented from bidding because of the Receiver's abbreviated marketing process. Clearly the impression meant to be created by that late flow of material was an important factor in the leave judge's decision to grant a stay and leave to appeal: 2019 ABCA 269 at para 13.

[16] Nor, as stated previously, have the appellants been able to re-finance the Hotels notwithstanding their assessment that there is still substantial equity in the Hotels based on the appraisals. At a certain point, however, it is the market that sets the value of property and appraisals simply become "relegated to not much more than well-meant but inaccurate predictions": ***Romspen Mortgage Corp v Lantzville Foothills Estates Inc***, 2013 BCSC 222 at para 20.

[17] The chambers judge was keenly alive to the abbreviated marketing period and the appraised values of the Hotels. Nevertheless, having regard to the unique nature of the property, the incomplete construction of the Development Hotel, the difficulties with prospective purchasers in branding the Hotels in an area outside of a major centre and an area which is in the midst of an economic downturn, she concluded that the Receiver acted in a commercially reasonable manner and obtained the best price possible in the circumstances. Even with an abbreviated period for submission of offers, the chambers judge reasonably concluded that the Receiver undertook an extensive marketing campaign, engaged a commercial realtor and construction consultant, and consulted and dialogued with the owner throughout the process, which process the appellants took no issue with, until the offers were received.

TAB 14

Ontario Supreme Court
Skyepharma PLC. v. Hyal Pharmaceutical Corp.
Date: 1999-10-24

Skyepharma PLC, Plaintiff

and

Hyal Pharmaceutical Corporation, Defendant

Ontario Superior Court of Justice [Commercial List] Farley J.

Heard: October 20, 1999

Judgment: October 24, 1999

Docket: 99-CL-3479

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

Berl Nadler and James Doris, for Skyepharma PLC.

S.L. Secord, for Cangene Corporation.

Robert J. Chadwick, for Bioglan Pharma PLC.

***Farley J.*:**

Endorsement

[1] PWC as court appointed receiver of Hyal made a motion before Ground, J. on Friday, October 15, 1999 for an order approving and authorizing the Receiver's acceptance of an agreement of purchase and sale with Skye designated as Plan C, the issuance of a vesting order as contemplated in Plan C so as to effect the closing of the transaction contemplated therein and the authority to take all steps necessary to complete the transaction as contemplated therein without further order of the court. Ground J. who had not been previously involved in this receivership adjourned the matter to me, but he expressed some question as to the activity of the Receiver as set out in his oral reasons, no doubt aided by Mr. Chadwick's very able and persuasive advocacy as to such points (Mr. Chadwick at the hearing before me referred to these as the Ground/Chadwick points). Further, I am given to

1999 CanLII 15007 (ON SC)

understand that Ground, J. did not have available to him the Confidential Supplement to the Third Report which would have no doubt greatly assisted. As a result, it appears, of the complexity of what was available for sale by the Receiver which may be of interest to the various interested parties (and specifically Skye, Bioglan and Cangene) and the significant tax loss of Hyal, there were potentially various considerations and permutations which centred around either asset sales and/or a sale of shares. Thus it is, in my view, helpful to have a general overview of all the circumstances affecting the proposed sale by the Receiver so that the situation may be viewed in context—as opposed to isolating on one element, sentence or word. To have one judge in a case hearing matters such as this is an objective of the Commercial List so as to facilitate this overview.

1999 CanLII 15007 (ON SC)

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

[3] Through its activities as authorized by the court, the Receiver has significantly increased the initial indications from the various interested persons. In a motion to approve a sale by a

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

(a) whether the receiver made a sufficient effort to obtain the best price and did not act improvidently;

(b) the interests of all parties;

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

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

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

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

1999 CanLII 15007 (ON SC)

TAB 15

In the Court of Appeal of Alberta

Citation: 1705221 Alberta Ltd v Three M Mortgages Inc, 2021 ABCA 144

Date: 20210421
Docket: 2003-0076AC;
2003-0077AC
Registry: Edmonton

2021 ABCA 144 (CanLII)

Appeal No. 2003-0076AC

Between:

1705221 Alberta Ltd

Appellant
(Plaintiff)

- and -

Three M Mortgages Inc and Avatex Land Corporation

Respondents
(Plaintiffs)

- and -

Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming

(Defendants)

- and –

BDO Canada Limited

Interested Party

- and –

Shelby Fehr

Interested Party

Appeal No. 2003-0077AC

2021 ABCA 144 (CanLII)

And Between:

Three M Mortgages Inc and Avatex Land Corporation

Respondents
(Plaintiffs)

- and -

Todd Oeming, Todd Oeming as the Personal Representative of the Estate of Albert Oeming and the Estate of Albert Oeming

Appellants
(Defendants)

- and –

BDO Canada Limited

Interested Party

- and –

Shelby Fehr

Interested Party

Restriction on Publication

By Restricted Court Access Order dated February 27 and 28, 2020, by The Honourable Mr. Justice D.R. Mah, there shall be a temporary sealing and no publication of any information relating, without limitation, to the valuations and offers to purchase the subject lands, as contained in (a) either of the two unfiled affidavits, dated February 26 and 27, 2020 or (b) the first and/or second Confidential Supplement, until the sale of the subject lands has been completed in accordance with the Sale Agreement and the filing of a letter with the Clerk of the Court from the Receiver confirming the sale of same, or until such further Order of the Court.

2021 ABCA 144 (CanLII)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Dawn Pentelechuk
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice D.R. Mah
Dated the 28th day of February, 2020
Filed on the 2nd day of March, 2020

(Docket: 1603 02314)

iii. The efficacy and integrity of the sale process by which offers are obtained; and

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

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

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

i. Sufficient Efforts to Sell

[22] A court approving a sale recommended by a receiver is not engaged in a perfunctory, rubberstamp exercise. But neither should a court reject a receiver's recommendation on sale absent exceptional circumstances: ***Soundair*** at paras 21, 58. A receiver plays the lead role in receivership proceedings. They are officers of the court; their advice should therefore be given significant weight. To otherwise approach the proceedings would weaken the receiver's central purpose and function and erode confidence in those who deal with them: ***Crown Trust Co v Rosenberg*** (1986), 39 DLR (4th) 526, 60 OR (2d) 87 (ONSC) at p 551.

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

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

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

2021 ABCA 144 (CanLII)

TAB 16

COURT OF APPEAL FOR ONTARIO

CITATION: B&M Handelman Investments Limited v. Drotos, 2018 ONCA 581
DATE: 20180625
DOCKET: M49307 (C65474)

Paciocco J.A. (Motion Judge)

In the Matter of the Bankruptcy of Christine Drotos, of the City of Toronto, in the Province of Ontario

BETWEEN

B&M Handelman Investments Limited, Flordale Holdings Limited, M. Himel Holdings Inc., 1530468 Ontario Ltd., Maxoren Investments, and Sheilaco Investments Inc.

Applicants (Responding Party)

and

Christine Drotos

Respondent

Eric Golden, for the moving party, Rosen Goldberg Inc.

P. James Zibarras, Leslie Dizgun, and Caitlin Fell, for the responding party, World Finance Corporation

David Preger, for the responding party, B&M Handelman Investments Limited

Adam J. Wygodny, for the responding party, Money Gate Investment Corp.

Miranda Spence, for the purchaser, Frederic P. Kielburger

Heard: June 13, 2018

On a motion for directions and leave to appeal from the order of Justice Sean F. Dunphy of the Superior Court of Justice, dated June 1, 2018.

Paciocco J.A.:

2018 ONCA 581 (CanLII)

[43] None of these factors are irrelevant or improper considerations. Dunphy J. was entitled to consider them. As Blair J.A. pointed out in *Regal Constellation Hotel Ltd. (Re)* (2004), 71 O.R. (3d) 355 (C.A.), [2004] O.J. No. 2744, at para. 23, courts exercise considerable caution when reviewing a sale by a court-appointed receiver and will interfere only in special circumstances. Moreover, defence is owed to the decision Dunphy J. made: 22.

[44] Finally, I accept the Receiver's submission that World Finance's proposed appeal lacks merit for the simple reason that even if the Birchmount Property were to sell for the amount World Finance claims it could have achieved, World Finance would still receive nothing. World Finance's process-based complaint is therefore an idle appeal. There is no material wrong it can complain of.

[45] Even if World Finance's proposed appeal had *prima facie* merit, I still would have denied leave to appeal, as neither of the other two leave to appeal requirements are satisfied.

[46] World Finance's proposed appeal does not raise an issue that is of general importance to the practice in bankruptcy matters or to the administration of justice as a whole. It is a fact-specific dispute about the propriety of this particular sale transaction.

[47] In my view, granting leave to appeal would also unduly hinder the bankruptcy proceeding. If the sale was delayed, additional interest and costs

2018 ONCA 581 (CanLII)

TAB 17

CANADA

CONSOLIDATION

CODIFICATION

Companies’ Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

R.S.C., 1985, c. C-36

L.R.C. (1985), ch. C-36

Current to June 19, 2024

Last amended on April 27, 2023

À jour au 19 juin 2024

Dernière modification le 27 avril 2023

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

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

Additional factor — initial application

(5) When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138.

Assignment of agreements

11.3 (1) On application by a debtor company and on notice to every party to an agreement and the monitor, the court may make an order assigning the rights and obligations of the company under the agreement to any person who is specified by the court and agrees to the assignment.

Exceptions

(2) Subsection (1) does not apply in respect of rights and obligations that are not assignable by reason of their nature or that arise under

(a) an agreement entered into on or after the day on which proceedings commence under this Act;

(b) an eligible financial contract; or

(c) a collective agreement.

Factors to be considered

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

(a) whether the monitor approved the proposed assignment;

(b) whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and

(c) whether it would be appropriate to assign the rights and obligations to that person.

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

g) le rapport du contrôleur visé à l'alinéa 23(1)b).

Facteur additionnel : demande initiale

(5) Lorsqu'une demande est faite au titre du paragraphe (1) en même temps que la demande initiale visée au paragraphe 11.02(1) ou durant la période visée dans l'ordonnance rendue au titre de ce paragraphe, le tribunal ne rend l'ordonnance visée au paragraphe (1) que s'il est également convaincu que les modalités du financement temporaire demandé sont limitées à ce qui est normalement nécessaire à la continuation de l'exploitation de la compagnie débitrice dans le cours ordinaire de ses affaires durant cette période.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 36, art. 65; 2019, ch. 29, art. 138.

Cessions

11.3 (1) Sur demande de la compagnie débitrice et sur préavis à toutes les parties au contrat et au contrôleur, le tribunal peut, par ordonnance, céder à toute personne qu'il précise et qui y a consenti les droits et obligations de la compagnie découlant du contrat.

Exceptions

(2) Le paragraphe (1) ne s'applique pas aux droits et obligations qui, de par leur nature, ne peuvent être cédés ou qui découlent soit d'un contrat conclu à la date à laquelle une procédure a été intentée sous le régime de la présente loi ou par la suite, soit d'un contrat financier admissible, soit d'une convention collective.

Facteurs à prendre en considération

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

a) l'acquiescement du contrôleur au projet de cession, le cas échéant;

b) la capacité de la personne à qui les droits et obligations seraient cédés d'exécuter les obligations;

c) l'opportunité de lui céder les droits et obligations.

Restriction

(4) The court may not make the order unless it is satisfied that all monetary defaults in relation to the agreement — other than those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the company's failure to perform a non-monetary obligation — will be remedied on or before the day fixed by the court.

Copy of order

(5) The applicant is to send a copy of the order to every party to the agreement.

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 29, s. 107, c. 36, ss. 65, 112.

11.31 [Repealed, 2005, c. 47, s. 128]

Critical supplier

11.4 (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

1997, c. 12, s. 124; 2000, c. 30, s. 156; 2001, c. 34, s. 33(E); 2005, c. 47, s. 128; 2007, c. 36, s. 65.

Removal of directors

11.5 (1) The court may, on the application of any person interested in the matter, make an order removing from office any director of a debtor company in respect of which an order has been made under this Act if the court

Restriction

(4) Il ne peut rendre l'ordonnance que s'il est convaincu qu'il sera remédié, au plus tard à la date qu'il fixe, à tous les manquements d'ordre pécuniaire relatifs au contrat, autres que ceux découlant du seul fait que la compagnie est insolvable, est visée par une procédure intentée sous le régime de la présente loi ou ne s'est pas conformée à une obligation non pécuniaire.

Copie de l'ordonnance

(5) Le demandeur envoie une copie de l'ordonnance à toutes les parties au contrat.

1997, ch. 12, art. 124; 2005, ch. 47, art. 128; 2007, ch. 29, art. 107, ch. 36, art. 65 et 112.

11.31 [Abrogé, 2005, ch. 47, art. 128]

Fournisseurs essentiels

11.4 (1) Sur demande de la compagnie débitrice, le tribunal peut par ordonnance, sur préavis de la demande aux créanciers garantis qui seront vraisemblablement touchés par la charge ou sûreté, déclarer toute personne fournisseur essentiel de la compagnie s'il est convaincu que cette personne est un fournisseur de la compagnie et que les marchandises ou les services qu'elle lui fournit sont essentiels à la continuation de son exploitation.

Obligation de fourniture

(2) S'il fait une telle déclaration, le tribunal peut ordonner à la personne déclarée fournisseur essentiel de la compagnie de fournir à celle-ci les marchandises ou services qu'il précise, à des conditions compatibles avec les modalités qui régissaient antérieurement leur fourniture ou aux conditions qu'il estime indiquées.

Charge ou sûreté en faveur du fournisseur essentiel

(3) Le cas échéant, le tribunal déclare dans l'ordonnance que tout ou partie des biens de la compagnie sont grevés d'une charge ou sûreté, en faveur de la personne déclarée fournisseur essentiel, d'un montant correspondant à la valeur des marchandises ou services fournis en application de l'ordonnance.

Priorité

(4) Il peut préciser, dans l'ordonnance, que la charge ou sûreté a priorité sur toute réclamation des créanciers garantis de la compagnie.

1997, ch. 12, art. 124; 2000, ch. 30, art. 156; 2001, ch. 34, art. 33(A); 2005, ch. 47, art. 128; 2007, ch. 36, art. 65.

Révocation des administrateurs

11.5 (1) Sur demande d'un intéressé, le tribunal peut, par ordonnance, révoquer tout administrateur de la compagnie débitrice à l'égard de laquelle une ordonnance a été rendue sous le régime de la présente loi s'il est

TAB 18

CITATION: Urbancorp, 2020 ONSC 7920
COURT FILE NO.: CV-18-600624-00CL
DATE: 12-23-20

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

2020 ONSC 7920 (CanLII)

RE: KSV KOFMAN INC., by and on behalf of URBANCORP CUMBERLAND 1 LP, by its general partner, URBANCORP CUMBERLAND 1 GP INC., Applicant

AND:

URBANCORP RENEWABLE POWER INC., Respondent

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Robin Schwill, Robert Nicholls and Shane Freedman*, for KSV Restructuring Inc. (formerly KSV Kofman Inc.), the Monitor and Receiver

Neil Rabinovitch, for Adv. Guy Gissin, the Israeli Functionary

Suzanne Murphy, Heather Meredith and Alex Steele, for Enwave Geo Communications LP, the Purchaser

Jeffrey Larry, for King Towns North Inc.

Scott Bomhof, for First Capital Realty

Robert Drake and Mario Forte, for The Fuller Landau Group Inc., Monitor of Urbancorp Cumberland 2 GP Inc., Urbancorp Cumberland 2 L.P., Bosvest Inc., Edge on Triangle Park Inc., Edge Residential Inc. and Westside Gallery Lofts Inc.

Maria Dimakas, for the Condominium Corporations

HEARD VIA ZOOM: December 11, 2020

RELEASED: December 23, 2020

ENDORSEMENT

Introduction

[1] KSV Restructuring Inc. (formerly KSV Kofman Inc.), Court-appointed receiver (the "Receiver") of Urbancorp Renewable Power Inc. ("URPI") and as Court-appointed Monitor of Urbancorp Cumberland 1 LP ("Cumberland LP"), Urbancorp Cumberland 1 GP Inc., and certain related entities (the "Monitor", and as Receiver and Monitor, the "Court Officer") for and on behalf of Urbancorp New Kings Inc. ("UNKI"), Vestaco Homes Inc. ("VHI") and 228 Queen's

[30] Section 243(1)(c) of the BIA provides:

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

[31] This subsection, in conjunction with the provisions of s. 100 of the *Courts of Justice Act (Ontario)* ("CJA") is broad enough to form the basis of the Receiver's request for the Assignment Order and for the court to make such order. If not, the ability of a receiver to discharge its functions would be severely restricted to the point where the objectives of Canadian insolvency laws would be frustrated in the receivership context.

[32] An alternative approach is to resort to the inherent jurisdiction of the court.

[33] I recently commented on this subject in *Stephen Francis Podgurski (Re)*, 2020 ONSC 2552.

> [65] There is also scope to grant the requested relief using the inherent jurisdiction of the court. The inherent jurisdiction of the provincial superior courts is a broad and diverse power. It has been said that inherent jurisdiction is a power that is exercisable "in any situation where the requirements of justice demands it" (*Gillespie v. Manitoba (Atty. Gen.)*, 2000 MBCA 1, at para. 92), and that "nothing shall be intended to be out of the jurisdiction of the Superior Court, but that which is specifically appears to be so" (*Board v. Board* [1919] A. C. 956 at pp. 17-18, per Viscount Haldane).
>
> [66] Recently, the Supreme Court of Canada reviewed the inherent jurisdiction of superior courts in *Endean v. British Columbia,* 2016 SCC 42, and described it as follows:
>
>> [23] The inherent powers of superior courts are central to the role of those courts, which form the backbone of our judicial system. Inherent jurisdiction derives from the very nature of the court as a superior court of law and may be defined as a "reserve or fund of powers" or a "residual source of powers", which a superior court "may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them": I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 *Curr. Legal Probs.* 23, at p. 51, cited with approval in, e.g., *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 20; *R. v. Caron*, 2011 SCC 5, [2011] 1 S.C.R.

2020 ONSC 7920 (CanLII)

TAB 19

Français

Courts of Justice Act

R.S.O. 1990, CHAPTER C.43

Consolidation Period: From July 1, 2024 to the e-Laws currency date.

Last amendment: 2024, c. 2, Sched. 19, s. 3.

Legislative History: 1991, c. 46; 1993, c. 27, Sched.; O. Reg. 922/93; 1994, c. 12, s. 1-48 (But see O. Reg. 441/97, 1998, c. 20, Sched. A, s. 20 and 1999, c. 12, Sched. B, s. 5); 1994, c. 27, s. 43; 1996, c. 25, s. 1, 9; 1996, c. 31, s. 65, 66; 1997, c. 19, s. 32; 1997, c. 23, s. 5; 1997, c. 26, Sched.; 1998, c. 4, s. 2; 1998, c. 18, Sched. B, s. 5; 1998, c. 18, Sched. G, s. 48; 1998, c. 20, s. 2; 1998, c. 20, Sched. A; 1999, c. 6, s. 18; 1999, c. 12, Sched. B, s. 4; 2000, c. 26, Sched. A, s. 5; 2000, c. 33, s. 20; 2001, c. 9, Sched. B, s. 6 (But see Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006*; 2002, c. 13, s. 56; 2002, c. 14, Sched., s. 9; 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. A, s. 4; 2004, c. 17, s. 32; 2005, c. 5, s. 17; 2006, c. 1, s. 4; 2006, c. 19, Sched. D, s. 5; 2006, c. 21, Sched. A; 2006, c. 21, Sched. C, s. 105; 2006, c. 21, Sched. F, s. 106, 136 (1); 2006, c. 35, Sched. C, s. 2; 2009, c. 11, s. 19, 20; 2009, c. 33, Sched. 2, s. 20; 2009, c. 33, Sched. 6, s. 50; 2015, c. 23, s. 1-3; 2015, c. 27, Sched. 1, s. 1; 2016, c. 5, Sched. 7; 2017, c. 2, Sched. 2, s. 1-19; 2017, c. 14, Sched. 4, s. 10; 2017, c. 20, Sched. 2, s. 3-6; 2017, c. 20, Sched. 11, s. 7; 2017, c. 24, s. 75; 2017, c. 34, Sched. 46, s. 10; 2018, c. 8, Sched. 15, s. 8; 2018, c. 17, Sched. 10; 2019, c. 7, Sched. 15; 2020, c. 11, Sched. 5, s. 1-11; 2020, c. 25, Sched. 1, s. 27; 2020, c. 25, Sched. 2, s. 1-3; 2021, c. 4, Sched. 3, s. 1-16; 2021, c. 34, Sched. 4; 2023, c. 2, Sched. 2; 2023, c. 9, Sched. 11; 2023, c. 9, Sched. 16, s. 23; 2023, c. 12, Sched. 3; 2024, c. 2, Sched. 6; 2024, c. 2, Sched. 19, s. 3.

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reference in one of those sections to a judge includes a justice of the peace presiding in the Ontario Court of Justice. R.S.O. 1990, c. C.43, s. 95 (3); 1996, c. 25, s. 9 (18).

Section Amendments with date in force (d/m/y)

1996, c. 25, s. 9 (18) - 19/04/1999

2021, c. 4, Sched. 3, s. 13 - 01/02/2022

COMMON LAW AND EQUITY

Rules of law and equity

96 (1) Courts shall administer concurrently all rules of equity and the common law. R.S.O. 1990, c. C.43, s. 96 (1); 1993, c. 27, Sched.

Rules of equity to prevail

(2) Where a rule of equity conflicts with a rule of the common law, the rule of equity prevails. R.S.O. 1990, c. C.43, s. 96 (2); 1993, c. 27, Sched.

Jurisdiction for equitable relief

(3) Only the Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may grant equitable relief, unless otherwise provided. 1994, c. 12, s. 38; 1996, c. 25, s. 9 (17).

Section Amendments with date in force (d/m/y)

1993, c. 27, Sched. - 31/12/1991; 1994, c. 12, s. 38 - 28/02/1995; 1996, c. 25, s. 9 (17) - 19/04/1999

Declaratory orders

97 The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right, whether or not any consequential relief is or could be claimed. 1994, c. 12, s. 39; 1996, c. 25, s. 9 (17).

Section Amendments with date in force (d/m/y)

1994, c. 12, s. 39 - 28/02/1995; 1996, c. 25, s. 9 (17) - 19/04/1999

Relief against penalties

98 A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just. R.S.O. 1990, c. C.43, s. 98; 1993, c. 27, Sched.

Section Amendments with date in force (d/m/y)

1993, c. 27, Sched. - 31/12/1991

Damages in substitution for injunction or specific performance

99 A court that has jurisdiction to grant an injunction or order specific performance may award damages in addition to, or in substitution for, the injunction or specific performance. R.S.O. 1990, c. C.43, s. 99.

Vesting orders

100 A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed. R.S.O. 1990, c. C.43, s. 100.

INTERLOCUTORY ORDERS

Injunctions and receivers

101 (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so. R.S.O. 1990, c. C.43, s. 101 (1); 1994, c. 12, s. 40; 1996, c. 25, s. 9 (17).

Terms

(2) An order under subsection (1) may include such terms as are considered just. R.S.O. 1990, c. C.43, s. 101 (2).

Section Amendments with date in force (d/m/y)

1994, c. 12, s. 40 - 28/02/1995; 1996, c. 25, s. 9 (17) - 19/04/1999

TAB 20

In the Court of Appeal of Alberta

Citation: DGDP-BC Holdings Ltd v Third Eye Capital Corporation, 2021 ABCA 226

Date: 20210617
Docket: 2001-0241-AC;
2001-0125-AC
Registry: Calgary

2001-0241-AC

Between:

DGDP-BC Holdings Ltd.

Appellant

- and -

Third Eye Capital Corporation

Respondent

- and -

PricewaterhouseCoopers Inc.

Respondent

2001-0125-AC

And Between:

DGDP-BC Holdings Ltd.

Appellant

- and -

Third Eye Capital Corporation

Respondent

- and -

Accel Canada Holdings Limited and Accel Energy Canada Limited

Respondents

2021 ABCA 226 (CanLII)

- and -

PricewaterhouseCoopers Inc. in its capacity as the court-appointed receiver of Accel Canada Holdings Limited and Accel Energy Canada Limited

Respondent

2021 ABCA 226 (CanLII)

The Court:

The Honourable Mr. Justice Jack Watson
The Honourable Mr. Justice Frans Slatter
The Honourable Madam Justice Ritu Khullar

Memorandum of Judgment

Appeal from the Order by
The Honourable Madam Justice K.M. Horner
Dated the 4th day of December, 2020
Filed on the 4th day of December, 2020
(Docket: 2001 06776)

Appeal from the Order by
The Honourable Madam Justice K.M. Horner
Dated the 12th day of June, 2020
Filed on the 15th day of June, 2020
(Docket: 2001 06776)

> statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> (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.
>
> (4) In deciding whether to make an order, the court is to consider, among other things, . . .

The appellant particularly relies on the requirement in s. 11.2(3) that in some circumstances the priority of the Interim Lenders' Charge could only be varied with its consent. It is clear that if what became the Receiver's Borrowings Charge had been created under s. 11.2(1), those charges could not have been given priority without the consent of the appellant.

[16] The respondents argue, however, that the Receiver's Borrowings Charge was not a charge granted under the *CCAA* and therefore does not fit within the provisions of s. 11.2(3). That section, they argue, only applies when two or more interim financing charges are made under the *CCAA*. Since the Receiver's Borrowings Charge was made under the *BIA*, it is not subject to the requirement for consent, and the wide jurisdiction given to supervising judges under the *BIA* allowed this supervising judge to set priorities.

[17] The respondents rely on s. 243(1)(c) of the *BIA*, which authorizes the supervising judge to "take any other action that the court considers advisable". There is a similar wide-ranging discretion under s. 13(2) of the *Judicature Act,* but it does not enhance the analysis here. These provisions create a plenary and open-ended jurisdiction in the court. Technically they are not a part of the "inherent" jurisdiction of the court; they are a residual statutory jurisdiction, not part of the "inherent jurisdiction of superior courts of record": ***Century Services Inc v Canada (Attorney General)***, 2010 SCC 60 at para. 64, [2010] 3 SCR 379. However, the appellant is correct that in either case, the residual or inherent discretion would yield to any specific statutory provision that expressly or impliedly narrowed it.

[18] How these various sections interact is a pure question of statutory interpretation. The provisions of the *CCAA* and *BIA* should be interpreted in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the statutes, the object of the statutes, and the intention of Parliament. Since the two statutes deal with the same topic, they should be interpreted and applied in a complementary way, with due regard to their different focuses: ***Century Services*** at paras. 24, 76, 78; ***Reference re Broadcasting Regulatory Policy CRTC 2010-168***, 2012 SCC 68 at paras. 37, 41, [2012] 3 SCR 489.

2021 ABCA 226 (CanLII)

TAB 21

Estate of Bernard Sherman and Trustees of the Estate and Estate of Honey Sherman and Trustees of the Estate *Appellants*

v.

Kevin Donovan and Toronto Star Newspapers Ltd. *Respondents*

and

Attorney General of Ontario, Attorney General of British Columbia, Canadian Civil Liberties Association, Income Security Advocacy Centre, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, HIV Legal Network and Mental Health Legal Committee *Interveners*

Succession de Bernard Sherman et fiduciaires de la succession et Succession de Honey Sherman et fiduciaires de la succession *Appelants*

c.

Kevin Donovan et Toronto Star Newspapers Ltd. *Intimés*

et

Procureur général de l'Ontario, procureur général de la Colombie-Britannique, Association canadienne des libertés civiles, Centre d'action pour la sécurité du revenu, Ad IDEM/Canadian Media Lawyers Association, Postmedia Network Inc., CTV, une division de Bell Média inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Citytv, a division of Rogers Media Inc., British Columbia Civil Liberties Association, HIV & AIDS Legal Clinic Ontario, Réseau juridique VIH et Mental Health Legal Committee *Intervenants*

INDEXED AS: SHERMAN ESTATE *v.* DONOVAN

2021 SCC 25

File No.: 38695.

2020: October 6; 2021: June 11.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Open court principle — Sealing orders — Discretionary limits on court openness — Important public

RÉPERTORIÉ : SHERMAN (SUCCESSION) *c.* DONOVAN

2021 CSC 25

N° du greffe : 38695.

2020 : 6 octobre; 2021 : 11 juin.

Présents : Le juge en chef Wagner et les juges Moldaver, Karakatsanis, Brown, Rowe, Martin et Kasirer.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Tribunaux — Principe de la publicité des débats judiciaires — Ordonnances de mise sous scellés — Limites

2021 SCC 25 (CanLII)

dignity dimension of their privacy is at "serious risk". For the purposes of the test for discretionary limits on court openness, this requires the applicant to show that the information in the court file is sufficiently sensitive such that it can be said to strike at the biographical core of the individual and, in the broader circumstances, that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.

qu'il y a un « risque sérieux » pour cette dimension de sa vie privée liée à sa dignité. Pour l'application du test des limites discrétionnaires à la publicité des débats judiciaire, le demandeur doit donc démontrer que les renseignements contenus dans le dossier judiciaire sont suffisamment sensibles pour que l'on puisse dire qu'ils touchent au cœur même des renseignements biographiques de la personne et, dans un contexte plus large, qu'il existe un risque sérieux d'atteinte à la dignité de la personne concernée si une ordonnance exceptionnelle n'est pas rendue.

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

[36] En l'espèce, les renseignements contenus dans les dossiers judiciaires ne revêtent pas ce caractère si sensible qu'on pourrait dire qu'ils touchent à l'identité fondamentale des personnes concernées; les fiduciaires n'ont pas démontré en quoi la levée des ordonnances de mise sous scellés met en jeu la dignité des personnes touchées. Je ne suis donc pas convaincu que l'atteinte à leur vie privée soulève un risque sérieux pour un intérêt public important, comme l'exige *Sierra Club*. De plus, comme je tenterai de l'expliquer, il n'y avait pas de risque sérieux que les personnes visées subissent un préjudice physique en raison de la levée des ordonnances de mise sous scellés. Par conséquent, la présente affaire n'est pas un cas où il convient de rendre des ordonnances de mise sous scellés ni aucune ordonnance limitant l'accès aux dossiers judiciaires en cause. Dans les circonstances, la question de l'admissibilité des nouveaux éléments de preuve du Toronto Star est théorique. Je suis d'avis de rejeter le pourvoi.

A. *The Test for Discretionary Limits on Court Openness*

A. *Le test des limites discrétionnaires à la publicité des débats judiciaires*

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

[37] Les procédures judiciaires sont présumées accessibles au public (*MacIntyre*, p. 189; *A.B. c. Bragg Communications Inc.*, 2012 CSC 46, [2012] 2 R.C.S. 567, par. 11).

[38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three

[38] Le test des limites discrétionnaires à la publicité présumée des débats judiciaires a été décrit comme une analyse en deux étapes, soit l'étape de la nécessité et celle de la proportionnalité de l'ordonnance proposée (*Sierra Club*, par. 53). Après un examen, cependant, je constate que ce test repose sur trois conditions préalables fondamentales dont une

2021 SCC 25 (CanLII)

prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:

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

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

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

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

[39] The discretion is structured and controlled in this way to protect the open court principle, which is understood to be constitutionalized under the right to freedom of expression at s. 2(b) of the Charter (*New Brunswick*, at para. 23). Sustained by freedom of expression, the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering. This Court has often highlighted the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process (see, e.g., *Vancouver Sun*,

personne cherchant à faire établir une telle limite doit démontrer le respect. La reformulation du test autour de ces trois conditions préalables, sans en modifier l'essence, aide à clarifier le fardeau auquel doit satisfaire la personne qui sollicite une exception au principe de la publicité des débats judiciaires. Pour obtenir gain de cause, la personne qui demande au tribunal d'exercer son pouvoir discrétionnaire de façon à limiter la présomption de publicité doit établir que :

(1) la publicité des débats judiciaires pose un risque sérieux pour un intérêt public important;

(2) l'ordonnance sollicitée est nécessaire pour écarter ce risque sérieux pour l'intérêt mis en évidence, car d'autres mesures raisonnables ne permettront pas d'écarter ce risque; et

(3) du point de vue de la proportionnalité, les avantages de l'ordonnance l'emportent sur ses effets négatifs.

Ce n'est que lorsque ces trois conditions préalables sont remplies qu'une ordonnance discrétionnaire ayant pour effet de limiter la publicité des débats judiciaires — par exemple une ordonnance de mise sous scellés, une interdiction de publication, une ordonnance excluant le public d'une audience ou une ordonnance de caviardage — pourra dûment être rendue. Ce test s'applique à toutes les limites discrétionnaires à la publicité des débats judiciaires, sous réserve uniquement d'une loi valide (*Toronto Star Newspapers Ltd. c. Ontario*, 2005 CSC 41, [2005] 2 R.C.S. 188, par. 7 et 22).

[39] Le pouvoir discrétionnaire est ainsi structuré et contrôlé de manière à protéger le principe de la publicité des débats judiciaires, qui est considéré comme étant constitutionnalisé sous le régime du droit à la liberté d'expression garanti par l'al. 2b) de la *Charte* (*Nouveau-Brunswick*, par. 23). Reposant sur la liberté d'expression, le principe de la publicité des débats judiciaires est l'un des fondements de la liberté de la presse étant donné que l'accès aux tribunaux est un élément essentiel de la collecte d'information. Notre Cour a souvent souligné l'importance de la publicité pour maintenir l'indépendance et l'impartialité des tribunaux, la confiance du

2021 SCC 25 (CanLII)

TAB 22

SUPREME COURT OF YUKON

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

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

2022 YKSC 2 (CanLII)

BETWEEN:

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

PETITIONER

AND

YUKON ZINC CORPORATION

RESPONDENT

Before Chief Justice S.M. Duncan

Counsel for the Petitioner	John T. Porter and Kimberly Sova (by video)
No one appearing	Yukon Zinc Corporation
Counsel for Welichem Research General Partnership	H. Lance Williams and Forrest Finn (by video)
Counsel for PricewaterhouseCoopers Inc.	Tevia Jeffries and Emma Newbery (by video)

REASONS FOR DECISION

Introduction

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

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

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

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

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

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

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

2022 YKSC 2 (CanLII)

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

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

> The purpose of granting such a sealing order is to protect the integrity and fairness of the sales process by ensuring that competitors or potential bidders do not obtain an unfair advantage by obtaining sensitive commercial information about the asset up for sale while others have to rely on their own resources to place a value on the asset when preparing their bids.
>
> **To achieve that purpose a sealing order typically remains in place until the closing of the proposed sales transaction. If the transaction closes, then the need for confidentiality disappears and the sealed materials can become part of the public court file. If the transaction proposed by the receiver does not close for some reason, then the materials remain sealed so that the confidential information about the asset under sale does not become available to potential bidders in the next round of bidding, thereby preventing them from gaining an unfair advantage in their subsequent bids. The integrity of the sale process necessitates keeping all bids confidential until a final sale of the assets has taken place.** [emphasis added].

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

2022 YKSC 2 (CanLII)

TAB 23

CITATION: Ontario Securities Commission v. Bridging Finance Inc., 2022 ONSC 1857
COURT FILE NO.: CV-21-00661458-00CL
DATE: 2022-03-30

2022 ONSC 1857 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Ontario Securities Commission

- **and -**

Bridging Finance Inc., Bridging Income Fund LP, Bridging Mid-Market Debt Fund LP, SB Fund GP INC., Bridging Finance GP INC., Bridging Income RSP Fund, Bridging Mid-Market Debt RSP Fund, Bridging Private Debt Institutional LP, Bridging Real Estate Lending Fund LP, Bridging SMA 1 LP, Bridging Infrastructure Fund LP, Bridging MJ GP INC., Bridging Indigenous Impact Fund, Bridging Fern Alternative Credit Fund, Bridging SMA 2 LP, Bridging SMA 2 GP Inc., and Bridging Private Debt Institutional RSP Fund

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *John Finnigan, Grant Moffat and Adam Driedger* for the Receiver, PricewaterhouseCoopers Inc.

Adam Gotfried, for the Ontario Securities Commission

Robert Staley and Kevin Zych, Representative Counsel for the Bridging Unitholders

*David Bish***,** for The Coco Group, 2693600 Ontario Inc., Rocky Coco and Jenny Coco

Marc Wasserman, Martino Calvaruso and Justine Erickson, for BlackRock Financial Management, Inc.

Steve Graff, for several investors in various Bridging Funds

Steve Weisz, for the University of Minnesota Foundation

Melissa Mackewn, for David Sharpe

David Ullman, for Thomas Canning (Maidstone) Limited

Lawrence Thacker, for Natasha Sharpe

Domenico Magisano and Spencer Jones, for a Unitholder in the Bridging Funds

Sharon Kour, for Certain Unitholders

[48] I am satisfied that the Status Quo Option, as recommended by both the Receiver and RC, represents the best possible outcome in these circumstances and it is approved.

[49] The Receiver has also requested an order sealing the Confidential Appendices.

[50] The Receiver takes a position that the Confidential Appendices contain the Remaining Revised Bids and the Receiver's summary of the economic terms of the Remaining Revised Bids and Liquidation Model should be sealed. The Receiver is of the view that the terms of the Remaining Revised Bids are confidential and include confidential information or realization estimates related to certain borrowers or assets. The Receiver submits that the disclosure of the Confidential Appendices, and in particular the assessment of the Cash Proposal Bidder and the Investment Proposal Bidder, by the Receiver of the value of the loans or assets, may negatively impact future realizations on the assets and thus the Receiver's efforts to maximize value for stakeholders. In addition, the Receiver points out that the disclosure of such confidential and commercially sensitive information would undermine the confidentiality rights and/or obligations of the Receiver, the Cash Proposal Bidder, the Investment Proposal Bidder and Certain Borrowers.

[51] The jurisdiction to grant a sealing order is found in s. 137(2) of the *Courts of Justice Act* and the test for the granting of such relief is set out in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, which test was recently restated by the Supreme Court of Canada in *Sherman State v. Donovan*, 2021 SCC 25 at paras. 37 – 38 where Kaiser J. wrote that:

> [37] Court proceedings are presumptively open to the public.
>
> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on applicants seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
>
> (3) as a matter proportionality, the benefits of the order outweigh its negative effects.

[52] No party opposed the sealing request.

[53] In my view, I am satisfied that the Receiver has satisfied the foregoing test in that the disclosure of the information in the Confidential Appendices would have a negative impact on

2022 ONSC 1857 (CanLII)

future realizations on the assets and thus the Receiver's efforts to maximize value for stakeholders. Further, there are no reasonable alternatives to the sealing order in the circumstances and in my view, no stakeholders will be materially prejudiced by sealing the Confidential Appendices and the salutary effects of granting the relief outweigh any deleterious effects.

[54] Accordingly, I am satisfied that the Confidential Appendices should be sealed pending further order of the court.

[55] Finally, the motion makes reference to proposed amendments to the Appointment Order, which would authorize the Receiver to liquidate the Property of Bridging, without the requirement for Court approval for transactions having a value below certain thresholds. The determination of this issue is deferred to a future date.

Disposition

[56] In summary, the SISP gives the Receiver the authority to terminate the SISP. The Receiver has determined, in its business judgment, that the best path forward is to terminate the SISP and continue with the Status Quo. The recommendation of the Receiver has overwhelming support. RC supports the recommendation of the Receiver, as do a substantial majority of Unitholders. Only one Unitholder opposes the recommendation of the Receiver. There are no exceptional circumstances that would cause me to intervene and proceed contrary to the recommendation of the Receiver, which recommendation I accept.

[57] The relief requested by the Receiver as outlined in [1] above is granted.

Chief Justice G.B. Morawetz

Date: March 30, 2022

2022 ONSC 1857 (CanLII)

TAB 24

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Leslie & Irene Dube Foundation Inc. v. P218 Enterprises Ltd.,* 2014 BCSC 1855

Date: 20141002
Docket: S-139627
Registry: Vancouver

2014 BCSC 1855 (CanLII)

Between:

Leslie & Irene Dube Foundation Inc. and 1076586 Alberta Ltd.
Petitioners

And

P218 Enterprises Ltd., Wayne Holdings Ltd., Okanagan Valley Asset Management Corporation, Willow Green Estates Inc., BMK 112 Holdings Inc., 0720609 B.C. Ltd., 0757736 B.C. Ltd., 0748768 B.C. Ltd., Dr. T. O'Farrell Inc., Pinloco Holdings Inc., 602033 B.C. Ltd., Andrian W. Bak, MD, FRCPC, Inc., Interior Savings Credit Union, Valiant Trust Company, Mara Lumber (Kelowna) (2007) Ltd., Rona Revy Inc., Rocky Point Engineering Ltd., Mitsubishi Electric Sales Canada Inc., BFI Canada Inc., John Byrson & Partners, Winn Rentals Ltd., 0964502 B.C. Ltd., Denby Land Surveying Limited, Mega Cranes Ltd., Weq Britco LP, Roynat Inc., Mcap Leasing Inc., Bodkin Leasing Corporation, HSBC Bank Canada, and Bank of Montreal
Respondents

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Receiver, Ernest & Young Inc.:	J.D. Schultz J.R. Sandrelli
Counsel for the Petitioners:	D.E. Gruber
Counsel for Valiant Trust Company:	J.D. Shields
Counsel for 0964502 B.C. Ltd.:	C.K. Wendell

e) engagement of Colliers for SH Process:	$50,000
f) other consulting fees:	$75,000
g) office, utility and operating expenses:	$52,500
h) contingency:	$55,000
TOTAL	$1,357,500

[49] The Receiver seeks to amend the Receivership Order pronounced January 27, 2014, as amended February 6, 2014 such that its permitted borrowing charge is increased from $2.5 million to $3.5 million.

[50] The Bond Holders and the Lien Claimants oppose the increase on the basis that there is no evidence as to where the increase in financing will come from or what the rate will be and that no particulars have been provided as to who the money will be paid to or why.

[51] I agree that approval of an increase in the borrowing charge in a vacuum is not desirable. However, I understand that negotiations are underway with the lender. I am satisfied that there is a need for the Receiver's borrowing charge to be increased, particularly given that more work will be required regarding the valuation and marketing of the Development.

[52] I am prepared to allow the increase on the condition that the financial terms for the increase are no less favourable to the creditors than the current terms of the Receiver's borrowing charge.

Approval of the Receiver's Activities to Date

[53] The Receiver seeks approval of its activities as set out in its first and second reports to the Court dated January 30 and August 14, 2014, respectively.

[54] The court has inherent jurisdiction to review and approve or disapprove the activities of a court appointed receiver. If the receiver has met the objective test of demonstrating that it has acted reasonably, prudently and not arbitrarily, the court

2014 BCSC 1855 (CanLII)

may approve the activities set out in its report to the court: *Bank of America Canada v. Willann Investments Ltd*., [1993] O.J. No. 1647 (Ct. J.) at paras. 3-5, aff'd [1996] O.J. No. 2806 (C.A.); *Lang Michener v. American Bullion Minerals Ltd*., 2005 BCSC 684 at para. 21.

[55] I accept that the Receiver has essentially fulfilled its mandate with respect to completion of Phase 1. Its activities as set out in its first report are approved.

[56] After completion of Phase 1, the Receiver commenced on a sale process in an attempt to maximize the return for the creditors. It may well be that the Receiver will be able to demonstrate that the steps it took in this regard were objectively reasonable. However, given my previous comments, I am not satisfied that the Receiver has shown that the stalking horse bid process it entered into was done prudently. It is premature to approve its activities in this regard.

Sealing Order

[57] Given my ruling on the SH Agreement and my comments that the Altus Group's appraisal dated March 3, 2014 is outdated, there is no need to consider this issue.

Conclusion

[58] The Receiver's applications for a Bidding Procedures Order and a Conditional Vesting Order approving the stalking horse bid subject to the procedures set out in the Bidding Procedures Order is dismissed.

[59] The Receiver's application for an order approving the SL 6 Purchase Agreement is granted.

[60] The Receiver's application for an order amending Paragraphs 19 and 20(c) of the Receivership Order pronounced January 27, 2014, as amended February 6, 2014, such that the term "$2.5 million" is changed to "$3.5 million" is allowed on the condition that the terms of such increase will not be less favourable than the existing terms of the Receiver's borrowing charge.

2014 BCSC 1855 (CanLII)

TAB 25

2004 CarswellOnt 428
Ontario Superior Court of Justice [Commercial List]

Regal Constellation Hotel Ltd., Re.

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

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

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

Farley J.

Heard: January 15, 2004

Judgment: January 15, 2004 *

Docket: 03-CL-5044

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

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

Related Abridgment Classifications

Debtors and creditors
VII Receivers
VII.6 Conduct and liability of receiver
VII.6.a General conduct of receiver
Real property
III Sale of land
III.6 Judicial sale
III.6.d Vesting order

Headnote

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

***Farley J.*:**

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

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

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

10 Mr. Rueter points out the Cocov (one of the principals) affidavit of June 25, 2003 that the property had an "as is" value of $30.65 million. However, this fails to take into account that not only was this affidavit before the receivership commenced (July 4, 2003), but it was in fact in an effort to convince the court that a receiver need not be appointed because there was sufficient value to cover the Bank indebtedness. Affidavits of this nature must be taken with a grain of salt regarding puffery. I note as well that receivership sales are believed generally to generate lower amounts than a sale in the ordinary course of a non-pressed vendor.

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

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

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

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

Motion granted.

APPENDIX — A

HSBC Bank of Canada and Regal Constellation Hotel Limited

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

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

Therefore the Court was not aware that the principals behind the offer #1 in the sealed Supplemental Report of the Receiver were the same as the principals behind purchaser #4 who was being recommended to the Court. The sale process was manipulated in that the same principals made offer #1 at $31.0 million and offer #4 at $25 million and that one of those principals, Mr. Cocov, deposed in an affidavit before this Court sworn 25 June 03, that the Hotel has a value of $30,650,000

TAB 26

2004 CarswellOnt 2653
Ontario Court of Appeal

Regal Constellation Hotel Ltd., Re

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

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

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

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

Laskin, Feldman, Blair JJ.A.

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

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

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

Related Abridgment Classifications
Debtors and creditors
VII Receivers
  VII.6 Conduct and liability of receiver
    VII.6.a General conduct of receiver
Real property
III Sale of land
  III.6 Judicial sale
    III.6.d Vesting order

Headnote
Sale of land --- Judicial sale — Vesting order
Vesting order is court order allowing court to effect change of title directly — Vesting order is also conveyance of title vesting interest in real or personal property in party entitled thereto under order — In its capacity as order, vesting order is in ordinary course subject to appeal — In Ontario, filing of notice of appeal does not automatically stay order and, in absence of stay, it remains effective and may be registered on title under the land titles system — Once vesting order that has not been stayed is registered on title, it is effective as registered instrument and it cannot be attacked except by means that apply to any other instrument transferring absolute title and registered under land titles system.

Table of Authorities
Cases considered by *Blair J.A.*:
Boucher v. Public Accountants Council (Ontario) (2004), 2004 CarswellOnt 2521 (Ont. C.A.) — referred to

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

> While Mr. Rueter alludes to "the sales process was manipulated", I do not see that anything that the Receiver did was in aid of, or assisted such (as alleged). The identity of who the principals were was not in issue so long as a deal could be closed without a vendor take back mortgage.
>
> . . . . .
>
> It seems to me that the Receiver acted properly and within the mandate given it from time to time by the court. It fulfilled its prime purpose of obtaining as high a value [as] it could for the hotel after an approved marketing campaign. Vis-à-vis the Receiver and that duty, it does not appear to me that the identity of the principals, but more importantly that there was an overlap regarding the aborted purchaser from Holdings prior to the receivership, HIG and 203, is of any moment.

Standard of Review

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

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

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

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

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

26 A court-appointed receiver is an officer of the court. It has a fiduciary duty to act honestly and fairly on behalf of all claimants with an interest in the debtor's property, including the debtor (and, where the debtor is a corporation, its shareholders). It must make candid and full disclosure to the court of all material facts respecting pending applications, whether favourable or unfavourable. See *Toronto Dominion Bank v. Usarco Ltd.* (2001), 196 D.L.R. (4th) 448 (Ont. C.A.), per Austin J.A. at paras. 28 - 31, and the authorities referred to by him, for a more elaborate outline of these principles. It has been said with respect to

TAB 27

Clerk's stamp:

COURT FILE NUMBER	2003 - 01472
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	EDMONTON
PLAINTIFF	ROYAL BANK OF CANADA
DEFENDANTS	LEIGH COMMERCIAL BUILDERS INC., LEIGH BUILDERS LTD., HEATHER RUMAK, RICHARD G. RUMAK, and ANDY JAMES RUMAK
DOCUMENT	**ORDER FOR FINAL DISTRIBUTION, APPROVAL OF RECEIVER'S FEES AND DISBURSEMENTS, APPROVAL OF RECEIVER'S ACTIVITIES AND DISCHARGE OF RECEIVER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MILLER THOMSON LLP Barristers and Solicitors 2700, Commerce Place 10155-102 Street Edmonton, AB, Canada T5J 4G8 Phone: 780.429.1751 Fax: 780.424.5866 Lawyer's Name: Susy Trace Lawyer's Email: strace@millerthomson.com File No.: 0255700-0001

DATE ON WHICH ORDER WAS PRONOUNCED:	**SEPTEMBER 8, 2021**
LOCATION WHERE ORDER WAS PRONOUNCED:	**EDMONTON, ALBERTA**
NAME OF MASTER WHO MADE THIS ORDER:	**THE HONOURABLE JUSTICE M. E. BURNS**

UPON THE APPLICATION of Grant Thornton Limited in its capacity as the Court-appointed receiver and manager (the "**Receiver**") of the undertakings, property and assets of Leigh Commercial Builders Inc. ("**LCBI**") and Leigh Builders Ltd. ("**LBL**", and collectively with LCBI, the "**Debtors**") for the final distribution of proceeds, approval of the Receiver's fees and disbursements, approval of the Receiver's activities and discharge of the Receiver; **AND UPON HAVING READ** the Application and the Second Report to the Court of Grant Thornton Limited in its capacity as receiver of the Debtors dated August 31, 2021 (the "**Receiver's Second Report**"), filed, the Confidential Supplement to the Receiver's Second Report (the "**Confidential**

Report"), the Supplementary Confidential Appendix "12" to the Confidential Report and the filed Supplementary Appendix "13" to the Receiver's Second Report; **AND UPON** noting that the Receiver is of the opinion that Royal Bank of Canada has a good and valid security interest in the property of each of the Debtors; **AND UPON** finding that after the Receiver completes the sale of lands owned by LBL and makes its final distributions of the proceeds of the assets of the Debtors, the administration of the receivership will be complete; **AND UPON HEARING** the submissions of counsel for the Receiver and all other interested parties present; **AND UPON** being satisfied that it is appropriate to do so,

IT IS HEREBY ORDERED AND DECLARED THAT:

1. Service of Notice of this Application and all materials in support (the "**Materials**") is hereby declared to be good and sufficient, no other person is required to have been served with the Materials and the time required for service of the Materials is abridged to that actually given.

Accounts and Final Distribution

2. The Receiver's accounts for fees and disbursements incurred in these proceedings, as set out in the Receiver's Second Report are hereby approved without the necessity of a formal passing of its accounts.

3. The accounts of the Receiver's legal counsel for its fees and disbursements, as set out in the Receiver's Second Report are hereby approved without the necessity of a formal assessment of its accounts.

4. The Receiver's activities as set out in the Receiver's Second Report, and the Statement of Receipts and Disbursements as attached to the Receiver's Second Report, are hereby ratified and approved.

5. The Receiver is authorized and directed to make the following distributions:

   (a) $103,879 payable to Royal Bank of Canada ("**RBC**") for amounts borrowed by the Receiver in these Proceedings and secured by the Receiver's Borrowing Charge ordered in the Receivership Order dated June 15, 2020;

   (b) $93,559 to the City of Wetaskiwin for outstanding property taxes owing for the Property; and

   (c) $278,989 to RBC to partially repay amounts owing to it by LBL.

Discharge

6. On the evidence before the Court, the Receiver has satisfied its obligations under and pursuant to the terms of the Orders granted in the within proceedings up to and including the date hereof, and the Receiver shall not be liable for any act or omission on its part including, without limitation, any act or omission pertaining to the discharge of its duties in the within proceedings, save and except for any liability arising out of fraud, gross negligence or wilful misconduct on the part of the Receiver, or with leave of the Court. Subject to the foregoing, any claims against the Receiver in connection with the performance of its duties are hereby stayed, extinguished and forever barred.

7. No action or other proceedings shall be commenced against the Receiver in any way arising from or related to its capacity or conduct as Receiver, except with prior leave of this Court on Notice to the Receiver, and upon such terms as this Court may direct.

8. Upon the Receiver filing with the Clerk of the Court a certificate signed by a licensed Trustee employed by the Receiver confirming that:

   (a) all matters set out in paragraph 5 of this Order have been completed;

   (b) the transaction contemplated by the sale of lands owned by LBL has been completed; and

   (c) the administration of the Receivership estate has been completed;

   then the Receiver shall be discharged as Receiver of the Debtors without further order of the Court, provided however, that notwithstanding its discharge herein (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of the Receiver in its capacity as Receiver.

Miscellaneous Matters

9. Service of this Order shall be deemed good and sufficient by:

   (a) Serving the same on:

      (i) the persons listed on the service list created in these proceedings;

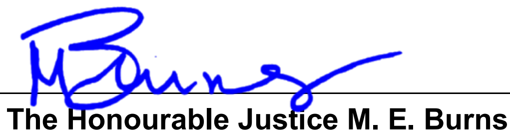
      (ii) any other person served with notice of the application for this Order;

      (iii) any other parties attending or represented at the application for this Order; and

   (b) Posting a copy of this Order on the Receiver's website at: https://www.grantthornton.ca/creditorupdates; and

   Service on any other person is hereby dispensed with.

10. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.



The Honourable Justice M. E. Burns

TAB 28

COURT FILE NUMBER	2003 03284	Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	EDMONTON	
PLAINTIFF	ROYAL BANK OF CANADA	
DEFENDANT	COPPERLINE EXCAVATING LTD., 1496986 ALBERTA LTD., SPRUCE CREEK CONTRACTING LTD., JAMIE BLACK and LORI BLACK	
DOCUMENT	**ORDER FOR FINAL DISTRIBUTION, APPROVAL OF RECEIVER'S FEES AND DISBURSEMENTS, APPROVAL OF RECEIVER'S ACTIVITIES AND DISCHARGE OF RECEIVER**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	Sharek Logan & van Leenen LLP, Barristers & Solicitors 2100 Scotia Place, 10060 Jasper Avenue NW Edmonton, Alberta, T5J 3R8 Phone: 780.413.3100 File 15350/DA Attn: David Archibold	

DATE ON WHICH ORDER WAS PRONOUNCED: **OCTOBER 25, 2021**

LOCATION WHERE ORDER WAS PRONOUNCED: **EDMONTON**

NAME OF JUSTICE WHO MADE THIS ORDER: **THE HONORABLE JUSTICE D. L. SHELLEY**

UPON THE APPLICATION by Ernst & Young Inc. in its capacity as the Court-appointed Receiver (the "**Receiver**") of the undertaking, property and assets of Copperline Excavating Ltd., 1496986 Alberta Ltd., and Spruce Creek Contracting Ltd. .(the "**Debtors**"); **AND UPON HAVING READ** the Receivership Order dated February 21, 2020 (the "**Receivership Order**"), the Receiver's Second Report, Supplement to the Receiver's Second Report, bench brief, and the Affidavit of Service; **AND UPON NOTING** it is in the interest of the stakeholders to make a distribution to secured creditors; **AND UPON NOTING** it is in the interest of the stakeholders to conclude the Receivership and discharge the Receiver after certain conclusory steps have occurred;

IT IS HEREBY ORDERED AND DECLARED THAT:

[1] The time for service of the notice of application for this Order is hereby abridged to the time actually given, and service of this Application and supporting materials as advised by counsel is good and sufficient, and this hearing is properly returnable before this Honourable Court today, and further service thereof is hereby dispensed with.

[2] The activities of the Receiver and its counsel as outlined in the Receiver's Second Report (the "Report") and Supplement to the Receiver's Second Report are hereby ratified and approved.

[3] The Receiver's Statement of Receipts and Disbursements to September 2, 2021 as set out in the Report is hereby ratified and approved.

[4] The fees and disbursements of the Receiver as set out in the Report are hereby approved without the requirement of a formal passing of accounts.

[5] The accounts of the Receiver's counsel, Sharek Logan & van Leenen LLP, for their fees and disbursements, as set out in the Report are hereby approved without the necessity of a formal assessment of their accounts.

[6] The accounts of counsel for the management of the Debtors for their fees and disbursements as set out in the Report as having been of assistance to the Receiver and its counsel are hereby approved without the necessity of a formal assessment of their accounts.

[7] On the evidence before the Court, the Receiver has satisfied its obligations under and pursuant to the terms of the Orders granted in the within proceedings up to and including the date hereof, and the Receiver shall not be liable for any act or omission on its part including, without limitation, any act or omission pertaining to the discharge of its duties in the within proceedings, save and except for any liability arising out of any in fraud, gross negligence or willful misconduct on the part of the Receiver. Subject to the foregoing any claims against the Receiver in connection with the performance of its duties are hereby stayed, extinguished and forever barred.

[8] No action or other proceedings shall be commenced against the Receiver in any way arising from or related to its capacity or conduct as Receiver, except with prior leave of this Court on Notice to the Receiver, and upon such terms as this Court may direct.

[9] The process of winding up or concluding the Receivership as proposed by the Receiver in the Report and Supplement to the Receiver's Second Report are hereby approved. Specifically, the Court directs the following steps to take place in order to bring the Receivership to conclusion:

a) The Receiver is to close the "0002" payroll and GST accounts opened by the Receiver with the Canada Revenue Agency upon completion of all administrative matters;

b) The Receiver is to make a distribution in the amounts as set out in the proposed distribution contained in the Supplement to the Receiver's Second Report at Schedule "A";

c) The Receiver and its legal counsel are authorized and directed to file a Notice of Ceasing to Act in any litigation involving the Debtors or the Receiver, and such Notices of Ceasing to Act shall designate the address for service upon the Debtor to be at:

12, 119 First Avenue
Spruce Grove, Alberta, T7X 2H4 (the "Address")
or such other address as may be communicated by counsel for the Defendants

d) The Receiver is to arrange for the cancellation of all remaining accounts in its own name, as well as the payment of any outstanding liabilities in respect of those accounts up to the date of cancellation or transfer;

e) The Receiver is entitled to pay its reasonable fees and disbursements accruing from September 2, 2021, as well as those of its legal counsel, out of the funds that the Receiver is holding in trust;

f) The Debtors' former directors and officers shall then have 30 days from the date of this Order to make appropriate arrangements with the Receiver to retain physical possession of the books and records of the Debtor, at their sole cost and expense. In the event that the Debtors' former directors and officers do not exercise their option to retain the books and records, the Receiver is hereby authorized to abandon the books and records to Management;

g) After payment of all amounts as outlined herein, the Receiver shall pay, subject to reasonable holdbacks not to exceed $133,412.66 that the Receiver may maintain to address 'windup' steps, all remaining funds from its trust account to Royal Bank of Canada;

h) Review and settle the beneficial ownership claim as to the Rental Property (as defined in the Reports) or bring an application to this Court to determine entitlement to the holdback funds in relation to this claim; and

i) Upon completion of the distribution of funds and other administrative matters outlined in this paragraph, the Receiver shall file an affidavit with the Court confirming all steps have been taken, the resolution of the holdback claim as to the Rental Property, together with the final Statement of Receipts and Disbursements.

[10] Upon completing the steps outlined in paragraph 9 of this Order, including the filing of the Affidavit as required by paragraph 9(i), of this Order, the Receiver is fully and finally discharged, provided however that notwithstanding its discharge herein (a) the Receiver shall remain Receiver for the performance of such incidental duties as may be required to complete the administration of the receivership herein, and (b) the Receiver shall continue to have the benefit of the provisions of all Orders made in this proceeding, including all approvals, protections and stays of proceedings in favour of the Receiver in its capacity as Receiver.

[11] Both before and after its discharge, the Receiver is authorized and directed to redirect and/or send any correspondence or other documents addressed to the Debtors or the Receiver and received by the Receiver to the Address. Thereafter the Receiver has no other obligation or responsibility in relation to any such correspondence or other documents, and for clarity has no obligation or responsibility to respond to or deal with any such correspondence or document. Notwithstanding the aforesaid, any funds received by the Receiver on account of the Debtors, or any one of them, shall be forwarded by the Receiver to the Royal Bank of Canada.

[12] For clarity, upon the discharge of the Receiver, all of the property of the Debtors, including without limitation, leased property, the books, records, and other documents and information of Debtors, shall revert to the Debtors, and the Receiver shall have no more right, entitlement, obligation or responsibility in respect of or relating to the property or information of the Debtors, including without limitation information to which the Personal Information Protection and Electronic Documents Act, SA 2003, c P6.5 may apply, and the Receiver shall have no responsibility or obligation to maintain any insurance in respect of the property of the Debtors.

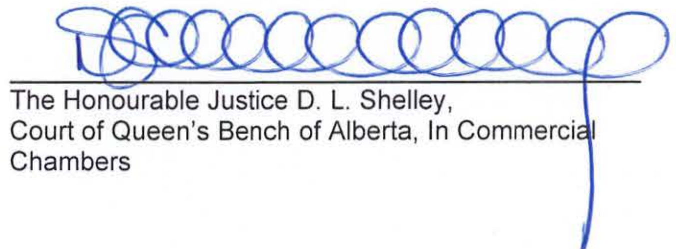
[13] The Interlocutory Sealing Order granted June 22, 2020, by the Honourable Justice J. J. Gill is vacated and of no further force and effect. The Clerk of the court is hereby directed to remove the confidential exhibit to the Receiver's First Report from the sealed envelope it is contained within and to file the said confidential Supplement to the Receiver's First Report in this Action.

~~[14] This Order shall have full force and effect in all Provinces and Territories in Canada, outside Canada and against all persons against whom it may be enforceable.~~

[15] This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

[16] This Order must be served only upon those interested parties attending or represented at the within application and service may be effected by Facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following the transmission or delivery of such documents.

[17] Service of this Order on any party not attending this Application is hereby dispensed with.



The Honourable Justice D. L. Shelley,
Court of Queen's Bench of Alberta, In Commercial Chambers